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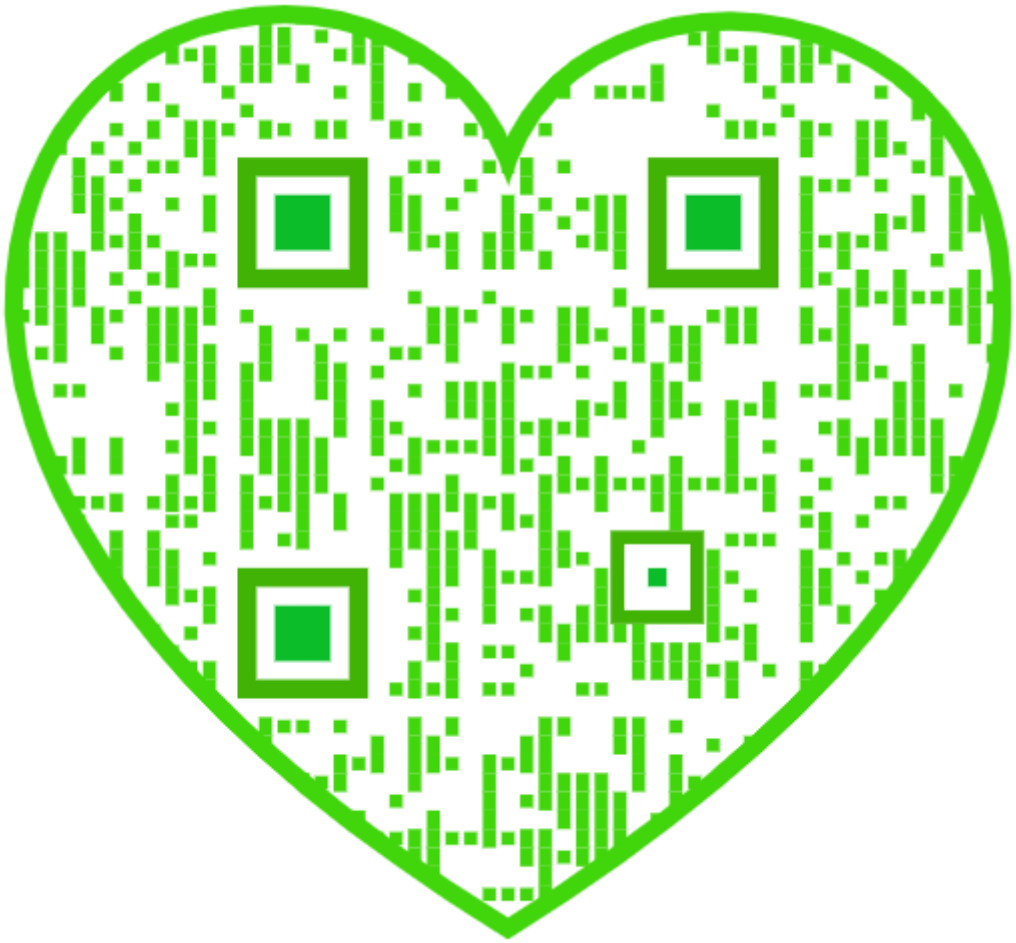

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more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

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CROSS-REFERENCES

[See 7 Cyc. 518-520]

XIV. ACTIONS.

A. Right of Action — 1. In General — a. Form of Remedy — (i) *Action* — (A) *Assumpsit.* The most usual remedy at common law, and indeed the only one which was formerly available against remote parties, is by an action of assumpsit, which lies in favor of an indorsee or transferee against the maker,[1] the

1. *Connecticut.*— Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.
Indiana.— Indianapolis Ins. Co. *v.* Brown, 6 Blackf. (Ind.) 378.
Iowa.— King *v.* Wall, Morr. (Iowa) 187.
Maryland.— Hopkins *v.* Kent, 17 Md. 113; Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Penn *v.* Flack, 3 Gill & J. (Md.) 369; Coursey *v.* Baker, 7 Harr. & J. (Md.) 28.
Massachusetts.— Goodwin *v.* Morse, 9 Metc. (Mass.) 278; Ramsdell *v.* Soule, 12 Pick. (Mass.) 126; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Wild *v.* Fisher, 4 Pick. (Mass.) 421.
Mississippi.—Dowell *v.* Brown, 13 Sm. & M. (Miss.) 43.
New Hampshire.— Edgerton *v.* Brackett, 11 N. H. 218; Tenney *v.* Sanborn, 5 N. H. 557.
New Jersey.— New Jersey Mfg., etc., Co. *v.* Myer, 12 N. J. L. 141.
New York.— Pierce *v.* Crafts, 12 Johns. (N. Y.) 90.
Vermont.— Brigham *v.* Hutchins, 27 Vt. 569.
United States.— Heckscher *v.* Binney, 3 Woodb. & M. (U. S.) 333, 11 Fed. Cas. No. 6,316; Brown *v.* Noyes, 2 Woodb. & M. (U. S.) 75, 4 Fed. Cas. No. 2,023.

accepter,[2] or an indorser;[3] in favor of the drawer against the accepter;[4] in favor of the payee against a guarantor or surety;[5] and generally in favor of all parties entitled to relief.[6] Under the money counts the bill or note in suit may be given in evidence.[7]

See 7 Cent. Dig. tit. "Bills and Notes," § 1334.

Corporation defendant.—Assumpsit may be brought against a corporation on a note executed for it by its agent. Proctor *v.* Webber, I D. Chipm. (Vt.) 371.

2. *Connecticut.*— Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Kentucky.— Breckinridge *v.* Shrieve, 4 Dana (Ky.) 375.

New York.— Purdy *v.* Vermilya, 8 N. Y. 346; Black *v.* Caffe, 7 N. Y. 281.

South Carolina.— Haviland *v.* Simons, 4 Rich. (S. C.) 338.

United States.— Frazer *v.* Carpenter, 2 McLean (U. S.) 235, 9 Fed. Cas. No. 5,069.

See 7 Cent. Dig. tit. "Bills and Notes," § 1336.

3. *Illinois.*— Thayer *v.* Peck, 93 Ill. 357; Bradshaw *v.* Hubbard, 6 Ill. 390.

Maryland.— Beck *v.* Thompson, 4 Harr. & J. (Md.) 531.

Massachusetts.— Hodges *v.* Holland, 16 Pick. (Mass.) 395; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; State Bank *v.* Hurd, 12 Mass. 172.

New York.— Cayuga County Bank *v.* Warden, 6 N. Y. 19; Spear *v.* Myers, 6 Barb. (N. Y.) 445; Bradford *v.* Corey, 5 Barb. (N. Y.) 461; Baker *v.* Martin, 3 Barb. (N. Y.) 634. *Contra*, Cottrell *v.* Conklin, 4 Duer (N. Y.) 45. But see Hays *v.* Phelps, 1 Sandf. (N. Y.) 64, construing N. Y. Laws (1832), c. 276, p. 489, as amended by N. Y. Laws (1837), c. 93, p. 72, and further construing N. Y. Laws (1845), c. 24, p. 19.

North Carolina— Jones *v.* Canady, 15 N. C. 86.

Ohio.— Harris *v.* Clark, 10 Ohio 5.

South Carolina.—Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

United States.—New York Third Nat. Bank *v.* Miners Nat. Bank, 102 U. S. 663 note, 26 L. ed. 252 note; Frazer *v.* Carpenter, 2 McLean (U. S.) 235, 9 Fed. Cas. No. 5,069. But see Mandeville *v.* Riddle, 1 Cranch (U. S.) 290, 2 L. ed. 112 [*reversing* 1 Cranch C. C. (U. S.) 95, 19 Fed. Cas. No. 11,807], where it was held that an indorsee cannot sue a remote indorser on the common counts for money had and received.

Contra, Spicer *v.* Smith, 23 Mich. 96.

See 7 Cent. Dig. tit. "Bills and Notes," § 1335.

4. Smith *v.* Bryan, 33 N. C. 418.

5. Emerson *v.* Aultman, 69 Md. 125, 14 Atl. 671; Colville *v.* Gilbert, 1 Ohio Dec. (Reprint) 526, 10 West. L. J. 324. But see Hatten *v.* Robinson, 4 Blackf. (Ind.) 479; Balcom *v.* Woodruff, 7 Barb. (N. Y.) 13.

6. *Alabama.*— Catlin *v.* Gilder, 3 Ala. 536.

Illinois.— Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Howes *v.* Austin, 35 Ill. 396; Lane *v.* Adams, 19 Ill. 167.

Iowa.— Knight *v.* Fox, Morr. (Iowa) 305.

Kentucky.—Anderson *v.* Anderson, 4 Dana (Ky.) 352. But see Norton *v.* Allen, 3 A. K. Marsh. (Ky.) 284, where it was held that a note for the payment of money, although not sealed as a specialty, must be declared on as such.

Massachusetts.— Dana *v.* Underwood, 19 Pick. (Mass.) 99; Webster *v.* Randall, 19 Pick. (Mass.) 13; Cole *v.* Cushing, 8 Pick. (Mass.) 48.

Mississippi.— Phipps *v.* Nye, 34 Miss. 330; Hughes *v.* Grand Gulf Bank, 2 Sm. & M. (Miss.) 115.

New York.— Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 53; Rockefeller *v.* Robison, 17 Wend. (N. Y.) 206; Willmarth *v.* Crawford, 10 Wend. (N. Y.) 341; Butler *v.* Haight, 8 Wend. (N. Y.) 535; Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; Throop *v.* Cheeseman, 16 Johns. (N. Y.) 264; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126; McClellan *v.* Anthony, 1 Edm. Sel. Cas. (N. Y.) 284.

Ohio.— Mitchell *v.* McCabe, 10 Ohio 405; Hart *v.* Ayres, 9 Ohio 5.

South Carolina.—Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

Vermont.— Hawley *v.* Hurd, 56 Vt. 617.

West Virginia.— Walker *v.* Henry, 36 W. Va. 100, 44 S. E. 440.

United States.— Campbell *v.* Jordan, Hempst. (U. S.) 534, 4 Fed. Cas. No. 2,362.

England.— Stratton *v.* Hill, 2 Chit. 126, 3 Price 253, 18 E. C. L. 545.

See 7 Cent. Dig. tit. "Bills and Notes," § 1332.

Accommodation indorser.— If an accommodation indorser of a promissory note pays the note he cannot recover from the maker upon the money counts but must sue on the note. Williams *v.* Durst, 25 Tex. 667, 78 Am. Dec. 548.

Bank-notes.—An action of assumpsit against a bank may be maintained by the holder of a circulating note of the bank. Hughes *v.* Grand Gulf Bank, 2 Sm. & M. (Miss.) 115.

One of two payees of a negotiable note indorsed by the payee may recover on it under the general money counts. Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297.

Where a note of a third person is transferred and its payment guaranteed the note and guaranty, being expressed to be for value received, will support the money counts. Butler *v.* Haight, 8 Wend. (N. Y.) 535.

7. *Arkansas.*— Henry *v.* Hazen, 5 Ark. 401.

(B) *Debt.* In many cases debt has been held to be a proper remedy upon a promissory note.[8] It may be brought by a payee,[9] indorsee,[10] or assignee[11] against the maker of a note; by the drawer against the accepter of a bill purporting to

Connecticut.— White *v.* Brown, 19 Conn. 577.

Illinois.— Boyle *v.* Carter, 24 Ill. 49.

Maryland.— McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102; Woods *v.* Schroeder, 4 Harr. & J. (Md.) 276.

Massachusetts.—Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750; Moore *v.* Moore, 9 Metc. (Mass.) 417; Webster *v.* Randall, 19 Pick. (Mass.) 13; Payson *v.* Whitcomb, 15 Pick. (Mass.) 212.

Michigan.— Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086; Port Huron, etc., R. Co. *v.* Potter, 55 Mich. 627, 72 N. W. 70; Michael *v.* Tuttle, 37 Mich. 502.

New York.— Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77; Arnold *v.* Crane, 8 Johns. (N. Y.) 79; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126. But see Bradford *v.* Martin, 3 Sandf. (N. Y.) 647.

Ohio.— Mitchell *v.* McCabe, 10 Ohio 405.

Vermont.— Jones *v.* Spear, 21 Vt. 426.

Wisconsin.— Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

And cases cited *supra*, this section.

A cash draft accepted may be given in evidence under a count for money had and received in an action by the payee against the accepter. Wells *v.* Brigham, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

A non-negotiable note in which no consideration appears on its face cannot be given in evidence under the money counts. Saxton *v.* Johnson, 10 Johns. (N. Y.) 418. See also Avery *v.* Latimer, 1 Ohio Dec. (Reprint) 46, 1 West. L. J. 310, where it seems that a sealed note cannot be offered in evidence under the money counts. But in Michigan a non-negotiable note, given for a valuable consideration, when it has become absolutely payable, may be sued for by the payee under the common counts, How. Anno. Stat. §§ 7335, 7336, which provide for declaring with common counts and a copy of the paper, not being confined to negotiable paper. Port Huron, etc., R. Co. *v.* Potter, 55 Mich. 627, 22 N. W. 70. And in Massachusetts assumpsit has been held to lie on a note signed with a scroll, although where it was made the scroll was a lawful seal. McClees *v.* Burt, 5 Metc. (Mass.) 198.

Bank checks may be declared on as such or given in evidence under the money counts. Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126. See also Woods *v.* Schroeder, 4 Harr. & J. (Md.) 276, holding that the money counts are proved *prima facie* by a bank check payable to bearer.

8. *Alabama.*— Henry *v.* Gamble, Minor (Ala.) 15, a note payable in money or merchandise.

Arkansas.— Bentley *v.* Dickson, 1 Ark. 165.

Missouri.— Nelson *v.* State Bank, 7 Mo. 219.

New Jersey.— Seely *v.* Myres, 2 N. J. L. 386.

North Carolina.— Gardner *v.* Clark, 5 N. C. 283.

Virginia.— Crawford *v.* Daigh, 2 Va. Cas. 521.

West Virginia.— Regnault *v.* Hunter, 4 W. Va. 257.

United States.— Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 4 L. ed. 268; French *v.* Tunstall, Hempst. (U. S.) 204, 9 Fed. Cas. No. 5,104*a*.

England.— Bishop *v.* Young, 2 B. & P. 78.

Debt will not lie on a lost note, inasmuch as oyer in this action may be demanded. Edwards *v.* McKee, 1 Mo. 123, 13 Am. Dec. 474.

The note must show upon its face when it becomes due, as this form of action does not permit of an averment to show the right thereof. Middleton *v.* Atkins, 7 Mo. 184; Curle *v.* McNutt, 6 Mo. 495.

9. *Alabama.*— Carroll *v.* Meeks, 3 Port. (Ala.) 226, holding that debt lies by the bearer against the maker of a promissory note payable to bearer and that it is not ground for reversal of judgment in such action that it is entered as in assumpsit, it being for the proper sum.

Indiana.— Taylor *v.* Meek, 4 Blackf. (Ind.) 388.

North Carolina.— Gardner *v.* Clark, 5 N. C. 283.

United States.— Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705. *Contra*, Lindo *v.* Gardner, 1 Cranch (U. S.) 343, 2 L. ed. 130 [*reversing* 1 Cranch (U. S.) 78, 9 Fed. Cas. No. 5,231].

England.— Hatch *v.* Trayes, 11 A. & E. 702, 9 L. J. Q. B. 119, 3 P. & D. 408, 39 E. C. L. 376; Bishop *v.* Young, 2 B. & P. 78.

10. *Missouri.*—Nelson *v.* State Bank, 7 Mo. 219; Warne *v.* Hill, 7 Mo. 40, under Mo. Rev. Code (1835), p. 105.

New York.— Willmarth *v.* Crawford, 10 Wend. (N. Y.) 341.

North Carolina.— Howell *v.* McCracken, 87 N. C. 399, where the indorsee took up the note after judgment.

Pennsylvania.— Camp *v.* Owego Bank, 10 Watts (Pa.) 130.

Tennessee.— Planters' Bank *v.* Tappan, 2 Humphr. (Tenn.) 96; Anderson *v.* Crockett, 6 Yerg. (Tenn.) 330.

11. Taylor *v.* Walpole, 1 Blackf. (Ind.) 378; Fischli *v.* Cowan, 1 Blackf. (Ind.) 350; Phillips *v.* Runnels, Morr. (Iowa) 391, 43 Am. Dec. 109.

"**The argument against allowing indebitatus assumpsit or debt** to be brought upon bills of exchange or promissory notes, except between the immediate parties between whom a consideration passed, is, that there

be for value received;[12] or by the payee,[13] the drawee,[14] or a remote indorsee striking out intermediate indorsements,[15] against the drawer of such a bill. Debt cannot be brought on a note payable in instalments until the whole has become due;[16] on a collateral undertaking to pay a debt of another person;[17] against the accepter of a bill in favor of the payee[18] or of an indorsee;[19] or by an indorsee against the indorser of a promissory note,[20] although it may be maintained by an indorsee against the maker and indorsers jointly.[21]

(II) *Summary Proceedings*—(A) *In General.* Summary proceedings for the collection of bills and notes have been provided both in Great Britain[22] and various American states.[23]

(B) *Petition and Summons.* In some of the states statutes have been enacted providing more or less summary proceedings for the collection of bills and notes and other evidences of debt by a process styled petition and summons.[24] Such

is no privity of contract existing between the parties, and no debt due or consideration passing between them, and that the liability depends upon the custom of merchants, independently of contract or consideration. The courts in England, in the time of Lord Holt, who considered bills of exchange and promissory notes, especially the latter, with their negotiable properties, innovations upon the common law, began by holding that the action of *indebitatus assumpsit* or debt could not be sustained upon them. . . . By a gradual relaxation of the rule as cases have arisen, these actions will now be sustained in these courts by the payee against the maker, on a note expressed to be for value received by the endorsee against the endorser, and on a bill by the payee against the drawer, and drawee against the acceptor, expressed to be for value received, and endorsee against endorser. . . . In these cases, however, the soundness of the above distinctions is still attempted to be sustained, or rather apparently acquiesced in, and some refinement is necessary to reconcile the one with the other." Willmarth *v.* Crawford, 10 Wend. (N. Y.) 341, 344.

12. Regnault *v.* Hunter, 4 W. Va. 257; Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 4 L. ed. 268; Vowell *v.* Alexander, 1 Cranch C. C. (U. S.) 33, 28 Fed. Cas. No. 17,017; Priddy *v.* Henbrey, 1 B. & C. 674, 8 E. C. L. 284, 3 D. & R. 165, 16 E. C. L. 160.

13. Dunlap *v.* Buckingham, 16 Ill. 109; Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599; Stratton *v.* Hill, 2 Chit. 126, 3 Price 253, 18 E. C. L. 545; Simpkins *v.* Pothecary, 5 Exch. 253, 14 Jur. 464, 19 L. J. Exch. 242, 1 L. M. & P. 249.

14. Sharpe *v.* Fowlkes, 7 Humphr. (Tenn.) 512.

15. Planters Bank *v.* Galloway, 11 Humphr. (Tenn.) 342; Home *v.* Semple, 3 McLean (U. S.) 150, 12 Fed. Cas. No. 6,658.

16. Farnham *v.* Hay, 3 Blackf. (Ind.) 167; Rudder *v.* Price, 1 H. Bl. 547.

17. Purslow *v.* Baily, 2 Ld. Raym. 1039.

18. Wilson *v.* Crowdhill, 2 Munf. (Va.) 302; Smith *v.* Segar, 3 Hen. & M. (Va.) 394; Regnault *v.* Hunter, 4 W. Va. 257; Home *v.* Semple, 3 McLean (U. S.) 150, 12 Fed. Cas. No. 6,658; Hatch *v.* Trayes, 11 A. & E. 702, 3 P. & D. 408, 39 E. C. L. 376; Priddy *v.* Henbrey, 1 B. & C. 674, 8 E. C. L. 284; Browne *v.* London, 1 Freem. K. B. 14, 1 Mod. 285; Hodsden *v.* Harridge, 2 Saund. 61*k*; Simmonds *v.* Parminter, 1 Wils. C. P. 185. *Contra*, by statute in Virginia. Hollingsworth *v.* Milton, 8 Leigh (Va.) 50.

19. Powell *v.* Ancell, 3 M. & G. 171, 42 E. C. L. 97; Cloves *v.* Williams, 3 Bing. N. Cas. 868, 5 Scott 68, 32 E. C. L. 398. *Contra*, by statute in Virginia (Vowell *v.* Alexander, 1 Cranch C. C. (U. S.) 33, 28 Fed. Cas. No. 17,017) and West Virginia (Regnault *v.* Hunter, 4 W. Va. 257).

20. Whiting *v.* King, Minor (Ala.) 122; Thompson *v.* Shreve, 24 Ark. 261; Frierson *v.* Reeves, 7 Humphr. (Tenn.) 359; Olive *v.* Napier, Cooke (Tenn.) 11. *Contra*, by statute in Pennsylvania (Loose *v.* Loose, 36 Pa. St. 538), and where the indorser has bound himself by a special agreement to stand good for the note until paid (Brown *v.* Bussey, 7 Humphr. (Tenn.) 573; Bayley *v.* Hazard, 3 Yerg. (Tenn.) 487).

21. State Bank *v.* Cowan, 11 Humphr. (Tenn.) 126; Planters' Bank *v.* Tappan, 2 Humphr. (Tenn.) 96.

If jurisdiction over the maker is lost or cannot be obtained debt cannot be continued against the indorser. State Bank *v.* Cowan, 11 Humphr. (Tenn.) 126.

22. See Kirkwood *v.* Smith, [1896] 1 Q. B. 582, 65 L. J. Q. B. 408, 74 L. T. Rep. N. S. 423, 44 Wkly. Rep. 480; Rochford *v.* Daniel, 1 F. & F. 602; Maltby *v.* Murrels, 5 H. & N. 813; Eyre *v.* Waller, 5 H. & N. 460, 6 Jur. N. S. 512, 29 L. J. Exch. 246, 2 L. T. Rep. N. S. 253, 8 Wkly. Rep. 450.

23. For cases construing acts of individual states see Stodder *v.* Cardwell, 20 Ala. 233 (construing the act of 1821); Devinney *v.* Lay, 19 Mo. 646 (construing the act of 1845); Copass *v.* Wheelock, 1 Lea (Tenn.) 381; Allen *v.* Wood, 1 Head (Tenn.) 430 (construing the act of 1856, c. 75); Harvey *v.* Bacon, 9 Yerg. (Tenn.) 308.

24. Duncan *v.* McAffee, 3 Ill. 559; Evans *v.* Landon, 3 Ill. 53; Kincaid *v.* Higgins, 1 Bibb (Ky.) 352; Harman *v.* Counts, 2 Brev. (S. C.) 476. See also Odenheimer *v.* Douglass, 5 B. Mon. (Ky.) 107; Hartman *v.* Welz,

summary remedies will, it has been said, receive a liberal construction from the courts.[25]

b. Accrual of Right — (i) *In General.* Before a bill or note matures[26] no action can in general be brought upon it;[27] but as a general rule a plea to the merits is a waiver of the objection that the suit was brought too soon.[28]

(ii) *Against Indorser.* The indorser's liability, being conditioned by the law merchant on notice of dishonor properly given, has been said not to commence until such notice is given, where there is no excuse or waiver to dispense with it; but action may be begun against the indorser immediately after mailing the notice of dishonor to him,[29] on the very day the note becomes due and is dishonored.[30] It has been held, however, and seems to be the rule in England, that

1 B. Mon. (Ky.) 242; Rice *v.* Hogan, 8 Dana (Ky.) 133; Harrow *v.* Dugan, 6 Dana (Ky.) 341; Pool *v.* McCaughan, 6 T. B. Mon. (Ky.) 335; Dallam *v.* Wilson, 4 T. B. Mon. (Ky.) 108; Kinsman *v.* Castleman, 1 T. B. Mon. (Ky.) 210; Kalfus *v.* Watts, Litt. Sel. Cas. (Ky.) 197; Wright *v.* Coleman, 4 Bibb (Ky.) 252; Louden *v.* Kenney, 1 Bibb (Ky.) 330.

25. Evans *v.* Landon, 3 Ill. 53.

26. What is maturity for purpose of suit see *supra*, VII [7 Cyc. 838 *et seq.*].

Effect of stipulation as to time of interest. — Although a note payable on a specified day contains a stipulation that it shall not bear interest until another specified day after maturity, an action can be brought on its non-payment at maturity. Billingsley *v.* Billingsley, 24 Ala. 518.

Issue of writ. — In Massachusetts it has been held that a writ may be issued against the maker on the day of maturity if it is not delivered to the sheriff until the next day (Butler *v.* Kimball, 5 Metc. (Mass.) 94), although it would be premature to serve such writ even after dusk on the last day of grace (Estes *v.* Tower, 102 Mass. 65, 3 Am. Rep. 439).

27. *Illinois.* — Mayer *v.* Pick, 192 Ill. 651, 61 N. E. 416, 85 Am. St. Rep. 352 [*affirming* 92 Ill. App. 189].

Iowa. — Seaton *v.* Hinneman, 50 Iowa 395; Whitney *v.* Bird, 11 Iowa 407.

Kentucky. — Hayney *v.* Sangston, 3 Dana (Ky.) 246.

Louisiana. — H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862.

Missouri. — Brown *v.* Shock, 27 Mo. App. 351.

Nebraska. — Grimison *v.* Russell, 20 Nebr. 337, 30 N. W. 249.

New York. — Randall *v.* Grant, 59 N. Y. App. Div. 485, 69 N. Y. Suppl. 221.

Ohio. — Spier *v.* Corll, 33 Ohio St. 236.

Pennsylvania. — Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647.

Vermont. — Harrington *v.* Rathbun, 11 Vt. 58.

Washington. — Commercial Bank *v.* Hart, 10 Wash. 303, 38 Pac. 1114; Hanson *v.* Tompkins, 2 Wash. 508, 27 Pac. 73.

In Texas it is sufficient if the note matures *pendente lite* (Culbertson *v.* Cabeen, 29 Tex. 247; Dignowitty *v.* Alexander, 25 Tex. Suppl. 162) and suit can be commenced before maturity by attachment as upon a debt not due (Cox *v.* Reinhardt, 41 Tex. 591).

Action by indorser in case of fraud. — An indorser may take up a note before maturity and sue the maker at once for fraud in inducing him to sign it. Davison *v.* Farr, 18 Misc. (N. Y.) 124, 41 N. Y. Suppl. 170.

Antedated note. — Where an antedated note containing a provision that it shall be payable on thirty days' notice to the maker is delivered by the latter after a notice to pay has been given him, suit thereon may be brought on the expiration of thirty days from the service of the notice, although the note had not been delivered for that length of time. Raspadori *v.* Cresta, 130 Cal. 10, 62 Pac. 218.

Action on two notes, only one of which is due. — Where the vendors of goods obtained by the purchasers by fraud sued on the two notes given for the price before one was due, and recovered judgment for the amount of both, it was held on appeal that they could only recover what was due at the commencement of the suit. Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.

The consent by defendant in an action on a note, commenced before its maturity, to the filing of a substituted complaint after the maturity of the note and the filing of an answer does not estop him from relying on the premature bringing of the action as a defense. Radue *v.* Pauwelyn, (Mont. 1902) 69 Pac. 557.

28. Fiore *v.* Ladd, 29 Oreg. 528, 46 Pac. 144. But see Stewart *v.* McBride, 1 Serg. & R. (Pa.) 202.

Collateral attack. — A judgment rendered on a note cannot be questioned collaterally on the ground that the action has been brought before the maturity of the bill or note. Robertson *v.* Huffman, 92 Ind. 247.

29. Coleman *v.* Ewing, 4 Humphr. (Tenn.) 241; Siggers *v.* Lewis, 1 C. M. & R. 370, 2 Dowl. P. C. 681, 3 L. J. Exch. 312, 4 Tyrw. 847.

30. *Alabama.* — Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Connecticut. — Rowland *v.* Rowe, 48 Conn. 432.

Maine. — Veazie Bank *v.* Paulk, 40 Me. 109; Flint *v.* Rogers, 15 Me. 67; Greeley *v.* Thurston, 4 Me. 479, 16 Am. Dec. 285.

no action can be begun against the indorser until a reasonable time has passed for him to receive the notice[31] and that it is too soon to bring suit on the day the note falls due after protesting it and sending notice to him by mail.[32]

(III) *Against Drawee or Indorser For Non-Acceptance.* Where a bill is dishonored by the drawee's refusal to accept it an action lies on it at once, without waiting for the day named in it for payment, against the drawer[33] or indorser.[34]

(IV) *Against Drawer* — (A) *In Favor of Accepter.* The accepter of a draft or bill of exchange cannot maintain an action for its recovery until he has paid the same or done some act equivalent to payment.[35]

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. (Mass.) 117; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; New England Bank *v.* Lewis, 2 Pick. (Mass.) 125; Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Suit day after notice. — Where the notice was sent on the last day of grace and suit was begun on the next day before the notice could be received it was held not to be premature. Shed *v.* Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209. See also Flint *v.* Rogers, 15 Me. 67. *Compare* New England Bank *v.* Lewis, 2 Pick. (Mass.) 125, where the contrary was held, the suit having been begun on the day of maturity and the notice given to the notary before but served on the indorser personally afterward.

Where the indorser lives in another town he may be sued as soon as (and, it seems, before) the notice is put into the post-office. Stanton *v.* Blossom, 14 Mass. 116, 7 Am. Dec. 198. But see New England Bank *v.* Lewis, 2 Pick. (Mass.) 125, where Parker, C. J., pointed out that the case did not turn on that point.

Where the holder and indorser live in the same town, and an action is commenced against the indorser on the day of maturity, before notice is given, there is not due diligence, although the notice is in the hands of the notary before the writ was given the officer. New England Bank *v.* Lewis, 2 Pick. (Mass.) 125.

Writ delivered to be served after notice.— If the writ is delivered to the officer before the notice is sent, to be served afterward, it is sufficient. Seaver *v.* Lincoln, 21 Pick. (Mass.) 267.

Upon a qualified indorsement to be liable in the second instance only, if the note has been previously paid by the maker, the right of action against the indorser accrues immediately in favor of the holder. McNeil *v.* Knott, 11 Ga. 142. And see Koutz *v.* Vanclief, 55 Cal. 345, where it was held that where an indorser promised "to pay . . . within two years" an action would not lie against him before the end of such time.

31. Smith *v.* Washington Bank, 5 Serg. & R. (Pa.) 318; Castrique *v.* Bernabo, 6 Q. B. 498, 9 Jur. 130, 14 L. J. Q. B. 3, 51 E. C. L. 498.

32. Manchester Bank *v.* Fellows, 28 N. H. 302.

33. *Connecticut.* — Sterry *v.* Robinson, 1 Day (Conn.) 11.

Maryland.—Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Massachusetts.— Watson *v.* Loring, 3 Mass. 557.

New York.— Weldon *v.* Buck, 4 Johns. (N. Y.) 144; Roosevelt *v.* Woodhull, Anth. N. P. (N. Y.) 50.

South Carolina.— Winthrop *v.* Pepoon, 1 Bay (S. C.) 468.

United States. — Watson *v.* Tarpley, 18 How. (U. S.) 517, 15 L. ed. 509; Baker *v.* Gallagher, 1 Wash. (U. S.) 461, 2 Fed. Cas. No. 768.

England.— Bright *v.* Purrier, Bull. N. P. 269, 3 Burr. 1687; Milford *v.* Mayor, Dougl. 55; Whitehead *v.* Walker, 11 L. J. Exch. 168, 9 M. & W. 506.

On presentment and protest for better security suit cannot be brought at once against the drawer. Taan *v.* Le Gaux, 1 Yeates (Pa.) 204.

34. Morgan *v.* Towiles, 8 Mart. (La.) 730; Lenox *v.* Cook, 8 Mass. 460; Watson *v.* Loring, 3 Mass. 557; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Ross *v.* Dixie, 7 U. C. Q. B. 414.

35. *Louisiana.*—Porter *v.* Sandidge, 32 La. Ann. 449; Nichols *v.* Morgan, 9 La. Ann. 534; Shannon *v.* Langhorn, 9 La. Ann. 526; Groning *v.* Krumbhaar, 13 La. 402.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

New Hampshire.— Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153.

New Jersey.—Suydam *v.* Combs, 15 N. J. L. 133.

Tennessee.— Planters' Bank *v.* Douglass, 2 Head (Tenn.) 699.

United States.— Gillis *v.* Van Ness, 1 Cranch C. C. (U. S.) 369, 10 Fed. Cas. No. 5,440; Parker *v.* U. S., Pet. C. C. (U. S.) 262, 18 Fed. Cas. No. 10,750.

An accommodation accepter to maintain his action against the drawer must prove his acceptance of the bill and its payment (Nichols *v.* Morgan, 9 La. Ann. 534. See also Shannon *v.* Langhorn, 9 La. Ann. 526; Groning *v.* Krumbhaar, 13 La. 403; Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153), but he may begin an action against the drawer on the day of maturity, although the bill has been taken

(B) *In Favor of Holder For Non-Acceptance.* Upon the dishonor of a bill a right of action on the part of the holder at once arises against the drawer, without waiting for it to mature;[36] and such right is not defeated or in any way affected by a subsequent presentment for payment.[37]

(V) *Against Assignor.* If an assignment of a note is made before maturity the assignor is liable to an action as soon as that event happens and the makers fail to discharge it; if after maturity, then he is bound to discharge it, at least within a reasonable time.[38]

c. Conditions Precedent — (I) *Payment of Debt of Maker Assumed by Payee.* A payee who has taken up and paid a note of a third person by one of his own is not obliged to pay off the note so given before suing such person on a note given him in consideration of his assumption of the original debt.[39]

(II) *Return of Collateral.* An offer to return collateral held as security for the payment of a bill or note is not a condition precedent to an action on the bill or note.[40]

(III) *Return of Goods or Money Received in Compromise.* A holder can retain and enforce a note given in compromise of a doubtful claim without returning, or offering to return, goods or money received under a previous compromise of the same claim.[41]

(IV) *Return of Part Payment.* It is not necessary before maintaining an action to return or tender money received on account of the instrument put in suit,[42] but where a promissory note is by its terms subject to a credit the holder cannot recover thereon, unless he shows that the credit has been made or that something has transpired to excuse him from making the contemplated deduction.[43]

(V) *Statutory Conditions.* No action can be maintained on a bill or note without a substantial compliance with all conditions precedent created by statute.[44]

d. Number of Actions. The holder of a bill or note may have as many actions as there are parties prior to him,[45] and a note to either of two payees gives

up by him before it matured, since the drawer's liability arises at once upon payment by such accepter at any hour on the day of maturity (Whitwell *v.* Brigham, 19 Pick. (Mass.) 117).

36. *Louisiana.*— Pecquet *v.* Mager, 14 La. 74; Williams *v.* Robinson, 13 La. 419; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306; Morgan *v.* Towles, 8 Mart. (La.) 730, 13 Am. Dec. 300.

Massachusetts.— Lenox *v.* Cook, 8 Mass. 460; Watson *v.* Loring, 3 Mass. 557.

New York.— Mason *v.* Franklin, 3 Johns. (N. Y.) 202; Oneida Bank *v.* Hurlbut, 1 Am. L. Reg. 219.

United States.—Watson *v.* Tarpley, 18 How. (U. S.) 517, 15 L. ed. 509; Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639.

England.— Bright *v.* Purrier, Bull. N. P. 269, 3 Burr. 1687; Milford *v.* Mayor, Dougl. 55; Ballingalls *v.* Gloster, 3 East 481, 4 Esp. 268; Whitehead *v.* Walker, 11 L. J. Exch. 168, 9 M. & W. 506.

The statute of limitations therefore will run against the holder from the time of its non-acceptance, where such non-acceptance amounts to a dishonor, and not from the time of a subsequent refusal on presentation for payment. Whitehead *v.* Walker, 11 L. J. Exch. 168, 9 M. & W. 506.

37. Lenox *v.* Cook, 8 Mass. 460; Hickling *v.* Hardey, 1 Moore C. P. 61, 7 Taunt. 312, 2 E. C. L. 378.

38. Yeates *v.* Walker, 1 Duv. (Ky.) 84.

39. Alderman *v.* Rivenbark, 96 N. C. 134, 1 S. E. 644.

40. Rich *v.* Boyce, 39 Md. 314; Brewster *v.* Frazier, 32 Md. 302.

41. Crans *v.* Hunter, 28 N. Y. 389.

42. Crooker *v.* Appleton, 25 Me. 131. See also Bobb *v.* Bancroft, 13 Kan. 123.

43. Bailey *v.* Garrison, 25 Tex. 333.

44. Payment of taxes.—Volger *v.* Smith, 47 Ga. 633; Thomas *v.* Knowles, 47 Ga. 398; Irvin *v.* Turner, 47 Ga. 382; Lewis *v.* Horne, 44 Ga. 627; Irvin *v.* Speer, 44 Ga. 626; Cameron *v.* Akin, 44 Ga. 192; Demington *v.* Douglass, 43 Ga. 353. See also Helms *v.* Whigham, 49 Ga. 44; Smith *v.* Howell, 46 Ga. 128; Greene *v.* Lowry, 46 Ga. 55; Hamilton *v.* Willingham, 45 Ga. 500; Rooney *v.* Sammis, 45 Ga. 19; Ezzard *v.* Worrill, 44 Ga. 629; Carhart *v.* Bivins, 44 Ga. 624; Hayward *v.* Easley, 43 Ga. 355.

45. Porter *v.* Ingraham, 10 Mass. 88; Simonds *v.* Center, 6 Mass. 18; Gilmore *v.* Carr, 2 Mass. 171.

Statutory provision.—A statute providing that "there shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage," etc., does not apply to an action brought against the indorser of a note secured by mortgage after judgment has been obtained against the maker. Vandewater *v.* McRae, 27 Cal. 596.

to each the right to recover thereon as well as the right to maintain a joint action.[46]

e. What Law Governs. The manner of enforcing payment of negotiable paper is governed by the law of the place where the remedy is sought to be enforced.[47]

2. For Refusal to Cancel Note. No action lies in favor of the maker against the holder for refusing to surrender or cancel a note after it has been paid.[48]

3. On Original Consideration — a. In General — (i) *Rule Stated.* Where a bill or note of a debtor is taken,[49] which is not accepted or paid at maturity, the creditor's right of action on the original consideration revives,[50] and where discounted through fraud the holder may rescind and sue on the original consideration.[51] At common law too no suit could be maintained against the drawer or maker of an order or check on the order or check itself, and the payee could only sue on the original liability,[52] or the drawee for money paid.[53]

(ii) *Necessity of Producing Paper.* Where the seller of property takes a negotiable note for the price he cannot sue on the original consideration, unless the note be produced and canceled, and the necessity for producing the note is not done away with by a release from liability on the note to the maker by the payee;[54] but if goods are obtained on a note by fraud and sold to a party

And a statute which enacts that no holder of a bill of exchange shall be permitted at any term of the circuit court to institute more than one suit upon such bill prohibits the institution of separate suits at the same term on such bill, but not at different terms of the court. Billingsley *v.* State Bank, 3 Ind. 375.

46. Collyer *v.* Cook, 28 Ind. App. 272, 62 N. E. 655.

47. Foss *v.* Nutting, 14 Gray (Mass.) 484; Logue *v.* Smith, Wright (Ohio) 10. *Compare* Burrows *v.* Hannegan, 1 McLean (U. S.) 315, 4 Fed. Cas. No. 2,206, where it was held that the law of Indiana, which requires a suit against the maker before recourse can be had against the indorser, does not govern an action in such state against the assignor of a negotiable note made and assigned in Ohio and payable there, the assignment being a new contract.

48. Price *v.* Murphy, 39 Mo. App. 210.

49. On non-performance of an agreement to give and receive such bill or note this is true *a fortiori*. Scearce *v.* Gall, 82 Ind. 255; Clifton *v.* Litchfield, 106 Mass. 34. See also Westcott *v.* Keeler, 4 Bosw. (N. Y.) 564, where it was held that where, in consideration of a loan, defendant gave the note of a third person indorsed by himself and when such note fell due requested the lender to get a new note from the third person promising that he would again indorse it, but afterward refused so to do, the lender could maintain an action against him on the original loan and on his agreement to indorse the new note given in renewal.

If an agent, on making a sale of goods, takes a note without authority and transfers it to his principal, the principal may still sue the purchaser for the price of the goods. Edmond *v.* Caldwell, 15 Me. 340.

50. *Nebraska.*— McCormick *v.* Peters, 24 Nebr. 70, 37 N. W. 927.

New Jersey.— Fry *v.* Patterson, 49 N. J. L. 612, 10 Atl. 390.

New York.— Porter *v.* Talcott, 1 Cow. (N. Y.) 359.

South Dakota.— Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837.

Tennessee.— Stewart *v.* Lathrop Mfg. Co., 95 Tenn. 497, 32 S. W. 464; Cook *v.* Beech, 10 Humphr. (Tenn.) 412; Porter *v.* Dillahunty, 8 Humphr. (Tenn.) 570.

Vermont.— Edgell *v.* Stanford, 6 Vt. 551. See also Arbuckle *v.* Hawks, 20 Vt. 538, where it was held that where a note was taken for an agreement to convey land upon its payment and the maker was let into possession in the meantime the payee might rescind the agreement on non-payment of the note and bring ejectment for the land.

Contra, Congressional Tp. No. 11 *v.* Weir, 9 Ind. 224; Slocumb *v.* Holmes, 1 How. (Miss.) 139.

A creditor cannot, however, take several notes for one book account, and, on their maturity at different times, recover part of his debt on one note and afterward sue upon the original consideration instead of the other notes for the balance of the debt. Buck *v.* Wilson, 113 Pa. St. 423, 6 Atl. 97.

51. Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874.

The indorsee of a note void on its face cannot recover the original consideration in an action against the makers and the indorser. Ottenheimer *v.* Cook, 10 Heisk. (Tenn.) 309. But see Edgell *v.* Stanford, 6 Vt. 551.

52. Porter *v.* Dillahunty, 8 Humphr. (Tenn.) 570. *Contra*, Henshaw *v.* Root, 60 Ind. 220 [*citing* Pollard *v.* Bowen, 57 Ind. 232; Griffin *v.* Kemp, 46 Ind. 172; Harker *v.* Anderson, 21 Wend. (N. Y.) 372].

53. Balch *v.* Aldrich, 56 Vt. 68.

54. It is otherwise if the note is non-negotiable. Fitch *v.* Bogue, 19 Conn. 285.

with notice, the vendor may bring an action of trover against such party for the goods without first returning the note to the maker.[55]

(III) *Effect of Renewal.* Merely taking a renewal will not bar a recovery on the original consideration,[56] but where a renewal is secured by a bond and warrant to confess judgment, and the amount is subsequently paid, except the costs of the judgment, the creditor cannot sue upon the original bill for such unpaid costs.[57]

b. Right of Assignee. An assignee of a bill or note has not as such a right to sue the assignor,[58] the maker, or the drawer[59] upon the original consideration, but if at the time of the assignment the original debt is also assigned the assignee may sue on the original demand in the name of his assignor, notwithstanding the indorsement to himself.[60]

B. Defenses — 1. In General — a. By Whom Available. Defenses to the original transaction which are personal to the obligor, and may either be set up or waived by him, cannot be set up by a stranger thereto.[61] Thus an accommodation indorser cannot set up a breach of warranty as to the quality of the articles for which the note was given.[62] So too usury is a defense personal to the borrower,[63] but a surety or accommodation indorser may himself plead any defense not personal to the maker of which the latter could take advantage.[64]

b. Against Whom Available. Defenses available against the real party in interest may be set up, although the action be brought by a nominal party.[65] A defense against a firm may be urged against an indorsee partner,[66] and as knowledge of one partner is knowledge of all, a defense against a partner is available against his copartner.[67]

c. By What Law Governed. As defenses which may be urged by an obligor to limit or defeat his liability may be assumed to have been in the minds of the parties at the time of assuming the obligation, the law of the place where the obligation in suit is incurred governs;[68] although the law of the forum has been

55. Stevens *v.* Austin, 1 Metc. (Mass.) 557.

56. Norris *v.* Aylett, 2 Campb. 329, although it has been transferred.

Renewal for principal of debt.—A creditor may take a renewal note for the principal of a debt, leaving the interest remaining open and retaining the original note, and may still have his action for the interest due him. Eames *v.* Cushman, 135 Mass. 573.

If a bill is taken for a note, and no demand of payment is made on the day of its maturity, and the debtor subsequently tenders the amount, which is refused by the creditor, his right of action on the note will not revive without a fresh demand of payment. Soward *v.* Palmer, 2 Moore C. P. 274, 8 Taunt. 277, 19 Rev. Rep. 515, 4 E. C. L. 144.

57. Dillon *v.* Rimmer, 1 Bing. 100, 7 Moore C. P. 427, 8 E. C. L. 421.

58. Cason *v.* Wallace, 4 Bush (Ky.) 388.

59. Battle *v.* Coit, 26 N. Y. 404 [*affirming* 19 Barb. (N. Y.) 68].

60. Davidson *v.* Bridgeport, 8 Conn. 472.

61. Kirkpatrick *v.* Oldham, 38 La. Ann. 553; Hennen *v.* Bourgeat, 12 Rob. (La.) 522; Bowman *v.* Pope, 33 Miss. 94; Sheary *v.* O'Brien, 75 N. Y. App. Div. 121, 77 N. Y. Suppl. 378; Crouch *v.* Wagner, 63 N. Y. App. Div. 526, 71 N. Y. Suppl. 607.

62. Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Fleitmann *v.* Ashley, 60 N. Y. App. Div. 201, 69 N. Y. Suppl. 1099; Veriscope Co. *v.* Brady, 77 N. Y. Suppl. 159.

63. Cain *v.* Gimon, 36 Ala. 168; Bullard *v.* Raynor, 30 N. Y. 197.

64. Satterfield *v.* Compton, 6 Rob. (La.) 120; Johnson *v.* Marshall, 4 Rob. (La.) 157; Weimer *v.* Shelton, 7 Mo. 237; Sawyer *v.* Chambers, 44 Barb. (N. Y.) 42; Gunnis *v.* Weigley, 114 Pa. St. 191, 6 Atl. 465. See also Dunscomb *v.* Bunker, 2 Metc. (Mass.) 8.

65. Farwell *v.* Tyler, 5 Iowa 535; Herbert *v.* Ford, 29 Me. 546; Felsenthal *v.* Hawks, 50 Minn. 178, 52 N. W. 528. See also Konig *v.* Bayard, 1 Pet. (U. S.) 250, 7 L. ed. 132, holding that the same defenses were available against a payer *supra protest* at the request of a payee as against the drawee himself.

66. Vezina *v.* Piché, 13 Quebec Super. Ct. 213.

67. Hubbard *v.* Galusha, 23 Wis. 398.

68. Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240; Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131. See also Roots *v.* Merriweather, 8 Bush (Ky.) 397, where it was held that where the law of the state where an instrument was payable was not properly alleged and proved, the admissibility of defenses would be governed by the state where the obligation was sought to be enforced.

held to govern with regard to matters of set-off.[69] So too a defense permitted by a certain statute will be presumed to have been contemplated by the parties at the time of the execution of the instrument and will be permitted after the repeal of such statute.[70]

2. Nature and Kinds — a. In General. The availability of matter as defense to actions on promissory notes is governed largely by the general law of contracts.[71] The defense must, however, be relevant and conform to the issue,[72] be confined to the contract sued upon,[73] and intended as an avoidance of the matter declared on.[74] So too defendant can plead only such equities as operate in his own favor.[75] In some jurisdictions it would seem that a defense in an action between the original parties must in some manner be connected with the consideration of the note or with its negotiation;[76] and this rule is more broadly applied where the action is by an indorsee, although he takes the same after maturity or with notice.[77]

b. Legal or Equitable. Not every just objection to the enforcement of the note can, in the absence of statute,[78] be made in an action at law. If the defense puts in issue intricate matters, partly foreign to the subject-matter of the suit, the determination of which is peculiarly the province of a court of equity, it cannot be urged in a purely legal action on the note;[79] and where a defense is clearly available at law equity will not interpose.[80]

c. Special or Particular Defenses — (I) *In General.* Inasmuch as each case depends largely upon the particular facts involved, an attempt to specifically designate every available defense would be impracticable; it may, however, be said that an erroneous interpretation of an unambiguous instrument is no defense,[81]

69. The statute applying to set-offs is regarded as remedial law. Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168.

70. Seegar *v.* Seegar, 19 Ill. 121.

71. See, generally, Contracts.

The word "defense," as used in a statute providing that in any action upon a promissory note, payable on demand, by an indorsee against the promisor, any matters might be deemed a legal defense which would be a legal defense to a suit on the same note if brought by the promisee, means an equitable defense, such as payment, set-off, etc., and does not refer to the disability to sue. Thayer *v.* Buffum, 11 Metc. (Mass.) 398. So too a statute providing that upon proof of the signature which is denied by defendant, such defendant might not set up other defenses, applies only to the personal signature of defendant and not to a denial of the signature of a partner. Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312.

72. Ball *v.* Consolidated Franklinite Co., 32 N. J. L. 102; East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

73. Hence inasmuch as the contract by an accommodation indorser is one of indorsement merely, he cannot set up as a defense that the note was given in a partnership transaction between the maker and payee, in which no final accounting had been had. Veriscope Co. *v.* Brady, 77 N. Y. Suppl. 159. See also Smith *v.* Erwin, 77 N. Y. 466.

74. State Bank *v.* Byrd, 14 Ark. 496.

75. And not those which belong to a party to whom he is liable. Ran *v.* Latham, 11 La. Ann. 276.

76. Case *v.* Maxey, 6 Cal. 276.

77. *Alabama.*— Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669 [*approved* in Kyle *v.* Thompson, 11 Ohio St. 616].

California.— Mohr *v.* Byrne, 135 Cal. 87, 67 Pac. 135.

Missouri.— Mattoon *v.* McDaniel, 34 Mo. 138; Crawford *v.* Johnson, 87 Mo. App. 478.

Vermont.— See Walbridge *v.* Kibbee, 20 Vt. 543.

England.— Chalmers *v.* Lanion, 1 Campb. 383, 10 R. R. 709.

Canada.— Renaud *v.* Bougie, 16 Quebec Super. Ct. 405.

78. For construction of provisions of the code authorizing the interposition of both the legal and equitable defense to a promissory note in an action thereon see Sachleben *v.* Heintze, 117 Mo. 520, 24 S. W. 54; Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181. See also Brown *v.* Crowley, 39 Ga. 376, 99 Am. Dec. 462.

79. Moseby *v.* Lewis, 4 Litt. (Ky.) 159; Steinback *v.* Ellis, 1 Mo. 414; Lee *v.* Field, 9 N. M. 435, 54 Pac. 873; Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991 [*approved* and *distinguished* in Union Bank *v.* Crine, 33 Fed. 809, where the defense was a purely legal one]; Boggs *v.* Wann, 58 Fed. 681; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

80. Mobile Bank *v.* Poelnitz, 61 Ala. 147; Quebec Bank *v.* Weyand, 30 Ohio St. 126. See also Etowah Mfg., etc., Co. *v.* Dobbins, 68 Ga. 823.

81. Obermann Brewing Co. *v.* Gurney, 33 Ill. App. 58.

nor can it be legally urged that the holder purchased the note and instituted an action thereon with a design to harass and oppress the maker.[82] While a plea of *non est factum* or illegal or immoral consideration or fraud in the inception of the instrument[83] may in some instances constitute a defense regardless of the status of the holder,[84] yet as a general rule all defenses and equities which would operate to defeat the action between the original parties or their privies are not available against a *bona fide* indorsee for value;[85] and the mere fact that the suit is brought in equity does not vary the rule.[86] So too it is held that non-compliance with a statute regulating the method by which certain corporate bodies shall do business is not available as a defense in an action between the indorsee of such bodies and the maker of the instrument, where there is a valid and *bona fide* transfer to such holders of the instrument.[87] In some cases, however, an indorsee

82. Bragg *v.* Raymond, 11 Cush. (Mass.) 274; Ormsby *v.* Gilman, 24 Vt. 437.

Declarations of an intended gift by a stepfather is not a sufficient defense. Myers *v.* Malcom, 20 Ill. 621.

A verbal promise by an indorsee to the payee to exact no more of the maker than he, the indorsee, had paid for the instrument is no defense. Babson *v.* Webber, 9 Pick. (Mass.) 163.

The avoidance of a transaction by an assignee in bankruptcy is a good defense by the maker of a note given in consideration of such transaction, although such maker was himself a party to the fraud. Potter *v.* Belden, 105 Mass. 11.

83. Bedell *v.* Scarlett, 75 Ga. 56.

84. See *infra*, XIV, B, 2, c, (VI), (C), (2), (a); XIV, B, 2, c, (VII), (B), (2).

85. *Alabama.*— Pond *v.* Lockwood, 8 Ala. 669.

Connecticut.— Fairchild *v.* Brown, 11 Conn. 26.

Florida.— See McKay *v.* Bellows, 8 Fla. 31.

Georgia.— Bond *v.* Central Bank, 2 Ga. 92.

Indiana.— Musselman *v.* McElhenny, 23 Ind. 4, 85 Am. Dec. 445.

Iowa.— Kahler *v.* Hanson, 53 Iowa 698, 6 N. W. 57; Lane *v.* Krekle, 22 Iowa 399.

Kansas.— Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

Kentucky.— Reid *v.* Cain, 3 Ky. L. Rep. 329.

Louisiana.— Pavey *v.* Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716; Kohlman *v.* Ludwig, 5 La. Ann. 33; Pralon *v.* Aymard, 12 Rob. (La.) 486; Bush *v.* Wright, 10 Rob. (La.) 23; Maurin *v.* Chambers, 6 Rob. (La.) 62; Melançon *v.* Melançon, 4 Rob. (La.) 33; Bordelon *v.* Kilpatrick, 3 Rob. (La.) 159; Robinson *v.* Shelton, 2 Rob. (La.) 277; Jones *v.* Young, 19 La. 553; Van Pelt *v.* Eagle Ins. Co., 18 La. 64; Hagan *v.* Caldwell, 15 La. 380; Crosby *v.* Heartt, 15 La. 304; Lanclos *v.* Robertson, 3 La. 259; Abat *v.* Gormley, 3 La. 238; Thompson *v.* Gibson, 1 Mart. N. S. (La.) 150; Le Blanc *v.* Sanglair, 12 Mart. (La.) 402. 13 Am. Dec. 377; Hubbard *v.* Fulton, 7 Mart. (La.) 241.

Maine.— Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. 48, 85 Am. St. Rep. 412; Hobart *v.* Penny, 70 Me. 248; Wait *v.* Chandler, 63 Me. 257.

Massachusetts.— Pettee *v.* Prout, 3 Gray (Mass.) 502, 63 Am. Dec. 778; Cone *v.* Baldwin, 12 Pick. (Mass.) 545.

Michigan.— Bostwick *v.* Dodge, 1 Dougl. (Mich.) 413, 41 Am. Dec. 584.

Minnesota.— Merchants', etc., Sav. Bank *v.* Cross, 65 Minn. 154, 67 N. W. 1147.

Mississippi.— Davis *v.* Blanton, 71 Miss. 821, 15 So. 132; Mercien *v.* Cotton, 34 Miss. 64; Commercial Bank *v.* Lewis, 13 Sm. & M. (Miss.) 226; Chanee *v.* Right, Walk. (Miss.) 156.

Missouri.— Hughes *v.* McAlister, 15 Mo. 296, 55 Am. Dec. 143.

New Hampshire.— Doe *v.* Burnham, 31 N. H. 426.

New Jersey.— Price *v.* Keen, 40 N. J. L. 332.

New York.— Farwell *v.* Hibner, 15 Hun (N. Y.) 280; Hendricks *v.* Judah, 1 Johns. (N. Y.) 319.

Ohio.— Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168.

Oklahoma.— Morrison *v.* Farmers', etc., Bank, 9 Okla. 697, 60 Pac. 273.

Pennsylvania.— Bullock *v.* Wilcox, 7 Watts (Pa.) 328; Hunter *v.* Blodget, 2 Yeates (Pa.) 480; Boston Commercial Bank *v.* Heppes, 9 Pa. Dist. 352, 23 Pa. Co. Ct. 447.

South Carolina.— Johnson *v.* King, 3 McCord (S. C.) 365.

Texas.— Blair *v.* Rutherford, 31 Tex. 465.

Virginia.— Lomax *v.* Picot, 2 Rand. (Va.) 247; McNeil *v.* Baird, 6 Munf. (Va.) 316.

Wisconsin.— Johnson *v.* Meeker, 1 Wis. 436.

See 7 Cent. Dig. tit. "Bills and Notes," § 944.

86. Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567.

87. *Indiana.*— Zink *v.* Dick, 1 Ind. App. 269, 27 N. E. 622.

Maine.— Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242.

Massachusetts.— Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376; Williams *v.* Cheney, 3 Gray (Mass.) 215.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769.

Missouri.— Mattoon *v.* McDaniel, 34 Mo. 138.

United States.— Lauter *v.* Jarvis-Conklin Mortg. Trust Co., 85 Fed. 894, 54 U. S. App. 49, 29 C. C. A. 473; Press Co. *v.* Hartford

taking an instrument as collateral security for a debt, although often designated a *bona fide* holder by the courts, is subject to defenses existing between the original parties as against a surplus between the amount of his debt thus secured and the value of the note;[88] and where the equity existing between the original parties is want of consideration or fraud, the rule has been held to apply where the indorsee purchased the instrument for less than its face value, either by payment of cash or property.[89] Other cases hold that a so-called *bona fide* indorsee taking as collateral security may recover the whole amount of the instrument taken regardless of the amount of his debt secured thereby[90] or regardless of the amount he may have paid for the instrument; such defenses being in no way available.[91]

City Bank, 58 Fed. 321, 17 U. S. App. 213, 7 C. C. A. 248 [*affirming* 56 Fed. 260].

Compare Massillon First Nat. Bank *v.* Conghron, (Tenn. Ch. 1899) 52 S. W. 1112.

88. *Arkansas.*—Brown *v.* Callaway, 41 Ark. 418.

California.— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521.

Illinois.— Saylor *v.* Daniels, 37 Ill. 331, 87 Am. Dec. 250; Vanliew *v.* Galesburg Second Nat. Bank, 21 Ill. App. 126; Steere *v.* Benson, 2 Ill. App. 560.

Indiana.— Jones *v.* Hawkins, 17 Ind. 550; Valette *v.* Mason, 1 Ind. 288.

Louisiana.—Forstall *v.* Fussell, 50 La. Ann. 249, 23 So. 273; Mechanics', etc., Bank *v.* Barnett, 27 La. Ann. 177; Citizens' Bank *v.* Payne, 18 La. Ann. 222, 89 Am. Dec. 650; Lacroix *v.* Derbigny, 18 La. Ann. 27.

Massachusetts.— Williams *v.* Cheney, 3 Gray (Mass.) 215; Stoddard *v.* Kimball, 6 Cush. (Mass.) 469; Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 56 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

Nebraska.— Barmby *v.* Wolfe, 44 Nebr. 77, 62 N. W. 318; Helmer *v.* Commercial Bank, 28 Nebr. 474, 44 N. W. 482.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Robertson *v.* McKibbin, 20 Misc. (N. Y.) 658, 46 N. Y. Suppl. 380; Pearce, etc., Engineering Co. *v.* Brouwer, 10 Misc. (N. Y.) 502, 31 N. Y. Suppl. 195, 63 N. Y. St. 621; Mechanics', etc., Bank *v.* Livingston, 4 Misc. (N. Y.) 257, 23 N. Y. Suppl. 813, 53 N. Y. St. 692; Williams *v.* Smith, 2 Hill (N. Y.) 301.

Texas.— Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885.

See also Moody *v.* Towle, 5 Me. 415; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Beckhaus *v.* Commercial Nat. Bank, 22 Wkly. Notes Cas. (Pa.) 53, 12 Atl. 72; Kinney *v.* Kruse, 28 Wis. 183, Curtis *v.* Mohr, 18 Wis. 615.

See 7 Cent. Dig. tit. "Bills and Notes," § 961.

89. *Iowa.*— Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301, expressly so by statute.

New Jersey.—De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158. See also Holcomb *v.* Wyckoff, 35 N. J. L. 35, 10 Am. Rep. 219; Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Youngs *v.* Lee, 12 N. Y. 551 [*affirming* 18 Barb. (N. Y.) 187]; Perry *v.* Council Bluffs City Waterworks Co., 67 Hun (N. Y.) 456, 22 N. Y. Suppl. 151, 51 N. Y. St. 326; Springfield First Nat. Bank *v.* Haulenbeck, 65 Hun (N. Y.) 54, 19 N. Y. Suppl. 567, 47 N. Y. St. 255; Todd *v.* Shelbourne, 8 Hun (N. Y.) 510; Huff *v.* Wagner, 63 Barb. (N. Y.) 215; Cardwell *v.* Hicks, 37 Barb. (N. Y.) 458, 23 How. Pr. (N. Y.) 281; Driggs *v.* Driggs, 11 N. Y. St. 256.

Tennessee.— Oppenheimer *v.* Farmers', etc., Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767; Green *v.* Stuart, 7 Baxt. (Tenn.) 418; Petty *v.* Hannum, 2 Humphr. (Tenn.) 102, 36 Am. Dec. 303.

England.— Edwards *v.* Jones, 7 C. & P. 633, 32 E. C. L. 795; Wiffen *v.* Robarts, 1 Esp. 261, 5 Rev. Rep. 737; Nash *v.* Brown, 6 C. B. 584, 60 E. C. L. 584; Jones *v.* Hibbert, 2 Stark. 304, 19 Rev. Rep. 694, 3 E. C. L. 419.

See 7 Cent. Dig. tit. "Bills and Notes," § 962.

90. Gowen *v.* Wentworth, 17 Me. 66; Tarbell *v.* Sturtevant, 26 Vt. 513; Sawyer *v.* Cutting, 23 Vt. 486; Ward *v.* Quebec Bank, 3 Quebec 122. See also Berenbroick *v.* Stephens, 8 Daly (N. Y.) 249.

91. *Connecticut.*— Bissell *v.* Dickerson, 64 Conn. 61, 29 Atl. 226; Belden *v.* Lamb, 17 Conn. 441.

Indiana.— Murphy *v.* Lucas, 58 Ind. 360.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

Maryland.— Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

Ohio.— Kitchen *v.* Loudenback, 3 Ohio Cir. Ct. 228.

Texas.— Petri *v.* Fond du Lac Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657, 84 Tex. 212, 20 S. W. 777; Denton Lumber Co. *v.* Fond du Lac First Nat. Bank, (Tex. 1892) 18 S. W. 962.

United States.— Cromwell *v.* Sac County, 97 U. S. 51, 24 L. ed. 681.

See 7 Cent. Dig. tit. "Bills and Notes," § 962.

(II) *ALTERATION*—(A) *In General.* That a note or bill was materially altered is a good defense to any party to the instrument who did not consent to the alteration, and is available against a *bona fide* purchaser for value, before maturity, without notice.[92] So where a note has appended to it or there is written on the same paper a condition or agreement varying the terms of the instrument the removal of the condition is such a material alteration as will constitute a defense to an action on the instrument against one not consenting to such removal even in the hands of a *bona fide* holder.[93] To render this defense avail-

92. *Arkansas.*— Fordyce *v.* Kosminski, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18.

Connecticut.—Ætna Nat. Bank *v.* Winchester, 43 Conn. 391.

Delaware.— Sudler *v.* Collins, 2 Houst. (Del.) 538; Newark Bank *v.* Crawford, 2 Houst. (Del.) 282.

Georgia.— Hill *v.* O'Neill, 101 Ga. 832, 28 S. E. 996.

Illinois.— Burwell *v.* Orr, 84 Ill. 465.

Indiana.— Cronkhite *v.* Nebeker, 81 Ind. 319, 42 Am. Rep. 127; Hert *v.* Oehler, 80 Ind. 83; McCoy *v.* Lockwood, 71 Ind. 319; Young *v.* Baker, (Ind. App. 1902) 64 N. E. 54.

Iowa.— Derr *v.* Keaough, 96 Iowa 397, 65 N. W. 339; Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Kansas.— Herington Bank *v.* Wangerin, 65 Kan. 423, 70 Pac. 330; Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

Kentucky.— Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; Cason *v.* Grant County Deposit Bank, 13 Ky. L. Rep. 635; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25.

Maryland.— Schwartz *v.* Wilmer, 90 Md. 136, 44 Atl. 1059.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Wade *v.* Withington, 1 Allen (Mass.) 561.

Michigan.— Bradley *v.* Mann, 37 Mich. 1; Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661.

Minnesota.— Seebold *v.* Tatlie, 76 Minn. 131, 78 N. W. 967.

Mississippi.— Simmons *v.* Atkinson, etc., Co., 69 Miss. 862, 12 So. 263, 23 L. R. A. 599.

Missouri.— Washington Sav. Bank *v.* Ecky, 51 Mo. 272; Trigg *v.* Taylor, 27 Mo. 245, 72 Am. Dec. 263; Middaugh *v.* Elliott, 61 Mo. App. 601; Kingston Sav. Bank *v.* Bosserman, 52 Mo. App. 269.

Nebraska.— Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577; Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538; State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

New York.— Hardy *v.* Norton, 66 Barb. (N. Y.) 527; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374; Mt. Morris Bank *v.* Lawson, 10 Misc. (N. Y.) 359, 31 N. Y. Suppl. 18, 63 N. Y. St. 432 [*reversing* 7 Misc. (N. Y.) 228, 27 N. Y. Suppl. 272, 58 N. Y. St. 25]; Flannagan *v.* National Union Bank, 2 N. Y. Suppl. 488, 18 N. Y. St. 826.

North Dakota.— Porter *v.* Hardy, 10 N. D. 551, 88 N. W. 458.

Ohio.— Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Garrard *v.* Haddan, 67 Pa. St. 82, 5 Am. Rep. 412; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; U. S. Bank *v.* Russel, 3 Yeates (Pa.) 391; Alexander *v.* Buckwalter, 8 Del. Co. (Pa.) 74, 17 Lanc. L. Rev. (Pa.) 366.

Tennessee.— Moss *v.* Maddux, 108 Tenn. 405, 67 S. W. 855.

Texas.— Farmers', etc., Bank *v.* Novich, 89 Tex. 381, 34 S. W. 914.

West Virginia.— Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

England.— Master *v.* Miller, 1 Anstr. 225, 2 H. Bl. 141, 5 T. R. 637, 2 Rev. Rep. 399; Long *v.* Moore, 3 Esp. 155 note; Engel *v.* Stourton, 53 J. P. 535.

Canada.— Carrique *v.* Beaty, 24 Ont. App. 302; Meredith *v.* Culver, 5 U. C. Q. B. 218; Samson *v.* Yager, 4 U. C. Q. B. O. S. 3.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 985–991.

Change of payee.—Where a note had been altered by erasing the word "order" and inserting the word "bearer" without the knowledge or consent of the makers an innocent purchaser, without indorsement, after the alteration, cannot sue upon it in his own name. Burch *v.* Daniel, 101 Ga. 228, 28 S. E. 622.

The extension or change of time of payment of a note by the holder, in an indorsement thereon, without the knowledge or consent of the maker, is a material alteration and renders it unenforceable. Boulton *v.* Langmuir, 24 Ont. App. 618; Gladstone *v.* Dew, 9 U. C. C. P. 439; Westloh *v.* Brown, 43 U. C. Q. B. 402. *Compare* Canada Invest., etc., Co. *v.* Brown, 19 Rev. Lég. 364. Hence one taking the note and the mortgage securing it after the original time, but before the extended time of payment has expired, takes them subject to payments made to the assignor not indorsed on the note. Avirett *v.* Barnhart, 86 Md. 545, 39 Atl. 532.

The renewal of an altered note on a new consideration will preclude the defense to the original. Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

93. *Iowa.*— Scofield *v.* Ford, 56 Iowa 370, 9 N. W. 309.

able, however, the alteration must be material,[94] and alteration by a wrong-doer has been held to be a mere act of spoliation which leaves the rights of the parties to the instrument unaffected.[95]

(B) *After Negligent or Incomplete Execution.* If the bill or note is so carelessly or negligently drawn or blank spaces are left, permitting material alteration, without defacing the instrument or changing its appearance so as to excite the suspicion of a person of ordinary business capacity, the alteration or filling up of such blanks[96] is no defense to it in the hands of an innocent purchaser;[97] and this rule is applicable to a note having a condition annexed which

Nebraska.— Davis *v.* Henry, 13 Nebr. 497, 14 N. W. 523; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9.

New York.— Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382.

Tennessee.— Stephens *v.* Davis, 85 Tenn. 271, 2 S. W. 382.

See 7 Cent. Dig. tit. "Bills and Notes," § 992.

94. Change of payee.—An alteration by an agent consisting in the substitution in the note and an agreement thereto annexed of his name for that of his principal is immaterial and constitutes no defense against a *bona fide* indorser. Lowry *v.* McLain, 75 Ga. 372.

Time of payment.—Where a memorandum giving the maker the privilege of paying before maturity is appended to the note before its delivery to a *bona fide* holder, although it may have been appended after the making of the note and its indorsement. an indorser is not discharged from liability. Bowie *v.* Hume, 13 App. Cas. (D. C.) 286.

Erasure of the place of payment of a note by an unauthorized person is an immaterial alteration as to the maker. Major *v.* Hansen, 2 Biss. (U. S.) 195, 16 Fed. Cas. No. 8,982.

Addition of surety.— A note cannot be defeated in the hands of a *bona fide* holder for value on the ground that a surety signed it without the consent of the maker. Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306.

If an altered note is restored before acquisition by an innocent holder the alteration is not a defense to the maker. Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

The unauthorized act of an agent of a surety in affixing seals to the signatures will be treated as a nullity and the instrument may be enforced to the extent contemplated. Fullerton *v.* Sturges, 4 Ohio St. 529. See also Cunnington *v.* Peterson, 29 Ont. 346 [*distinguishing* Reid *v.* Humphrey, 6 Ont. App. 403].

95. Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534 [*reversing* 4 Daly (N. Y.) 199].

Alteration by a stranger without the holder's knowledge will not defeat the note in the latter's hands. Paterson *v.* Higgins, 58 Ill. App. 268.

96. Alteration distinguished from filling of blank.— Some cases distinguish between an altered note, that is, one changed after it has been once legally drawn up and delivered, and one signed in blank which carries with it the implied power of filling up the blanks in proper amounts and figures. Harris *v.* Berger, 15 N. Y. St. 389.

The execution of printed notes with the blanks unfilled seems to be regarded as a letter of credit for an indefinite sum, and it will not do to allow a person who does this to escape the consequences of his act to the prejudice of the public. Harris *v.* Berger, 15 N. Y. St. 389. See also Davis *v.* Lee, 26 Miss. 505, 59 Am. Dec. 267.

97. *Alabama.*—Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959: Winter *v.* Pool. 104 Ala. 580, 16 So. 543; Robertson *v.* Smith, 18 Ala. 220.

Colorado.— Statton *v.* Stone, 15 Colo. App. 237, 61 Pac. 481.

Georgia.— Moody *v.* Threlkeld, 13 Ga. 55.

Illinois.— Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Seibel *v.* Vaughan, 69 Ill. 257; Harvey *v.* Smith, 55 Ill. 224; Merritt *v.* Boyden, 93 Ill. App. 613 [*affirmed* in 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246]; Weaver *v.* Leseure, 89 Ill. App. 628.

Indiana.— Noll *v.* Smith, 64 Ind. 511, 31 Am. Rep. 131; Woollen *v.* Ulrich, 64 Ind. 120.

Kentucky.— Cason *v.* Grant County Deposit Bank, 97 Ky. 487, 17 Ky. L. Rep. 344, 31 S. W. 40, 53 Am. St. Rep. 418; Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Smith *v.* Lockridge, 8 Bush (Ky.) 423; Newell *v.* Somerset First Nat. Bank, 13 Ky. L. Rep. 775.

Louisiana.— Isnard *v.* Torres, 10 La. Ann. 103.

Maine.— Breckenridge *v.* Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353.

Michigan.— Weidman *v.* Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603.

Missouri.— Farmers' Bank *v.* Garten, 34 Mo. 119; Kingston Sav. Bank *v.* Bosserman, 52 Mo. App. 269; Scotland County Nat. Bank *v.* O'Connel, 23 Mo. App. 165.

North Carolina.— Humphreys *v.* Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293.

Pennsylvania.— Brown *v.* Reed, 79 Pa. St. 370, 21 Am. Rep. 75; Zimmerman *v.* Rote, 75 Pa. St. 188; Simpson *v.* Bovard, 74 Pa. St. 351; Garrard *v.* Haddan, 67 Pa. St. 82, 5 Am. Rep. 412; Howie *v.* Lewis, 14 Pa. Super. Ct. 232.

Tennessee.—Grissom *v.* Fite, 1 Head (Tenn.) 332, where a plea by an indorser for accommodation that the maker had exceeded the

might be detached or removed without indicating that fact, so as to leave a perfect negotiable instrument.[98] But in order to constitute a blank piece of paper upon which a name is written a note in blank, it is absolutely necessary that it should have been intended for use as a contractual obligation.[99]

(III) *DURESS.* It is not a defense to a note in the hands of a *bona fide* holder that it was obtained by duress,[1] but otherwise where the transferrer had notice of the facts.[2]

(IV) *FAILURE OF CONSIDERATION* — (A) *In General.* As between original parties to a bill or note the consideration thereof may always, in the absence of an estoppel,[3] be inquired into; and a want or failure of the same constitutes a

amount agreed upon was held bad, because it did not negative that the parties were *bona fide* holders for value.

Texas.— Jones *v.* Primm, 6 Tex. 170.

Wisconsin.— Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

United States.— Angle *v.* Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556.

England.— Garrard *v.* Lewis, 10 Q. B. D. 30, 47 L. T. Rep. N. S. 408, 31 Wkly. Rep. 475.

Canada.— McInnes *v.* Milton, 30 U. C. Q. B. 489; Sanford *v.* Ross, 6 U. C. Q. B. O. S. 104.

Compare Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 949, 950, 991.

Limitation of doctrine.— The doctrine has no application in a suit by the assignee of paper which is not negotiable. Smith *v.* Holzhauer, 67 N. J. L. 202, 50 Atl. 683.

Where an interest blank is left vacant by the maker its subsequent filling in a way not to attract attention will not defeat it in the hands of a *bona fide* purchaser. Rainbolt *v.* Eddy, 34 Iowa 440, 11 Am. Rep. 152. See also Desseure *v.* Weaver, 99 Ill. App. 375 [*citing* Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246]; Iron Mountain Bank *v.* Murdock, 62 Mo. 70.

If the alteration is plainly apparent the maker is not liable. Alexander *v.* Buckwalter, 8 Del. Co. (Pa.) 74, 17 Lanc. L. Rev. 366.

Where the maker of a note indorsed for his accommodation alters it to a larger sum, by taking advantage of vacant space left in the printed form, the holder may recover the true amount of the indorser. Worrall *v.* Gheen, 39 Pa. St. 388.

There is no duty incumbent upon the accepter of a bill of exchange toward the public or subsequent holders of the bill to see that the bill is in such a form as to prevent the possibility of fraudulent alteration after it has left his hands. Scholfield *v.* Londesborough, [1896] App. Cas. 514, 65 L. J. Q. B. 593, 75 L. T. Rep. N. S. 254, 45 Wkly. Rep. 124.

98. Elliott *v.* Levings, 54 Ill. 213; Noll *v.* Smith, 64 Ind. 511, 31 Am. Rep. 131; Woollen *v.* Ulrich, 64 Ind. 120; Cornell *v.* Nebeker, 58 Ind. 425; Scofield *v.* Ford, 56 Iowa 370, 9 N. W. 309; Zimmerman *v.* Rote, 75 Pa. St. 188.

99. Thus it is a clear defense against a *bona fide* holder of an alleged note that the note was written in over an autograph given in blank for mere purpose of identification. Caulkins *v.* Whisler, 29 Iowa 495, 4 Am. Rep. 236. See also Grand Haven First Nat. Bank *v.* Zeims, 93 Iowa 140, 61 N. W. 483. Or where a name was signed on a piece of paper with no intention of making a note in blank and carelessly left on a table and a note was written in over it, the person so signing has a clear defense. Nance *v.* Lary, 5 Ala. 370.

Implied power to fill blanks see *supra*, I, C, 2, a, (I), (A) [7 Cyc. 619].

The distinction is that in one case he intended to enter into a contract obligation, and that the blank should be filled up, and consequently he is held liable, although the blanks were filled in differently than he intended; while in the other the person signing never intended to enter into any obligation and the law cannot create one for him. Harris *v.* Berger, 15 N. Y. St. 389.

1. *Iowa.* — Veach *v.* Thompson, 15 Iowa 380.

Michigan.— Farmers' Bank *v.* Butler, 48 Mich. 192, 12 N. W. 36.

New Hampshire.— Clark *v.* Pease, 41 N. H. 414.

New York.— Loomis *v.* Ruck, 56 N. Y. 462.

Wisconsin.— Keller *v.* Schmidt, 104 Wis. 596, 80 N. W. 935.

See 7 Cent. Dig. tit. "Bills and Notes," § 954.

Note secured by mortgage.—A *bona fide* purchaser for value of a promissory note secured by a mortgage on real estate is not affected by the defense of duress on the part of the maker of the note, who has taken no steps to declare the mortgage invalid. Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694.

2. A note extorted by threats of prosecution for a criminal offense of which the party threatened is guilty in fact, but which is no way connected with the demand for which compensation was sought, is void in the hands of a transferee with notice. Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803. To a similar effect see McClatchie *v.* Haslam, 17 Cox C. C. 402, 65 L. T. Rep. N. S. 691 [*following* Osbaldiston *v.* Simpson, 7 Jur. 736, 13 Sim. 513, 36 Eng. Ch. 512].

3. See *infra*, XIV, B, 3, b.

good defense,[4] even though the consideration be expressed therein[5] or expressly acknowledged by the words "value received."[6] So too this defense is available between parties to a subsequent single transfer of the instrument, such as a trans.

4. *Alabama.*— Wynne *v.* Whisenant, 37 Ala. 46 (holding that the maker may waive the illegality of the instrument and set up failure of consideration); Litchfield *v.* Allen, 7 Ala. 779.

Arkansas.— Gale *v.* Harp. 64 Ark. 462, 43 S. W. 144.

California.— Risley *v.* Gray, 98 Cal. 40, 32 Pac. 884; Fisher *v.* Salmon, 1 Cal. 413, 54 Am. Dec. 297.

Connecticut.— Bunnell *v.* Butler, 23 Conn. 65; Lawrence *v.* Stonington Bank, 6 Conn. 521.

Delaware.— Mills *v.* Gilpin, 2 Harr. (Del.) 32; Hartwell *v.* McBeth, 1 Harr. (Del.) 363.

Georgia.— Radcliffe *v.* Biles, 94 Ga. 480, 20 S. E. 359.

Illinois.— Sturges *v.* Miller, 80 Ill. 241; Capps *v.* Smith, 4 Ill. 177; Gorham *v.* Peyton, 3 Ill. 363; Wineman *v.* Oberne, 40 Ill. App. 269; Johnson *v.* Morrison First Nat. Bank, 24 Ill. App. 352; Forbes *v.* Williams, 13 Ill. App. 280.

Iowa.— Storm Lake First Nat. Bank *v.* Felt, 100 Iowa 680, 69 N. W. 1057; Merrill *v.* Gamble, 46 Iowa 615; George *v.* Gillespie, 1 Greene (Iowa) 421; Swan *v.* Ewing, Morr. (Iowa) 344.

Kansas.— Dodge *v.* Oatis, 27 Kan. 762; French *v.* Gordon, 10 Kan. 370; Blood *v.* Northup, 1 Kan. 28.

Kentucky.— Wake *v.* Commonwealth Bank, 2 Dana (Ky.) 394; Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472; Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429; Burns *v.* Ross, 17 Ky. L. Rep. 181, 30 S. W. 641.

Louisiana.— Woods *v.* Schlater, 24 La. Ann. 284; Payne *v.* Waterson, 16 La. Ann. 239; Gilman *v.* Pilsbury, 16 La. Ann. 51; Wolfe *v.* Jewett, 10 La. 383; Kernion *v.* Jumonville de Villier, 8 La. 547; Russell *v.* Hall, 8 Mart. N. S. (La.) 558; Byrd *v.* Craig, 1 Mart. N. S. (La.) 625; Coupry *v.* Dufau, 1 Mart. N. S. (La.) 90; Grieve *v.* Sagory, 3 Mart. (La.) 599.

Maine.— Jenness *v.* Parker, 24 Me. 289; Folsom *v.* Mussey, 8 Me. 400, 23 Am. Dec. 522.

Maryland.— Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. 268; Beall *v.* Pearre, 12 Md. 550; Wyman *v.* Gray, 7 Harr. & J. (Md.) 409.

Massachusetts.— Hawks *v.* Truesdell, 12 Allen (Mass.) 564; Goodwin *v.* Morse, 9 Metc. (Mass.) 278.

Michigan.— Kelley *v.* Guy, 116 Mich. 43, 74 N. W. 291.

Mississippi.— Campbell *v.* Brown, 6 How. (Miss.) 106.

Missouri.— Klein *v.* Keyes, 17 Mo. 326.

New Hampshire.— Aldrich *v.* Whitaker, 70 N. H. 627, 47 Atl. 591; Pike *v.* Taylor, 49 N. H. 124.

New York.— Bookstaver *v.* Jayne, 60 N. Y. 146; Block *v.* Stevens, 72 N. Y. App. Div. 246, 76 N. Y. Suppl. 213; McCulloch *v.* Hoffman, 10 Hun (N. Y.) 133; Sawyer *v.* Chambers, 44 Barb. (N. Y.) 42; Britton *v.* Hall, 1 Hilt. (N. Y.) 528; Watkins *v.* Peters, 20 Misc. (N. Y.) 655, 46 N. Y. Suppl. 254; Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301; Denniston *v.* Bacon, 10 Johns. (N. Y.) 198. See also Fitch *v.* Redding, 4 Sandf. (N. Y.) 130, where the court, while submitting to the rule, held that where the defense rests upon the single ground of the absence of a valuable consideration it does not deserve much favor in a court of justice.

North Carolina.— Washburn *v.* Picot, 14 N. C. 390.

Ohio.— Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181.

Oregon.— Williams *v.* Culver, 30 Oreg. 375, 48 Pac. 365.

Pennsylvania.— Clement *v.* Reppard, 15 Pa. St. 111; Barnet *v.* Offerman, 7 Watts (Pa.) 130; Child *v.* McKean, 2 Miles (Pa.) 192 (holding that such defense must be distinctly shown by evidence and would not be inferred); Hawley *v.* Hirsch, 2 Woodw. (Pa.) 158; Moore *v.* Phillips, 13 Montg. Co. Rep. (Pa.) 173.

Tennessee.— Turley *v.* Bartlett, 10 Heisk. (Tenn.) 221; Walker *v.* McConnico, 10 Yerg. (Tenn.) 228. See also Flewellin *v.* Hale, 6 Yerg. (Tenn.) 515.

Texas.— Rohde *v.* Lafayette Lodge, 15 Tex. 446; Kalamazoo Nat. Bank *v.* Sides, (Tex. Civ. App. 1894) 28 S. W. 918; Reichstatter *v.* Hall, 3 Tex. App. Civ. Cas. § 416.

United States.— Scudder *v.* Andrews, 2 McLean (U. S.) 464, 21 Fed. Cas. No. 12,564; Ryberg *v.* Snell, 2 Wash. (U. S.) 294, 30 Fed. Cas. No. 12,189. See also Hettinger *v.* Meyers, 81 Fed. 805; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204 (where it is said that he must also show how and why he is entitled to make such Jefense, as against plaintiff, in any aspect of the case made in the complaint).

Canada.— Merchants' Bank *v.* Robinson, 8 Ont. Pr. 117.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1367, 1372.

5. Branch *v.* Howard, 4 Tex. Civ. App. 271, 23 S. W. 478.

6. *Connecticut.*— Litchfield Bank *v.* Peck, 29 Conn. 384.

Georgia.— Reviere *v.* Evans, 103 Ga. 169, 29 S. E. 756.

Indiana.— Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695; Barner *v.* Morehead, 22 Ind. 354; Swank *v.* Nichols, 20 Ind. 198; Kortepeter *v.* List, 16 Ind. 295.

Iowa.— Simpson Centenary College *v.* Tuttle, 71 Iowa 596, 33 N. W. 74.

Kansas.— Blood *v.* Northup, 1 Kan. 28.

ferrer and his indorsee,[7] or between parties having only the rights and immunities of the original parties to the instrument, such as transferees of non-negotiable paper,[8] paper overdue,[9] or with notice of such equities[10] either actual or in contemplation of law.[11] But the rule is otherwise where the action is brought by a party occupying the position of a *bona fide* holder,[12] such defense not ordinarily being available.[13] This is true although the instrument be executed and indorsed

Louisiana.— Krumbhaar *v.* Ludeling, 3 Mart. (La.) 640.

Maryland.— Beall *v.* Pearre, 12 Md. 550.

Massachusetts.— Hill *v.* Buckminster, 5 Pick. (Mass.) 391.

Minnesota.— Ruggles *v.* Swanwick, 6 Minn. 526.

Mississippi. — Pollen *v.* James, 45 Miss. 129.

Missouri.— Harwood *v.* Brown, 23 Mo. App. 69.

New Hampshire. — Haynes *v.* Thom, 28 N. H. 386.

New York.— McCulloch *v.* Hoffman, 10 Hun (N. Y.) 133; Johnson *v.* Titus, 2 Hill (N. Y.) 606; Slade *v.* Halsted, 7 Cow. (N. Y.) 322; Schoonmaker *v.* Roosa, 17 Johns. (N. Y.) 301; Pearson *v.* Pearson, 7 Johns. (N. Y.) 26.

Ohio.— Loffland *v.* Russell, Wright (Ohio) 438.

Pennsylvania.—Child *v.* McKean, 2 Miles (Pa.) 192.

South Carolina.— Singleton *v.* Bremar, Harp. (S. C.) 201.

United States.— Rising Sun Nat. Bank *v.* Brush, 10 Biss. (U. S.) 188, 6 Fed. 132.

See 7 Cent. Dig. tit. "Bills and Notes," § 1367.

7. Shanklin *v.* Cooper, 8 Blackf. (Ind.) 41; Niles *v.* Porter, 6 Blackf. (Ind.) 44; Brown *v.* Fort, 1 Mart. (La.) 34; Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389; Martin *v.* Kercheval, 4 McLean (U. S.) 117, 16 Fed. Cas. No. 9,163.

8. *Connecticut.*— Barnum *v.* Barnum, 9 Conn. 242.

Kentucky.— Schnabel *v.* German-American Title Co., 21 Ky. L. Rep. 1063, 53 S. W. 1031.

Maine.— Herbert *v.* Ford, 33 Me. 90.

Pennsylvania.— Baker *v.* Nipple, 16 Pa. Co. Ct. 659.

South Carolina.—McLaughlin *v.* Braddy, 63 S. C. 433, 41 S. E. 523.

As to what constitute non-negotiable instruments see *supra*, I, B, 4 [7 Cyc. 541].

9. *Delaware.*— McCready *v.* Cann, 5 Harr. (Del.) 175.

Iowa.— Dubuque First Nat. Bank *v.* Werst, 52 Iowa 684, 3 N. W. 711.

Kentucky.— Frazer *v.* Edwards, 5 Dana (Ky.) 538.

Louisiana.— Clement *v.* Sigur, 29 La. Ann. 798.

Pennsylvania.— Barnet *v.* Offerman, 7 Watts (Pa.) 130.

As to when paper is overdue see *supra*, VII [7 Cyc. 838 *et seq.*].

10. *Arkansas.*— Tilson *v.* Gatling, 60 Ark. 114, 29 S. W. 35.

California.— Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

Illinois.— Hamlin *v.* Kingsley, 12 Ill. 342; Elston *v.* Blanchard, 3 Ill. 420.

Indiana.—Scotten *v.* Randolph, 96 Ind. 581.

Iowa.— Skinner *v.* Raynor, 95 Iowa 536, 64 N. W. 601.

Kansas.— Hale *v.* Aldaffer, 5 Kan. App. 40, 5 Pac. 194, 47 Pac. 320.

Massachusetts.— Grew *v.* Burditt, 9 Pick. (Mass.) 265.

New Jersey.— Starr *v.* Torrey, 22 N. J. L. 190.

Ohio.— Brown *v.* Willis, 13 Ohio 26.

United States.— Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204; Perry *v.* Crammond, 1 Wash. (U. S.) 100, 19 Fed. Cas. No. 11,005.

11. Saxton *v.* Dodge, 57 Barb. (N. Y.) 84.

12. As to what constitutes bona fide holder for value see *supra*, IX [7 Cyc. 924 *et seq.*].

13. *Alabama.*— King *v.* People's Bank, 127 Ala. 266, 28 So. 658.

Arkansas.— Cagle *v.* Lane, 49 Ark. 465, 5 S. W. 790; McLain *v.* Coulter, 5 Ark. 13.

California.— Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; Siebe *v.* Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14; Splivallo *v.* Patten, 38 Cal. 138, 99 Am. Dec. 358.

Colorado.— Parkison *v.* Boddiker, 10 Colo. 503, 15 Pac. 806; Parsons *v.* Parsons, (Colo. App. 1902) 67 Pac. 345; Statton *v.* Stone, (Colo. App. 1900) 61 Pac. 481; Pendleton *v.* Smissaert, 1 Colo. App. 508, 29 Pac. 521; Rand *v.* Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661.

Connecticut.—Terrell *v.* Colebrook, 35 Conn. 188; Middletown Bank *v.* Jerome, 18 Conn. 443.

Delaware.— Maher *v.* Moore, (Del. 1898) 42 Atl. 721; McCready *v.* Cann, 5 Harr. (Del.) 175; Waterman *v.* Barratt, 4 Harr. (Del.) 311; Bush *v.* Peckard, 3 Harr. (Del.) 385.

Florida.— White *v.* Camp, 1 Fla. 94. See also McKay *v.* Bellows, 8 Fla. 31.

Georgia.— Parr *v.* Erickson, 115 Ga. 873, 42 S. E. 240; Burch *v.* Pope, 114 Ga. 334, 40 S. E. 227; English-American L. & T. Co. *v.* Hiers, 112 Ga. 823, 38 S. E. 103; Graham *v.* Campbell, 105 Ga. 839, 32 S. E. 118; Keith *v.* Fork, 105 Ga. 511, 31 S. E. 169; Post *v.* Abbeville, etc., R. Co., 99 Ga. 232, 25 S. E. 405; Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Smith *v.* Rawson, 61 Ga. 208; Faulkner *v.* Ware, 34 Ga. 498.

Illinois.— National Bank of America *v.* State Nat. Bank, 164 Ill. 503, 45 N. E. 968

merely for accommodation,[14] and as mere knowledge of the accommodation char-

[*affirming* 64 Ill. App. 355]; Matson *v.* Alley, 141 Ill. 284, 31 N. E. 419; Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546; Baldwin *v.* Killian, 63 Ill. 550; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; American Nat. Bank *v.* Western Hay, etc., Co., 69 Ill. App. 268; Mahon *v.* Gaither, 59 Ill. App. 583; Kepley *v.* Schmidt, 21 Ill. App. 402; Cassell *v.* Morrison, 8 Ill. App. 175; Taylor *v.* Thompson, 3 Ill. App. 109.

Indiana.— Huntington First Nat. Bank *v.* Ruhl, 122 Ind. 279, 23 N. E. 766; McCauley *v.* Murdock, 97 Ind. 229; Glover *v.* Jennings, 6 Blackf. (Ind.) 10; Voris *v.* Harsharger, 11 Ind. App. 555, 39 N. E. 521; Potter *v.* Sheets, 5 Ind. App. 506, 32 N. E. 811.

Iowa.— Council Bluffs Iron Works *v.* Cuppey, 41 Iowa 104; Bates *v.* Kemp, 13 Iowa 223; Iowa College *v.* Hill, 12 Iowa 462.

Kansas.— Overhoff *v.* Trusdell, 5 Kan. App. 881, 49 Pac. 331.

Kentucky.— Spencers *v.* Briggs, 2 Metc. (Ky.) 123; Kelly *v.* Smith, 1 Metc. (Ky.) 313; Luckett *v.* Triplett, 2 B. Mon. (Ky.) 39; Bement *v.* McClaren, 1 B. Mon. (Ky.) 296; Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429; Grey *v.* Commonwealth Bank, 2 Litt. (Ky.) 378.

Louisiana.— People's Bank *v.* Trudeau, 38 La. Ann. 898; Hebert *v.* Doussan, 8 La. Ann. 267; Mallard *v.* Alillet, 6 La. Ann. 92.

Maine.— Burrill *v.* Parsons, 71 Me. 282; Dudley *v.* Littlefield, 21 Me. 418; Hascall *v.* Whitmore, 19 Me. 102, 36 Am. Dec. 738; Lewis *v.* Hodgdon, 17 Me. 267; Smith *v.* Hiscock, 14 Me. 449.

Massachusetts.— Produce Exch. Trust Co. *v.* Bieberhach, 176 Mass. 577, 58 N. E. 162; Ft. Dearborn Nat. Bank *v.* Carter, etc., Co., 152 Mass. 34, 25 N. E. 27; Arpin *v.* Owens, 140 Mass. 144, 3 N. E. 25; Williams *v.* Cheney, 3 Gray (Mass.) 215.

Michigan.— Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 44.

Minnesota.— Daniels *v.* Wilson, 21 Minn. 530.

Mississippi.— Wiggins *v.* McGimpsey, 13 Sm. & M. (Miss.) 532; Green *v.* McDonald, 13 Sm. & M. Miss.) 445; Gridley *v.* Tucker, 1 Freem. (Miss.) 209.

Missouri.— Springfield First Nat. Bank *v.* Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; Merrick *v.* Phillips, 58 Mo. 436; Smith *v.* Giegrich, 36 Mo. 369; Wright Invest. Co. *v.* Fillingham, 85 Mo. App. 534.

Nebraska.— Stedman *v.* Rochester Loan, etc., Co., 42 Nebr. 641, 60 N. W. 890; Coakley *v.* Christie, 20 Nebr. 509, 30 N. W. 73; Western Cottage Organ Co. *v.* Boyle, 10 Nebr. 409, 6 N. W. 473.

New Hampshire.— Trask *v.* Wingate, 63 N. H. 474, 3 Atl. 926; Green *v.* Bickford, 60 N. H. 159.

New York.— Bookheim *v.* Alexander, 64 Hun (N. Y.) 458, 19 N. Y. Suppl. 776, 46 N. Y. St. 200; Central Bank *v.* Lang, 1 Bosw. (N. Y.) 202; Brooks *v.* Christopher, 5 Duer (N. Y.) 216; Fourth Nat. Bank *v.* Snow, 3 Daly (N. Y.) 167; Ferdon *v.* Jones, 2 E. D. Smith (N. Y.) 106; Bernstein *v.* Crow, 22 Misc. (N. Y.) 99, 48 N. Y. Suppl. 531; American Boiler Co. *v.* Foutham, 50 N. Y. Suppl. 351; Vallett *v.* Parker, 6 Wend. (N. Y.) 615.

Ohio.— Rees *v.* Sessions, 41 Ohio St. 234.

Pennsylvania.— Dunshee *v.* Carothers, (Pa. 1886) 7 Atl. 183; Flanagan *v.* Mechanics' Bank, 54 Pa. St. 398; Historical Pub. Co. *v.* Hartranft, 3 Pa. Super. Ct. 59, 39 Wkly. Notes Cas. (Pa.) 315; Forepaugh *v.* Baker, 21 Wkly. Notes Cas. (Pa.) 299, 13 Atl. 465; Twining *v.* Hunt, 7 Wkly. Notes Cas. (Pa.) 223.

South Carolina.— Rock Island First Nat. Bank *v.* Anderson, 32 S. C. 538, 11 S. E. 379; Cooke *v.* Pearce, 23 S. C. 239; Poag *v.* McDonald, 2 Mill (S. C.) 183.

Tennessee.—Bearden *v.* Moses, 7 Lea (Tenn.) 459; Stone *v.* Bond, 2 Heisk. (Tenn.) 425; Trigg *v.* Saxton, (Tenn. Ch. 1897) 37 S. W. 567.

Texas.— Hardie *v.* Wright, 83 Tex. 345, 18 S. W. 615; Maxwell *v.* McCune, 37 Tex. 515; Herndon *v.* Bremond, 17 Tex. 432; Raatz *v.* Gordon, (Tex. Civ. App. 1899) 51 S. W. 651.

Vermont.— Rutland Provision Co. *v.* Hall, 71 Vt. 208, 44 Atl. 94; Brockway *v.* Mason, 29 Vt. 519; Powers *v.* Ball, 27 Vt. 662.

Virginia.— Payne *v.* Zell, 98 Va. 294, 36 S. E. 379; Corbin *v.* Southgate, 3 Hen. & M. (Va.) 319.

Wisconsin.— Holdin *v.* Kirby, 21 Wis. 149; Stilwell *v.* Kellogg, 14 Wis. 461.

United States.— Arthurs *v.* Hart, 17 How. (U. S.) 6, 15 L. ed. 30; United States *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774; Pease *v.* McClelland, 2 Bond (U. S.) 42, 19 Fed. Cas. No. 10,882; Fogg *v.* Stickney, 9 Fed. Cas. No. 4,898, 11 Nat. Bankr. Rep. 167.

England.— McIntosh *v.* McLeod, 18 Nova Scotia 128, 6 Can. L. T. 449.

See 7 Cent. Dig. tit. "Bills and Notes," § 963.

As to when consideration may be inquired into against bona fide holder where note is void ab initio see *infra*, XIV, B, 2, c, (VII), (B), (2).

As to when fraud in obtaining execution of instrument will permit inquiry into consideration against bona fide holder see *infra*, XIV, B, 2, c, (VI), (C), (2), (a).

14. *Connecticut.*— Thacher *v.* Stevens, 46 Conn. 561, 33 Am. Rep. 39.

Illinois.— Metcalf *v.* Draper, 98 Ill. App. 399.

Louisiana.— Weill *v.* Trosclair, 42 La. Ann. 171, 7 So. 232.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 222.

Mississippi.—Hawkins *v.* Neal, 60 Miss. 256.

Missouri.— Edwards *v.* Thomas, 66 Mo. 468; Chaffe *v.* Memphis, etc., R. Co., 64 Mo.

acter of paper does not defeat the *bona fide* character of a holder,[15] it follows that this cannot be urged as a defense against such holder for value and in due course, even though he knew of the character of the paper at the time he acquired the same.[16]

(B) *Partial Failure.* With regard to the right to urge a partial failure of consideration as a defense in an action between the original parties the courts are at a variance.[17] The English doctrine, which is followed in some American cases, holds that a failure, to be available as a defense in an action at law, must be total, and that for a partial failure, unless the consideration be clearly and easily divisible,[18] a defendant must resort to chancery or to a cross action for damages.[19] This circuity of action has, however, in many instances been discountenanced and condemned; in some cases by virtue of statutory enactment, in others by judicial enunciation, and a partial failure has been allowed to be shown as a defense *pro*

193; Whittemore *v.* Obear, 58 Mo. 280; Macy *v.* Kendall, 33 Mo. 164.

New York.— Schepp *v.* Carpenter, 51 N. Y. 602 [*affirming* 49 Barb. (N. Y.) 542]; Harbeck *v.* Craft, 4 Duer (N. Y.) 122; Meyers *v.* Kasten, 9 Misc. (N. Y.) 221, 29 N. Y. Suppl. 677; Bridgeport City Bank *v.* Empire Stone Dressing Co., 19 How. Pr. (N. Y.) 51.

North Carolina.— Norfolk Nat. Bank *v.* Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868.

Pennsylvania.— Leatherman *v.* Van Dusen, (Pa. 1888) 12 Atl. 171; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Liebig Mfg. Co. *v.* Hill, 9 Pa. Super. Ct. 469, 43 Wkly. Notes Cas. (Pa.) 497; Leib *v.* Lanigan, 2 Leg. Chron. (Pa.) 386.

United States.— Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

England.— Peruvian R. Co. *v.* Thames, etc., Mar. Ins. Co., L. R. 2 Ch. 617.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 964, 965.

15. See *supra*, IX, A, 3, b, (II), (B), (1) [7 Cyc. 947].

16. *Arkansas.*— Evans *v.* Speer Hardware Co., 45 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919.

District of Columbia.— Deener *v.* Browne, 1 MacArthur (D. C.) 350.

Illinois.— Hodges *v.* Nash, 141 Ill. 391, 31 N. E. 151 [*affirming* 43 Ill. App. 638]; Harlow *v.* Boswell, 15 Ill. 56; Woods *v.* Hynes, 2 Ill. 103; Dawson *v.* Tolman, 37 Ill. App. 134; Waite *v.* Kalurisky, 22 Ill. App. 382.

Indiana.— Niles *v.* Porter, 6 Blackf. (Ind.) 44.

Iowa.— Bankers Iowa State Bank *v.* Mason Hland Lathe Co., (Iowa 1902) 90 N. W. 612; Winters *v.* Home Ins. Co., 30 Iowa 172.

Maryland.— Schwartz *v.* Wilmer, 90 Md. 136, 44 Atl. 1059; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Minnesota.— Rea *v.* McDonald, 68 Minn. 187, 71 N. W. 11.

Missouri.— Maffatt *v.* Greene, 149 Mo. 48, 50 S. W. 809.

Nebraska.— Baker *v.* Union Stock Yards Nat. Bank, 63 Nebr. 801, 89 N. W. 269.

New Jersey.—Duncan *v.* Gilbert, 29 N. J. L. 521.

New York.— Holland Trust Co. *v.* Waddell, 75 Hun (N. Y.) 104, 26 N. Y. Suppl. 980, 56 N. Y. St. 868; Archer *v.* Shea, 14 Hun (N. Y.) 493; Pierson *v.* Boyd, 2 Duer (N. Y.) 33; Pettigrew *v.* Chave, 2 Hilt. (N. Y.) 546; Clapp *v.* Cooper, 31 Misc. (N. Y.) 466, 64 N. Y. Suppl. 466.

United States.— Greenway *v.* Orthwein Grain Co., 85 Fed. 536, 29 C. C. A. 330; Israel *v.* Gale, 77 Fed. 532, 23 C. C. A. 274; Perry *v.* Crammond, 1 Wash. (U. S.) 100, 19 Fed. Cas. No. 11,005.

See 7 Cent. Dig. tit. "Bills and Notes," § 964.

17. See Elminger *v.* Drew, 4 McLean (U. S.) 388, 8 Fed. Cas. No. 4,416.

18. O'Donobue *v.* Swain, 4 Manitoba 476. See, generally, CONTRACTS.

19. *California.*— Reese *v.* Gordon, 19 Cal. 147.

Delaware.— Carpenter *v.* Phillips, 2 Houst. (Del.) 524; Mills *v.* Gilpin, 2 Harr. (Del.) 32.

Georgia.— Hinton *v.* Scott, Dudley (Ga.) 245; Jordan *v.* Jordan, Dudley (Ga.) 181.

Indiana.— See Case *v.* Grim, 77 Ind. 565; Webb *v.* Deitch, 17 Ind. 340.

Kentucky.— Wise *v.* Kelly, 2 A. K. Marsh. (Ky.) 545; Ball *v.* Jackson, 1 A. K. Marsh. (Ky.) 176; Williams *v.* Briscoe, 1 A. K. Marsh. (Ky.) 168; Owsley *v.* Beasley, 4 Bibb (Ky.) 277.

Maine.— See Clark *v.* Peabody, 22 Me. 500.

Massachusetts.—See Noble *v.* Smith, Quincy (Mass.) 254.

New Hampshire.— Fletcher *v.* Chase, 16 N. H. 38.

North Carolina.— Evans *v.* Williamson, 79 N. C. 86; Washburn *v.* Picot, 14 N. C. 390.

Vermont.— Cragin *v.* Fowler, 34 Vt. 326, 80 Am. Dec. 680.

United States.—Greenleaf *v.* Cook, 2 Wheat. (U. S.) 13, 4 L. ed. 172; Varnum *v.* Mauro, 2 Cranch C. C. (U. S.) 425, 28 Fed. Cas. No. 16,889; Boone *v.* Queen, 2 Cranch C. C. (U. S.) 371, 3 Fed. Cas. No. 1,643; Elminger *v.* Drew, 4 McLean (U. S.) 388, 8 Fed. Cas. No. 4,416; Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

tanto.[20] Usually, however, it is necessary that the sum to be deducted shall be capable of ascertainment by mere computation as distinguished from an unliquidated amount,[21] although some cases do not observe this distinction.[22]

(c) *Of Renewal Note.* Where a note is executed to a payee in renewal only of a prior note given him, the real consideration for which it is given is that for which the prior note was given, and the failure of the same may be pleaded in an action on the latter note.[23] But where a note has been assigned and the assignee

Canada.— Clarke *v.* Ash, 5 N. Brunsw. 211; Brundige *v.* Delaney, 2 Nova Scotia Dec. 62; Kilroy *v.* Simkins, 26 U. C. C. P. 281; Georgian Bay Lumber Co. *v.* Thompson, 35 U. C. Q. B. 64; Henderson *v.* Cotter, 15 U. C. Q. B. 345; Orser *v.* Mounteny, 9 U. C. Q. B. 382; Hill *v.* Ryan, 8 U. C. Q. B. 443; Kellogg *v.* Hyatt, 1 U. C. Q. B. 445; Dixon *v.* Paul, 4 U. C. Q. B. O. S. 327.

See 7 Cent. Dig. tit. "Bills and Notes," § 1373.

20. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632; Peden *v.* Moore, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649.

California.— Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

Illinois.— Scuchmann *v.* Knoebel, 27 Ill. 175; Hill *v.* Enders, 19 Ill. 163.

Indiana.— Catlett *v.* McDowell, 4 Blackf. (Ind.) 556.

Iowa.— Griffey *v.* Payne, Morr. (Iowa) 68.

Kentucky.— See Reese *v.* Walton, 4 B. Mon. (Ky.) 507.

Maine.— Wadsworth *v.* Smith, 23 Me. 562.

Maryland.— Beall *v.* Pearre, 12 Md. 550.

Mississippi.— Rasberry *v.* Moye, 23 Miss. 320.

Missouri.— Gamache *v.* Grimm, 23 Mo. 38; Barr *v.* Baker, 9 Mo. 850.

Minnesota.— Nichols, etc., Co. *v.* Soderquist, 77 Minn. 509, 80 N. W. 630; Torinus *v.* Buckham, 29 Minn. 128, 12 N. W. 348 [*distinguishing* Bisbee *v.* Torinus, 26 Minn. 155, 2 N. W. 168]; Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677. But where there is one consideration for several promissory notes, such consideration not being susceptible of apportionment, a partial failure cannot, in the absence of fraud or mistake, impeach any one of the notes in an action on it. Leighton *v.* Grant, 20 Minn. 345.

Nebraska.—Lanning *v.* Burns, 36 Nebr. 236, 54 N. W. 427.

New Jersey.— Wyckoff *v.* Runyon, 33 N. J. L. 107.

New York.— Sawyer *v.* Chambers, 43 Barb. (N. Y.) 622; Union Foundry, etc., Works *v.* New York Lumber Drying Co., 13 N. Y. St. 701; Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Judd *v.* Dennison, 10 Wend. (N. Y.) 512; Burton *v.* Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Spalding *v.* Vandercook, 2 Wend. (N. Y.) 431.

Ohio.— Lowenstine *v.* Males, 3 Ohio Dec. (Reprint) 330.

Oklahoma.— Hagan *v.* Bigler, 5 Okla. 575, 49 Pac. 1011.

Pennsylvania.— See Truesdale *v.* Watts, 12 Pa. St. 73.

Tennessee.— See Edwards *v.* Porter, 2 Coldw. (Tenn.) 42.

Vermont.— The statutes of this state make this defense admissible, but it is confined thereunder to the original parties as shown by the instrument itself, and cannot be interposed when the action is brought by an indorsee. Craigue *v.* Hall, 73 Vt. 104, 50 Atl. 806, 87 Am. St. Rep. 690, 55 L. R. A. 876; Russell *v.* Rood, 72 Vt. 238, 47 Atl. 789; Burgess *v.* Nash, 66 Vt. 44, 28 Atl. 419; Hoyt *v.* McNally, 66 Vt. 38, 28 Atl. 417.

United States.—American Nat. Bank *v.* Watkins, 119 Fed. 545; Martin *v.* Barton Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320 (by virtue of Georgia statute).

See 7 Cent. Dig. tit. "Bills and Notes," §§ 1373, 1374.

Rule not applicable where consideration is real estate.— The rule that a partial failure of consideration will avail *pro tanto* as a defense to the action does not apply where the consideration of the note is real estate. Evans *v.* Murphy, 1 Stew. & P. (Ala.) 226; Peden *v.* Moore, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649; Hodgdon *v.* Golder, 75 Me. 293; Thompson *v.* Mansfield, 43 Me. 490; Morrison *v.* Jewell, 34 Me. 146; Wentworth *v.* Goodwin, 21 Me. 150.

21. *Connecticut.*— Pulisfer *v.* Hotchkiss, 12 Conn. 234.

Minnesota.— See Bisbee *v.* Torinus, 26 Minn. 165, 2 N. W. 168.

New Hampshire.— Riddle *v.* Gage, 37 N. H. 519, 75 Am. Dec. 151; Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380. See also Nichols *v.* Hunton, 45 N. H. 470, where the court held that while the above text is the rule at common law, the statute in this state has made partial failure admissible as a defense in all cases where a total failure could be shown.

New Jersey.—Allen *v.* U. S. Bank, 20 N. J. L. 620.

Vermont.— Richardson *v.* Sanborn, 33 Vt. 75; Hassam *v.* Dompier, 28 Vt. 32; Walker *v.* Smith, 2 Vt. 539.

Canada.— See McGregor *v.* Bishop, 14 Ont. 7; Star Kidney Pad Co. *v.* Greenwood, 5 Ont. 28.

See 7 Cent. Dig. tit. "Bills and Notes," § 1374.

22. Herbert *v.* Ford, 29 Me. 546; Davis *v.* Wait, 12 Oreg. 425, 8 Pac. 356.

23. Wheelock *v.* Berkeley, 138 Ill. 153, 27 N. E. 942; Bray *v.* Pearsoll, 12 Ind. 334. See also Rentfrow *v.* Shaw, 4 How. (Miss.) 651

in lieu thereof obtains from the maker a note payable to himself,[24] or where a new note taken in lieu of another is founded on a valuable consideration, independent of that on which the original was founded,[25] a failure of consideration of the original is no defense in an action on the latter,[26] and the same rule applies to a draft drawn to extinguish outstanding drafts.[27]

(v) *FORGERY.* Forgery is a complete defense to an action on the forged instrument by a *bona fide* holder.[28] One who has obtained commercial paper through a forged indorsement cannot defend against the true owner, in an action for the paper or its proceeds, as a *bona fide* purchaser in the regular course of business.[29]

(vi) *FRAUD* — (a) *In General.* While an unconsummated intent to fraudu-

(where, although there was an exchange of notes, the circumstances were such that the transaction was viewed as naught but a substituted agreement, and a failure of the original consideration was allowed to be set up); American Button-Hole, etc., Co. *v.* Murray, 1 Fed. Cas. No. 292. *Compare* Gatzmer *v.* Pierce, 6 Wkly. Notes Cas. (Pa.) 433, where, however, an extension of time was granted in the renewal note.

24. Williams *v.* Rank, 1 Ind. 230. See also State *v.* Hobbs, 40 N. H. 229.

Substituted notes take the place of originals, so far as their validity depends upon a resolution authorizing the original notes, in whose place they were put. Crooke *v.* Mali, 11 Barb. (N. Y.) 205.

25. Muirhead *v.* Kirkpatrick, 21 Pa. St. 237.

26. See Parsons *v.* Gaylord, 3 Johns. (N. Y.) 463.

27. Kaufman *v.* Barringer, 20 La. Ann. 419.

28. *Illinois.*— Miers *v.* Coates, 57 Ill. App. 216.

Indiana.— Citizens' State Bank *v.* Adams, 91 Ind. 280.

Louisiana.— Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521.

Massachusetts.— Rowe *v.* Putnam, 131 Mass. 281.

Michigan.— Camp *v.* Carpenter, 52 Mich. 375, 18 N. W. 113.

Missouri.— Chamberlain Banking House *v.* Noble, 85 Mo. App. 428.

New York.— Palm *v.* Watt, 7 Hun (N. Y.) 317; McCarville *v.* Lynch, 14 Misc. (N. Y.) 174, 35 N. Y. Suppl. 383, 69 N. Y. St. 812; Smith *v.* Boyer, 41 How. Pr. (N. Y.) 258.

Tennessee.— Roach *v.* Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883 [*overruling* Duke *v.* Hall, 9 Baxt. (Tenn.) 282].

Wisconsin.— Butler *v.* Carns, 37 Wis. 61; Terry *v.* Allis, 16 Wis. 478.

United States.— York Bank *v.* Asbury, 1 Biss. (U. S.) 230, 30 Fed. Cas. No. 18,142; Mersman *v.* Werges, 1 McCrary (U. S.) 528, 3 Fed. 378.

Canada.— Larue *v.* Evanturel, 2 L. C. L. J. 112; Ryan *v.* Montreal Bank, 12 Ont. 39; Hamilton Bank *v.* Imperial Bank, 27 Ont. App. 590 [*affirming* 31 Ont. 100].

Compare Mather *v.* Maidstone, 18 C. B. 273, 25 L. J. C. P. 310, 86 E. C. L. 273.

See 7 Cent. Dig. tit. "Bills and Notes," § 952.

For estoppel to assert forgery see *infra*, XIV, B, 3, b.

The good faith of the holder of a forged note gives him no equities as against the person whose name is forged. Camp *v.* Carpenter, 52 Mich. 375, 18 N. W. 113.

Draft issued for forged check.— In an action on a draft by one who discounted it in the regular course of business it is no defense to the bank which issued the draft that a check for which it was issued was forged. Anderson *v.* Dundee State Bank, 66 Hun (N. Y.) 613, 21 N. Y. Suppl. 925, 50 N. Y. St. 918 [*reversing* 20 N. Y. Suppl. 511, 47 N. Y. St. 447].

Unauthorized indorsement.— The holder of a note on which the name of the payee has been indorsed without authorization, although a holder for value before maturity and without notice of any defense, holds subject to defenses existing between the original parties. Gilbert *v.* Sharp, 2 Lans. (N. Y.) 412. The holder of a bill of exchange cannot recover against the accepter where the bill was transferred and the payee's indorsement made without their authority. Union Sav. Assoc. *v.* Diehold, 1 Mo. App. 323.

29. Buckley *v.* Jersey City Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Arnold *v.* National Albany Exch. Bank, 3 Thomps. & C. (N. Y.) 769.

Diligence in giving notice of fraud.—An indorsee of a draft to which the drawer's and payee's names were forged cannot defend against the drawer who paid the draft to the indorsee, where there has been no delay in discovering and giving notice of the fraud and demanding a return of the money paid. McCall *v.* Corning, 3 La. Ann. 409, 48 Am. Dec. 454.

Remedy in chancery.—A note having a forged indorsement and left with third parties for collection may, on a bill in chancery by the owner, be directed to be delivered to the court, and the maker required to pay it to the complainant. White *v.* Mechanics' Nat. Bank, 4 Daly (N. Y.) 225; White *v.* Sweeny, 4 Daly (N. Y.) 223; Kibby *v.* Kibby, Wright (Ohio) 607.

lently convert a note is no defense to an action thereon,[30] it may be said that as a rule all fraudulent representations or practices connected with the execution or negotiation of a bill may be set up as a defense between the original parties or those having no greater rights or immunities,[31] but do not destroy the immunity accorded such instruments in the hands of a *bona fide* holder.[32]

(B) *As to Consideration.* While artifice or fraudulent representations affecting the value of the consideration for which the instrument was given may of course be shown, in an action between the original parties such fraud is not as a rule a defense against a *bona fide* holder for value.[33]

(C) *In Procurement of Execution or Indorsement* — (1) RULE. While fraud in procuring the execution of an instrument may of course be shown between the original parties, or parties with notice,[34] it is a rule adopted for the protection of negotiable instruments in general[35] that the maker, indorser, or accepter of a negotiable instrument procured through fraud may be held liable to a purchaser for value before maturity without notice; and he will not be allowed to set up the defense of fraud to relieve himself of such liability.[36]

30. Elias *v.* Finnegan, 37 Minn. 144, 33 N. W. 330.

31. Angier *v.* Brewster, 69 Ga. 362; Hickson *v.* Early, 62 S. C. 42, 39 S. E. 782.

32. Strough *v.* Gear, 48 Ind. 100; Banque Nationale *v.* City Bank, 17 L. C. Jur. 197. See also Von Windisch *v.* Klaus, 46 Conn. 433, 435, where the court said: "The rule is that fraud between the antecedent parties will be no defence or bar to the title of a *bona fide* holder of a note for a valuable consideration who took it before it became due without notice of any infirmity therein; and this for the protection of the circulation of negotiable instruments."

33. *Georgia.*— Taylor *v.* Cribb, 100 Ga. 94, 26 S. E. 468; Grooms *v.* Olliff, 93 Ga. 789, 20 S. E. 655.

Illinois.— Culver *v.* Hide, etc., Bank, 78 Ill. 625; Latham *v.* Smith, 45 Ill. 25; Woods *v.* Hynes, 2 Ill. 103; Taft *v.* Myerscough, 92 Ill. App. 560; Hayden *v.* Olinger, 5 Ill. App. 632.

Kentucky.— Clark *v.* Tanner, 100 Ky. 275, 19 Ky. L. Rep. 590, 38 S. W. 11; Spencers *v.* Briggs, 2 Metc. (Ky.) 123; Kelley *v.* Smith, 1 Metc. (Ky.) 313; Wood *v.* Waters, 1 Litt. (Ky.) 176, 13 Am. Dec. 228.

Maine.— Farrell *v.* Lovett, 68 Me. 326, 28 Am. Rep. 59.

Mississippi.— Winstead *v.* Davis, 40 Miss. 785.

Nebraska.— Stedman *v.* Rochester Loan, etc., Co., 42 Nebr. 641, 60 N. W. 890.

Pennsylvania.— Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652; Heist *v.* Hart, 73 Pa. St. 286; Mackey *v.* Richardson, 2 Wkly. Notes Cas. (Pa.) 226.

Vermont.— Powers *v.* Ball, 27 Vt. 662.

Application of rule.— In Heist *v.* Hart, 73 Pa. St. 286, defendant gave to A a negotiable note, in payment for a patent which defendant alleged was a fraud. A parol agreement was made at the time that A would not negotiate the note and would renew it. This agreement having been broken, defendant advised the would-be purchaser of such parol agreement and counseled him not to buy, without saying anything, however, about fraud in the transaction. It was held that these facts constituted no defense, although A had really committed a fraud on defendant.

34. Lancaster Nat. Bank *v.* Mackey, 5 Kan. App. 437, 49 Pac. 324; Merrick *v.* Butler, 2 Lans. (N. Y.) 103; Turley *v.* Bartlett, 10 Heisk. (Tenn.) 221.

35. Parkersburg First Nat. Bank *v.* Johns, 22 W. Va. 520, 535, 46 Am. Rep. 506, where the court said: "This rule is absolutely necessary to the protection of innocent holders of commercial paper. And the interest of the whole country demands, that the rule be strictly adhered to. It is much better to suffer a few individuals to be defrauded out of their property, than to relax this salutary rule, and let the whole country suffer. It is feared that some courts, in their earnest desire to protect the citizen from the frauds of venders of patents, have unwittingly struck the law-merchant a fearful blow, and at the same time visited the sin of the defrauder upon the innocent holders of the very paper, which by their trust and overweening confidence in these same dishonest adventurers they have placed upon the market."

The facts and circumstances which will take a case out of the rule must present more than ordinary equities. Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; Thurston *v.* McKown, 6 Mass. 428; Leonard *v.* Dougherty, 22 W. Va. 536; Parkersburg First Nat. Bank *v.* Johns, 22 W. Va. 520, 46 Am. Rep. 506.

36. *Alabama.*—Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522.

Arkansas.— Lanier *v.* Union Mortg., etc., Co., 64 Ark. 39, 40 S. W. 466.

California.— McMahon *v.* Thomas, (Cal. 1895) 39 Pac. 783; Bedell *v.* Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307; Mitchell *v.* Hackett, 14 Cal. 661.

Connecticut.— McCormick *v.* Warren, 74 Conn. 234, 50 Atl. 740; Ross *v.* Webster, 63 Conn. 64, 26 Atl. 476; Von Windisch *v.* Klaus,

(2) Limitation of Rule — (a) In General. In some of the states fraud or circumvention in obtaining a note is a good defense even as against a *bona fide*

46 Conn. 433; Humphrey *v.* Clark, 27 Conn. 381.

Delaware.—McCarty *v.* Lockwood, 6 Houst. (Del.) 451; Bush *v.* Peckard, 3 Harr. (Del.) 385.

District of Columbia.— Mason *v.* Jones, 7 D. C. 247.

Georgia.— Walters *v.* Palmer, 110 Ga. 776, 36 S. E. 79; Taylor *v.* Cribb, 100 Ga. 94, 26 S. E. 468; Highsmith *v.* Martin, 99 Ga. 92, 24 S. E. 865; Merritt *v.* Bagwell, 70 Ga. 578; Robenson *v.* Vason, 37 Ga. 66.

Illinois.— Gehlbach *v.* Carlinville Nat. Bank, 83 Ill. App. 129; American Trust, etc., Bank *v.* Crowe, 82 Ill. App. 537; Exchange Nat. Bank *v.* Plate, 69 Ill. App. 489; Taylor *v.* Thompson, 3 Ill. App. 109.

Indiana.— Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Wells *v.* Sutton, 85 Ind. 70; Woollen *v.* Whitacre, 73 Ind. 198; Ruddell *v.* Fhalor, 72 Ind. 533, 37 Am. Rep. 177; Indiana Nat. Bank *v.* Weckerly, 67 Ind. 345; Maxwell *v.* Morehart, 66 Ind. 301; Nebeker *v.* Cutsinger, 48 Ind. 436; Strough *v.* Gear, 48 Ind. 100; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380; Glover *v.* Jennings, 6 Blackf. (Ind.) 10; Blair *v.* Buser, Wils. (Ind.) 333.

Iowa.— Hawkins *v.* Wilson, 71 Iowa 761, 32 N. W. 416; Sully *v.* Goldsmith, 32 Iowa 397; Woodward *v.* Rodgers, 31 Iowa 342; Loomis *v.* Metcalf, 30 Iowa 382; Douglass *v.* Matting, 29 Iowa 498, 4 Am. Rep. 238; Bridge *v.* Livingston, 11 Iowa 57.

Kansas.— Draper *v.* Cowles, 27 Kan. 484.

Kentucky.—David *v.* Merchants' Nat. Bank, 103 Ky. 586, 20 Ky. L. Rep. 263, 45 S. W. 878; Spencers *v.* Biggs, 2 Metc. (Ky.) 123; Kelly *v.* Smith, 1 Metc. (Ky.) 313; Bement *v.* McClaren, 1 B. Mon. (Ky.) 296; Early *v.* McCart, 2 Dana (Ky.) 414.

Louisiana.— Taylor *v.* Bowles, 28 La. Ann. 294; Follain *v.* Dupré, 11 Rob. (La.) 454; Clark *v.* Stackhouse, 2 Mart. (La.) 319.

Maine.— Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242; Wait *v.* Chandler, 63 Me. 257; Nutter *v.* Stover, 48 Me. 163; Fletcher *v.* Gushee, 32 Me. 587.

Maryland.— Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285; Gwynn *v.* Lee, 9 Gill (Md.) 137.

Massachusetts.— Smith *v.* Livingston, 111 Mass. 342; Prouty *v.* Roberts, 6 Cush. (Mass.) 19, 52 Am. Dec. 761; Thurston *v.* McKown, 6 Mass. 428.

Michigan.— Paw Paw First Nat. Bank *v.* Houseknecht, 121 Mich. 313, 80 N. W. 13.

Mississippi.— Rosemond *v.* Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. Rep. 336.

Missouri.— Jaccard *v.* Shands, 27 Mo. 440; Emmert *v.* Meyer, 65 Mo. App. 609, 2 Mo. App. Rep. 1175.

New Hampshire.— Page *v.* Chapman, 58 N. H. 333.

New Jersey.— Reading Second Nat. Bank *v.* Hewitt, 59 N. J. L. 57, 34 Atl. 988; Holcomb *v.* Wyckoff, 35 N. J. L. 35, 10 Am. Rep. 219; Hamilton *v.* Vought, 34 N. J. L. 187; Dougherty *v.* Scudder, 17 N. J. Eq. 248.

New York.— Clothier *v.* Adriance, 51 N. Y. 322; Crouch *v.* Wagner, 63 N. Y. App. Div. 526, 71 N. Y. Suppl. 607; McDonald *v.* Johnson, 64 Hun (N. Y.) 637, 19 N. Y. Suppl. 443, 46 N. Y. St. 838; Nassau Bank *v.* Broadway Bank, 54 Barb. (N. Y.) 236; Justh *v.* National Bank, 36 N. Y. Super. Ct. 273, 45 How. Pr. (N. Y.) 492 [*affirmed* in 56 N. Y. 478]; Ketcham *v.* Govin, 35 Misc. (N. Y.) 375, 71 N. Y. Suppl. 991.

Ohio.— Gano *v.* Samuel, 14 Ohio 592.

Pennsylvania.— Gillespie *v.* Rogers, 184 Pa. St. 488, 39 Atl. 290; Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652; Hoats *v.* Aschbach, 160 Pa. St. 6, 28 Atl. 437; Taylor *v.* Gitt, 10 Pa. St. 428; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Mackey *v.* Richardson, 2 Wkly. Notes Cas. (Pa.) 226; Third Nat. Bank *v.* McCann, 15 Phila. (Pa.) 326, 39 Leg. Int. (Pa.) 198; State Bank *v.* Schreck, 1 Leg. Chron. (Pa.) 65.

South Carolina.— Sims *v.* Lyles, 1 Hill (S. C.) 39, 26 Am. Dec. 155.

Tennessee.—Holeman *v.* Hobson, 8 Humphr. (Tenn.) 127; Donelson *v.* Young, Meigs (Tenn.) 155.

Texas.— Watson *v.* Flanagan, 14 Tex. 354; Mulberger *v.* Morgan, (Tex. Civ. App. 1896) 34 S. W. 148.

Virginia.— Vathir *v.* Zane, 6 Gratt. (Va.) 246.

Wisconsin.— Andrews *v.* Hart, 17 Wis. 297.

United States.— Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Seymour *v.* Malcolm McDonald Lumber Co., 58 Fed. 957, 7 C. C. A. 593; Mason *v.* Jones, Hayw. & H. (U. S.) 329, 16 Fed. Cas. No. 9,240.

England.— Clutton *v.* Attenborough, [1897] App. Cas. 90, 66 L. J. Q. B. 221, 75 L. T. Rep. N. S. 556, 45 Wkly. Rep. 276.

See 7 Cent. Dig. tit. "Bills and Notes," § 966.

The maker may defend against a holder who did not obtain the instrument for value. Smith *v.* Popular Loan, etc., Assoc., 93 Pa. St. 19.

Reliance upon custom.— The fact that the drawer of a check, in giving it to a person who represented himself as another, relied on the custom of the bank on which it was drawn, of requiring the payee of a check to be identified is no defense to an action thereon by a *bona fide* holder. Famous Shoe, etc., Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. Rep. 424, 26 L. R. A. 568.

Forgery of cosurety.—A surety on a promissory note, whose name has been procured by fraud and misrepresentation, and by the

holder, where there has been no culpable negligence on the part of the maker.[37] This is on the ground that the note is illegal in its inception,[38] and is not the note or act of the party sought to be charged.[39] The fraud and circumvention must

forging of the name of another person as apparent cosurety, cannot set up such defense as against an innocent payee. Hunter *v.* Fitzmaurice, 102 Ind. 449, 2 N. E. 127 [*following* Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147]. See also Rothermal *v.* Hughes, 134 Pa. St. 510, 19 Atl. 677.

Retention of proceeds.—A partnership whose indorsement has been procured by false representations to one partner cannot defend against an innocent purchaser, where they have received the proceeds and remained silent until the insolvency of the maker. Bruce *v.* Davenport, 1 Abb. Dec. (N. Y.) 233, 3 Keyes (N. Y.) 472, 3 Transcr. App. (N. Y.) 82, 5 Abb. Pr. N. S. (N. Y.) 185 [*reversing* 36 Barb. (N. Y.) 349].

37. *Illinois.*— Auten *v.* Gruner, 90 Ill. 300; Vanbrunt *v.* Singley, 85 Ill. 281; Culver *v.* Hide, etc., Bank, 78 Ill. 625; Hewitt *v.* Jones, 72 Ill. 218; Hubbard *v.* Rankin, 71 Ill. 129; Sims *v.* Bice, 67 Ill. 88; Richardson *v.* Schirtz, 59 Ill. 313; Murray *v.* Beckwith, 48 Ill. 391; Latham *v.* Smith, 45 Ill. 25; Mulford *v.* Shepard, 2 Ill. 583, 33 Am. Dec. 432; Woods *v.* Hynes, 2 Ill. 103; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224; Metcalf *v.* Draper, 98 Ill. App. 399; Vannatta *v.* Lindley, 98 Ill. App. 327 [*affirmed* in 198 Ill. 40, 64 N. E. 735]; Gray *v.* Goode, 72 Ill. App. 504; Hayden *v.* Olinger, 5 Ill. App. 632.

Indiana.— Mitchell *v.* Tomlinson, 91 Ind. 167; Detwiler *v.* Bish, 44 Ind. 70; Cline *v.* Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Lindley *v.* Hofman, 22 Ind. App. 237, 53 N. E. 471.

Iowa.— Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434.

Michigan.— Sturgis First Nat. Bank *v.* Deal, 55 Mich. 592, 22 N. W. 53; Soper *v.* Peck, 51 Mich. 563, 17 N. W. 57.

Missouri.— Corby *v.* Weddle, 57 Mo. 452 [*following* Martin *v.* Smylee, 55 Mo. 577]; Briggs *v.* Ewart, 51 Mo. 245, 11 Am. Dec. 445. See these cases criticized in Shirts *v.* Overjohn, 60 Mo. 305.

New York.— National Exch. Bank *v.* Veneman, 43 Hun (N. Y.) 241, 4 N. Y. St. 363; Whitney *v.* Snyder, 2 Lans. (N. Y.) 477; Hutkoff *v.* Moje, 20 Misc. (N. Y.) 632, 46 N. Y. Suppl. 905; Chapman *v.* Rose, 44 How. Pr. (N. Y.) 364.

Ohio.— Perkins *v.* White, 36 Ohio St. 530; De Camp *v.* Hamma, 29 Ohio St. 467.

Wisconsin.— Butler *v.* Carns, 37 Wis. 61; Kellogg *v.* Steiner, 29 Wis. 626; Walker *v.* Elkert, 29 Wis. 194, 9 Am. Rep. 548.

England.— Foster *v.* Mackinnon, L. R. 4 C. P. 704, 38 L. J. C. P. 310, 20 L. T. Rep. N. S. 887, 17 Wkly. Rep. 1105.

Canada.— L'Abbe *v.* Normandin, 32 L. C. Jur. 163; Ford *v.* Auger, 18 L. C. Jur. 296; Banque Jaques-Cartier *v.* Leblanc, 1 Quebec Q. B. 128; Banque Jacques-Carter *v.* Lalande, 20 Quebec Super. Ct. 43; Montreal Bank *v.* Cameron, 17 U. C. Q. B. 636.

Where by statute an assignee may interpose any defense that might have been used against the original obligee, the defense that the execution of coupon bonds was procured by fraud and without consideration is available against a *bona fide* purchaser, although the payee was engaged in the business of taking and selling such bonds, that fact not being known to the obligors and the bonds not being delivered to be put in circulation. Louisville Ins. Co. *v.* Hoffman, 20 Ky. L. Rep. 2016, 50 S. W. 979.

Under the Illinois statute fraud in the obtaining of the making or executing of a note will constitute a defense to such note against a *bona fide* holder, but the fraud must have been such that the party was deceived as to the effect of his act. Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

Dealers in patent rights.—A promissory note obtained by fraud and circumvention, by the usual device of persons traveling about the country as dealers in patent rights of new inventions, with papers so prepared as to obtain signatures to notes when the signer does not intend to execute a note, but supposes he is executing a different instrument, are void, notwithstanding the inability of the signer to explain exactly how he was victimized. Champion *v.* Ulmer, 70 Ill. 322.

38. Smith *v.* Mohr, 64 Mo. App. 39, 2 Mo. App. Rep. 914; Kellogg *v.* Steiner, 29 Wis. 626; Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548.

Regarded as a forgery.—An instrument in the form of a negotiable promissory note signed by a person under circumstances devoid of any negligence on his part, and delivered by him in ignorance of its true character and by means of fraud, will be regarded as a forgery and cannot be enforced, even in the hands of a *bona fide* purchaser. Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434 [*quoting* Trambly *v.* Ricard, 130 Mass. 259]; Gibbs *v.* Linabury, 22 Mich. 479, 7 Am. Rep. 675; Griffiths *v.* Kellogg, 39 Wis. 290, 20 Am. Rep. 48.

39. Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434; Griffiths *v.* Kellogg, 39 Wis. 290, 20 Am. Rep. 48. See also Anderson *v.* Walter, 34 Mich. 113 (where it was held that while there might be cases where one signing and putting in circulation an instrument should be bound by the terms thereof, even though it turned out different from what he supposed it to be, the rule did not go so far as to require a party signing in good faith what he has heard read, and what purports to be a power of attorney, contract, deed, mortgage, or sim-

not, however, relate to the quality, quantity, value, or character of the consideration of the contract, but must constitute such a trick or device as induces the giving of one character under the belief that it is another of a different character.[40]

(b) Necessity of Freedom From Negligence. It is absolutely essential, however, that an obligor, to invoke this immunity, must exercise prudent diligence, and in no way negligently contribute to the imposition.[41] Negligence on the part of the maker or accepter will defeat any right that he may claim or attempt to set up in defense of such note in the hands of a *bona fide* purchaser, even though he may establish a claim of actual fraud practised upon him in the procurement of the instrument.[42] Hence one in possession of his faculties, who has the opportunity for examination and relies upon the representations of persons with whom he is dealing, cannot claim exemption for his act if the instrument which he signed should prove other than he had been led to believe.[43]

ilar instrument, to be held liable, in case a negotiable note of that date, of which he had no notice or intimation, should have been mysteriously lurking in the depths of the instrument so signed, and should afterward turn up with his signature attached to it); Walker *v.* Ebert, 29 Wis. 194, 197, 9 Am. Rep. 548 (where the court said: "Negotiability in such cases pre-supposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii* — begging the question altogether").

Signature without knowledge or consent. — The maker of a promissory note, whose signature is obtained without his consent or knowledge, will not be held on the note, even in the hands of an innocent holder for value before maturity. Briggs *v.* Ewart, 51 Mo. 245, 11 Am. Dec. 445.

40. Latham *v.* Smith, 45 Ill. 25.

The fraud necessary to defeat a recovery by a bona fide assignee of a promissory note before maturity must relate to the execution and not to the consideration upon which the note is based. Gray *v.* Goode, 72 Ill. App. 504.

41. Walton Guano Co. *v.* Copelan, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; Yoemans *v.* Lane, 101 Ill. App. 228; Metcalf *v.* Draper, 98 Ill. App. 399; Kalamazoo Nat. Bank *v.* Clark, 52 Mo. App. 593.

42. *Connecticut.*— Roe *v.* Jerome, 18 Conn. 138.

Georgia.— Boynton *v.* McDaniel, 97 Ga. 400, 23 S. E. 824.

Illinois.— Homes *v.* Hale, 71 Ill. 552; Mead *v.* Munson, 60 Ill. 49.

Indiana.— Baldwin *v.* Barrows, 86 Ind. 351; Baldwin *v.* Bricker, 86 Ind. 221; Williams *v.* Stoll, 79 Ind. 80, 41 Am. Rep. 60; Ruddell *v.* Fhalor, 72 Ind. 533, 37 Am. Rep. 177; Kimble *v.* Christie, 55 Ind. 140; Dutton *v.* Clapper, 53 Ind. 276; Glenn *v.* Porter, 49 Ind. 500; Nebeker *v.* Cutsinger, 48 Ind. 436.

Iowa.— Fayette County Sav. Bank *v.* Steffes, 54 Iowa 214, 6 N. W. 267; Douglass *v.* Matting, 29 Iowa 498, 4 Am. Rep. 238; McDonald *v.* Muscatine Nat. Bank, 27 Iowa 319.

Kansas.— Ort *v.* Fowler, 31 Kan. 173, 2 Pac. 580, 47 Am. Rep. 501.

Maine.—Nichols *v.* Baker, 75 Me. 334; Kellogg *v.* Curtis, 65 Me. 59.

Massachusetts.— Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

Michigan.— Gibbs *v.* Linabury, 22 Mich. 479, 7 Am. Rep. 675.

Minnesota.— Ward *v.* Johnson, 51 Minn. 480, 53 N. W. 766, 38 Am. St. Rep. 515.

Missouri.— Frederick *v.* Clemens, 60 Mo. 313; Shirts *v.* Overjohn, 60 Mo. 305; Kalamazoo Nat. Bank *v.* Clark, 52 Mo. App. 593; Cowgill *v.* Petifish, 51 Mo. App. 264; Cameron First Nat. Bank *v.* Stanley, 46 Mo. App. 440; Cannon *v.* Moore, 17 Mo. App. 92.

New Hampshire.— Citizens' Nat. Bank *v.* Smith, 55 N. H. 593.

New York.— Chapman *v.* Rose, 56 N. Y. 137, 15 Am. Rep. 401; Fenton *v.* Robinson, 4 Hun (N. Y.) 252, 6 Thomps. & C. (N. Y.) 427.

Ohio.— Ross *v.* Doland, 29 Ohio St. 473.

Pennsylvania.— Garrard *v.* Haddan, 67 Pa. St. 82, 5 Am. Rep. 412.

43. *Georgia.*— Boynton *v.* McDaniel, 97 Ga. 400, 23 S. E. 824.

Illinois.— Sims *v.* Bice, 67 Ill. 88.

Indiana.— Mitchell *v.* Tomlinson, 91 Ind. 167; Ruddell *v.* Dillman, 73 Ind. 518, 38 Am. Rep. 152; Ruddell *v.* Fhalor, 72 Ind. 533, 37 Am. Rep. 177; Noll *v.* Smith, 64 Ind. 511, 31 Am. Rep. 131; Woollen *v.* Ulrich, 64 Ind. 120; Kimble *v.* Christie, 55 Ind. 140; Nebeker *v.* Cutsinger, 48 Ind. 436.

Kansas.— Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

Maine.— Nichols *v.* Baker, 75 Me. 334; Kellogg *v.* Curtis, 65 Me. 59.

Minnesota.— Ward *v.* Johnson, 51 Minn. 480, 53 N. W. 766, 38 Am. St. Rep. 515.

Missouri.— Frederick *v.* Clemens, 60 Mo.

(c) As Affected by Illiteracy. The fact that a party whose signature is obtained by a fraudulent representation that the instrument is of a different character from the one that he believes he is signing is an illiterate person is material when such fraud is pleaded as a defense in an action against a *bona fide* purchaser.[44] The maker or accepter must, however, have been guilty of no negligence and have taken advantage of such reasonable means as lay at his hand.[45]

(d) *In Negotiation and Transfer* — (1) In General — (a) Rule. It is not as a rule a good defense that the vendor was not the owner of a bill, or was with-

313; Shirts *v.* Overjohn, 60 Mo. 305; Cowgill *v.* Petifish, 51 Mo. App. 264; Cameron First Nat. Bank *v.* Stanley, 46 Mo. App. 440; Cannon *v.* Moore, 17 Mo. App. 92.

New Hampshire.— Citizens' Nat. Bank *v.* Smith, 55 N. H. 593.

New York.— Chapman *v.* Rose, 56 N. Y. 137, 15 Am. Rep. 401; Carey *v.* Miller, 25 Hun (N. Y.) 28; Whitney *v.* Snyder, 2 Lans. (N. Y.) 477; National Exch. Bank *v.* Venemans, 4 N. Y. St. 363.

Ohio.— Perkins *v.* White, 36 Ohio St. 530; Winchell *v.* Crider, 29 Ohio St. 480; Ross *v.* Doland, 29 Ohio St. 473; De Camp *v.* Hamma, 29 Ohio St. 467.

The question as to what will constitute negligence in such cases is one that has not met with a uniform decision among the several courts of this country, some applying the rule in the strictest acceptation of the term (Parkersburg First Nat. Bank *v.* Johns, 22 W. Va. 520, 535, 46 Am. Rep. 506, where the court said: "We think we may safely lay down this general rule, that, when a purchaser of a negotiable promissory note takes it for value before maturity without notice of any fraud in its execution, unless at the time it was so purchased by him, it was absolutely void, he will recover on such note against the maker, although the maker was induced by fraud to sign it, not intending to sign such note, but a paper of an entirely different character, and in such case the question of negligence in the maker forms no legitimate subject of enquiry." See also Rowland *v.* Fowler, 47 Conn. 347; Cline *v.* Guthrie, 42 Ind. 227, 13 Am. Rep. 357 [where the maker of a note was induced by fraud and circumvention to sign his name when he honestly supposed and believed that he was writing his name on a blank piece of paper to enable the payee to see how his name was spelled or written. The note was never voluntarily delivered but was wrongfully and forcibly taken possession of by the payees and by them carried away against the consent and over the objection of the maker. Under such circumstances it was held that the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a *bona fide* holder for value]; Daniel Neg. Instr. § 850), while others have adopted a more lenient view on account of the hardships resulting to ignorant and unsuspecting victims (Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548; Foster *v.* McKinnon, L. R. 4 C. P. 704, 38 L. J. C. P. 310, 20 L. T. Rep. N. S. 887, 17 Wkly. Rep. 1105).

44. *Illinois.*— Taylor *v.* Atchison, 54 Ill. 196, 5 Am. Rep. 118.

Iowa.— Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434.

Nebraska.— Willard *v.* Nelson, 35 Nebr. 651, 53 N. W. 572, 37 Am. St. Rep. 455; Omaha First Nat. Bank *v.* Lierman, 5 Nebr. 247.

New York.— Whitney *v.* Snyder, 2 Lans. (N. Y.) 477.

Pennsylvania.— Mercur *v.* Schwankie, 4 Leg. Gaz. (Pa.) 99.

Wisconsin.— Bowers *v.* Thomas, 62 Wis. 480, 22 N. W. 710; Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548.

See also Anderson *v.* Walter, 34 Mich. 113, 122, in which case there was evidence tending to show that the maker could read but very little; that the paper read to him was not read correctly, part having been omitted. In passing upon his liability the court said: "It would seem to be a self-evident proposition that where a party to an instrument undertakes to read it over in the presence and hearing of the other party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and that the other interested party has a right to rely upon its being so read and need not examine it himself. These papers were compared in the usual and customary manner, and ordinarily no negligence can be attributed to one who signs papers, after having so heard them compared, without any farther or other examination."

45. *California.*— Bedell *v.* Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307.

Illinois.— Anderson *v.* Warne, 71 Ill. 20, 22 Am. Rep. 83; Yeoman *v.* Lane, 101 Ill. App. 228; Muhlke *v.* Hegerness, 56 Ill. App. 322.

Indiana.— Yeagley *v.* Webb, 86 Ind. 424 [*following* Nebeker *v.* Cutsinger, 48 Ind. 436]; Williams *v.* Stoll, 79 Ind. 80, 41 Am. Rep. 604; Ruddell *v.* Dillman, 73 Ind. 518, 37 Am. Rep. 152; Fisher *v.* Von Behren, 70 Ind. 19, 36 Am. Rep. 162.

Minnesota.— Mackey *v.* Peterson, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211.

Wisconsin.— Keller *v.* Schmidt, 104 Wis. 596, 80 N. W. 935.

out authority to negotiate it, where the holder has bought it in good faith and before maturity.[46]

(b) APPLICATION OF RULE — aa. *In Fraud of Creditors.* It is no defense to an action by a *bona fide* holder that the instrument in suit was executed or transferred in fraud of creditors,[47] nor can the maker of a note defend against the indorsee or assignee thereof on the ground that the transfer was with intent to defraud the creditors of the assignor.[48]

bb. *By Partner.* The fact that a partner executes or indorses a note in the firm-name, without authority, or for his individual debt, or in fraud of his firm, is no defense to the firm in an action against it by a *bona fide* holder for value without notice,[49] and it is immaterial that the partner's action is expressly prohibited

46. Ogden *v.* Marchand, 29 La. Ann. 61; First Nat. Bank *v.* Beck, 2 Tex. App. Civ. Cas. § 832; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Purchase from one of two trustees.— Where a purchaser of real estate at a trustee's sale passed to one of the two trustees a negotiable note of another, payable to the purchaser's order and indorsed by him in blank, and afterward said trustee, without the consent or knowledge of his co-trustee, sold said note before its maturity to one who took it in good faith, for full value, and without notice that it belonged to a trust estate, such purchaser acquired a valid title to the note. Barroll *v.* Foreman, 86 Md. 675, 39 Atl. 273.

47. Murray *v.* Jones, 50 Ga. 109; Fury *v.* Kempin, 79 Mo. 477; Dalrymple *v.* Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438 [*affirming* 2 Hun (N. Y.) 488, 5 Thomps. & C. (N. Y.) 573]; Warren *v.* Lynch, 5 Johns. (N. Y.) 239; Glenn *v.* Day, 1 Edm. Sel. Cas. (N. Y.) 287.

Participation in fraud.— Where one sells property with the view of defrauding his creditors and the purchaser, participating in such fraudulent intent, executes notes for the value of the property, these notes are transferred by the vendor to a *bona fide* holder, and notice of such transfer is given to the maker, he will not only be liable to pay such notes to the holder, but may also be charged as trustee of the vendor by reason of his participation in the fraudulent sale. Gregory *v.* Harrington, 33 Vt. 241.

Transfer by insolvent corporation.—By the New York statute to avoid the transfer of a note by an insolvent corporation in the hands of a *bona fide* holder, it must appear that the transfer was made, not only when the corporation was insolvent or contemplating insolvency, but also with intent to give a preference to a particular creditor. New York Mar. Bank *v.* Clements, 31 N. Y. 33.

Defense by sureties on renewal note.— The invalidity of the consideration of notes assigned is not a defense to other notes given in lieu thereof by sureties thereon, who were not defrauded by the assignment. Adams *v.* Rodarmell, 19 Ind. 339.

48. Rohrer *v.* Turrill, 4 Minn. 407; Newsom *v.* Russell, 77 N. C. 277; Holden *v.* Kirby, 21 Wis. 149.

49. *California.*— Rich *v.* Davis, 6 Cal. 141 [*affirming* 4 Cal. 22].

Illinois.— Wright *v.* Brosseau, 73 Ill. 381.

Kentucky.— Commonwealth Bank *v.* Brooking, 2 Litt. (Ky.) 41.

Maine.— Waldo Bank *v.* Lumbert, 16 Me. 416; Emerson *v.* Harmon, 14 Me. 271.

Maryland.— Porter *v.* White, 39 Md. 613.

Massachusetts.— Munroe *v.* Cooper, 5 Pick. (Mass.) 412; Chazournes *v.* Edwards, 3 Pick. (Mass.) 5.

Michigan.—Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627; Nichols *v.* Sober, 38 Mich. 678.

Mississippi.— Hibernian Bank *v.* Everman, 52 Miss. 500.

New York.— Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143; Gildersleeve *v.* Mahony, 5 Duer (N. Y.) 383; Benedict *v.* De Groot, 45 How. Pr. (N. Y.) 384; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; Livingston *v.* Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273.

Pennsylvania.— Leatherman *v.* Hecksher, (Pa. 1888) 12 Atl. 485; Haldeman *v.* Middletown Bank, 28 Pa. St. 440, 70 Am. Dec. 142; Saylor *v.* Merchants' Exch. Bank, 1 Walk. (Pa.) 328.

Vermont.— Roth *v.* Colvin, 32 Vt. 125.

Wisconsin.— Rollins *v.* Russell, 46 Wis. 594, 1 N. W. 277.

United States.— Michigan Ins. Bank *v.* Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763.

See 7 Cent. Dig. tit. "Bills and Notes," § 995.

Forged indorsement.— That the partner who committed the wrong forged the name of a third person as indorser will not change the rule. Boardman *v.* Gore, 15 Mass. 331; Manufacturers, etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83.

If the firm was dissolved at the time of the indorsement a member thereof previous to its dissolution is not liable as indorser to a *bona fide* purchaser before maturity. Driggs *v.* Driggs, 11 N. Y. St. 256.

Partial defense.— If an indorsement by one partner is in fraud of the firm and not within the scope of its business one who had paid but part of the consideration is but a *bona fide* purchaser *pro tanto*. Driggs *v.* Driggs, 11 N. Y. St. 256.

by the articles of copartnership.[50] But partners who have not participated in the transaction may defend by showing knowledge on the part of the holder that the transaction was not within the scope of the firm's business or that the circumstances were such as to demand such inquiry by him as would acquaint him with that fact and that he failed to make such inquiry.[51]

(2) DIVERSION. That negotiable paper was diverted from the purpose for which it was drawn, made, accepted, or indorsed, or that the person intrusted with it for a specific purpose misapplied or misappropriated it or its proceeds, in fraud of the maker or indorser is not available as a defense in an action upon the instrument by a *bona fide* holder for value without notice.[52] On the same prin-

50. Commonwealth Bank *v.* Brooking, 2 Litt. (Ky.) 41; Hibernian Bank *v.* Everman, 52 Miss. 500.

51. Rolston *v.* Click, 1 Stew. (Ala.) 526 (where one partner affixed the partnership name as security for the debt of a third person); Cooper *v.* McClurkan, 22 Pa. St. 80; Tanner *v.* Hall, 1 Pa. St. 417.

That the note in suit was executed on behalf of a limited partnership without authority and in violation of statute is a good defense. Thus in an action on a note of a limited partnership organized under a statute making it unlawful for such associations to loan their credit without the consent in writing of a majority in number and value, it is a good defense that the note in suit was issued in fraud of the company, and without such consent. Lerch Hardware Co. *v.* Columbia First Nat. Bank, (Pa. 1886) 5 Atl. 778.

52. *Alabama.*— Clapp *v.* Mock. 8 Ala. 122.

Arkansas.— Evans *r.* Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919.

Florida.—Arnau *v.* Florida First Nat. Bank, 36 Fla. 398, 18 So. 786.

Illinois.— McIntire *v.* Yates, 104 Ill. 491; Andrews *v.* Butler, 46 Ill. App. 183.

Indiana.— Wells *v.* Sutton, 85 Ind. 70; Stoner *r.* Brown, 18 Ind. 464.

Iowa.— Stratton Bank *v.* Dixon, 105 Iowa 148, 74 N. W. 919; Iowa College *v.* Hill, 12 Iowa 462.

Kentucky.— Moreland *v.* Citizens' Sav. Bank, 97 Ky. 211, 17 Ky. L. Rep. 88, 30 S. W. 637.

Louisiana.— Cochrane *v.* Dickenson, 40 La. Ann. 127, 3 So. 841.

Maine.— Salem First Nat. Bank *v.* Grant, 71 Me. 374, 36 Am. Rep. 334; Nutter *v.* Stover, 48 Me. 163.

Maryland.— Barroll *v.* Foreman, 88 Md. 188, 40 Atl. 883; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.—Wareham Bank *v.* Lincoln, 3 Allen (Mass.) 192; Stoddard *v.* Kimball, 6 Cush. (Mass.) 469, 4 Cush. (Mass.) 604; Sweetser *v.* French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666.

Michigan.— Howry *v.* Eppinger, 34 Mich. 29.

Missouri.— Paulette *v.* Brown, 40 Mo. 52; American Nat. Bank *v.* Harrison Wire Co., 11 Mo. App. 446.

Montana.— American Exch. Nat. Bank *v.* Ulm, 21 Mont. 440, 54 Pac. 563.

Nebraska.— Faulkner *v.* White, 33 Nebr. 199, 49 N. W. 1122.

New Jersey.—Duncan *r.* Gilbert. 29 N. J. L. 521; Halsted *r.* Colvin, 51 N. J. Eq. 387, 26 Atl. 928.

New York.— Parker *v.* McLean, 134 N. Y. 255, 32 N. E. 73 [*affirming* 12 N. Y. Suppl. 219, 34 N. Y. St. 790]; Wilson *v.* Rocke, 58 N. Y. 642; Platt *r.* Beebe, 57 N. Y. 339; Mechanics' Nat. Bank *r.* Comstock, 55 N. Y. 24, 14 Am. Rep. 168; Park Bank *r.* Watson, 42 N. Y. 490. 1 Am. Rep. 573; Essex County Bank *v.* Russell, 29 N. Y. 673; Blair *v.* Hagemeyer, 26 N. Y. App. Div. 219, 49 N. Y. Suppl. 965; Claflin *r.* Farmers', etc., Bank, 36 Barb. (N. Y.) 540 [*reversed* in 25 N. Y. 293. 24 How. Pr. (N. Y.) 11]; Pollard *r.* Rocke, 36 N. Y. Super. Ct. 301; Rosenwald *v.* Goldstein, 27 Misc. (N. Y.) 827, 57 N. Y. Suppl. 224. See also Purchase *r.* Mattison, 2 Rob. (N. Y.) 71; Wheeler *r.* Allen, 19 Alb. L. J. 402. *Contra*, Lawrence *v.* D'Arnsthal, 4 N. Y. Leg. Obs. 344.

North Carolina.— Ray *v.* Banks, 51 N. C. 118.

Pennsylvania.— Lingg *r.* Blummer, 88 Pa. St. 518; Bardsley *r.* Delp, 88 Pa. St. 420, 6 Wkly. Notes Cas. (Pa.) 479 [*reversing* 6 Wkly. Notes Cas. (Pa.) 366].

Tennessee.— Newland *r.* Oakley, 6 Yerg. (Tenn.) 489.

Washington.— Peters *v.* Gay, 9 Wash. 383, 37 Pac. 325.

Wisconsin.—Johnson *v.* Weed, etc., Co., 103 Wis. 291, 79 N. W. 236; State *v.* Hastings, 15 Wis. 75.

See 7 Cent. Dig. tit. "Bills and Notes," § 993.

Knowledge of maker's death.—A purchaser in good faith, without notice, may recover against the maker's estate, notwithstanding that the indorser for whose accommodation it was made put it into circulation fraudulently as against the maker and that plaintiff purchased with knowledge of the maker's death. Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511.

An attorney holding a note merely for collection cannot confer title by indorsement in the owner's name and delivery without the owner's consent, even to an innocent purchaser. Quigley *v.* Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503.

ciple one who has intrusted such an instrument to another cannot reclaim it from a *bona fide* holder[53] or recover the amount thereof from the maker or a *bona fide* purchaser to whom the maker paid it.[54] The purchaser will, however, be protected only to the extent of the consideration paid by him.[55]

(VII) *ILLEGALITY*—(A) *As Between Original Parties.* As between the original parties or persons having only their rights the illegality of the instrument is a good defense.[56] Thus it is available against one who gave no valuable consideration for the instrument,[57] who purchased after maturity,[58] or who took the instrument with knowledge of its illegality.[59]

(B) *As Against Bona Fide Holders*—(1) IN GENERAL. Illegality is not as a rule a defense to commercial paper in an action thereon by a *bona fide* holder thereof, to whom it was transferred for value before maturity without notice.[60]

The misconduct of a trustee named in a deed of trust given to indemnify the maker of a note for a claim against the indemnitor is no defense to the maker as against the assignee of the note. Barry *v.* Holderman, 6 J. J. Marsh. (Ky.) 471.

Violation of statute.— The right of a *bona fide* holder to recover is not affected by the fact that it was transferred to him without notice by the indorsee, in violation of a statute denouncing as an offense the disposition of collateral security before maturity of the debt secured. Gardner *v.* Gager, 1 Allen (Mass.) 502.

Fraudulent disposition of renewed bill.— As against a *bona fide* holder it is no defense to an accepter that the drawer fraudulently disposed of a draft for which a subsequent draft had been substituted. Whittle *v.* Hide, etc., Nat. Bank, 7 Tex. Civ. App. 616, 26 S. W. 1011.

53. Mahan *v.* Dubuclet, 27 La. Ann. 45; Odell *v.* Gray, 15 Mo. 337, 55 Am. Dec. 147; Bradford *v.* Williams, 91 N. C. 7.

54. Branch *v.* Augusta Nat. Bank, 4 Kan. App. 440, 49 Pac. 344; Florat *v.* Marchand, 26 La. Ann. 741.

55. Faulkner *v.* White, 33 Nebr. 199, 49 N. W. 1122.

Security.—Where the diverted note is given to the holder to secure a debt he may recover more than the amount of debt due. Stoddard *v.* Kimball, 6 Cush. (Mass.) 469.

56. *Alabama.*— Bozeman *v.* Allen, 48 Ala. 512.

Colorado.— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139.

Georgia.— Poe *v.* Justices of Peace, Dudley (Ga.) 249.

Iowa.— Payne *v.* Raubinek, 82 Iowa 587, 48 N. W. 995; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Hanks *v.* Brown, 79 Iowa 560, 44 N. W. 811.

New York.— Porter *v.* Knapp, 6 Lans. (N. Y.) 125; Chesbrough *v.* Wright, 41 Barb. (N. Y.) 28.

England.—Jennings *v.* Hammond, 9 Q. B. D. 225, 51 L. J. Q. B. 493, 31 Wkly. Rep. 40; Robinson *v.* Bland, 2 Burr. 1077.

Canada.— Dansereau *v.* St. Louis, 18 Can. Supreme Ct. 587; Smith *v.* McEachren, 1 Nova Scotia Dec. 299; Bell *v.* Riddell, 2 Ont. 25; Dion *v.* Boulanger, 4 Quebec Super. Ct. 358; Ireland *v.* Guess, 3 U. C. Q. B. 220.

See 7 Cent. Dig. tit. "Bills and Notes," § 971.

That the purpose for which money advanced was illegal by the laws of a foreign country is no defense where the instrument given therefor is valid in the country where it is made and sought to be enforced. Toronto Bank *v.* McDougall, 28 U. C. C. P. 345.

Money advanced for speculation.— In an action on an unconditional note given by defendant to plaintiff, it is no defense that plaintiff knew the money advanced was to be used in speculation, where plaintiff had no interest in the profits or losses which defendant might make or sustain, and where it was not shown that he knew the speculation was to be unlawful. Paker *v.* Magrath, 106 Ga. 419, 32 S. E. 370.

57. Brisbane *v.* Lestarjette, 1 Bay (S. C.) 113.

58. Wing *v.* Dunn, 24 Me. 128.

59. *California.*— Jones *v.* Hanna, 81 Cal. 507, 22 Pac. 883.

New York.— Devlin *v.* Brady, 36 N. Y. 531 [*affirming* 32 Barb. (N. Y.) 518]; Berry *v.* Thompson, 17 Johns. (N. Y.) 436 [*affirming* 3 Johns. Ch. (N. Y.) 395].

Rhode Island.— Atwood *v.* Weeden, 12 R. I. 293.

South Carolina.— Brisbane *v.* Lestarjette, 1 Bay (S. C.) 113.

Tennessee.— Overton *v.* Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367.

60. *Alabama.*— Orr *v.* Sparkman, 120 Ala. 9, 23 So. 829; Bozeman *v.* Allen, 48 Ala. 512; Ivey *v.* Nicks, 14 Ala. 564.

Arkansas.— Tucker *v.* Wilamowicz, 8 Ark. 157.

California.— Haight *v.* Joyce, 2 Cal. 64, 56 Am. Dec. 311.

Colorado.— Boughner *v.* Meyer, 5 Colo. 71, 40 Am. Rep. 139.

District of Columbia.— Wirt *v.* Stubblefield, 17 App. Cas. (D. C.) 283.

Georgia.— Parr *v.* Erickson, 115 Ga. 873, 42 S. E. 240; Smith *v.* Wood, 111 Ga. 221, 36 S. E. 649; Angier *v.* Smith, 101 Ga. 844, 28 S. E. 167; Rhodes *v.* Beall, 73 Ga. 641; Meadow *v.* Bird, 22 Ga. 246; Poe *v.* Justices

(2) Instruments Void Ab Initio. If the instrument is void *ab initio*, the

of Peace, Dudley (Ga.) 249. See also Jenkins *v.* Jones, 108 Ga. 556, 34 S. E. 149.

Illinois.— Eagle *v.* Kohn, 84 Ill. 292; Shirley *v.* Howard, 53 Ill. 455; Hemenway *v.* Cropsey, 37 Ill. 357; Sherman *v.* Blackman, 24 Ill. 347; Conkling *v.* Underhill, 4 Ill. 388; Adams *v.* Wooldridge, 4 Ill. 255; Hopmeyer *v.* Frederick, 74 Ill. App. 301; Long *v.* Jones, 69 Ill. App. 615; Biegler *v.* Merchants' L. & T. Co., 62 Ill. App. 560.

Indiana.— Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316; Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; Johnston *v.* Dickson, 1 Blackf. (Ind.) 256; Pape *v.* Hartwig, 23 Ind. App. 333, 55 N. E. 271.

Iowa.— Payne *v.* Raubinek, 82 Iowa 587, 48 N. W. 995; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Hanks *v.* Brown, 79 Iowa 560, 44 N. W. 811; Cook *v.* Weirman, 51 Iowa 561, 2 N. W. 386; Lake *v.* Streeter, 34 Iowa 601; Anderson *v.* Starkweather, 28 Iowa 409.

Kansas.— Draper *v.* Cowles, 27 Kan. 484; Gross *v.* Funk, 20 Kan. 655.

Kentucky.— Roby *v.* Sharp, 6 T. B. Mon. (Ky.) 375; Owings *v.* Grimes, 5 Litt. (Ky.) 331; Brown *v.* U. S. Home, etc., Assoc., 12 Ky. L. Rep. 283, 13 S. W. 1085.

Louisiana.— Knox *v.* White, 20 La. Ann. 326. And see Coco *v.* Calliham, 21 La. Ann. 624.

Maine.— Heslan *v.* Bergeron, 94 Me. 395, 47 Atl. 896; Cottle *v.* Cleaves, 70 Me. 256; Hapgood *v.* Needham, 59 Me. 442; Fields *v.* Tibbetts, 57 Me. 358, 99 Am. Dec. 779; Baxter *v.* Ellis, 57 Me. 178.

Maryland.— Herrick *v.* Swomley, 56 Md. 439; Gwynn *v.* Lee, 9 Gill (Md.) 137; Burt *v.* Gwinn, 4 Harr. & J. (Md.) 507; Gwyn *v.* Lee, 1 Md. Ch. 445.

Massachusetts.— Smith *v.* Livingston, 111 Mass. 342; Ayer *v.* Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Cazet *v.* Field, 9 Gray (Mass.) 329; Williams *v.* Cheney, 3 Gray (Mass.) 215.

Minnesota.— Robinson *v.* Smith, 62 Minn. 62, 64 N. W. 90; Rochester First Nat. Bank *v.* Bentley, 27 Minn. 87, 6 N. W. 422.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769.

Missouri.— Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Camp *v.* Byrne, 41 Mo. 525; Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

Nebraska.— Cheney *v.* Janssen, 20 Nebr. 128, 29 N. W. 289; Sedgwick *v.* Dixon, 18 Nebr. 545, 26 N. W. 247; Darst *v.* Backus, 18 Nebr. 231, 24 N. W. 681; Evans *v.* De Roe, 15 Nebr. 630, 20 N. W. 99; Cheney *v.* Cooper, 14 Nebr. 415, 16 N. W. 471; State Sav. Bank *v.* Scott, 10 Nebr. 83, 4 N. W. 314; Wortendyke *v.* Meehan, 9 Nebr. 221, 2 N. W. 339; Smith *v.* Columbus State Bank, 9 Nebr. 31, 1 N. W. 893 [*disapproving* Kittle *v.* De Lamater, 3 Nebr. 325]; Moses *v.* Comstock, 4 Nebr. 516.

New Hampshire.— Great Falls Bank *v.* Farmington, 41 N. H. 32; Doe *v.* Burnham, 31 N. H. 426; Norris *v.* Langley, 19 N. H. 423; Wentworth *v.* Blaisdell, 17 N. H. 275; Clark *v.* Ricker, 14 N. H. 44; Young *v.* Berkley, 2 N. H. 410.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 1 Thomps. & C. (N. Y.) 494]; Warren *v.* Haight, 65 N. Y. 171; Chatham Bank *v.* Betts, 37 N. Y. 356 [*affirming* 9 Bosw. (N. Y.) 552, 23 How. Pr. (N. Y.) 476]; Farmers', etc., Bank *v.* Parker, 37 N. Y. 148; Kitchel *v.* Schenck, 29 N. Y. 515; Birdsall *v.* Wheeler, 62 N. Y. App. Div. 625, 71 N. Y. Suppl. 67; Canajoharie Nat. Bank *v.* Diefendorf, 51 Hun (N. Y.) 642, 4 N. Y. Suppl. 262, 21 N. Y. St. 692; Vosburgh *v.* Diefendorf, 48 Hun (N. Y.) 613, 1 N. Y. Suppl. 58, 16 N. Y. St. 493; Grimes *v.* Hillenbrand, 4 Hun (N. Y.) 354, 6 Thomps. & C. (N. Y.) 620; Hill *v.* Northrup, 1 Hun (N. Y.) 612, 4 Thomps. & C. (N. Y.) 120; Burton *v.* Stewart, 62 Barb. (N. Y.) 194; Chesbrough *v.* Wright, 41 Barb. (N. Y.) 28; Smalley *v.* Doughty, 6 Bosw. (N. Y.) 66; Odell *v.* Greenly, 4 Duer (N. Y.) 358; Gould *v.* Armstrong, 2 Hall (N. Y.) 266; City Bank *v.* Barnard, 1 Hall (N. Y.) 70; Paddock *v.* Coates, 19 Misc. (N. Y.) 305, 44 N. Y. Suppl. 334; Allen *v.* McFadden, 20 N. Y. Suppl. 360, 48 N. Y. St. 88; McKnight *v.* Wheeler, 6 Hill (N. Y.) 492; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Rockwell *v.* Charles, 2 Hill (N. Y.) 499; Hackley *v.* Sprague, 10 Wend. (N. Y.) 113; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

North Carolina.— Glenn *v.* Farmers' Bank, 70 N. C. 191.

Ohio.— Pickaway County Bank *v.* Prather, 12 Ohio St. 497; Stewart *v.* Simpson, 2 Ohio Cir. Ct. 415.

Pennsylvania.— Northern Nat. Bank *v.* Arnold, 187 Pa. St. 356, 40 Atl. 794; Hunter *v.* Henninger, 93 Pa. St. 373; Haskell *v.* Jones, 86 Pa. St. 173; Creed *v.* Stevens, 4 Whart. (Pa.) 223; Bank *v.* Flanigan, 15 Phila. (Pa.) 102, 39 Leg. Int. (Pa.) 264; Metropolitan Nat. Bank *v.* Sieber, 11 Phila. (Pa.) 558, 33 Leg. Int. (Pa.) 193.

South Carolina.— Johnson *v.* King, 3 McCord (S. C.) 365; Foltz *v.* Mey, 1 Bay (S. C.) 486.

Tennessee.— Bradshaw *v.* Valkenburg, 97 Tenn. 316, 37 S. W. 88.

Texas.— Thompson *v.* Samuels, (Tex. 1896) 14 S. W. 143 [*criticizing* Monroe *v.* Smelly, 25 Tex. 586, 78 Am. Dec. 541; Connor *v.* Mackey, 20 Tex. 747; Norvell *v.* Oury, 13 Tex. 31]; Roach *v.* Davis, (Tex. Civ. App. 1900) 54 S. W. 1070; Campbell *v.* Jones, 2 Tex. Civ. App. 263, 21 S. W. 723; Stewart *v.* Miller, 3 Tex. App. Civ. Cas. § 292. But see Roquemore *v.* Alloway, 33 Tex. 461.

defense of illegality is available even against an innocent purchaser for value, before maturity and without notice.[61]

Vermont.— Pendar *v.* Kelley, 48 Vt. 27; Converse *v.* Foster, 32 Vt. 828; Pindar *v.* Barlow, 31 Vt. 529.

Virginia.— Lynchburg Nat. Bank *v.* Scott, 91 Va. 652, 22 S. E. 487, 50 Am. St. Rep. 860, 29 L. R. A. 827.

Wisconsin.—Armstrong *v.* Gibson, 31 Wis. 61, 11 Am. Rep. 599; Howard *v.* Boorman, 17 Wis. 459; Cornell *v.* Hichens, 11 Wis. 353.

United States.— Tilden *v.* Blair, 21 Wall. (U. S.) 241, 22 L. ed. 632; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47; Press Co. *v.* Hartford City Bank, 58 Fed. 321, 7 C. C. A. 248 [*affirming* 56 Fed. 260]; Jackson *v.* Foote, 11 Biss. (U. S.) 223, 12 Fed. 37; St. Louis Third Nat. Bank *v.* Harrison, 3 McCrary (U. S.) 316, 10 Fed. 243; Palmer *v.* Call, 2 McCrary (U. S.) 522, 7 Fed. 737; Hatch *v.* Burroughs, 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203.

England.— Edwards *v.* Dick, 4 B. & Ald. 212, 23 Rev. Rep. 255, 6 E. C. L. 455; Day *v.* Stuart, 6 Bing. 109, 3 M. & P. 334, 19 E. C. L. 57; Lilley *v.* Rankin, 56 L. J. Q. B. 248, 55 L. T. 814.

See 7 Cent. Dig. tit. "Bills and Notes," §§ 971–982.

Equitable actions.— The word "action" as used in Mich. Comp. Laws, § 1316, providing that, in any action brought on negotiable paper which is based on a usurious consideration, if plaintiff became *bona fide* purchaser before maturity he shall be entitled to recover unless he had notice of the usury before bringing suit, includes a suit in equity as well as an action at law. Coatsworth *v.* Barr, 11 Mich. 199.

Statutory provisions.— Me. Rev. Stat. c. 69, § 6, precluding the maker from interposing the defense of usury against an indorser for value without notice, is not controlled by section 2, which permits any debtor to prove usury and avoid the payment of the excess taken. Wing *v.* Dunn, 24 Me. 128.

61. *Alabama.*— Hanover Nat. Bank *v.* Johnson, 90 Ala. 549, 8 So. 42; Hawley *v.* Bibb, 69 Ala. 52; Bozeman *v.* Allen, 48 Ala. 512; Pearson *v.* Bailey, 23 Ala. 537; Fairs *v.* King, 1 Stew. (Ala.) 255.

Arkansas.— Wyatt *v.* Wallace, 67 Ark. 575, 55 S. W. 1105.

California.— Haight *v.* Joyce, 2 Cal. 64, 56 Am. Dec. 311.

Connecticut.— Conklin *v.* Roberts, 36 Conn. 461; Townsend *v.* Bush, 1 Conn. 260.

Georgia.— Jones Dannenberg Co., 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271; Clarke *v.* Havard, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499; Atlanta Sav. Bank *v.* Spencer, 107 Ga. 629, 33 S. E. 878; Weed *v.* Bond, 21 Ga. 195.

Illinois.— Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699; Hopmeyer *v.* Frederick, 74 Ill. App. 301; Pope *v.* Hanke, 52 Ill. App. 453; International Bank *v.* Vankirk, 39 Ill. App. 23.

Indiana.— Sondheim *v.* Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; Aurora *v.* Wise, 22 Ind. 88, 85 Am. Dec. 413; Irwin *v.* Marquett, 26 Ind. App. 383, 59 N. E. 38, 84 Am. St. Rep. 297.

Iowa.— Traders' Bank *v.* Alsop, 64 Iowa 97, 19 N. W. 863.

Kentucky.— Union Nat. Bank *v.* Brown, (Ky. 1897) 41 S. W. 273; True *v.* Triplett, 4 Metc. (Ky.) 57; Early *v.* McCart, 2 Dana (Ky.) 414; Thompson *v.* Moore, 4 T. B. Mon. (Ky.) 79; Nunn *v.* Citizens' Bank, 21 Ky. L. Rep. 961, 53 S. W. 665.

Louisiana.— Baldwin *v.* Sewell, 23 La. Ann. 444; Levy *v.* Gremillion, 21 La. Ann. 635; Groves *v.* Clark, 21 La. Ann. 567.

Maryland.— See Burt *v.* Gwinn, 4 Harr. & J. (Md.) 507.

Massachusetts.— Stevens *v.* Wood, 127 Mass. 123; Bridge *v.* Hubbard, 15 Mass. 96, 8 Am. Dec. 86; Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57.

Michigan.— See Maine Mile-Track Assoc. *v.* Hammond, 127 Mich. 690, 87 N. W. 135.

Mississippi.— Lucas *v.* Waul, 12 Sm. & M. (Miss.) 157; Torrey *v.* Grant, 10 Sm. & M. (Miss.) 89.

Missouri.— Morris *v.* White, 83 Mo. App. 194.

Nebraska.— Larson *v.* Pender First Nat. Bank, 62 Nebr. 303, 87 N. W. 18; Kittle *v.* De Lamater, 3 Nebr. 325.

New Hampshire.— Wentworth *v.* Blaisdell, 17 N. H. 275.

New York.— Claflin *v.* Boorum, 122 N. Y. 385, 25 N. E. 360, 33 N. Y. St. 640; Union Bank *v.* Gilbert, 83 Hun (N. Y.) 417, 31 N. Y. Suppl. 945, 64 N. Y. St. 740; Grimes *v.* Hillenbrand, 4 Hun (N. Y.) 354, 6 Thomps. & C. (N. Y.) 620; Gould *v.* Armstrong, 2 Hall (N. Y.) 266; Aeby *v.* Rapelye, 1 Hill (N. Y.) 9; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Wilkie *v.* Roosevelt, 3 Johns. Cas. (N. Y.) 206, 2 Am. Dec. 149.

North Carolina.— Faison *v.* Grandy, 128 N. C. 438, 38 N. E. 897, 83 Am. St. Rep. 693 [*affirming* 126 N. C. 827, 36 S. E. 276]; Ward *v.* Sugg, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280; Glenn *v.* Farmers' Bank, 70 N. C. 191.

Ohio.— Lagonda Nat. Bank *v.* Portner, 46 Ohio St. 381, 21 N. E. 634.

Pennsylvania.— Harper *v.* Young, 112 Pa. St. 419, 3 Atl. 670; Unger *v.* Boas, 13 Pa. St. 601.

South Carolina.— Mordecai *v.* Dawkins, 9 Rich (S. C.) 262; Gaillard *v.* Le Seigneur, 1 McMull. (S. C.) 225; Solomons *v.* Jones, 3 Brev. (S. C.) 54, 5 Am. Dec. 538; Payne *v.* Trezevant, 2 Bay (S. C.) 23; Bell *v.* Wood, 1 Bay (S. C.) 249.

Texas.— Gilder *v.* Hearne, 79 Tex. 120, 14

(c) *Instruments Made on Sunday.* That a note was executed or a bill drawn on Sunday is not a defense against a *bona fide* holder for value and without notice, where there is nothing on the face of the instrument to indicate that fact;[62] but this rule does not apply where the contract by which the instrument was acquired was itself made on Sunday.[63]

(d) *Usurious Instruments* — (1) In General. In some jurisdictions promissory notes embracing usurious interest are held to be void, even in the hands of a *bona fide* purchaser,[64] but where the note is valid in its inception, although there are decisions to the contrary,[65] the general rule is that the maker or indorser

S. W. 1031; Andrews *v.* Hoxie, 5 Tex. 171; Noel *v.* Clark, 25 Tex. Civ. App. 136, 60 S. W. 356; Smith *v.* Mason, (Tex. Civ. App. 1897) 39 S. W. 188; Mason First Nat. Bank *v.* Ledbetter, (Tex. Civ. App. 1896) 34 S. W. 1042; Campbell *v.* Jones, 2 Tex. Civ. App. 263, 21 S. W. 723.

Vermont.— Streit *v.* Sanborn, 47 Vt. 702; Converse *v.* Foster, 32 Vt. 828.

Wyoming.— Swinney *v.* Edwards, (Wyo. 1898) 55 Pac. 306.

United States.—Atlas Nat. Bank *v.* Holm, 71 Fed. 489, 19 C. C. A. 94; Rodecker *v.* Littauer, 59 Fed. 857, 8 C. C. A. 320; Root *v.* Godard, 3 McLean (U. S.) 102, 20 Fed. Cas. No. 12,037; Hatch *v.* Burroughs, 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203.

England.— Clubb *v.* Hutson, 18 C. B. N. S. 414, 114 E. C. L. 414; Lowe *v.* Waller, Dougl. 736; Bowyer *v.* Bampton, 2 Str. 1155.

Canada.— Summerfeldt *v.* Worts, 12 Ont. 48.

Obligations incurred through gaming are in many jurisdictions made void by statute, regardless of the good faith of the holder (Western Nat. Bank *v.* Rocky Ford State Bank, (Colo. App. 1902) 70 Pac. 439; Chapin *v.* Dake, 57 Ill. 295, 11 Am. Rep. 15; Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699; Irwin *v.* Marquett, 26 Ind. App. 383, 59 N. E. 38, 84 Am. St. Rep. 297; Morris *v.* White, 83 Mo. App. 194. See, generally, Gaming), but it is only by virtue of statute that this is the case (Haight *v.* Joyce, 2 Cal. 64, 56 Am. Dec. 311; Evans *v.* Morley, 20 U. C. Q. B. 236; Wallbridge *v.* Becket, 13 U. C. Q. B. 395; Burr *v.* Marsh, (Mich. T.) 4 Vict.).

The statute need not expressly declare the instrument void. It is enough if it does so by implication. Snoddy *v.* American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705.

The illegality must be clearly proved against a *bona fide* purchaser for value without notice. Newman *v.* Blades, 21 Ky. L. Rep. 1353, 54 S. W. 849.

The remedy of the indorsee is against the indorser. Bowyer *v.* Bampton, 2 Str. 1155.

62. *Arkansas.* — Trieber *v.* Commercial Bank, 31 Ark. 128.

Georgia.— Harrison *v.* Powers, 76 Ga. 218; Ball *v.* Powers, 62 Ga. 757.

Iowa.— Clinton Nat. Bank *v.* Graves, 48 Iowa 228.

Kentucky.— Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

Maine.— Cumberland Bank *v.* Mayberry, 48 Me. 198.

Massachusetts.—Cranson *v.* Goss, 107 Mass. 439, 9 Am. Rep. 45.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

New Hampshire.— State Capital Bank *v.* Thompson, 42 N. H. 369.

Pennsylvania.— Waverly First Nat. Bank *v.* Furman, 4 Pa. Super. Ct. 415.

Canada.— Cromhie *v.* Overholtzer, 11 U. C. Q. B. 55; Houliston *v.* Parsons, 9 U. C. Q. B. 681.

See 7 Cent. Dig. tit. "Bills and Notes," § 974.

The surety of a note cannot set up against a transferee after maturity the fact that the note, although purporting to have been executed on a secular day, was executed on Sunday, where he does not show that any equity existed in his favor as against the payee. Leightman *v.* Kadetska, 58 Iowa 676, 12 N. W. 736, 43 Am. Rep. 129.

63. Harrison *v.* Powers, 76 Ga. 218.

64. Stokeley *v.* Buckler, 22 Ky. L. Rep. 1740, 61 S. W. 460; Faison *v.* Grandy, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693.

A statute giving validity to a usurious note in the hands of a *bona fide* purchaser without notice will not operate retrospectively on a usurious note executed before its enactment. North Bridgewater Bank *v.* Copeland, 7 Allen (Mass.) 139; Hackley *v.* Sprague, 10 Wend. (N. Y.) 113.

Pro tanto defense.—Under Mass. Rev. Stat. c. 35, § 2, and Mass. Stat. (1846), c. 199, usury between the payee and maker of a promissory note is a good defense for the latter *pro tanto* to the note in the hands of a *bona fide* indorsee, to whom it was indorsed before maturity for full value and without notice of the usury. Kendall *v.* Robertson, 12 Cush. (Mass.) 156. See also Miles *v.* Kelley, 16 Tex Civ. App. 147, 40 S. W. 599, where it is held that a usurious note in the hands of an innocent purchaser is void as to the interest, and judgment can be rendered thereon only for the balance of principal unpaid.

New promise.—A promise by the maker to an innocent holder of usurious paper to pay it, if indulgence is given, is binding on him and may be enforced if the delay is given. Palmer *v.* Severance, 8 Ala. 53.

65. Lloyd *v.* Keach, 2 Conn. 175, 7 Am. Dec. 256; Brittin *v.* Freeman, 17 N. J. L. 191; Fish *v.* De Wolf, 4 Bosw. (N. Y.) 573.

cannot defend on the ground that the note was subsequently transferred usuriously.[66]

(2) Accommodation Paper. In respect to accommodation notes sold or negotiated at a greater rate of discount than legal interest the authorities are not uniform. Thus there are decisions to the effect that the purchaser of such paper from the payee who pays less than the face of the instrument stands in the same situation in respect to the defense of usury as if he were the payee named, and although he has no knowledge of the accommodation.[67] On the other hand it is held that the defense is unavailable against such a purchaser unless he had knowledge of the character of the paper.[68]

(3) Corporate Notes. Where by statute a corporation cannot interpose the defense of usury to a note, the indorsers of the instrument or sureties thereon are likewise precluded.[69]

See also Torrey *v.* Grant, 10 Sm. & M. (Miss.) 89.

66. *Alabama.*—Saltmarsh *v.* Planters', etc., Bank, 17 Ala. 761.

Iowa.— Dickerman *v.* Day, 31 Iowa 444, 7 Am. Rep. 156.

Maine.— Farmer *v.* Sewall, 16 Me. 456; Clapp *v.* Hanson, 15 Me. 345; French *v.* Grindle, 15 Me. 163.

Massachusetts.—Knights *v.* Putnam, 3 Pick. (Mass.) 184; Churchill *v.* Suter, 4 Mass. 156.

New Jersey.— Brittin *v.* Freeman, 17 N. J. L. 191.

New York.— Rapelye *v.* Anderson, 4 Hill (N. Y.) 472; Cram *v.* Hendricks, 7 Wend. (N. Y.) 569; Rice *v.* Mather, 3 Wend. (N. Y.) 62; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Holmes *v.* Williams, 10 Paige (N. Y.) 326, 40 Am. Dec. 250; Holford *v.* Blatchford, 2 Sandf. Ch. (N. Y.) 149.

Tennessee.— May *v.* Campbell, 7 Humphr. (Tenn.) 450.

United States.— Nichols *v.* Fearson, 7 Pet. (U. S.) 103, 8 L. ed. 623.

The taking of usurious interest upon one negotiable promissory note cannot be set up in defense to an action upon another such note held by the same person. Primrose *v.* Anderson, 24 Pa. St. 215.

67. *Alabama.*— Carlisle *v.* Hill, 16 Ala. 398; Metcalf *v.* Watkins, 1 Port. (Ala.) 57.

Maryland.— Williams *v.* Banks, 11 Md. 198; Cockey *v.* Forrest, 3 Gill & J. (Md.) 482; Sauerwein *v.* Brunner, 1 Harr. & G. (Md.) 477.

Massachusetts.— Whitten *v.* Hayden, 7 Allen (Mass.) 407; Sylvester *v.* Swan, 5 Allen (Mass.) 134, 81 Am. Dec. 734; Van Schaack *v.* Stafford, 12 Pick. (Mass.) 565; Knights *v.* Putnam, 3 Pick. (Mass.) 184; Churchill *v.* Suter, 4 Mass. 156.

New York.— Clark *v.* Sisson, 22 N. Y. 312 [*affirming* 5 Duer (N. Y.) 468, 4 Duer (N. Y.) 408]; Catlin *v.* Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Hall *v.* Earnest, 36 Barb. (N. Y.) 585; Bossange *v.* Ross, 29 Barb. (N. Y.) 576; Dowe *v.* Schutt, 2 Den. (N. Y.) 621; Dix *v.* Van Wyck, 2 Hill (N. Y.) 522; Aeby *v.* Rapelye, 1 Hill (N. Y.) 9; Cram *v.* Hendricks, 7 Wend. (N. Y.) 569; Powell *v.* Waters, 17 Johns. (N. Y.) 176; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Wilkie *v.* Roosevelt, 3 Johns. Cas. (N. Y.) 66; Jones *v.* Hake, 2 Johns. Cas. (N. Y.) 60; Holmes *v.* Williams, 10 Paige (N. Y.) 326, 40 Am. Dec. 250; Pratt *v.* Adams, 7 Paige (N. Y.) 615; Holford *v.* Blatchford, 2 Sandf. Ch. (N. Y.) 149.

Ohio.— Corcoran *v.* Powers, 6 Ohio St. 19.

Texas.— Connor *v.* Donnell, 55 Tex. 167.

An allegation by an accommodation indorser that plaintiff purchased the note in suit at a usurious discount is insufficient for failing to show that the instrument was purchased of the party accommodated. Archer *v.* Shea, 14 Hun (N. Y.) 493.

68. *Connecticut.*— Humphrey *v.* Clark, 27 Conn. 381; Middletown Bank *v.* Jerome, 18 Conn. 443; Smith *v.* Beach, 3 Day (Conn.) 268.

Illinois.— Sherman *v.* Blackman, 24 Ill. 347.

Iowa.— Dickerman *v.* Day, 31 Iowa 444, 7 Am. Rep. 156.

Louisiana.— Byrne *v.* Grayson, 15 La. Ann. 457.

New York.— Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. (N. Y.) 281, 21 How. Pr. (N. Y.) 279.

Pennsylvania.— Gaul *v.* Willis, 26 Pa. St. 259.

Tennessee.— Ramsey *v.* Clark, 4 Humphr. (Tenn.) 244, 40 Am. Dec. 245.

Virginia.— Whiteworth *v.* Adams, 5 Rand. (Va.) 333; Taylor *v.* Bruce, Gilm. (Va.) 42.

Wisconsin.— Otto *v.* Durege, 14 Wis. 571.

False representations.— If a third party takes a note which never had a legal inception at a deduction greater than legal interest, under a deceitful representation made by the agent of the maker that it has been put into the market for value in the regular course of business, the latter cannot set up the falsity of the agent's statements to defend the action. Campbell *v.* Nichols, 33 N. J. L. 81.

69. Union Nat. Bank *v.* Wheeler, 60 N. Y. 612 [*distinguishing* Merchants Exch. Nat. Bank *v.* Commercial Warehouse Co., 49 N. Y. 635, where it was held that the statute only prevents a corporation from avoiding its own contract on the ground of usury]; Rosa *v.* Butterfield, 33 N. Y. 665; Stewart *v.* Bram-

(4) Renewed or Substituted Instrument. A second bill or note which is merely a renewal or substitution for the first is subject to the defense of usury which existed as to the original;[70] but if commercial paper void for usury is renewed by a *bona fide* holder without notice, at the instance of the maker or other parties thereto, the defense of usury cannot be set up in an action on the new instrument.[71]

(viii) *Incapacity or Want of Authority of Parties*—(a) *Legal or Mental Condition.* Defenses going to show that no valid contract was ever made because of the parties' legal incapacity are admissible against all holders, if not waived or barred.[72] Thus even as against a *bona fide* holder it may be shown that the maker or indorser of the instrument in suit was a married woman, without statutory authority to bind herself at the time of such execution or indorsement;[73]

hall, 11 Hun (N. Y.) 139; Hungerford's Bank *v.* Dodge, 30 Barb. (N. Y.) 626. *Contra*, Hungerford's Bank *v.* Potsdam, etc., R. Co., 10 Abb. Pr. (N. Y.) 24 [*reversing* 9 Abb. Pr. (N. Y.) 124].

70. Clark *v.* Sisson, 4 Duer (N. Y.) 408, 5 Duer (N. Y.) 468.

In Iowa, by statute, the *bona fide* indorsee of a renewal note which includes usurious interest can recover the amount of the consideration paid of the indorser only. Brown *v.* Wilcox, 15 Iowa 414.

Forfeiture of interest.— If each renewal of a note tainted with usury is accompanied by a new payment of usury, the forfeiture of threefold the amount of all the illegal interest so received will be deducted in an action by an indorsee for value before maturity of the last note, although prior to the last renewal the payee had procured the note then held by him to be discounted at a bank, and agreed for the renewal while it was thus out of his hands. Knapp *v.* Briggs, 2 Allen (Mass.) 551.

71. Masterson *v.* Grubbs, 70 Ala. 406; Mitchell *v.* McCullough, 59 Ala. 179; Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. (N. Y.) 281, 21 How. Pr. (N. Y.) 279; Smalley *v.* Doughty, 6 Bosw. (N. Y.) 66; Powell *v.* Waters, 8 Cow. (N. Y.) 669; Brinckerhoff *v.* Foote, 1 Hoffm. Ch. (N. Y.) 291; Palmer *v.* Call, 2 McCrary (U. S.) 522, 7 Fed. 737. See also Witham *v.* Lee, 4 Esp. 264.

New note by indorser.—An indorser of notes discounted at an illegal rate, to whom they are surrendered on his giving his own note therefor, cannot in an action on such note deduct the usurious interest exacted and paid on the intended notes. Macungie Sav. Bank *v.* Hottenstein, 89 Pa. St. 328.

Knowledge of usury before renewal.—Where new security is given to a *bona fide* holder of a usurious note, usury cannot be set up as a defense, although the holder had knowledge thereof after the note was acquired by him, but before the new security was given. Smedberg *v.* Simpson, 2 Sandf. (N. Y.) 85.

Liability for interest.—Where the purchaser is ignorant of its taint of usury and renews it at a legal rate at the solicitation of its maker and his sureties they cannot deny their liability for interest for the time of the extension. Smith *v.* White, (Tex. Civ. App. 1893) 25 S. W. 809.

72. Anglo-Californian Bank *v.* Ames, 27 Fed. 727.

Who may urge incapacity.—As the contract of a person of unsound mind is binding till avoided by himself or his legal representative, it follows that such incapacity of an indorser of the holder cannot be set up by the maker in an action against him. Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707.

73. *Alabama.*— Scott *v.* Taul, 115 Ala. 529, 22 So. 447.

Louisiana.— Conrad *v.* Le Blanc, 29 La. Ann. 123; Sprigg *v.* Boissier, 5 Mart. N. S. (La.) 54.

Michigan.— Waterbury *v.* Andrews, 67 Mich. 281, 34 N. W. 575; Johnson *v.* Sutherland, 39 Mich. 579.

Missouri.— Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804.

New Jersey.— Rahway Nat. Bank *v.* Brewster, 49 N. J. L. 231, 12 Atl. 769.

New York.— Linderman *v.* Farquharson, 101 N. Y. 434, 5 N. E. 67; Scudder *v.* Gori, 3 Rob. (N. Y.) 661; Loweree *v.* Babcock, 8 Abb. Pr. N. S. (N. Y.) 255; Corn Exch. Ins. Co. *v.* Babcock, 8 Abb. Pr. N. S. (N. Y.) 246.

Texas.— See Noel *v.* Clark, 25 Tex. Civ. App. 136, 60 S. W. 356.

Contra, Laster *v.* Stewart, 89 Ga. 181, 15 S. E. 42; Perkins *v.* Rowland, 69 Ga. 661; Leitner *v.* Miller, 49 Ga. 489.

See 7 Cent. Dig. tit. "Bills and Notes," § 945.

In California a note of a *feme covert* is valid in the hands of an innocent purchaser for value before maturity, although as between herself and the payee it was agreed that payment would never be required. Goad *v.* Moulton, 67 Cal. 536, 8 Pac. 63.

Married woman as surety.—Under the Indiana statute (Ind. Rev. Stat. (1881), § 5119) a note executed by a married woman as surety is void as to her, even in the hands of an innocent purchaser for value acquired in the regular course of business. She, however, alone can claim the benefit of the statute. Voreis *v.* Nussbaum, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45.

Under a statute permitting a feme covert

that the maker of the instrument was an infant;[74] or that the party was insane at the time of the execution of the instrument,[75] although if it is held that the instrument is given for necessaries or other adequate consideration of benefits furnished the maker in good faith, without knowledge of his unsound mental condition, it may be enforced to the extent of the value of the consideration so furnished.[76] So too it has been held that complete intoxication of the maker at the time of the execution of a negotiable instrument is a good defense, even against a *bona fide* holder;[77] but the better rule is that while such a defense would be good against the payee,[78] or between an indorsee and his immediate

to bind her separate estate, a note made by a married woman stating that it was given for the benefit of her separate estate is valid in the hands of a purchaser in good faith, although the payee knew that such statement was false, as such knowledge could not be imputed to a third party who purchased in good faith. Nott *v.* Thomson, 35 S. C. 461, 14 S. E. 940.

74. *California.*— Buzzell *v.* Bennett, 2 Cal. 101.

Georgia.— Howard *v.* Simpkins, 70 Ga. 322.

Illinois.— Morton *v.* Steward, 5 Ill. App. 533.

Indiana.— Ayers *v.* Burns, 87 Ind. 245, 44 Am. Rep. 759; Henderson *v.* Fox, 5 Ind. 489.

Iowa.— Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565.

New Jersey.— See Fenton *v.* White, 4 N. J. L. 115.

New York.— Goodsell *v.* Myers, 3 Wend. (N. Y.) 479; Swasey *v.* Vanderheyden, 10 Johns. (N. Y.) 33.

Pennsylvania.— Montgomery *v.* Brown, 1 Del. Co. (Pa.) 307, where the note was given in payment for necessaries.

England.— Williamson *v.* Watts, 1 Campb. 552; Burgess *v.* Merrill, 4 Taunt. 468; Trueman *v.* Hurst, 1 T. R. 40.

But see Dubose *v.* Wheddon, 4 McCord (S. C.) 221; Bradley *v.* Pratt, 23 Vt. 378, which hold that where the consideration was necessaries furnished the infant, the defense of infancy could not be set up against the note in the hands of the original payee.

75. *Connecticut.*— Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119. See also Webster *v.* Woodford, 3 Day (Conn.) 90.

Indiana.— McClain *v.* Davis, 77 Ind. 419.

Kentucky.— Taylor *v.* Dudley, 5 Dana (Ky.) 308.

Massachusetts.— Mitchell *v.* Kingman, 5 Pick. (Mass.) 431.

New Hampshire.— Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642.

New York.— See Rice *v.* Peet, 15 Johns. (N. Y.) 503.

Ohio.— Hosler *v.* Beard, 54 Ohio St. 398, 42 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

Pennsylvania.— Moore *v.* Hershey, 90 Pa. St. 196.

United States.— Anglo-Californian Bank *v.* Ames, 27 Fed. 727.

England.— Sentance *v.* Poole, 3 C. & P. 1, 14 E. C. L. 419; Alcock *v.* Alcock, 3 M. & G. 268, 42 E. C. L. 147. Although it was formerly held in England that a person could not be allowed to "stultify himself" by setting up his lunacy in defense against a contract made by him. Beverley's Case, 4 Coke 123*b*; Dane *v.* Kirkwall, 8 C. & P. 679, 34 E. C. L. 958; Brown *v.* Jodrell, 3 C. & P. 30, M. & M. 105, 14 E. C. L. 434; Stroud *v.* Marshall, Cro. Eliz. 398; Levy *v.* Baker, M. & M. 106, 22 E. C. L. 483.

See 7 Cent. Dig. tit. "Bills and Notes," § 945.

Surety of unsound mind.— A person who is *non compos mentis*, who signs a note as surety, cannot be held thereon, even though the party taking the note had no knowledge of the fact that the surety's mind was unsound. Van Patton *v.* Beals, 46 Iowa 62.

In Pennsylvania the rule has been laid down that an accommodation indorser of a promissory note who receives no benefit therefrom, either to himself or his estate, may defend against a *bona fide* holder on the ground that he was *non compos mentis* at the time of the indorsement, and this even where the holder had at the time of the transfer to him no knowledge of the indorser's lunacy. He may, however, recover provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration. Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543, 39 Am. Rep. 821.

Where a lunatic indorsed a note for accommodation, which was merely a renewal of a note he had previously indorsed in the same manner while sane, he is liable to the holder in good faith who received it before the indorser was adjudged insane and without notice thereof. Snyder *v.* Laubach, 7 Wkly. Notes Cas. (Pa.) 464.

76. Shoulters *v.* Allen, 51 Mich. 529, 16 N. W. 888; Hosler *v.* Beard, 54 Ohio St. 398, 42 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

77. Caulkins *v.* Fry, 35 Conn. 170.

78. *Arkansas.*— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567, where stress was laid upon the necessity of complete intoxication in order to render the contract void.

Maryland.— Johns *v.* Fritchey, 39 Md. 258.

New Jersey.— Burroughs *v.* Richman, 13 N. J. L. 233, 23 Am. Dec. 717.

North Carolina.— See Morris *v.* Clay, 53 N. C. 216.

Pennsylvania.— McSparran *v.* Neeley, 91 Pa. St. 17.

indorser,[79] the maker's intoxication cannot be interposed against a *bona fide* holder for value.[80]

(B) *From Fiduciary Relationship* — (1) AGENTS. That a maker or indorser of commercial paper, purporting to act in the capacity of agent, had no authority, either real or apparent, to so act, is a defense, regardless of the status of the holder.[81] So too where the limitation of the agent's authority is made to appear upon the face of the instrument or otherwise, the principal will not be bound beyond the authority given to such agent.[82] But the fact that an agent exceeds his authority in executing or transferring negotiable paper will not constitute a defense to an innocent holder, where he acts within the apparent scope of his authority.[83]

South Carolina.— See Berkley *v.* Cannon, 4 Rich. (S. C.) 136.

Utah.— Smith *v.* Williamson, 8 Utah 219, 30 Pac. 753.

England.— Gore *v.* Gibson, 9 Jur. 140, 14 L. J. Exch. 151, 13 M. & W. 623; Yates *v.* Boen, 2 Str. 1104. See also Gregory *v.* Fraser, 3 Campb. 454.

Degree of intoxication.— In Cavender *v.* Waddingham, 5 Mo. App. 457, 465, the degree of intoxication held necessary to avoid a contract is thus stated by the court: "Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable a party to avoid his contract; such excitement and drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind at the time of entering into the contract."

79. Gore *v.* Gibson, 9 Jur. 140, 14 L. J. Exch. 151, 13 M. & W. 623.

80. Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306; McSparran *v.* Neeley, 91 Pa. St. 17; State Bank *v.* McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; Northam *v.* Latouche, 4 C. & P. 140, 19 E. C. L. 446. See also Stigler *v.* Anderson, (Miss. 1893) 12 So. 831.

81. *New Hampshire.*— Eaton *v.* Berwin, 49 N. H. 219; Andover *v.* Grafton, 7 N. H. 298.

New York.— Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599.

Vermont.— Holden *v.* Durant, 29 Vt. 184.

United States.— Dexter Sav. Bank *v.* Friend, 90 Fed. 703; Root *v.* Godard, 3 McLean (U. S.) 102, 20 Fed. Cas. No. 12,037.

England.— Fearn *v.* Filica, 14 L. J. C. P. 15, 7 M. & G. 513, 8 Scott N. P. 241, 49 E. C. L. 513.

82. *Connecticut.*— Ladd *v.* Franklin, 37 Conn. 53.

New Jersey.—Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941.

New York.— Beach *v.* Vandewater, 1 Sandf. (N. Y.) 265.

Tennessee.— Elliott Nat. Bank *v.* Western, etc., R. Co., 70 Tenn. 676.

England.— Attwood *v.* Munnings, 7 B. & C. 278, 6 L. J. K. B. O. S. 9, 1 M. & R. 66, 31 Rev. Rep. 194, 14 E. C. L. 130 (in which case the acceptance was by procuration); Stagg *v.* Elliott, 12 C. B. N. S. 373, 9 Jur. N. S. 158, 31 L. J. C. P. 260, 6 L. T. Rep. N. S. 433, 10 Wkly. Rep. 647, 104 E. C. L. 373; Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Alexander *v.* Mackenzie, 6 C. B. 766, 13 Jur. 346, 18 L. J. C. P. 94, 60 E. C. L. 766. See also East India Co. *v.* Tritton, 3 B. & C. 280, 5 D. & R. 214, 3 L. J. K. B. O. S. 24, 27 Rev. Rep. 353, 10 E. C. L. 134.

83. *Alabama.*— Florence R., etc., Co. *v.* Chase Nat. Bank, 106 Ala. 364, 17 So. 720; Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

Georgia.— Haskins *v.* Thorne, 101 Ga. 126, 28 S. E. 611.

Illinois.— McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

Louisiana.— Broadway Sav. Bank *v.* Vorster, 30 La. Ann. 587; Ogden *v.* Marchand, 29 La. Ann. 61.

Maine.— Russell *v.* Folsom, 72 Me. 436; Commercial Bank *v.* St. Croix Mfg. Co., 23 Me. 280.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Bird *v.* Daggett, 97 Mass. 494.

Michigan.— Genesee County Sav. Bank *v.* Michigan Bridge Co., 52 Mich. 438, 17 N. W. 790, 18 N. W. 206.

Minnesota.—Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

Missouri.— Neuhoff *v.* O'Reilly, 93 Mo. 164, 6 S. W. 78; Lee *v.* Turner, 89 Mo. 489, 14 S. W. 505; Hannibal First Nat. Bank *v.* North Missouri Coal, etc., Co., 86 Mo. 125.

New Jersey.— National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553; Mechanics' Banking Assoc. *v.* New York, etc., White Lead Co., 35 N. Y. 505 [*affirming* 20 How. Pr. (N. Y.) 509, 23 How. Pr. (N. Y.) 74]; Exchange Bank *v.* Monteath, 26 N. Y. 505 [*reversing* 24 Barb. (N. Y.) 371]; Nelson *v.* Eaton, 26 N. Y. 410; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678 [*affirming* 4 Duer (N. Y.) 219]; Grant *v.* Treadwell, 82 Hun (N. Y.) 591, 31 N. Y. Suppl. 702, 64 N. Y. St. 388; National Spraker Bank *v.* Treadwell, 80 Hun (N. Y.) 353, 30 N. Y. Suppl. 77, 61 N. Y. St. 817; National Park Bank *v.* German-American Mut. Warehouse, etc., Co., 53 N. Y. Super. Ct. 367; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Wile, etc., Co. *v.* Rochester, etc., Land Co., 4 Misc. (N. Y.) 570, 25 N. Y. Suppl. 794; North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; Willmarth *v.* Crawford,

(2) Corporate Officers — (a) Without Color of Authority. That negotiable paper is executed or indorsed in the name of a corporation by one of its officers without any apparent legal authority is a good defense, even against a *bona fide* holder.[84] This is especially true where such paper does not concern any business of the corporation, and there is no by-law or resolution authorizing its officers to execute or indorse negotiable paper or proof of a recognized course of business by which such officers have been held out to the world as possessing such power.[85]

(b) Authority For Specific Purposes. The better doctrine seems to be that when a corporation has the power under any circumstances to issue negotiable securities a *bona fide* holder has the right to presume that they were issued under

10 Wend. (N. Y.) 241; Stoney *v.* Merchants' L. Ins. Co., 11 Paige (N. Y.) 635. See also Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442.

North Carolina.— Fons *v.* Jones, 127 N. C. 464, 37 S. E. 480.

Pennsylvania.— Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

Virginia.— De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 647.

Wisconsin.— Lehigh Valley Coal Co. *v.* West Depere Agricultural Works, 63 Wis. 45, 22 N. W. 831; Cornell *v.* Hickens, 11 Wis. 353; Blunt *v.* Walker, 11 Wis. 334, 78 Am. Dec. 709.

United States.— Lexington *v.* Butler, 14 Wall. (U. S.) 296, 20 L. ed. 809; Marshall County *v.* Schenck, 5 Wall. (U. S.) 772, 18 L. ed. 556; Mercer County *v.* Hacket, 1 Wall. (U. S.) 93, 17 L. ed. 548; Woods *v.* Lawrence County, 1 Black (U. S.) 386, 12 L. ed. 122; Dexter Sav. Bank *v.* Friend, 90 Fed. 703; Todd *v.* Kentucky Union Land Co., 57 Fed. 47; Irwin *v.* Bailey, 8 Biss. (U. S.) 523, 16 Fed. Cas. No. 9,079, 11 Chic. Leg. N. 376, 8 Reporter 421.

England.— Edmunds *v.* Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20; *In re* Ireland Land Credit Co., L. R. 4 Ch. 460, 39 L. J. Ch. 27, 20 L. T. Rep. N. S. 641, 17 Wkly. Rep. 689; Saunderson *v.* Brooksbank, 4 C. & P. 286, 19 E. C. L. 518.

Canada.— Thorold Mfg. Co. *v.* Imperial Bank, 13 Ont. 330.

A certificate of deposit made out to "S. B. Knapp, cashier," may be transferred by S. B. Knapp, although the funds deposited are shown to belong to the bank of which he is cashier, as such transfer is within the scope of his apparent authority. St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

Agent's violation of instructions.—A purchaser of notes indorsed in blank from an agent with full authority to sell cannot be prejudiced by any violation by the agent of his instructions as to the manner of making the sale or as to his disposition of the proceeds, where the purchaser had no notice of such instructions. Beyond the apparent general right with which such agent is thereby clothed third parties are not bound to inquire. Howery *v.* Eppinger, 34 Mich. 29.

84. *Illinois.*— Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554; Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Clarke *v.* Hancock County, 27 Ill. 305; Schuyler County *v.* People, 25 Ill. 181.

Iowa.— Williamson *v.* Keokuk, 44 Iowa 88.

Kentucky.— M. V. Monarch Co. *v.* Farmers', etc., Bank, 105 Ky. 430, 20 Ky. L. Rep. 1351, 49 S. W. 317, 88 Am. St. Rep. 310.

New York.— Chillicothe Bank *v.* Dodge, 8 Barb. (N. Y.) 233.

Virginia.— Davis *v.* Rockingham Invest. Co., 89 Va. 290, 15 S. E. 547.

United States.— Anthony *v.* Jasper County, 101 U. S. 693, 25 L. ed. 1005 [*affirming* 4 Dill. (U. S.) 136, 1 Fed. Cas. No. 488, 3 Centr. L. J. 321].

85. *Illinois.*— School Directors *v.* Fogleman, 76 Ill. 189.

Maine.— See Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266.

New York.—Halstead *v.* New York, 5 Barb. (N. Y.) 218; Wahlig *v.* Standard Pump Mfg. Co., 9 N. Y. Suppl. 739, 30 N. Y. St. 390.

Ohio.— Pittsburg, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596.

Virginia.— Clifton Forge *v.* Brush Electric Co., 92 Va. 289, 23 S. E. 288; Davis *v.* Rockingham Invest. Co., 89 Va. 290, 15 S. E. 547.

United States.— Palmer *v.* St. Stephen's Church, 16 Fed. 742.

Warrants issued by school directors without authority, or in excess of authority, are subject to a defense based upon that fact, even in the hands of a *bona fide* holder, he being bound to look to the director's authority to issue the same. School Directors *v.* Fogleman, 76 Ill. 189; Eastman *v.* Lyon, 40 Iowa 438; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Banking and other business corporations differentiated.— In Mather *v.* Union L. & T. Co., 7 N. Y. Suppl. 213, 214, 26 N. Y. St. 58, the court said: "The defendant not being a banking corporation, the acceptance was not within the apparent authority with which the agent was invested; and it is for the plaintiff to prove that it was authorized by the charter, by-laws, or some resolutions of the corporation, or, as in Olcott *v.* Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298, by its recognition of similar acts of the same official, or by proof that the corporation ratified

circumstances which give the requisite authority, and their irregular issue constitutes no defense.[86] This rule has been adhered to, even in the case of accommodation paper,[87] but does not apply to paper issued by a municipal corporation.[88]

(c) Irregular Exercise of Authority. Where the power to issue negotiable securities is granted a corporation by law, irregularity in its exercise, or mere non-compliance with a by-law as to the manner of execution, cannot be set up as a defense.[89]

the act performed by accepting some benefit by its performance. The substantial difference between the acts of an officer of a banking and business corporation in regard to commercial paper is only in the proof of authority required. The acts of an officer of a bank, in respect to commercial paper, as a rule carry with them the presumption of authority implied from the very nature of the corporate business, and from the apparent authority with which the officer must be assumed to have been clothed with respect thereto in the proper carrying on of that business; but when it comes to a corporation whose business does not necessarily require the giving or indorsement of notes, or the acceptance of bills, the law exacts proof that the act has corporate sanction in some form."

Liability of indorser.— The fact that the act of a corporation in becoming the drawer of a bill of exchange was *ultra vires* does not relieve an indorser from liability. M. V. Monarch Co. *v.* Farmers', etc., Bank, 105 Ky. 430, 20 Ky. L. Rep. 1351, 49 S. W. 317, 88 Am. St. Rep. 310.

86. *Alabama.*— Florence R. & Imp. Co. *v.* Chase Nat. Bank, 106 Ala. 364, 17 So. 720.

California.— Main *v.* Casserly, 67 Cal. 128, 7 Pac. 426.

Colorado.— St. Joe, etc., Consol. Min. Co. *v.* Aspen First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055.

Georgia — Mitchell *v.* Rome R. Co., 17 Ga. 574.

Maryland.— Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285.

Missouri.— Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299.

Nebraska.— Nebraska Nat. Bank *v.* Ferguson, 49 Nebr. 109, 28 N. W. 370, 59 Am. St. Rep. 522.

New Hampshire.— Eaton *v.* Berwin, 49 N. H. 219.

New Jersey.— Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; Willmarth *v.* Crawford, 10 Wend. (N. Y.) 341; Stoney *v.* American L. Ins. Co., 11 Paige (N. Y.) 635.

Pennsylvania.— Allegheny City *v.* McClurkan, 14 Pa. St. 81.

United States.— Macon County *v.* Shores, 97 U. S. 272, 24 L. ed. 889; Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258, 24 L. ed. 693; Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208; Grommes *v.* Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419.

England.— Royal British Bank *v.* Turquand, 6 E. & B. 327, 1 Jur. N. S. 1086, 24 L. J. Q. B. 327, 88 E. C. L. 327.

See 7 Cent. Dig. tit. "Bills and Notes," § 948.

87. *California.*— Hall *v.* Auburn Tp. Co., 27 Cal. 255, 87 Am. Dec. 75.

Connecticut.— Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123.

Georgia.— Jacobs Pharmacy Co. *v.* Southern Bank, etc., Co., 97 Ga. 573, 25 S. E. 171.

Indiana.— Madison, etc., R. Co. *v.* Norwich Sav. Soc., 24 Ind. 457.

Massachusetts.— Monument Nat. Bank *v.* Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Bird *v.* Daggett, 97 Mass. 494.

Minnesota.— American Trust, etc., Bank *v.* Gluck, 68 Minn. 129, 70 N. W. 1085.

New Jersey.— Blake *v.* Mfg. Co., (N. J. 1897) 38 Atl. 241; National Bank of Republic *v.* Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York.— Gloversville Nat. Bank *v.* Wells, 79 N. Y. 498; Genesee Bank *v.* Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Morford *v.* Farmers' Bank, 26 Barb. (N. Y.) 568. See also Fox *v.* Rural Home Co., 90 Hun (N. Y.) 365, 35 N. Y. Suppl. 896, 70 N. Y. St. 558.

Texas.— Marshall Nat. Bank *v.* O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344.

United States.— Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595.

88. The reason being that the avenues to information in regard to the law and the ordinances of such corporation, being open to public inspection, the holder of such securities will be presumed to have examined them and to have known whether the corporation had the requisite power to issue them; while no such opportunity is given in regard to private corporations. Bissell *v.* Kankakee, 64 Ill. 249, 16 Am. Rep. 554; Bradley *v.* Ballard, 55 Ill. 413, 8 Am. Rep. 656; Marshall County *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154; Coloma *v.* Eaves, 92 U. S. 484; 23 L. ed. 579; St. Joseph Tp. *v.* Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328; Kenicott *v.* Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319; Pendleton County *v.* Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

89. National Spraker Bank *v.* George C. Treadwell Co., 80 Hun (N. Y.) 363, 30 N. Y.

(IX) *INSTITUTION OF RELATIVE LEGAL PROCEEDINGS.* It is not a defense in a suit at law upon a note that proceedings in chancery have been instituted by other parties to restrain the payment of the same,[90] or that equity has been invoked to enforce a lien for which the instrument was given;[91] nor, until after the expiration of the right of redemption, is it a good defense that a mortgagee has entered to foreclose a mortgage amply securing a note.[92]

(X) *IRREGULARITY IN EXECUTION OR NEGOTIATION* — (A) *In General.* Inasmuch as a *bona fide* holder is entitled to rely upon the recitals of the note as a true exposition of the contract between the original parties, it is no defense as against him that the note was not executed at the place where it bears date,[93] that the note is wrongly dated,[94] or that it is made to read payable in specie instead of depreciated currency for which it was given.[95] Nor is it a defense against such holder that the note was post-stamped.[96]

(B) *Non-Delivery.* While a delivery is necessary to complete the negotiable character of an instrument,[97] the defense of want of delivery cannot be urged against a *bona fide* holder for value where the note gets into circulation through the act, fault, or neglect of defendant.[98]

(C) *Breach of Collateral Agreements* — (1) BETWEEN PRIMARY OBLIGORS. As between the original parties or those having only their rights, it is a good defense that a collateral agreement, which was made as a condition of the liability on the note, has not been performed,[99] or that there is a breach of the warranty as

Suppl. 77, 61 N. Y. St. 817; Kerr *v.* Corry, 105 Pa. St. 282. See also Williamson *v.* Keokuk, 44 Iowa 88.

90. Campbell *v.* Gilman, 26 Ill. 120; Bryan *v.* Saltenstall, 3 J. J. Marsh. (Ky.) 672.

91. Speight *v.* Porter, 26 Miss. 286.

92. Portland Bank *v.* Fox, 19 Me. 99.

Where a vendor gives his own note for the difference between the price of the chattel sold and a promissory note taken in payment thereof, the pendency of a suit by him as indorsee against the indorser will not in any manner affect the defense of want of consideration when sued upon the note which he executed. Litchfield *v.* Allen, 7 Ala. 779.

93. Watson *v.* Boston Woven Cordage Co., 75 Hun (N. Y.) 115, 26 N. Y. Suppl. 1101, 58 N. Y. St. 194 [*citing* Daniel Neg. Instr. § 869].

94. Huston *v.* Young, 33 Me. 85.

95. Roby *v.* Sharp, 6 T. B. Mon. (Ky.) 375.

96. Notwithstanding a statutory provision that a note issued without a stamp shall be "invalid and of no effect." Blackwell *v.* Denie, 23 Iowa 63 [*following* the rule laid down in Green *v.* Davies, 4 B. & C. 235, 10 E. C. L. 557, 1 C. & P. 451, 12 E. C. L. 263, 6 D. & R. 306, 3 L. J. K. B. O. S. 185, 28 Rev. Rep. 230; Wright *v.* Riley, 1 Peake 173]. See also Gage *v.* Sharp, 24 Iowa 15; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; 3 Parsons Contr. (4th ed.) c. 10.

Presumption as to proper stamping.— Where a note bore a stamp of the proper amount at the time it was received by plaintiff the presumption is that it was affixed at the proper time and by the proper party, and where he is an innocent holder for value the presumption in his favor is conclusive. Robinson *v.* Lair, 31 Iowa 9 [*citing* Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281; Blackwell *v.* Denie, 23 Iowa 63].

97. See *supra*, II, D, 2, a, (I) [7 Cyc. 683].

98. The reasons being that where one of two parties must suffer, he whose act or neglect caused the loss must bear it; and that the defect or infirmity of the title of the person from whom the *bona fide* holder derived the note does not affect the *bona fide* holder. Gould *v.* Segee, 5 Duer (N. Y.) 260. See also Clarke *v.* Johnson, 54 Ill. 296 [*following* Shipley *v.* Carroll, 45 Ill. 285]; McCormick *v.* Holmes, 41 Kan. 265, 21 Pac. 108; Kinyon *v.* Wohlford, 17 Minn. 239, 10 Am. Rep. 165; Greeser *v.* Sugarman, 37 Misc. (N. Y.) 799, 76 N. Y. Suppl. 922; Daniel Neg. Instr. §§ 35, 91, 96. *Compare* Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497, where defendant executed the note, left it on a table, and went out to find a required surety, leaving instructions to the payee that the note was not to be touched until he returned; but the payee in his absence took the note, against the protest of defendant's sister, and put it in circulation before he had performed his part of the contract, of which this note constituted a part. The court held that a good defense existed on the ground of fraud against the maker.

That a note was executed in the presence of a certain person merely as a matter of amusement, without any design of delivering it to him, is no defense against an innocent indorsee for value. Shipley *v.* Carroll, 45 Ill. 285.

99. *Indiana.*— Coppock *v.* Burkhart, 4 Blackf. (Ind.) 220.

Kentucky.— Coffman *v.* Wilson, 2 Metc. (Ky.) 542.

Maine.— Roads *v.* Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246.

to the consideration for which the note was given;[1] but in order to take advantage of such a defense, defendant must have done all that was required of him at the time.[2]

(2) As Against Bona Fide Holder. The holder of a negotiable instrument is not bound by a private agreement between the maker or indorser or any of the other parties thereto, unless he had a notice of such an agreement and took the bill subject to its condition.[3] Hence it is no defense against such holder that

Missouri.— Wagner *v.* Diedrich, 50 Mo. 484.

New Jersey.— Babbitt *v.* Moore, 51 N. J. L. 229, 17 Atl. 99.

New York.— Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. 32 [*affirming* 90 Hun (N. Y.) 398, 35 N. Y. Suppl. 944, 70 N. Y. St. 659]; Michel *v.* Ellwanger, 58 N. Y. App. Div. 616, 68 N. Y. Suppl. 464; Lindon *v.* Beach, 6 Hun (N. Y.) 200.

North Carolina.— Bresee *v.* Crumpton, 121 N. C. 122, 28 S. E. 351.

Pennsylvania.— Breneman *v.* Furniss, 90 Pa. St. 186, 35 Am. Rep. 651; Martin *v.* McCune, 42 Wkly. Notes Cas. (Pa.) 511; Wertsner *v.* Graber, 14 Montg. Co. Rep. (Pa.) 217. See also Cake *v.* Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

Tennessee.— Hamilton *v.* Mingo Coal, etc., Co., (Tenn. Ch. 1900) 59 S. W. 420.

Wisconsin.— Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554.

Canada.— McQuarrie *v.* Brand, 28 Ont. 69; Wismer *v.* Wismer, 22 U. C. Q. B. 446; Matthewson *v.* Carman, 1 U. C. Q. B. 266; McCollum *v.* Church, 3 U. C. Q. B. O. S. 356.

Compare Dow *v.* Tuttle, 4 Mass. 414, 3 Am. Dec. 226, where, although the suit was by an indorsee, there was apparently no question of *bona fide* holder in the case. The court said in this case that although a separate action might lie for the breach of a collateral promise, yet such a promise was no bar to an action on the note. But see editor's note at end of opinion, which criticizes the decision on the ground that the two promises should have been treated as one transaction. See also McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393, 58 Pac. 358, where a party who had put his note on the market and allowed a consideration to be paid for it was not allowed to prove any parol agreement made before its delivery.

1. *Alabama.*— Weaver *v.* Shropshire, 42 Ala. 230.

Georgia.— Rutherford *v.* Newson, 30 Ga. 728.

Iowa.— Brayley *v.* Goff, 40 Iowa 76, holding that where a defendant partner makes default the other alone can defend on the ground of a breach of warranty.

Kentucky.— Kelso *v.* Frye, 4 Bibb (Ky.) 493.

New York.— Judd *v.* Dennison, 10 Wend. (N. Y.) 512.

Pennsylvania.—Hays *v.* Kingston, 23 Wkly. Notes Cas. (Pa.) 277, 16 Atl. 745.

South Dakota.— National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 870 [*reversed* in 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594, 46 L. R. A. 732].

2. Biscoe *v.* Moore, 12 Ark. 77; Pritchard *v.* Johnson, 60 Ga. 288. See also California State Bank *v.* Webber, 110 Cal. 538, 42 Pac. 1066; Klett *v.* Claridge, 31 Pa. St. 106. Thus a refusal to perform a contemporaneous agreement made at the execution of a note given to secure a reduction of interest on a bond, whereby the payee agreed to deliver the bond and a certain mortgage to the maker when the note was paid, if payment was enforced, is no defense to an action on a note, in the absence of a tender in payment of the money due thereon, into court. Storz *v.* Kinzler, 73 N. Y. App. Div. 372, 77 N. Y. Suppl. 64.

3. *District of Columbia.*— Hutchinson *v.* Brown, 19 D. C. 136.

Georgia.— Wooten *v.* Inman, 33 Ga. 41.

Illinois.— Maze *v.* Heinze, 53 Ill. App. 503.

Indiana.— Cooper *v.* Merchants', etc., Nat. Bank, 25 Ind. App. 341, 57 N. E. 569. See also Galvin *v.* Syfers, 22 Ind. App. 43, 52 N. E. 96.

Iowa.— Gage *v.* Sharp, 24 Iowa 15.

Kentucky.— Frank *v.* Quast, 86 Ky. 649, 9 Ky. L. Rep. 781, 6 S. W. 909; Gano *v.* Finnell, 13 B. Mon. (Ky.) 390; Cunningham *v.* Potter, 23 Ky. L. Rep. 847, 64 S. W. 493; Menzies *v.* Farmers Bank, 3 Ky. L. Rep. 822.

Massachusetts.— Fearing *v.* Clark, 16 Gray (Mass.) 74, 77 Am. Dec. 394 (note delivered in escrow); Sweetser *v.* French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Mack *v.* Clark, 1 Metc. (Mass.) 423. See also Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

New Jersey.—Haines *v.* Dubois, 30 N. J. L. 259.

New York.— Chase Nat. Bank *v.* Faurot, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605 [*affirming* 72 Hun (N. Y.) 373, 25 N. Y. Suppl. 447, 55 N. Y. St. 179]; Metropolitan Bank *v.* Engel, 66 N. Y. App. Div. 273, 72 N. Y. Suppl. 691 [*citing* Daniel Neg. Instr. § 114, subs. 1]; Pensacola First Nat. Bank *v.* Anderson, 55 N. Y. App. Div. 570, 67 N. Y. Suppl. 434; Harbeck *v.* Craft, 4 Duer (N. Y.) 122; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Woodhull *v.* Holmes, 10 Johns. (N. Y.) 231; Wilson *v.* Law, 26 N. Y. Wkly. Dig. 509.

North Carolina.— Parker *v.* Sutton, 103 N. C. 191, 9 S. E. 283, 14 Am. St. Rep. 795; Parker *v.* McDowell, 95 N. C. 219, 59 Am. Rep. 235; Ray *v.* Banks, 51 N. C. 118.

Tennessee.— Merritt *v.* Duncan, 7 Heisk. (Tenn.) 156, 19 Am. Rep. 612.

Texas.— Leeds *v.* Hamilton Paint, etc., Co., (Tex. Civ. App. 1896) 35 S. W. 77.

by an agreement a party to a note should not be held liable except upon a condition or a contingency.[4] Nor is it a defense against the holder in due course that a check was given only as a memorandum and was not to be drawn or passed.[5]

(XI) *Loss or Theft of Instrument* — (A) *In General.* That negotiable paper was lost or stolen is no defense against a *bona fide* purchaser for value without notice; and he may also defend on the ground that he is such a purchaser when his right to the instrument or its proceeds is assailed.[6]

(B) *Non-Negotiable Instruments.* If the lost or stolen paper is non-negotiable the purchaser is not protected by the law merchant and acquires no right which will enable him to defend against the true owner as a *bona fide* holder,[7] but the

United States.— Union Bank *v.* Crine, 33 Fed. 809.

4. *Iowa.*— Graff *v.* Logue, 61 Iowa 704, 17 N. W. 171.

Maine.— Wait *v.* Chandler, 63 Me. 257.

Missouri.— Donovan *v.* Fox, 121 Mo. 236, 25 S. W. 915.

New York.—Canda *v.* Zeller, 3 N. Y. Suppl. 128, 21 N. Y. St. 164.

United States.— Calm *v.* Dolley, 105 Fed. 836; Thomas *v.* Page, 3 McLean (U. S.) 369, 23 Fed. Cas. No. 13,907.

A condition that another signature should be obtained to a note is no defense to a holder without notice, for in such a case the person to whom the note is indorsed is considered by law the agent of the party who stipulates for the condition and the party is bound by the agent's acts.

Arkansas.— Craighead *v.* Farmers' Bldg., etc., Assoc., 69 Ark. 332, 63 S. W. 668.

Indiana.— Whitcomb *v.* Miller, 90 Ind. 384.

Kansas.— Topeka Bank *v.* Nelson, (Kan. 1897) 49 Pac. 155.

Minnesota.— Freeport First Nat. Bank *v.* Campo-Board Mfg. Co., 61 Minn. 274, 63 N. W. 731; Yellow Medicine County Bank *v.* Tagley, 57 Minn. 391, 59 N. W. 486.

New Hampshire.— Merriam *v.* Rockwood, 47 N. H. 81.

North Dakota.—Porter *v.* Andrus, 10 N. D. 558, 88 N. W. 567.

Pennsylvania.— Rutland Bank *v.* Seitzinger, 2 Wkly. Notes Cas. (Pa.) 303.

Tennessee.— Jordan *v.* Jordan, 10 Lea (Tenn.) 124, 43 Am. Rep. 294.

Vermont.— Dixon *v.* Dixon, 31 Vt. 450, 76 Am. Dec. 129; Passumpsic Bank *v.* Goss, 31 Vt. 315.

Compare Dunn *v.* Smith, 12 Sm. & M. (Miss.) 602.

See 7 Cent. Dig. tit. "Bills and Notes," § 951.

Agreement to cancel.— An agreement by a separate contemporaneous instrument that a mortgage executed with a note to secure a surety against any liability which he might incur should be canceled when the debt was paid is no defense against one who has obtained the note in due course. St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 275, 86 N. W. 864.

An agreement that the payee will accept as payment on the note any legal claims against him that the makers may obtain is no defense against a *bona fide* holder. Goldthwait *v.* Bradford, 36 Ind. 149. Nor is the agreement that the note will be renewed at maturity, or real estate taken in payment thereof, a defense. Lindsey *v.* Casselberry, 3 Wkly. Notes Cas. (Pa.) 42.

5. Appel *v.* Greenawald, 2 Wkly. Notes Cas. (Pa.) 395.

6. *Georgia.*— Robinson *v.* Darien Bank, 18 Ga. 65.

Illinois.— Garvin *v.* Wiswell, 83 Ill. 215; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

Kentucky.—Caruth *v.* Thompson, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559; Sinclair *v.* Piercy, 5 J. J. Marsh. (Ky.) 63. See also Prather *v.* Weissiger, 10 Bush (Ky.) 117.

Louisiana.— Marsh *v.* Small, 3 La. Ann. 402, 48 Am. Dec. 452.

Massachusetts.— Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231.

Missouri.— Franklin Sav. Inst. *v.* Heinsman, 1 Mo. App. 336.

New York.— Hall *v.* Wilson, 16 Barb. (N. Y.) 548. See also Fulton Bank *v.* Phœnix Bank, 1 Hall (N. Y.) 562.

Pennsylvania.— Kuhns *v.* Gettysburg Nat. Bank, 68 Pa. St. 445.

Tennessee.—Whiteside *v.* Chattanooga First Nat. Bank, (Tenn. Ch. 1898) 47 S. W. 1108.

Texas.— First Nat. Bank *v.* Beck, 2 Tex. App. Civ. Cas. § 832.

England.— Goodman *v.* Harvey, 4 A. & E. 870, 6 L. J. K. B. 260, 6 N. & M. 372, 31 E. C. L. 381; Raphael *v.* Bank of England, 17 C. B. 161, 25 L. J. C. P. 33, 4 Wkly. Rep. 10, 84 E. C. L. 161.

Estoppel.— Where unmatured notes indorsed to the payee in blank are appropriated by an agent, who is permitted to keep them for business purposes, but sells them to a *bona fide* purchaser for value and absconds, the payee is estopped to deny the purchaser's title. Walters *v.* Tielkemeyer, 72 Mo. App. 371.

On a conviction for stealing bank-notes the court will not order the stolen notes to be restored to the person from whom they were stolen, they having been received *bona fide* by innocent persons in the way of business. U. S. *v.* Read, 2 Cranch C. C. (U. S.) 159, 27 Fed. Cas. No. 16,125.

7. Prather *v.* Weissiger, 10 Bush (Ky.) 117; Young *v.* Brewster, 62 Mo. App. 628.

loss or theft is an available defense to the rightful owner or person entitled to its possession.[8]

(XII) *MISTAKE.* A mistake in determining the amount for which a note should be given,[9] or in determining the identity of the payee of a check,[10] cannot be taken advantage of against a *bona fide* holder; but such mistakes in determining the amount or in the intended payee are available against the original payee or indorsee with notice.[11]

(XIII) *PAYMENT OR DISCHARGE.* A plea of payment or satisfaction is of course a good defense between the original parties to a note or between parties having only their rights;[12] but as it is the duty of a party paying a note or making a partial payment thereon to take up the paper or have the payment made indorsed thereon,[13] it follows that a defense of payment, when these precautions have not been observed, cannot be urged as against a *bona fide* holder.[14]

8. United States treasury note.— Where a United States treasury note, indorsed, "Pay to the secretary of the treasury for conversion," signed by the cashier of the owner, was stolen from a carrier to whom it was intrusted for transportation to the treasury, the indorsement erased, and the note sold to an innocent purchaser, it was held that the purchaser acquired no title. Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534 [*reversing* 4 Daly (N. Y.) 199].

Canceled instruments.—It is a good defense to an action by a *bona fide* purchaser of certificates of indebtedness of a municipality that after their redemption and cancellation they were stolen and the cancellation marks removed. District of Columbia *v.* Cornell, 130 U. S. 655, 9 S. Ct. 694, 32 L. ed. 1041. See also Knight *v.* Lanfear, 7 Rob. (La.) 172, where a treasury note, canceled and put in circulation by one who had stolen it, was sold without recourse, and it was held that the vendee might recover the price from the vendor.

9. Steadwell *v.* Morris, 61 Ga. 97; Miller *v.* Butler, 1 Cranch C. C. (U. S.) 470, 17 Fed. Cas. No. 9,565.

10. Burrows *v.* Western Union Tel. Co., 86 Minn. 499, 90 N. W. 1111.

11. Wildermann *v.* Donnelly, 86 Minn. 184, 90 N. W. 366; Blain *v.* Oliphant, 9 U. C. Q. B. 473.

Where maker and payee intended that the note should bear no interest, and in pursuance of such intention omitted to insert any reference to interest, erroneously supposing that such omission would accomplish this end, the mistake will be corrected in equity at the instance of the maker, where the action is brought by one not a *bona fide* purchaser. Loudermilk *v.* Loudermilk, 98 Ga. 780, 25 S. E. 927.

12. Shinn *v.* Fredericks, 56 Ill. 439; Sharps *v.* Eccles, 5 T. B. Mon. (Ky.) 69; Walden *v.* Webber, 15 Ky. L. Rep. 846; Stevens *v.* Parker, 5 Allen (Mass.) 333. See also Davis *v.* Smith, 1 Phila. (Pa.) 46, 7 Leg. Int. (Pa.) 46.

13. See *supra*, XI, E, 1 [7 Cyc. 1039].

14. *Alabama.*— Capital City Ins. Co. *v.* Quinn, 73 Ala. 558; Barbour *v.* Washington F. & M. Ins. Co., 60 Ala. 433.

Colorado.— Campbell *v.* Equitable Securities Co., (Colo. App. 1902) 68 Pac. 788.

Delaware.— Sudler *v.* Collins, 2 Houst. (Del.) 538.

Georgia.— Haug *v.* Riley, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 244; University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467; Wilcox *v.* Aultman, 64 Ga. 544, 37 Am. Rep. 92. See also Roswell Mfg. Co. *v.* Hudson, 72 Ga. 24.

Illinois.— Hunter *v.* Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Mobley *v.* Ryan, 14 Ill. 51, 56 Am. Dec. 488; Avery *v.* Swords, 28 Ill. App. 202; McClelland *v.* Bartlett, 13 Ill. App. 236; Knebelcamp *v.* Smith, 3 Ill. App. 243.

Iowa.— City Bank *v.* Taylor, 60 Iowa 66, 14 N. W. 128; Lathrop *v.* Donaldson, 22 Iowa 234; Wilkinson *v.* Sargent, 9 Iowa 521; Jefferson County *v.* Fox, Morr. (Iowa) 48.

Louisiana.— Doll *v.* Rizotti, 20 La. Ann. 263, 96 Am. Dec. 399, holding, however, that the instrument in the hands of a *bona fide* holder did not survive a mortgage which had been paid, but rendered it again enforceable, the mortgage having been canceled at the time of payment. *Compare* Murray *v.* Gibson, 2 La. Ann. 311, declaring Mississippi law.

Maryland.— Shriner *v.* Lamborn, 12 Md. 170.

Massachusetts.— Biggerstaff *v.* Marston, 161 Mass. 101, 36 N. E. 785; Tuttle *v.* Willington, Quincy (Mass.) 335; Russel *v.* Oakes, Quincy (Mass.) 48.

Michigan.— Texarkana Nat. Bank *v.* Stillwell, 121 Mich. 154, 79 N. W. 1093.

Mississippi.— Coffman *v.* Commonwealth Bank, 41 Miss. 212, 90 Am. Dec. 371.

Missouri.— Goodfellow *v.* Stillwell, 73 Mo. 17; Grant *v.* Kidwell, 30 Mo. 455.

Nebraska.— Yenney *v.* Central City Bank, 44 Nebr. 402, 62 N. W. 872.

New Hampshire.— Dow *v.* Rowell, 12 N. H. 49.

New York.— Buffalo Third Nat. Bank *v.* Bowman Spring, 50 N. Y. App. Div. 66, 63 N. Y. Suppl. 410; Harpending *v.* Gray, 76 Hun (N. Y.) 351, 27 N. Y. Suppl. 762, 59 N. Y. St. 92; Levy *v.* Temerson, 33 Misc. (N. Y.) 754, 67 N. Y. Suppl. 853; Mitchell *v.* Bristol, 10 Wend. (N. Y.) 492; Prior *v.* Jacocks, 1 Johns. Cas. (N. Y.) 169. See also Sanford *v.* Mickles, 4 Johns. (N. Y.) 224.

(XIV) *RETENTION OF COLLATERAL SECURITY.* The fact that plaintiff holds collateral security for the note in suit,[15] or that he has been so negligent in disposing of such collateral that the maker would have a cause of action against him therefor,[16] is not a good defense to an action at law, nor is it a defense against an indorser that plaintiff, by attaching the property of the maker, has thereby obtained a sufficient security to pay the note.[17] Nor would it be a defense that collateral delivered to a third party at the instance of plaintiff had been in the absence of authority from plaintiff collected by such party.[18]

(XV) *WANT OF TITLE OR INTEREST* — (A) *Of Authority to Prosecute.* It is a good defense that plaintiff is without authority to prosecute the action.[19]

(B) *Denial of Title or Ownership* — (1) IN GENERAL. There are decisions that a denial of ownership or an assertion that plaintiff was not the owner of the instrument at the time of the institution of the action, without more, presents a good defense;[20] and that defendant may contest plaintiff's title so far as it may be necessary to ascertain that a recovery by him will preclude further liability;[21] but if plaintiff is vested with the legal title he may maintain the action without regard to equities existing between himself and his assignor or indorser, and it is no defense that another is the equitable owner or beneficiary,[22] except where

Ohio.—Chappell *v.* Phillips, Wright (Ohio) 372; Allen *v.* Johnson, 20 Ohio Cir. Ct. 8, 11 Ohio Cir. Dec. 42.

Pennsylvania.—Runyan *v.* Reed, 5 Pa. L. J. Rep. 439.

Tennessee.— Gosling *v.* Griffin, 85 Tenn. 737, 3 S. W. 642.

Texas.— Cundiff *v.* McLean, 40 Tex. 391.

Wisconsin.— Jackson County Bank *v.* Parsons, 112 Wis. 265, 87 N. W. 1083.

See 7 Cent. Dig. tit. "Bills and Notes," § 956.

15. *District of Columbia.*—Ambler *v.* Ames, 1 App. Cas. (D. C.) 191.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

Nebraska.— Carson *v.* Buckstaff, 57 Nebr. 262, 77 N. W. 670.

New York.—Lee Bank *v.* Kitching, 7 Bosw. (N. Y.) 664, 11 Abb. Pr. (N. Y.) 435.

Pennsylvania.—Historical Pub. Co. *v.* Hartranft, 3 Pa. Super. Ct. 59, 39 Wkly. Notes Cas. (Pa.) 315; Gerlach *v.* Cammerer, 2 Wkly. Notes Cas. (Pa.) 67.

Canada.—Arthur *v.* Yeadon, 29 Nova Scotia 379. See also Simonds *v.* Travis, 13 N. Brunsw. 14.

See 7 Cent. Dig. tit. "Bills and Notes," § 1360.

16. Taggard *v.* Curtenius, 15 Wend. (N. Y.) 155. See also Moore *v.* Prussing, 165 Ill. 319, 46 N. E. 184; Girard F. & M. Ins. Co. *v.* Marr, 46 Pa. St. 504.

17. Amoskeag Bank *v.* Robinson, 44 N. H. 503. See also Bellows *v.* Lovell, 4 Pick. (Mass.) 153.

It is prima facie a defense in an action against an accommodation payee and indorser that plaintiff, at the request and approbation of the makers of the instrument in suit, sold another note executed by the makers and indorsed by defendant for their own accommodation, for the purpose of paying the note in suit, and that he realized enough from such sale to pay the same. Burrall *v.* Jones, 7 Bosw. (N. Y.) 404.

18. St. Paul, etc., Grain Co. *v.* Rudd, 102 Iowa 748, 71 N. W. 417.

19. Taylor *v.* Littell, 21 La. Ann. 665.

20. *California.*— Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331.

Michigan.— Reynolds *v.* Kent, 38 Mich. 246.

Missouri.— Merchants' Bank *v.* Fowler, 36 Mo. 33.

Nebraska.— Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.

New York.— Green *v.* Swink, 26 N. Y. Wkly. Dig. 574.

Ohio.— Gould *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 525, 8 Cinc. L. Bul. 281; Hengehold *v.* Gardner, 6 Ohio Dec. (Reprint) 822, 4 Cinc. L. Bul. 958, 8 Am. L. Rec. 352.

United States.— Boggs *v.* Wann, 58 Fed. 681.

21. Hays *v.* Hathorn, 74 N. Y. 486; Fletcher *v.* Fletcher, 29 Vt. 98; Hackett *v.* Kendall, 23 Vt. 275.

22. *Alabama.*— Hampton *v.* Shehan, 7 Ala. 295.

Illinois.— Caldwell *v.* Laurence, 84 Ill. 161.

Indiana.— Johnson *v.* Conklin, 119 Ind. 109, 21 N. E. 462; Crist *v.* Crist, 1 Ind. 570, 50 Am. Dec. 481; Butler *v.* Sturges, 6 Blackf. (Ind.) 186.

Massachusetts.— Brigham *v.* Marean, 7 Pick. (Mass.) 40.

Missouri.— Nicolay *v.* Fritschle, 40 Mo. 67; Cocker *v.* Cocker, 2 Mo. App. 451.

Nevada.— Hulley *v.* Chedic, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729.

New York.— Hays *v.* Southgate, 10 Hun (N. Y.) 511.

Pennsylvania.— Brown *v.* Clark, 14 Pa. St. 469.

Rhode Island.— Hutchings *v.* Reinhalter, 23 R. I. 518, 51 Atl. 429.

plaintiff's possession is *mala fides* and may work some prejudice to defendant.[23] Hence it is no defense that plaintiff is a mere pledgee.[24] But some cases permit the person sought to be charged to defend on the ground that plaintiff is not the real party in interest or that another is,[25] so as to let in a defense or permit a set-off against such other.[26] Thus it may be shown that the note in suit was transferred to the holder to avoid a defense which would be available but for the transfer, and that the transferrer is the real owner.[27]

(2) TRANSFER BY PLAINTIFF. That plaintiff has transferred the note in action or has parted with his interest therein presents a good defense.[28]

Tennessee.— Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805.

Texas.— Brown *v.* Chenoworth, 51 Tex. 469; Sanders *v.* Atkinson, 1 Tex. App. Civ. Cas. § 1325.

Vermont.— Ormsbee *v.* Kidder, 48 Vt. 361. See 7 Cent. Dig. tit. "Bills and Notes, § 1362.

Where in an action by the beneficiary, the holder appears, admits plaintiff's ownership, and disclaims title in himself, a defense that plaintiff is not the owner is of no avail. Simon *v.* Wildt, 84 Ky. 157.

Acquiescence of real owner.— Where the person claimed by defendant to be the real owner had full knowledge of the action and asserted no right to interfere, it was held that payment of the judgment to plaintiff, if permitted by the real owner of the note, would be a sufficient protection to defendant. Hackett *v.* Kendall, 23 Vt. 275.

Substitute note given to widow of payee of original.— It is no defense that the note in suit was given to plaintiff, the widow of the payee, in lieu of other notes given to the latter, since she might be acting either as executrix in her own wrong or might be entitled to the note as heir. Riley *v.* Loughrey, 22 Ill. 97.

23. Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805.

Fraud of creditors.— That the payee filed his petition in bankruptcy, and failed to include therein the note in suit, which he had assigned to plaintiff to collect for his benefit so as to enable him to defraud his creditors, does not show *mala fides*, so as to enable the maker to defeat the action on the ground that plaintiff has no title. Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805.

24. Unauthorized pledge.— The maker or accepter of a bill of exchange cannot set up that it was the property of a bank, and was pledged to plaintiff as security for a loan by the cashier, who had no authority so to pledge it. New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Pledge by administrator of notes of estate.— If an administrator transfers to his sureties, as security, notes belonging to the estate, the maker cannot dispute the pledgee's title, especially where, after the transfer, the sureties advanced money to pay a judgment against the estate. Rogers *v.* Squires, 98 N. Y. 49.

25. Wood *v.* Wellington, 30 N. Y. 218; Eaton *v.* Alger, 57 Barb. (N. Y.) 179.

Holder trustee for indorser.— An indorser may defend on the ground that the note was paid and that plaintiff holds it as a trustee for him. Maynard *v.* Nekervis, 9 Pa. St. 81.

Transfer of note of decedent by administrator.— It is a good defense that the note in suit belonged to the estate of a deceased person, and that plaintiff received it of the administrator in payment of an individual debt by the latter or in exchange for other property, with full knowledge of the facts. Prosser *v.* Leatherman, 4 How. (Miss.) 237, 34 Am. Dec. 121.

Prior action by claimants of subject-matter of note.— In an action by an administrator on a note given him for land bought by defendant at administrator's sale, a plea that the heirs were alone interested in the note, and that, after the sale, they brought suit against defendant for the land, and put him to great expense in defending the suit, presents no defense. Story *v.* Kemp, 51 Ga. 399.

26. McClure *v.* Litchfield, 11 Ala. 337; Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429; Lauve *v.* Bell, 1 La. 191; Childerston *v.* Hammon, 9 Serg. & R. (Pa.) 68.

Ownership in prior indorser.— To an action by the third against the second indorser, it is a sufficient defense that the payee, who is also first indorser, is the owner of the note and that the action is for his benefit. Oberle *v.* Schmidt, 86 Pa. St. 221.

27. See Lange *v.* Uhlmann, 47 Mo. App. 277; Eyre *v.* Yohe, 67 Pa. St. 477; Rice *v.* Abeles, 1 Wkly. Notes Cas. (Pa.) 38; Graphic Co. *v.* Marcy, 12 Phila. (Pa.) 218, 34 Leg. Int. (Pa.) 248; Lee *v.* Ware, 3 Rich. (S. C.) 193.

Permitting set-off.— Where defendant alleged that the transfer was fraudulently made to enable the payee to avoid paying money owed by him to defendant and asked to set off his claim against the note and plaintiff demurred, it was held that as the demurrer confessed the truth of the answer plaintiff would be regarded as holding the note in trust for her husband and defendant would be allowed to make the set-off. Hillhouse *v.* Adams, 57 Conn. 152, 17 Atl. 698.

28. Beebe *v.* Real Estate Bank, 5 Ark. 183; Gray *v.* Real Estate Bank, 5 Ark. 93; Gillispie *v.* Ft. Wayne, etc., R. Co., 12 Ind. 398; Waggoner *v.* Colvin, 11 Wend. (N. Y.) 27.

Pledge.— That plaintiff pledged the note in suit as collateral security for a debt of which he had since tendered payment and

(3) Irregularity in Acquisition by Plaintiff. It is a good defense that plaintiff did not acquire title by transfer from the true owner,[29] that the instrument was not transferred as alleged,[30] or that the transfer was not intended to divest the transferrer of his title[31] or was illegal;[32] but if plaintiff is a holder for value the maker cannot object to the irregularity of the transfer between the parties.[33]

(4) Necessity of Defense to Instrument. The title or interest of the holder of commercial paper cannot be disputed or inquired into unless necessary for the purpose of defense, and unless a meritorious defense is presented.[34] Thus it has been held that the maker cannot, as against an indorsee holder, defend upon the ground that the holder paid no value therefor, unless he is deprived of a defense available against the original holder or has been thereby defrauded of some right;[35] nor in the absence of such circumstances can the accepter of a bill

that the pledgee refused to receive it or to give up the note is no defense. Wolcott *v.* Boston Faucet Co., 9 Gray (Mass.) 376.

Assignment of recovery.— It is not a defense that after suit brought the claim and judgment which might be recovered was assigned without indorsement to a third person not made a party to the suit. Allen *v.* Newberry, 8 Iowa 65.

Necessity of showing assignee's title.—As signment of the note in suit is no defense without proof of a right to it in the assignee. Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087.

29. In an action against a firm on their indorsement it is a good defense that the indorser was not a member of the firm. Bank *v.* Castner, 9 Wkly. Notes Cas. (Pa.) 273.

Indorsement by widow of decedent holder. — It is a good defense that the note belongs to the estate of a former deceased holder and that the indorsement to plaintiff was made by the widow without taking out administration or otherwise acquiring any legal title. Stebbins *v.* Goldthwait, 31 Ind. 159.

30. Mechanics' Bank *v.* Fowler, 36 Mo. 33; Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.

31. Herrick *v.* Carman, 10 Johns. (N. Y.) 224; Hudson *v.* Walcott, 39 Ohio St. 618.

Assignment after maturity.— That defendant assigned the note to plaintiff after maturity, for the purpose of transferring it and for no other purpose, is insufficient, because no more than an averment that he assigned the note not intending to be liable as an assignor. Dunn *v.* Ghost, 5 Colo. 134.

32. Sproule *v.* Merrill, 29 Me. 260.

33. Wood *v.* Wellington, 30 N. Y. 218; Howland *v.* Bates, 3 Misc. (N. Y.) 609, 22 N. Y. Suppl. 557, 51 N. Y. St. 857 [*affirming* 1 Misc. (N. Y.) 91, 20 N. Y. Suppl. 373, 48 N. Y. St. 642].

Fraud of creditors.— That the transfer to plaintiff was in fraud of creditors is no defense. Sullivan *v.* Bonesteel, 79 N. Y. 631. But see Cross *v.* Brown, 51 N. H. 486, holding that the maker of a note, who is also administrator of the payee, may defend against the indorsee by showing that the consideration of the transfer was inadequate, and that therefore the indorsement was invalid as against the creditors of the payee, that the avails of the note are needed to pay debts of the payee, and that he, as administrator, claims the note to apply it for that purpose.

Transfer of note payable to firm.— It is not a defense to the maker of a note payable to a firm that it was transferred to plaintiff by one member thereof in payment of his individual debt. Drexler *v.* Smith, 30 Fed. 754.

34. *Alabama.*— Moore *v.* Penn, 5 Ala. 135.

California.— Price *v.* Dunlap, 5 Cal. 483; Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

Georgia.— Bomar *v.* Equitable Mortg. Co., 111 Ga. 143, 36 S. E. 601; Johnson *v.* Cobb, 100 Ga. 139, 28 S. E. 72; Varner *v.* Lamar, 9 Ga. 589; Hall *v.* Carey, 5 Ga. 239; Field *v.* Thornton, 1 Ga. 306; Nisbet *v.* Lawson, 1 Ga. 275.

Illinois.— Caldwell *v.* Lawrence, 84 Ill. 161.

Indiana.— Musselman *v.* Hays, 28 Ind. App. 360, 62 N. E. 1022.

Louisiana.— Case *v.* Watson, 21 La. Ann. 731; Ran *v.* Latham, 11 La. Ann. 276.

New York.— Aspinwall *v.* Meyer, 2 Sandf. (N. Y.) 180; Guernsey *v.* Burns, 25 Wend. (N. Y.) 411.

Pennsylvania.— Chamberlin *v.* Keeler, 15 Pa. Super. Ct. 236.

Texas.— Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

United States.— Lum *v.* Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743.

Canada.— Lemay *v.* Boissinot, 10 Quebec 90.

See 7 Cent. Dig. tit. "Bills and Notes," § 1362.

In Louisiana the bare denial of plaintiff's right to a negotiable instrument indorsed in blank cannot authorize the maker to contest the holder's title, unless it be alleged that the note was lost or stolen. McKinney *v.* Beeson, 14 La. 254.

35. *Alabama.*— Yeatman *v.* Mattison, 59 Ala. 382. See also Lea *v.* Cassen, 61 Ala. 312.

Illinois.— Burnap *v.* Cook, 32 Ill. 168.

Iowa.— See Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99, 1 Am. Rep. 256.

of exchange or draft set up want of consideration between the drawer and the payee.[36]

d. Set-Off — (1) *In General.* Actions on promissory notes form no exception to the rule that upon a proper showing a party should be allowed to counterclaim or set off certain demands which he may have against plaintiff;[37] but the doctrine of set off as applied to negotiable paper is restricted to the primary parties and their privies or parties with notice, and is not available against a *bona fide* holder.[38] Between original parties or those standing in their shoes the doctrine is more restricted than in some species of actions, as set-offs are not equities within the meaning of that term as used in commercial-paper phrascology;[39] and it has been held that an indorsee of an overdue note may enforce it against the maker, even though the indorsement is made for the express purpose of shutting out a set-off available against the indorser.[40] Only claims arising out of the

Missouri.— Powers *v.* Nelson, 19 Mo. 190; Banister *v.* Kenton, 46 Mo. App. 462; Goldstein *v.* Winkelman, 28 Mo. App. 432.

New York.— Forestville Baptist Soc. *v.* Farnham, 15 Hun (N. Y.) 381; Aspinwall *v.* Meyer, 2 Sandf. (N. Y.) 180; Snyder *v.* Gruniger, 77 N. Y. Suppl. 234.

Pennsylvania.— Heil *v.* Girard Bank, 30 Pa. St. 136; Burpee *v.* Smoot, 4 Wkly. Notes Cas. (Pa.) 186; Leib *v.* Lanigan, 2 Leg. Chron. (Pa.) 386.

Vermont.— Tarbell *v.* Sturtevant, 26 Vt. 513.

Wisconsin.— Anderson *v.* Johnson, 106 Wis. 218, 82 N. W. 177 [*affirming* Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710].

United States.—See Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

Canada.— Miller *v.* Ferrier, 7 U. C. Q. B. 540.

See 7 Cent. Dig. tit. "Bills and Notes," § 1347.

36. *Arkansas.*— Coolidge *v.* Burnes, 25 Ark. 241.

Colorado.— Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613.

Indiana.— Marsh *v.* Low, 55 Ind. 271.

Louisiana.— Smith *v.* Adams, 14 La. Ann. 409; Davidson *v.* Keyes, 2 Rob. (La.) 254, 38 Am. Dec. 209; Debuys *v.* Johnson, 4 Mart. N. S. (La.) 286.

Minnesota.— Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555.

New York.— Tompkins *v.* Carner, 8 N. Y. Suppl. 193, 27 N. Y. St. 264.

South Carolina.— Stoney *v.* Joseph, 1 Rich. Eq. (S. C.) 352.

See 7 Cent. Dig. tit. "Bills and Notes," § 1347.

The indorser can never inquire into the consideration, as between the maker and holder, unless the circumstances be such as make the note void against the maker himself, as in the case of usury. City Bank *v.* Barnard, 1 Hall (N. Y.) 70.

37. See Barker *v.* Barth, 192 Ill. 460, 61 N. E. 388; Huber *v.* Egner, 22 Ky. L. Rep. 1800, 61 S. W. 353; Prouty *v.* Musquiz, (Tex. Civ. App. 1900) 59 S. W. 568; Chisholm *v.* Chisholm, 3 Nova Scotia Dec. 85; Brooke *v.* Arnold, Taylor (U. C.) 25; Wright *v.* Cook, 9 U. C. Q. B. 605; Matthewson *v.* Carman, 1 U. C. Q. B. 266. See also RECOUPMENT, SET-OFF, and COUNTER-CLAIM.

38. *Indiana.*— Proctor *v.* Baldwin, 82 Ind. 370.

Kentucky.— Barbaroux *v.* Barker, 4 Metc. (Ky.) 47; Carothers *v.* Richards, 17 Ky. L. Rep. 42, 30 S. W. 211.

Maine.— Cabot *v.* Given, 45 Me. 144.

New York.— Brookman *v.* Metcalf, 32 N. Y. 591 [*affirming* 5 Bosw. (N. Y.) 429]; McGrath *v.* Pitkin, 56 N. Y. Suppl. 398; Dodge *v.* Ockerhausen, 22 N. Y. Suppl. 25, 51 N. Y. St. 196; Smith *v.* Van Loan, 16 Wend. (N. Y.) 659.

North Carolina.— United States Nat. Bank *v.* McNair, 116 N. C. 550, 21 S. E. 389.

Ohio.— Loomis *v.* Eagle Bank, 1 Disn. (Ohio) 285, 12 Ohio Dec. (Reprint) 625; Ross *v.* Johnson, 1 Handy (Ohio) 388, 12 Ohio Dec. (Reprint) 198.

Pennsylvania.— Young *v.* Shriner, 80 Pa. St. 463.

Texas.— Selkirk *v.* McCormick, 33 Tex. 136; Smith *v.* Turney, 32 Tex. 143.

United States.— Drexler *v.* Smith, 30 Fed. 754. See also Mandeville *v.* Union Bank, 9 Cranch (U. S.) 9, 3 L. ed. 639.

"An existing set-off," as used in the statutory provision providing that an indorsee takes a note subject to any existing set-off of which he has notice, means a set-off actually available at the time of the acquisition of the instrument; a possibility of a future set-off is not sufficient. Stites *v.* Hobbs, 2 Disn. (Ohio) 571.

39. Way *v.* Lamb, 15 Iowa 79; Ludwig *v.* Dearborn, 8 Pa. Dist. 69; Stewart *v.* Tizzard, 3 Phila. (Pa.) 362, 16 Leg. Int. (Pa.) 132.

If the action is joint the separate debt of plaintiff to the maker or indorser cannot be set off under a joint plea of set-off. Paterson *v.* Howison, 2 U. C. Q. B. 139.

40. Ludwig *v.* Dearborn, 8 Pa. Dist. 69; Oulds *v.* Harrison, 3 C. L. R. 353, 10 Exch. 572, 24 L. J. Exch. 66, 3 Wkly. Rep. 160, 28 Eng. L. & Eq. 524; Metropolitan Bank *v.* Snure, 10 U. C. C. P. 24. To a similar effect see Stewart *v.* Tizzard, 3 Phila. (Pa.) 362, 16 Leg. Int. (Pa.) 132.

same note or transaction connected with it can be set off in England,[41] Canada,[42] and in a number of American jurisdictions.[43] In other jurisdictions independent demands may be set off where in other respects the party is entitled to go into that defense;[44] and under a statute prohibiting the allowance of a discount when a note is made payable without defalcation or discount a maker of such note is not entitled to a set-off, although the indorsee had notice of such demand or took the note after maturity and dishonor.[45]

(II) *TIME OF ACQUISITION.* In some jurisdictions it would seem that a maker may set off a claim against the holder if he acquired it against the payee or transferrer before notice of the transfer.[46] But however the soundness of the reasoning on which this position is maintained may be questioned by some of our courts, it is well settled that a set-off, to be available against an indorsee, must have been acquired against the payee before the transfer;[47] and under some statutes the payee must also have had notice of the acquisition of such claim before he made the transfer.[48] Set-offs subsequently acquired, even though arising out of a previous transaction, cannot be set up;[49] but this rule does not apply to equities not constituting set-offs which grow out of the original transaction and are not discovered until after the transfer.[50]

41. Burrough *v.* Moss, 10 B. & C. 558, 5 M. & R. 296, 21 E. C. L. 238; Oulds *v.* Harrison, 3 C. L. R. 353, 10 Exch. 572, 24 L. J. Exch. 66, 3 Wkly. Rep. 160, 28 Eng. L. & Eq. 524; Whitehead *v.* Walker, 7 Jur. 330, 11 L. J. Exch. 168, 12 L. J. Exch. 28, 10 M. & W. 696.

42. Wood *v.* Ross, 8 U. C. C. P. 299; Hughes *v.* Snure, 22 U. C. Q. B. 597.

43. Elliott *v.* Deason, 64 Ga. 63; Ryan *v.* Chew, 13 Iowa 589; Shipman *v.* Robbins, 10 Iowa 208; Barnes *v.* McMullins, 78 Mo. 260; Cutler *v.* Cook, 77 Mo. 388; Murphy *v.* Arkansas, etc., Land, etc., Co., 97 Fed. 723. See also Betts *v.* Mix, 2 Miles (Pa.) 151. *Compare* Harris *v.* Burwell, 65 N. C. 584, where by virtue of the statute the English doctrine is departed from.

As to necessity for mutuality of obligations between parties see Crawford *v.* Beal, Dudley (Ga.) 204; Carman *v.* Garrison, 13 Pa. St. 158.

As to impropriety of setting up demand growing out of partnership between maker, payee, and third party, previous to an accounting, see Cummings *v.* Morris, 25 N. Y. 625 [*affirming* 3 Bosw. (N. Y.) 560].

44. Sargent *v.* Southgate, 5 Pick. (Mass.) 312, 16 Am. Dec. 409; Phipps *v.* Shegogg, 30 Miss. 241. See also Snow *v.* Fletcher, 43 N. H. 642.

45. Tillou *v.* Britton, 9 N. J. L. 120; Coryell *v.* Croxall, 5 N. J. L. 764.

46. Gary *v.* James, 7 Ala. 640; Rosenthal *v.* Rambo, 28 Ind. App. 265, 62 N. E. 637; Huber *v.* Egner, 22 Ky. L. Rep. 1800, 61 S. W. 353; Martin *v.* Trobridge, 1 Vt. 477. See also Barker *v.* Barth, 192 Ill. 460, 61 N. E. 388.

47. *Iowa.*— Campbell *v.* Rusch, 9 Iowa 337. But see Downing *v.* Gibson, 53 Iowa 517, 5 N. W. 699, where under a later statute the only requisites to the availability of a counter-claim as set-off is that it be acquired by defendant before notice of the transfer.

Kentucky.— Hunt *v.* Martin, 2 Litt. (Ky.) 82.

Massachusetts.— Backus *v.* Spaulding, 129 Mass. 234; Baxter *v.* Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707.

Minnesota.— Linn *v.* Rugg, 19 Minn. 181.

New York.— See Elwell *v.* Dodge, 33 Barb. (N. Y.) 336.

Ohio.— Whims *v.* Grove, 1 Ohio Cir. Dec. 59.

Texas.— Henderson *v.* Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35.

Vermont.— See Sherwood *v.* Francis, 11 Vt. 204.

Virginia.—Davis *v.* Miller, 14 Gratt. (Va.) 8.

United States.— Fossitt *v.* Bell, 4 McLean (U. S.) 427, 9 Fed. Cas. No. 4,958.

Canada.— McDonald *v.* Neville, 16 Nova Scotia 191; Thorne *v.* Haight, (Hil. T.) 6 Vict.

See 7 Cent. Dig. tit. "Bills and Notes," § 1354.

A judgment rendered against the payee before the indorsement and in favor of the maker may be set off against the judgment of the indorsee against the maker, under the statutes of Maine. Burnham *v.* Tucker, 18 Me. 179. See also Lewis *v.* Brooks, 12 Metc. (Mass.) 304 [*affirming* 9 Metc. (Mass.) 367].

48. Parker *v.* Kendall, 3 Vt. 540. To a similar effect see Bliss *v.* Houghton, 13 N. H. 126, construing Vermont statutes.

Necessity of indorsee giving notice.— Under the procedure of Alabama it is not necessary that the assignee of a note by indorsement or delivery should himself give notice to the maker of his acquisition of the instrument to exclude set-offs acquired subsequently to the assignment. Such set-offs cannot be urged if the maker is informed of the transfer by any party who knows of the fact. Crayton *v.* Clark, 11 Ala. 787.

49. Davis *v.* Neligh, 7 Nebr. 84.

50. Kyle *v.* Thompson, 11 Ohio St. 616.

(iii) *Between What Parties Available.* It is also well recognized by the courts that a claim, to be available as a set-off, must arise between other than intermediate parties. If the instrument has been indorsed several times the maker cannot, in an action by the holder, set off a claim which he may have against a prior indorsee,[51] although transferred to plaintiff after maturity,[52] unless so allowed by a contract between the parties founded on some new consideration.[53]

3. Right to Assert — a. Necessity of Rescission. Where a party seeks to defend on the ground of fraud or failure of consideration, he must, if he has received anything of value for the note, return the same or make a tender thereof before he can defeat the instrument as a cause of action, by offering such defenses as an absolute bar to the action,[54] unless by lapse of time or other circumstance the thing received has lost validity before the fraud is discovered;[55] but where the thing received as consideration is absolutely void or of no value no return is necessary.[56]

b. Estoppel to Assert. The principle of estoppel either by deed or *in pais*, as applied to negotiable paper, being intended to give credit and circulation to such security and to protect the honest holder thereof,[57] it follows that parties thereto are often estopped from asserting defenses which might otherwise have been available, but which, in the light of their previous acts or representations, are unfair, fraudulent, or prejudicial to plaintiff.[58] Thus an obligor may be

51. *Alabama.*— Bostick *v.* Scruggs, 50 Ala. 10; McKenzie *v.* Hunt, 32 Ala. 494; Stocking *v.* Toulmin, 3 Stew. & P. (Ala.) 35. See also Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67.

Mississippi.— Savage *v.* Laclede Bank, 62 Miss. 586.

New York.—Arrangoiz *v.* Frazer, 2 Hilt. (N. Y.) 244.

Ohio.— Lillie *v.* Bates, 3 Ohio Cir. Ct. 94, 2 Ohio Cir. Dec. 54.

South Carolina.— Perry *v.* Mays, 2 Bailey (S. C.) 354; English *v.* Nixon, 3 McCord (S. C.) 549.

Tennessee.— Hooper *v.* Spicer, 2 Swan (Tenn.) 494.

See 7 Cent. Dig. tit. "Bills and Notes," § 1355.

52. Favorite *v.* Lord, 35 Ill. 142; Root *v.* Irwin, 18 Ill. 147; Hooper *v.* Spicer, 2 Swan (Tenn.) 494.

53. Goldthwaite *v.* Montgomery First Nat. Bank, 67 Ala. 549; Kennedy *v.* Manship, 1 Ala. 43. See also Cumberland Bank *v.* Hann, 18 N. J. L. 222.

54. *Alabama.*— Gillespie *v.* Battle, 15 Ala. 276.

California.— Fitz *v.* Bynum, 55 Cal. 459.

Connecticut.— See Tottle *v.* Thomas, 12 Conn. 565.

Indiana.— Wood *v.* Ridgeville College, 114 Ind. 320, 16 N. E. 619; Heaton *v.* Knowlton, 53 Ind. 357; Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214.

Ohio.— Mellen *v.* Harvey, 6 Ohio S. & C. Pl. Dec. 15, 29 Cinc. L. Bul. 191.

Vermont.— Harrington *v.* Lee, 33 Vt. 249; Stone *v.* Peake, 16 Vt. 213.

England.—Archer *v.* Bamford, 1 L. J. K. B. O. S. 228, 3 Stark. 175, 3 E. C. L. 642.

See 7 Cent. Dig. tit. "Bills and Notes," § 1365.

55. Winslow *v.* Bailey, 16 Me. 319.

56. Taft *v.* Myerscough, 197 Ill. 600, 64 N. E. 711; Hubbard *v.* Rankin, 71 Ill. 129; Lee *v.* Ryder, 1 Kan. App. 293, 41 Pac. 221; Smith *v.* Smith, 30 Vt. 139; Waddell *v.* Jaynes, 22 U. C. C. P. 212.

57. Forbes *v.* Espy, 21 Ohio St. 474.

58. *Kentucky.*— Cassidy *v.* Martin Bank, 23 Ky. L. Rep. 208, 62 S. W. 528; Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

Louisiana.— Hood *v.* Frellsen, 31 La. Ann. 577.

Maine.— Maine Mut. Mar. Ins. Co. *v.* Blunt, 64 Me. 95; Howard *v.* Palmer, 64 Me. 86.

Michigan.— Roberts *v.* Wilkinson, 34 Mich. 129.

Missouri.— Wisdom *v.* Shanklin, 74 Mo. App. 428.

New York.— Monongahela Valley Bank *v.* Weston, 172 N. Y. 259, 64 N. E. 946.

Pennsylvania.— Williams *v.* Holmes, 1 Pennyp. (Pa.) 441.

Tennessee.— Hollandsworth *v.* Squires, (Tenn. Ch. 1900) 56 S. W. 1044.

Virginia.— Commercial Bank *v.* Cabell, 96 Va. 552, 32 S. E. 53.

Canada.— Irwin *v.* Freeman, 13 Grant Ch. (U. C.) 465; Merchants' Bank *v.* Lucas, 13 Ont. 520; Pratt *v.* Drake, 17 U. C. Q. B. 27.

See also Musselman *v.* McElhenny, 23 Ind. 4, 85 Am. Dec. 445; Carter *v.* Bolin, 11 Tex. Civ. App. 283, 32 S. W. 123.

An acceptance of a deed with warranty prevents the purchaser from setting up either fraud or failure of consideration in an action at law, as such deed imports a consideration. Starke *v.* Hill, 6 Ala. 785.

A judgment in an action of deceit against the holder of a note, the consideration of which was worthless mining stock, estops the indorser from interposing the deceit as a defense to an action on the note. Morrill *v.* Prescott, 64 N. H. 505, 15 Atl. 123.

estopped where the failure of consideration or defect alleged is occasioned by his non-compliance with his own agreement or obligation,[59] by executing the note with full knowledge of the defects in the consideration or of facts relieving him from his liability,[60] by making promises to pay, or by making partial payments after knowledge, actual or constructive, of the value and merits of the consideration,[61] by voluntarily placing his notes in the hands of another for negotiation,[62] by inducing plaintiff to purchase the same,[63] or by standing by and seeing the note indorsed to a party without having his offset or equity indorsed thereon.[64] Nor can the maker in the absence of fraud deny the corporate existence of the payee[65] or allege that the payee or indorsee is a fictitious person,[66] nor can an indorser or accepter set up against a *bona fide* holder that the signature of the maker, drawer, or prior indorser is a forgery;[67] but a denial of knowledge of the

A married woman is bound by an estoppel *in pais* like any other person, under the statutes of Indiana, and cannot therefore as against a subsequent *bona fide* purchaser claim ownership of notes which she had delivered under her blank indorsement. Shirk *v.* North, 138 Ind. 210, 37 N. E. 590.

A drawee accepting a draft for the accommodation of the indorser is not estopped from setting up usury as against the holder discounting such draft. Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. (N. Y.) 281, 21 How. Pr. (N. Y.) 279.

An admission that plaintiff obtained the note before maturity does not estop defendant from setting up the defense that such plaintiff is not a *bona fide* holder and that the consideration has failed. McDonald *v.* Mayer, 97 Ga. 281, 23 S. E. 72.

The drawer of a letter of credit is estopped to assert that it was invalid by reason of being transferred to the holder for a purpose different from that for which it was issued, where the holder accepted it in payment of a preëxisting debt from the purchaser, after being told by the drawer, with knowledge of the consideration for the intended transfer to the holder, that it was good. Johannessen *v.* Munroe, 158 N. Y. 641, 53 N. E. 535 [*affirming* 9 N. Y. App. Div. 409, 41 N. Y. Suppl. 586, 75 N. Y. St. 977].

59. Auten *v.* Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329; Cook *v.* Whitfield, 41 Miss. 541; Kolp *v.* Specht, 11 Tex. Civ. App. 685, 33 S. W. 714; Glassford *v.* McFaul, (Trin. T.) 3 & 4 Vict.

A delay of several years in claiming a failure of consideration and also an execution of a new note to the transferee does not estop the maker from showing that he did so on the supposition that the transfer was held for value, or from setting up the defense of failure of consideration where the transferee was in no way induced to change his situation in any manner. Kirkpatrick *v.* Muirhead, 16 Pa. St. 117.

60. Atlanta Consol. Bottling Co. *v.* Hutchinson, 109 Ga. 550, 35 S. E. 124; Edison General Electric Co. *v.* Blount, 96 Ga. 272, 23 S. E. 306; Colby *v.* Lyman, 4 Nebr. 429. *Aliter* where it is not shown that he had full knowledge of the defects, or had inspected the material; the defects therein being patent. Means *v.* Subers, 115 Ga. 371, 41 S. E. 633.

61. McCreary *v.* Parsons, 31 Kan. 447, 2 Pac. 570; Lewis *v.* Hodgdon, 17 Me. 267; Morgan *v.* Nowlin, 126 Mich. 105, 85 N. W. 468. See also Aspen First Nat. Bank *v.* Mineral Farm Consol. Min. Co., (Colo. App. 1902) 68 Pac. 981; Lambeth *v.* Kerr, 3 Rob. (La.) 144.

Application of rule.— A promise by an obligor to an assignee after the assignment to pay the note does not estop him from setting up an equity then unknown to him, as the assignee was not thereby induced by such promise to part with his money, and the obligor obtained no benefit by way of forbearance. Clay *v.* McClanahan, 5 B. Mon. (Ky.) 241. Nor would a promise by the maker of a note to pay the same, subsequently to maturity, defeat his defense of payment of excessive interest. Goins *v.* Taylor, 18 Ky. L. Rep. 468, 37 S. W. 68.

62. Yeomans *v.* Lane, 101 Ill. App. 228.

63. *Kentucky.*— Billington *v.* McColpin, 22 Ky. L. Rep. 1281, 60 S. W. 923, where the inducement to purchase was the indorsement made thereon by the maker.

Massachusetts.— Tobey *v.* Chipman, 13 Allen (Mass.) 123.

Tennessee.— Frame *v.* Tabler, (Tenn. Ch. 1898) 52 S. W. 1014.

Vermont.— Raymond *v.* Williams, 7 Vt. 230.

England.— Leach *v.* Buchanan, 4 Esp. 226. See also McLain *v.* Coulter, 5 Ark. 13; Brown *v.* Daggett, 22 Me. 30.

64. Firman *v.* Blood, 2 Kan. 496.

65. Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105.

66. Lane *v.* Krekle, 22 Iowa 399; Kohn *v.* Watkins, 26 Kan. 691, 40 Am. Rep. 336; Forbes *v.* Espy, 21 Ohio St. 474; Phillips *v.* Im Thurn, 18 C. B. N. S. 694, 114 E. C. L. 694.

67. *District of Columbia.*— Bowie *v.* Hume, 13 App. Cas. (D. C.) 286.

Kansas.— Cochran *v.* Atchison, 27 Kan. 728; Kohn *v.* Watkins, 26 Kan. 691, 40 Am. Rep. 336.

Kentucky.— Burgess *v.* Northern Bank, 4 Bush (Ky.) 600.

Louisiana.— Olivier *v.* Andry, 7 La. 496.

existence of equities against the note does not estop one from setting up defenses growing out of the original transaction, of which he had no knowledge at the time.[68]

4. To Whom Defense Inures. A defense pleaded by the makers will not as a rule inure as an answer of the indorser,[69] nor will an answer of the indorser inure to the benefit of the maker.[70] If the action is against the joint makers a defense personal to one of them will not inure to a co-maker;[71] but where the answer goes to the merits of the case defeating plaintiff's right to recover it inures to the benefit of the other defendants.[72]

C. Parties — 1. Parties Plaintiff — a. Who May Maintain Action — (I) *In General* — (A) *Rule Stated* — (1) Holder of Legal Title. To maintain an action on commercial paper it should as a general rule be brought by or under the authority of one having the legal title to the paper[1] and the possession

New York.— Turnbull *v.* Bowyer, 40 N. Y. 450, 100 Am. Dec. 523 [*affirming* 2 Rob. (N. Y.) 406]; Lennon *v.* Grauer, 2 N. Y. App. Div. 513, 38 N. Y. Suppl. 22, 74 N. Y. St. 451 [*affirmed* in 159 N. Y. 433, 54 N. E. 11]; Arnson *v.* Abrahamson, 16 Daly (N. Y.) 72, 9 N. Y. Suppl. 514, 30 N. Y. St. 657.

Pennsylvania.— Levy *v.* U. S. Bank, 1 Binn. (Pa.) 27, 4 Dall. (Pa.) 234, 1 L. ed. 814.

South Carolina.— Rambo *v.* Metz, 5 Strobh. (S. C.) 108, 53 Am. Dec. 694.

United States.— U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 6 L. ed. 334; U. S. *v.* U. S. Bank, 4 Dall. (U. S.) 235 note, 1 L. ed. 814.

Canada.—McLeod *v.* Carman, 12 N. Brunsw. 602; Choquette *v.* Leclaire, 19 Quebec Super. Ct. 521; Eastwood *v.* Westley, 6 U. C. Q. B. O. S. 55.

A maker who forged the indorsement of the payee and put the note in circulation is estopped as to a *bona fide* holder to deny the genuineness of the indorsement. Meacher *v.* Fort, 3 Hill (S. C.) 287, 30 Am. Dec. 364.

A surety who signs a note after the forged signatures of others cannot defend against an innocent holder. Selser *v.* Brock, 3 Ohio St. 302.

If a party has at any time paid other forged bills and notes of the same party, under similar circumstances to the ones presented in question, he is estopped thereby from affirming such forgery (Morris *v.* Bethell, L. R. 5 C. P. 47, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 137; Barber *v.* Gingell, 3 Esp. 60); but mere silence for a fortnight from the time when a party has learned of the forgery, during which the position of the holder is in no way altered or prejudiced, does not constitute an estoppel (McKenzie *v.* British Linen Co., 6 App. Cas. 82, 44 L. T. Rep. N. S. 43, 29 Wkly. Rep. 477 [*approved* in Freeman *v.* Cooke, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114]).

68. Clements *v.* Loggins, 2 Ala. 514.

69. Wolf *v.* Michael, 21 Misc. (N. Y.) 86, 46 N. Y. Suppl. 991; Alfred *v.* Watkins, Code Rep. N. S. (N. Y.) 343, 1 Edm. Sel. Cas. (N. Y.) 369.

70. Nevill *v.* Hancock, 15 Ark. 511.

71. Brant *v.* Barnett, 10 Ind. App. 653, 38 N. E. 421; Slevin *v.* Reynolds, 1 Handy (Ohio) 37, 12 Ohio Dec. (Reprint) 14.

72. Brant *v.* Barnett, 10 Ind. App. 653, 38 N. E. 421; Miller *v.* Longacre, 26 Ohio St. 291.

1. *Alabama.*— Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913; Tisdale *v.* Maxwell, 58 Ala. 40; Sykes *v.* Lewis, 17 Ala. 261; Moore *v.* Penn, 5 Ala. 135; Lea *v.* Mobile Branch Bank, 8 Port. (Ala.) 119.

California.— Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331.

Connecticut.— New Haven Trust Co. *v.* Fitzpatrick, 74 Conn. 317, 50 Atl. 725; French *v.* Jarvis, 29 Conn. 347; Chaplin Soc. *v.* Canada, 8 Conn. 286; Brush *v.* Curtis, 4 Conn. 312.

Georgia.— Cooper *v.* Jones, 79 Ga. 379, 4 S. E. 916.

Illinois.— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560; Burnap *v.* Cook, 32 Ill. 168; Lockridge *v.* Nuckolls, 25 Ill. 178; Campbell *v.* Humphries, 3 Ill. 478.

Indiana.— Rich *v.* Starbuck, 51 Ind. 87; McNitt *v.* Hatch, 4 Blackf. (Ind.) 531. But see Judah *v.* Potter, 18 Ind. 224.

Iowa.— Mainer *v.* Reynolds, 4 Greene (Iowa) 187.

Kansas.— Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709.

Louisiana.— Burton *v.* Kron, 19 La. Ann. 107; Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521; Clannon *v.* Calhoun, 10 La. Ann. 460.

Maine.— Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266; Bragg *v.* Greenleaf, 14 Me. 395; Bradford *v.* Bucknam, 12 Me. 15.

Maryland.— Canfield *v.* McIlwaine, 32 Md. 94; Burckmyer *v.* Whiteford, 6 Gill (Md.) 1; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Massachusetts.— Cobb *v.* Tirrell, 141 Mass. 459, 5 N. E. 828; Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376; Towne *v.* Wason, 128 Mass. 517; Brigham *v.* Marean, 7 Pick. (Mass.) 40. But the holder, with the owner's consent, may maintain an action in his own name. Wheeler *v.* Johnson, 97 Mass. 39.

thereof[2] or the right to its possession;[3] but the holder of the legal title may sue thereon, although not the full owner, if the maker is not thereby prejudiced in his defense,[4] especially where such suit is at the request, or with the consent, of

Michigan.— Reynolds *v.* Kent, 38 Mich. 246; Blackwood *v.* Brown, 32 Mich. 104.

Minnesota.— Van Eman *v.* Stanchfield, 13 Minn. 75.

Mississippi.— Dease *v.* Reed, 24 Miss. 239; Dowell *v.* Brown, 13 Sm. & M. (Miss.) 43; Anderson *v.* Patrick, 7 How. (Miss.) 347.

New Hampshire.— Southwick *v.* Ely, 15 N. H. 541.

New York.— Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999, 47 N. Y. St. 661; Lockood *v.* Underwood, 16 Hun (N. Y.) 592; Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132; Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213; Waggoner *v.* Colvin, 11 Wend. (N. Y.) 27; Comstock *v.* Hoag, 5 Wend. (N. Y.) 600; Haxton *v.* Bishop, 3 Wend. (N. Y.) 13; Gregory *v.* Burrall, 2 Wend. (N. Y.) 391; Throop *v.* Cheeseman, 16 Johns. (N. Y.) 264.

North Carolina.— Howell *v.* McCracken, 87 N. C. 399.

Pennsylvania.— Oberle *v.* Schmidt, 86 Pa. St. 221.

South Carolina.— Richardson *v.* Gower, 10 Rich. (S. C.) 109; Mitchell *v.* Byrne, 6 Rich. (S. C.) 171.

Vermont.— Royce *v.* Nye, 52 Vt. 372.

Wisconsin.— Bicknell *v.* Tallman, 3 Pinn. (Wis.) 388.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362.

England.— Emmett *v.* Tottenham, 8 Exch. 884. 17 Jur. 509, 22 L. J. Exch. 281, 1 Wkly. Rep. 372; Junghluth *v.* Way, 1 H. & N. 71, 25 L. J. Exch. 257.

See 7 Cent. Dig. tit. "Bills and Notes," § 1377.

An administrator de bonis non who has never been in possession of a note given by the debtor of the intestate to a prior administrator cannot recover on the note. Brooks *v.* Mastin, 69 Mo. 58.

Assignee of pledgee.— One who claims title to a promissory note, pledged as collateral security, as the assignee of such pledgee, cannot maintain an action thereon unless he shows that he also owns the debt to secure which it is pledged. Van Eman *v.* Stanchfield, 13 Minn. 75.

Independently of statute, equitable and beneficial owners can bring action only in the name of the party holding the legal title. Hudson *v.* Weir, 29 Ala. 294; Moore *v.* Penn, 5 Ala. 135; Garner *v.* Cook, 30 Ind. 331; Harriman *v.* Hill, 14 Me. 127; Lum *v.* Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743. *Compare* Simon *v.* Wildt, 84 Ky. 157, 7 Ky. L. Rep. 800. And see *contra*, Guest *v.* Rhine, 16 Tex. 549; Merlin *v.* Manning, 2 Tex. 351.

2. If it is actually held by a third party it will in general defeat his action (Hook *v.* Murdoch, 38 Mo. 224), since defendant is entitled to have it produced and surrendered on payment; and *a fortiori*, this is true where it is held adversely by another (Van Alstyne *v.* National Commercial Bank, 4 Abb. Dec. (N. Y.) 449; Crandall *v.* Schroeppel, 1 Hun (N. Y.) 557; Burton *v.* Dees, 4 Yerg. (Tenn.) 4).

The possession of a third party for plaintiff by agreement of the parties will not prevent plaintiff's recovery. Selden *v.* Pringle, 17 Barb. (N. Y.) 458. See also Gillett *v.* Ball, 9 Pa. St. 13.

Note in possession of pledgee.— The owner of a note may sue as indorsee although the note was, at the time of the indorsement to him, in the possession of another as pledgee of the indorser (Fisher *v.* Bradford, 7 Me. 28), but he cannot bring suit while the note is in the pledgee's possession (Felton *v.* Smith, 84 Ind. 485).

3. Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331.

The payee may recover on a check procured by another in his name for money due him and paid to such other person on his forging an indorsement of the payee's name. Dodge *v.* National Exch. Bank, 20 Ohio St. 234, 30 Ohio St. 1.

The pledgee of a note may sue upon it while still in the pledgor's possession, the recovery being as trustee for the pledgor for all excess above the amount due to the pledgee. Stones *v.* Butt, 2 Cr. & M. 416.

The tender to B of a note made by A, under the payee's agreement with B for goods purchased, makes it B's property and will support an action by B against A, although it was refused by B, and after being held some time for him was sold by the payee to C conditionally, and afterward destroyed by fire while still in the payee's possession. Des Arts *v.* Leggett, 16 N. Y. 582.

4. *Connecticut.*— Freeman *v.* Perry, 22 Conn. 617.

Illinois.— Lohman *v.* Cass County Bank, 87 Ill. 616; Richards *v.* Betzer, 53 Ill. 466.

Kentucky.— Brooking *v.* Clarke, 2 Litt. (Ky.) 197.

Louisiana.— Wood *v.* Hardy, 11 La. Ann. 760; Morgan *v.* Maddox, 8 Mart. N. S. (La.) 294; Findley *v.* Breedlove, 4 Mart. N. S. (La.) 105; Shaw *v.* Thompson, 3 Mart. N. S. (La.) 392.

Maine.— Southard *v.* Wilson, 29 Me. 56; Lowney *v.* Perham, 20 Me. 235.

Maryland.— Williamson *v.* Allen, 2 Gill & J. (Md.) 344.

Massachusetts.— Peaslee *v.* McLoon, 16 Gray (Mass.) 488.

New York.— Tibbetts *v.* Blood, 21 Barb. (N. Y.) 650.

Pennsylvania.— Hodge *v.* Comly, 2 Miles (Pa.) 286.

South Carolina.— Carroll *v.* Still, 13 S. C. 430.

the owner, as well as for his benefit,[5] although originally brought without his knowledge and subsequently adopted by him,[6] and defendant cannot question plaintiff's title, except on the ground of bad faith in plaintiff or prejudice to defendant's rights.[7] The owner may, however, maintain an action in the name of a nominal plaintiff[8] with the latter's consent.[9]

(2) REAL PARTY IN INTEREST — (a) IN GENERAL. Where, however, the statute requires suit to be brought by "the real party in interest," plaintiff must show himself to be such, and mere legal title is not sufficient,[10] although an equitable

Tennessee.— Barbee *v.* Williams, 4 Heisk. (Tenn.) 522.

Texas.— Zachary *v.* Gregory, 32 Tex. 452; Wimbish *v.* Holt, 26 Tex. 673; De Cordova *v.* Atchison, 13 Tex. 372; Andrews *v.* Hoxie, 5 Tex. 171; Fowler *v.* Willis, 4 Tex. 46; McMillan *v.* Croft, 2 Tex. 397; Thompson *v.* Cartwright, 1 Tex. 87, 46 Am. Dec. 95; Lewis *v.* Womack, (Tex. Civ. App. 1896) 33 S. W. 894; Wheeler *v.* Roberts, 2 Tex. App. Civ. Cas. § 127.

Vermont.— Hyde *v.* Lawrence, 49 Vt. 361.

United States.— Irwin *v.* Bailey, 8 Biss. (U. S.) 523, 13 Fed. Cas. No. 7,079, 11 Chic. Leg. N. 376, 8 Reporter 421.

See 7 Cent. Dig. tit. "Bills and Notes," § 1377.

Any defense is admissible in such an action which would be available against the real owner. Farwell *v.* Tyler, 5 Iowa 535.

5. Spofford *v.* Norton, 126 Mass. 533; O'Brien *v.* Sauls, 2 Rich. (S. C.) 332; Austin *v.* Birchard, 31 Vt. 589.

6. Golder *v.* Foss, 43 Me. 364.

7. *Illinois.*— Caldwell *v.* Lawrence, 84 Ill. 161.

Louisiana.—Scionneaux *v.* Waguespack, 32 La. Ann. 283; Case *v.* Watson, 21 La. Ann. 731; Richardson *v.* Fenner, 10 La. Ann. 599.

New York.— Guernsey *v.* Burns, 25 Wend. (N. Y.) 411.

Pennsylvania.— Pearce *v.* Austin, 4 Whart. (Pa.) 489, 34 Am. Dec. 523.

Texas.— Thompson *v.* Cartwright, 1 Tex. 87, 46 Am. Dec. 95.

Want of corporate power.— Where suit is brought on a note by a national bank as purchaser defendant cannot question its title on the ground of a want of corporate power to purchase the paper. National Pemberton Bank *v.* Porter, 125 Mass. 333, 28 Am. Rep. 235.

Wrongful obtention of note.—Where a note was wrongfully obtained by the holder from the owner, defendant in a suit thereon was permitted to question plaintiff's title. Lockridge *v.* Nuckolls, 25 Ill. 178.

8. **Fictitious name.**— Suit may be brought by the true owner in a fictitious name. Epting *v.* Jones, 47 Ga. 622.

9. Ticonic Nat. Bank *v.* Bagley, 68 Me. 249; Demuth *v.* Cutler, 50 Me. 298; Patten *v.* Moses, 49 Me. 255; Golder *v.* Foss, 43 Me. 364; Skowhegan Bank *v.* Baker, 36 Me. 154; Franklin Bank *v.* Lawrence, 32 Me. 586; Gage *v.* Johnson, 20 Me. 437. *Contra,* Hampson *v.* Owens, 55 Md. 583; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Pitts *v.* Holmes, 10 Cush. (Mass.) 92; Ogilby *v.* Wallace, 2 Hall (N. Y.) 553; O'Brien *v.* Sauls, 2 Rich. (S. C.) 332. And see Stout *v.* Vause, 1 Rob. (Va.) 167, which, however, was a suit in equity, and the decision was based upon the general equity rule that all persons beneficially interested in the subject-matter of a suit must be made parties thereto.

In New York it has been held that suit may be brought in the name of a party having no interest, without his knowledge or assent. Gage *v.* Kendall, 15 Wend. (N. Y.) 640.

10. *Alabama.*— Crook *v.* Douglass, 35 Ala. 693.

Indiana.— Rich *v.* Starbuck, 51 Ind. 87; Mendenhall *v.* Baylies, 47 Ind. 575; Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316. See also Black *v.* Enterprise Ins. Co., 33 Ind. 223.

Kansas.— J. C. Bobart Commission Co. *v.* Buckingham, 62 Kan. 658, 64 Pac. 627.

Minnesota.— Rohrer *v.* Turrill, 4 Minn. 407; Helfer *v.* Alden, 3 Minn. 332.

New York.— Clark *v.* Phillips, 21 How. Pr. (N. Y.) 87; Parker *v.* Totten, 10 How. Pr. (N. Y.) 233.

North Carolina.—Andrews *v.* McDaniel, 68 N. C. 385.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; Clawson *v.* Cone, 2 Handy (Ohio) 67.

Pennsylvania.— Evans *v.* McHugh, 2 Woodw. Dec. (Pa.) 21. But see Anonymous, 7 Leg. Int. (Pa.) 11.

South Carolina.— Sullivan *v.* Hellams, 6 S. C. 184.

Texas.— Wheeler *v.* Roberts, 2 Tex. App. Civ. Cas. § 127.

United States.— Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31. But see Foss *v.* Nutting, 14 Gray (Mass.) 484, holding that the New York statute, requiring actions to be "prosecuted in the name of the real party in interest" will not govern an action brought in Massachusetts on such a transfer made in New York.

See 7 Cent. Dig. tit. "Bills and Notes," § 1387.

Action by individual partner to whom note given.— Under the New York code the payee of a note is entitled to maintain an action thereon in his own name, although the note may have been given to him as one of several copartners in a partnership transaction. Mynderse *v.* Snook, 1 Lans. (N. Y.) 488.

Note owned by voluntary association.—

title is.[11] If, however, the action is commenced by the real party in interest it will be sufficient, although the interest subsequently passes to another.[12]

(b) WHO IS REAL PARTY IN INTEREST. The real party in interest is the person beneficially entitled to the proceeds of the bill or note.[13] As a rule the holder is presumptively [14] the owner, and as such is the real party in interest and entitled to bring suit.[15]

Where it appears that a note belongs to a voluntary association of individuals and that plaintiff, although the note was given to him personally, has no real interest therein, an action cannot be maintained by him. Nightingale *v.* Barney, 4 Greene (Iowa) 106.

Note payable to use of county.— A note payable to another for the use of a county must be sued by the county, as by an individual in the same circumstances, in the name of the person who is the legal owner. Linn County *v.* Holland, 12 Mo. 127.

Successor in office.— Where a note was made to a designated person, agent of a county named, or his successor in office, etc., it was held that such person's successor could not sue upon the note in his own name, since a county agent is not a quasi-corporation. Upton *v.* Starr, 3 Ind. 508.

11. Bacon *v.* Scott, 154 Pa. St. 250, 26 Atl. 422; Seattle Nat. Bank *v.* Emmons, 16 Wash. 585, 48 Pac. 262.

12. Concord Granite Co. *v.* French, 3 N. Y. Civ. Proc. 56.

13. *Alabama.*— Tankersley *v.* Graham, 8 Ala. 247.

Iowa.— McDowell *v.* Bartlett, 14 Iowa 157.

Kansas.—Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

Kentucky.— Rogge *v.* Cassidy, 12 Ky. L. Rep. 54, 13 S. W. 716.

Massachusetts.— See Norcross *v.* Pease, 5 Allen (Mass.) 331.

Missouri.— Stillwell *v.* Hamm, 97 Mo. 579, 11 S. W. 252.

Nebraska.— Johnson *v.* Chilson, 29 Nebr. 301, 45 N. W. 462; Lacey *v.* Central Nat. Bank, 4 Nebr. 179.

New Hampshire.— Cameron *v.* Little, 13 N. H. 23.

New York.—Bell *v.* Tilden, 16 Hun (N. Y.) 346; Killmore *v.* Culver, 24 Barb. (N. Y.) 656; Cumings *v.* Morris, 3 Bosw. (N. Y.) 560 [*affirmed* in 25 N. Y. 625].

Texas.— McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

See 7 Cent. Dig. tit. "Bills and Notes," § 1388.

Beneficial and fiduciary interest.— In Madison Square Bank *v.* Pierce, 137 N. Y. 444, 32 N. E. 557, 51 N. Y. St. 175, 33 Am. St. Rep. 751, 20 L. R. A. 335 [*affirming* 62 Hun (N. Y.) 493, 17 N. Y. Suppl. 270, 42 N. Y. St. 832], defendant made his note payable to his own order and indorsed it to another who indorsed it to plaintiff. The receiver of the first indorsee paid part of the amount due on the note to plaintiff. It was held that plaintiff was entitled to recover the full amount of the note partly in his own right and partly as trustee for the receiver.

14. See *infra*, XIV, E, 1, d, (I).

15. *Colorado.*— Walsh *v.* Allen, 6 Colo. App. 303, 40 Pac. 473, although transferred after maturity.

Florida.— Smith *v.* Westcott, 34 Fla. 430, 16 So. 332.

Indiana.— Hancock *v.* Ritchie, 11 Ind. 48; Key *v.* Robinson, 8 Ind. 368.

Iowa.— Green *v.* Marble, 37 Iowa 95.

Kansas.—Linney *v.* Thompson, 3 Kan. App. 718, 45 Pac. 456.

Maryland.— Kunkel *v.* Spooner, 9 Md. 462, 66 Am. Dec. 332.

Minnesota.— Minnesota Thresher Mfg. Co. *v.* Heipler, 49 Minn. 395, 52 N. W. 33; Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

Missouri.— Willard *v.* Moies, 30 Mo. 142.

Montana.—Meadowcraft *v.* Walsh, 15 Mont. 544, 39 Pac. 914.

New York.— Cummings *v.* Morris, 25 N. Y. 625 [*affirming* 3 Bosw. (N. Y.) 560]; Callahan *v.* Crow, 91 Hun (N. Y.) 346, 36 N. Y. Suppl. 225, 70 N. Y. St. 799; Mynderse *v.* Snook, 53 Barb. (N. Y.) 234; James *v.* Chalmers, 5 Sandf. (N. Y.) 52 [*affirmed* in 6 N. Y. 209]; Savage *v.* Bevier, 12 How. Pr. (N. Y.) 166.

Washington.—Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

An indorsee for collection may sue upon the bill or note as the real party in interest. Lehman *v.* Press, 106 Iowa 389, 76 N. W. 818; Abell Note Brokerage, etc., Bond Co. *v.* Hurd, 85 Iowa 559, 52 N. W. 488; Elmquist *v.* Markoe, 45 Minn. 305, 47 N. W. 70; Eaton *v.* Alger, 47 N. Y. 345. But see Iselin *v.* Rowlands, 30 Hun (N. Y.) 488; Bell *v.* Tilden, 16 Hun (N. Y.) 346, in which latter case it was held that one having no other interest in a bill of exchange than that of collecting agent is not a real party in interest who can maintain an action thereon in his own name.

Receiver.— Where the members of a partnership have been enjoined from collecting a note and the maker has been enjoined from paying it to them a receiver appointed by such court and ordered to collect the note is the party really interested, within the meaning of Ala. Code, § 2129. Leonard *v.* Storrs, 31 Ala. 488.

Holder of note as collateral see *infra*, XIV, C, 1, a, (III), note 25.

Non-negotiable note.—In Missouri and New York the real owner of a promissory note not negotiable may maintain an action thereon in his own name (Bennett *v.* Pound, 28 Mo. 598; Allgoever *v.* Edmunds, 66 Barb. (N. Y.) 579), and where the payee sues on a non-negotiable note which is lost he will be pre-

(B) *Payee.* Suit upon unindorsed negotiable paper can be brought only by the payee or his personal representative, and in general the party entitled to sue is to be looked for in the instrument as the designated payee.[16] The payee cannot, however, maintain an action where an indorsee is the owner, without the latter's direction or consent,[17] and a plea that plaintiff has assigned the note sued on to another before suit is good,[18] but if the payee after assignment or indorsement has been obliged to take up the paper, his right of action thereon revives.[19]

(C) *Transferee* — (1) OF NEGOTIABLE PAPER — (A) IN GENERAL. In the absence of statute the holder of paper indorsed in full must sue in his own name,[20] and paper made payable to order must be indorsed by the payee to enable another party to sue upon it in his own name.[21] Hence where paper was improperly

sumed to be the owner (Price *v.* Dunlap, 5 Cal. 483).

16. *Illinois.*— Newman *v.* Ravenscroft, 67 Ill. 496.

Indiana.— Templin *v.* Krahn, 3 Ind. 373.

Maine.— Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583.

Missouri.— Nicolay *v.* Fritschle, 40 Mo. 67.

New York.— Hoxie *v.* Kennedy, 10 N. Y. St. 786.

Ohio.— Numlin *v.* Westlake, 2 Ohio 24.

Tennessee.— Vincent *v.* Groom, 1 Yerg. (Tenn.) 430.

Texas.— Allen *v.* Pannell, 51 Tex. 165.

Vermont.— Strong *v.* Riker, 16 Vt. 554.

See 7 Cent. Dig. tit. "Bills and Notes," § 1378.

Even where the payee has no interest he can recover thereon and will hold the amount when recovered for the benefit of the real owner. Rochelle *v.* Musson, 3 Mart. (La.) 73. See also Hoxie *v.* Kennedy, 10 N. Y. St. 786; Vincent *v.* Groom, 1 Yerg. (Tenn.) 430. But see Sullivan *v.* Hellams, 6 S. C. 184, where it was held that the payee of a sealed note could not, under the statute of South Carolina requiring a suit by the real party in interest, maintain an action thereon, where he sued for the use of another.

If a note is made to "the heirs of" a particular person, who is then living, the persons intended may bring suit (Bacon *v.* Fitch, 1 Root (Conn.) 181); and it has even been held that the heirs of a person named may accept, and sue in the executor's name on a note made payable to the executor of such person (Turnbull *v.* Freret, 5 Mart. N. S. (La.) 703).

17. *Arkansas.*— Purdy *v.* Brown, 4 Ark. 535.

Georgia.— Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

Kentucky.— Betz *v.* Altemeyer, 1 Ky. L. Rep. 281.

Louisiana.— Guilfont *v.* Ascension Parish, 28 La. Ann. 413; Moore *v.* Moxwell, 2 Mart. N. S. (La.) 249.

Maine.— Bragg *v.* Greenleaf, 14 Me. 395.

Maryland.— Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Mississippi.— Lake *v.* Hastings, 24 Miss. 490.

Pennsylvania.— Small *v.* Jones, 8 Watts (Pa.) 265.

Texas.— Anderson *v.* Shaw, 2 Tex. Unrep. Cas. 285.

Special indorsement.— A note indorsed specially cannot be given in evidence to support an action in the name of the original payee. Smith *v.* Runnells, Walk. (Miss.) 144. See also Spence *v.* Robinson, 35 W. Va. 313, 13 S. E. 1004. *Contra,* Dean *v.* Warnock, 98 Pa. St. 565.

Where suit is brought in the name of the payee for the use of another to whom the instrument appears to have been regularly indorsed, the form of the action is an acknowledgment that the indorser is the owner of the note and the suit cannot be supported by the payee. Hunt *v.* Stewart, 7 Ala. 525. And see Bullock *v.* Ogburn, 13 Ala. 346, where it was held that in an action on a note in the name of the payee for the use of an assignee of the note, if the assignment is stricken out pending suit, the legal title does not revest in the payee so as to enable him to recover.

18. Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252; Campbell *v.* Humphries, 3 Ill. 478; Brady *v.* Chandler, 31 Mo. 28; Thomas *v.* Wash, 1 Mo. 665.

19. Campbell *v.* Humphries, 3 Ill. 478.

Right of prior holder to sue notwithstanding indorsement see *supra,* VI, C, 1, a, (III), (B) [7 Cyc. 797].

20. Sater *v.* Hendershott, Morr. (Iowa) 118; Lawrance *v.* Fussell, 77 Pa. St. 460.

21. *Arkansas.*— Taylor *v.* Coolidge, 17 Ark. 454.

Connecticut.— Freeman *v.* Perry, 22 Conn. 617.

Florida.— Hooker *v.* Gallagher, 6 Fla. 351.

Georgia.— Benson *v.* Abbott, 95 Ga. 69, 22 S. E. 127; Columbus Nat. Bank *v.* Leonard, 91 Ga. 805, 18 S. E. 32.

Indiana.— Lewis *v.* Hathman, 7 Ind. 585.

Louisiana.— Scott *v.* McDougall, 14 La. Ann. 309.

Maine.— Durgin *v.* Bartol, 64 Me. 473; Smalley *v.* Wight, 44 Me. 442, 69 Am. Dec. 112.

Massachusetts.— Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

Michigan.— Minor *v.* Bewick, 55 Mich. 491, 22 N. W. 12; Robinson *v.* Wilkinson, 38 Mich. 299.

New Jersey.— Fine *v.* High Bridge M. E. Church Assoc., 44 N. J. L. 148.

transferred by assignment or delivery, without indorsement, suit should be brought in the name of the payee or last holder of the legal title for the benefit of the holder.[22] This statement, however, is subject to modification under the statutes already referred to requiring the action to be brought by the real party in interest,[23] under which statutes a holder, although without formal indorsement, may sue in his own name,[24] especially where the title of the holder is admitted by

Pennsylvania.— Waters *v.* Millar, 1 Dall. (Pa.) 369, 1 L. ed. 180.

Rhode Island.— Hopkins *v.* Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387.

South Carolina.— Marvin *v.* McRae, Rice (S. C.) 171; Myers *v.* James, 2 Bailey (S. C.) 547.

Tennessee.— Dickson *v.* Cunningham, Mart. & Y. (Tenn.) 203.

Vermont.— Royce *v.* Nye, 52 Vt. 372.

England.— Whistler *v.* Forester, 14 C. B. N. S. 248, 32 L. J. C. P. 161, 8 L. T. Rep. N. S. 317, 11 Wkly. Rep. 648, 108 E. C. L. 248.

In New York, under the code, the owner of a promissory note can maintain an action on it in his own name against the makers, although not so indorsed that he could sue an indorsee under the rules of common law. Houghton *v.* Dodge, 5 Bosw. (N. Y.) 326.

In equity the holder of a note payable to order without indorsement has all the payee's or assignor's rights and may sue in his own name (Freeman *v.* Perry, 22 Conn. 617; Foreman *v.* Beckwith, 73 Ind. 515; Scott *v.* Metcalf, 13 Sm. & M. (Miss.) 563), although he has a remedy at law by suing in the name of his assignor (Taylor *v.* Reese, 44 Miss. 89).

Suit in equity — Proof of title.—Where the real owner of a bill or note transferred without indorsement brings suit in equity in his own name he must prove his title (Caldwell *v.* Meshew, 44 Ark. 564) and may make his transferrer a party to the action (Heartman *v.* Franks, 36 Ark. 501. See also Perry *v.* Seitz, 2 Duv. (Ky.) 122, holding this to be necessary).

22. *Alabama.*— Taylor *v.* Acre, 8 Ala. 491; Herndon *v.* Taylor, 6 Ala. 461; Planters, etc., Bank *v.* Willis, 5 Ala. 770; Elliott *v.* Montgomery, 4 Ala. 600.

Connecticut.— Freeman *v.* Perry, 22 Conn. 617.

Georgia.— Benson *v.* Abbott, 95 Ga. 69, 22 S. E. 127.

Louisiana.— Filhiol *v.* Jones, 8 Mart. (La.) 635.

Maine.— Marsh *v.* Hayford, 80 Me. 97, 13 Atl. 271. See also Harriman *v.* Hill, 14 Me. 127; Titcomb *v.* Thomas, 5 Me. 282, in which latter case the bill was made payable to the drawer and it was held that an action would lie for the benefit of the assignee against the accepter in the name of the drawer as on a bill payable to himself.

Maryland.— Hampson *v.* Owens, 55 Md. 583.

Massachusetts.— Tucker *v.* Tucker, 119 Mass. 79; Foss *v.* Nutting, 14 Gray (Mass.) 484; Stone *v.* Hubbard, 7 Cush. (Mass.) 595; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387.

Mississippi.— Eckford *v.* Hogan, 44 Miss. 398; Taylor *v.* Reese, 44 Miss. 89. See also Haynes *v.* Ezell, 25 Miss. 242.

New Hampshire.— Dunn *v.* Meserve, 58 N. H. 429.

North Carolina.— Dibble *v.* Scott, 58 N. C. 164.

Ohio.— Numlin *v.* Westlake, 2 Ohio 24.

Pennsylvania.— Jones *v.* Martins, 13 Pa. St. 614.

Rhode Island.— Mechanics' Sav. Bank *v.* Goff, 13 R. I. 516.

Tennessee.— Lynn *v.* Glidwell, 8 Yerg. (Tenn.) 1; Nelson *v.* Marly, 2 Yerg. (Tenn.) 576.

Vermont.— Royce *v.* Nye, 52 Vt. 372, where it was held that there could not even be a recovery upon the common counts.

England.— Chalmers *v.* Page, 3 B. & Ald. 697, 5 E. C. L. 400; Pease *v.* Hirst, 10 B. & C. 122, 5 M. & R. 88, 21 E. C. L. 61.

If the payee is dead, a holder, without indorsement from his widow, should sue in the name of his legal representatives at law and not in equity. Nash *v.* Hogan, 45 N. J. Eq. 108, 16 Atl. 433. But see Taylor *v.* Reese, 44 Miss. 89, where it was held that where the legal holder transferred the note without indorsement, afterward died intestate, and no legal representative had since been appointed, the owner might sue in equity in his own name.

Intervention by real owner.— The real owner by delivery without indorsement may intervene, in Indiana, by a cross complaint in a suit brought against the maker by a subsequent indorsee and have his rights determined in such suit. Clark *v.* Brown, 70 Ind. 405.

Effect of payment to and surrender by payee.— Where a note has been paid to and surrendered by the payee without indorsement his name cannot afterward be used in an action brought for the use of the party paying, notwithstanding the payee's subsequent consent to the suit. Merrimack Bank *v.* Parker, 7 Pick. (Mass.) 88.

23. See *supra*, XIV, C, 1, a, (I), (A), (2), (a).

24. *Alabama.*—Grantham *v.* Payne, 77 Ala. 584.

Indiana.— Gillispie *v.* Ft. Wayne, etc., Co., 12 Ind. 398. See also Foreman *v.* Beckwith, 73 Ind. 515, holding that the holder of a note payable at a bank in Indiana, who has taken it from the payee by delivery only, has an equitable title thereto and may bring suit

the answer,[25] and it is sufficient if the note is payable to a partnership and is delivered to plaintiff by one partner,[26] if it is delivered by the payee with an express refusal to indorse it,[27] or even if it was payable to a corporation and still held by it at the time of its dissolution.[28] By force of statute in many states, moreover, an assignee may bring suit in his own name;[29] and this is allowed

thereon in his own name by making the payee a party defendant.

Kansas.— Weeks *v.* Medler, 20 Kan. 57.

Missouri.— Harvey *v.* Brookes, 36 Mo. 493; Brady *v.* Chandler, 31 Mo. 28; Willard *v.* Moies, 30 Mo. 142; Lewis *v.* Bowen, 29 Mo. 202; Boeka *v.* Nuella, 28 Mo. 180.

New York.— Billings *v.* Jane, 11 Barb. (N. Y.) 620; Brooklyn Cent. Bank *v.* Lang, 1 Bosw. (N. Y.) 202; Savage *v.* Bevier, 12 How. Pr. (N. Y.) 166.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601; Robertson *v.* Dunn, 87 N. C. 191; Jackson *v.* Love, 82 N. C. 405, 33 Am. Rep. 685; Willey *v.* Gatling, 70 N. C. 410; Andrews *v.* McDaniel, 68 N. C. 385.

Oregon.— Moore *v.* Miller, 6 Oreg. 254, 25 Am. Rep. 518.

Purchase at assignee's sale.— In Massachusetts one who purchases at an assignee's sale acquires the legal title without indorsement and may sue in his own name. Stone *v.* Hubbard, 7 Cush. (Mass.) 595.

Warrant to confess judgment.— The owner of a note without indorsement may take judgment under a warrant to confess judgment in favor of the holder. Clements *v.* Hull, 35 Ohio St. 141.

25. Fenwick *v.* Phillips, 3 Metc. (Ky.) 87.

26. Bartholow, etc., Banking House *v.* St. Joseph Lead Co., 12 Mo. App. 587.

27. Van Riper *v.* Baldwin, 19 Hun (N. Y.) 344.

28. Hyde *v.* Lawrence, 49 Vt. 361.

29. *Alabama.*— Morris *v.* Poillon, 50 Ala. 403.

Iowa.— Warnock *v.* Richardson, 50 Iowa 450; Allison *v.* Barrett, 16 Iowa 278.

Missouri.— McGee *v.* Riddlesbarger, 39 Mo. 365; Harvey *v.* Brooke, 36 Mo. 493; Bennett *v.* Pound, 28 Mo. 598.

New Hampshire.— Hunt *v.* Aldrich, 27 N. H. 31.

New York.— Callahan *v.* Crow, 91 Hun (N. Y.) 346, 36 N. Y. Suppl. 225, 70 N. Y. St. 799.

North Carolina.— Wilcoxon *v.* Logan, 91 N. C. 449. *Compare* Abrams *v.* Cureton, 74 N. C. 523, where it was held that the assignee could not sue in his own name, the assignment having been without consideration and for the benefit of the assignor or in effect a power to collect. But see Jones *v.* Yeargain, 12 N. C. 420, where it was held that where the purchaser of goods transfers without indorsement a note in payment, he makes the transferee his agent to sue thereon in his name. And see Sutton *v.* Owen, 65 N. C. 123.

South Carolina.— Ware *v.* Key, 2 McCord (S. C.) 373, holding that the assignee of a negotiable instrument may sue either in his own name or in the name of the assignor.

See, generally, ASSIGNMENTS, 4 Cyc. 96 *et seq.*

Assignment in fraud of creditors.— Where the payee assigns a note in fraud of creditors and indorses on the note the amount alleged to be due to his assignee, the latter may recover against the maker in his own name and hold the balance as trustee for the payee. Eason *v.* Locherer, 42 Tex. 173.

Assignees and receivers.— The assignee in trust of a bank may bring suit in equity without the aid of the statute under the general assignment to him upon notes held by the bank and indorsed by it in blank. Whether an action at law would lie in the name of the assignee *quære* (Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264); and the maker cannot question the validity of the assignment by the bank (Shryock *v.* Basehore, 82 Pa. St. 159). It is sufficient if such assignment is valid by the *lex loci contractus*, although invalid by the *lex fori* (Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126). So a bank receiver may sue, and the irregularity of his assignment is no defense (Case *v.* Marchand, 23 La. Ann. 60); and the assignee of a corporation may sue under an assignment by its agent without seal, and if the assignment is not impeached he need not prove the authority of the agent (Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120). But a foreign assignee in insolvency has no power in general to bring suit in his own name. Brush *v.* Curtis, 4 Conn. 312.

Making a note payable to a named person "guardian of" another for an individual debt due to the former, will not prevent its subsequently passing to his assignee in bankruptcy, and a subsequent transfer to his bondsmen or his ward will not enable them to bring suit. Beeson *v.* Shively, 28 Kan. 574.

A note may be transferred by a foreign executor and his assignee may sue. Campbell *v.* Brown, 64 Iowa 425, 20 N. W. 745, 52 Am. Rep. 446.

Discharge in bankruptcy — New promise to assignor.— The assignee of a note payable to bearer cannot bring suit against a maker who has been discharged in bankruptcy on a new promise made by the bankrupt to plaintiff's assignor. Moore *v.* Viele, 4 Wend. (N. Y.) 420.

New promise to accommodation accepter.— If a bill is taken up by an accommodation accepter his assignee may bring suit against the drawer in his own name on an express promise of payment made to him. De Barry *v.* Withers, 44 Pa. St. 356.

in the case of the assignment by separate instrument of a note under seal,[30] or the assignment of a note or bill by a trust deed.[31] Where, however, a note is not transferable, as in the case of a note made to a public officer for public dues or fines, an assignment confers no right of action upon the assignee.[32] As a general rule therefore the indorsee[33] or assignee of a negotiable instrument[34] may sue thereon in his own name[35] if he is the owner,[36] although the indorsement be after

Where two notes are assigned to different parties their interest is separate and they cannot sue jointly upon the notes, although secured by one mortgage. Swenson *v.* Moline Plow Co., 14 Kan. 387.

30. Thornton *v.* Crowther, 24 Mo. 164. See also Morris *v.* Poillon, 50 Ala. 403, holding that, although an assignment was made upon a separate paper and the note assigned was at the time in the hands of an unlawful holder, the assignee might sue in his own name.

31. Nelson *v.* Eaton, 26 N. Y. 410.

32. Bates *v.* Butler, 46 Me. 387. See also Ranney *v.* Brooks, 20 Mo. 105, where it was held that a note taken to a sheriff by order of court and ordered to be paid to his successor could not be sued on by an assignee of the sheriff.

33. Nominal indorsee.— A payee of a note may assign and indorse the same in writing to a nominal indorsee as legal holder, for the purpose of suit, under Wash. Code, § 15, providing that any assignee of a "specialty, book-account, or other chose in action" may, by virtue of the assignment thereof in writing, maintain an action in any court in his own name, notwithstanding the assignor may have an interest in the thing assigned, provided that the debtor may offset any claim against the original owner. McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

34. Sealed note.— The indorsee of a note under seal may maintain debt on it against the maker, since there is a privity of contract between the parties. Hazlett *v.* Painter, Tapp. (Ohio) 212. See also Lamkin *v.* Nye, 43 Miss. 241; Hamilton *v.* Cunningham, Tapp. (Ohio) 257.

Town orders.— Although no authority is expressly given by statute to selectmen to issue a negotiable order, yet town orders made payable to the order of the payee and accepted by the treasurer and indorsed by the payee, may be sued in the name of the indorsee. Emery *v.* Mariaville, 56 Me. 315.

35. Indorsed or assigned to a person by a wrong name, he may sue upon it in his true name, averring the mistake, and establishing by evidence at the trial that he was the person intended. Taylor *v.* Strickland, 37 Ala. 642; Lafferty *v.* Lafferty, 10 Ark. 268; Chenot *v.* Lefevre, 8 Ill. 637. See also Robb *v.* Bailey, 13 La. Ann. 457, holding that where a note made to S. Robb & Co. was sued by S. Robb, he was bound to prove that he alone composed the firm.

36. *Alabama.*— Morris *v.* Poillon, 50 Ala. 403; Barclay *v.* Moore, 17 Ala. 634; Pond *v.* Lockwood, 8 Ala. 669.

Arkansas.— Pike *v.* Galloway, 17 Ark. 90.

Connecticut.— Goff *v.* Billinghurst, 2 Root (Conn.) 527; Bowne *v.* Olcott, 2 Root (Conn.) 353, which hold that an indorsee of a note executed and indorsed in another state may bring an action on it in his own name in Connecticut, although by the laws of that state such note may not be negotiable.

Illinois.— Forster *v.* New Albany Second Nat. Bank, 61 Ill. App. 272.

Indiana.— Kimball *v.* Whitney, 15 Ind. 280.

Iowa.— Richards *v.* Daily, 34 Iowa 427; Phillips *v.* Runnels, Morr. (Iowa) 391, 43 Am. Dec. 109.

Kansas.— Linney *v.* Thompson, 3 Kan. App. 718, 45 Pac. 456.

Kentucky.— Prather *v.* Weissiger, 10 Bush (Ky.) 117; Instone *v.* Williamson, 2 Bibb (Ky.) 83.

Louisiana.— Jones *v.* Elliott, 4 La. Ann. 303, where the note was assigned by a separate instrument.

Maine.— Emery *v.* Mariaville, 56 Me. 315.

Massachusetts.— Cotting *v.* Foster, 178 Mass. 564, 60 N. E. 386; Sanger *v.* Stimpson, 8 Mass. 260; Van Staphorst *v.* Pearce, 4 Mass. 258.

Michigan.— Stevens *v.* Hannan, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125.

Minnesota.—Rosemond *v.* Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. Rep. 336; Elmquist *v.* Markoe, 45 Minn. 305, 47 N. W. 970.

Mississippi.— Jenkins *v.* Sherman, 77 Miss. 884, 28 So. 726.

Missouri.— McGee *v.* Riddlesbarger, 39 Mo. 365; Brady *v.* Chandler, 31 Mo. 28; McClain *v.* Weidemeyer, 25 Mo. 364; Thornton *v.* Crowther, 24 Mo. 164.

New York.— Nelson *v.* Eaton, 26 N. Y. 410; Callahan *v.* Crow, 91 Hun (N. Y.) 346, 36 N. Y. Suppl. 225, 70 N. Y. St. 799; Clark *v.* Tyron, 4 Misc. (N. Y.) 63, 23 N. Y. Suppl. 780, 53 N. Y. St. 123; Henschel *v.* Mahler, 3 Den. (N. Y.) 428; U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374; Lodge *v.* Phelps, 2 Cai. Cas. (N. Y.) 321.

North Carolina.— Wilcoxon *v.* Logan, 91 N. C. 449.

Ohio.— Hamilton *v.* Cunningham, Tapp. (Ohio) 257; Hazlett *v.* Painter, Tapp. (Ohio) 212.

Pennsylvania.—Kyner *v.* Shower, 13 Pa. St. 444; Leidy *v.* Tammany, 9 Watts (Pa.) 353.

South Carolina.— Farmer *v.* Baker, 3 Brev. (S. C.) 548.

Texas.— Smith *v.* Clopton, 4 Tex. 109; Bennett *v.* Carsner, 1 Tex. App. Civ. Cas. § 618.

Washington.—McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

maturity,[37] and should not bring his action in the name of his indorser.[38] An indorsee, however, may maintain an action in the name of the payee with the latter's consent,[39] which may be given pending trial,[40] and can sue in the name of the payee where the note was overdue when transferred.[41] So if the maker of a note transfers it for a valuable consideration to a third person, not the payee, that person may, with the consent of the payee, maintain an action upon it in his name.[42]

(b) Effect of Transfer Pending Suit — aa. *By Plaintiff.* In a few cases it has been held that if plaintiff transfers a bill or note after commencing suit his suit will abate.[43] The weight of authority, however, is to the contrary, and it has been variously held that the suit may be continued in the name of the original

Wyoming.— Stamper *v.* Gay, 3 Wyo. 322, 23 Pac. 69.

United States.— Kirkman *v.* Hamilton, 6 Pet. (U. S.) 20, 8 L. ed. 305; Inwin *v.* Bailey, 8 Biss. (U. S.) 523, 13 Fed. Cas. No. 7,079, 11 Chic. Leg. N. 376, 8 Reporter 421; Muir *v.* Jenkins, 2 Cranch C. C. (U. S.) 18, 17 Fed. Cas. No. 9,903; Home *v.* Semple, 3 McLean (U. S.) 150, 12 Fed. Cas. No. 6,658; Mitchell *v.* Walker, 17 Fed. Cas. No. 9,670, 19 Alb. L. J. 182, 4 Cinc. L. Bul. 172, 2 Browne Nat. Bankr. Cas. 180, 25 Int. Rev. Rec. 64, 185, 26 Leg. Int. (Pa.) 74, 158, 26 Pittsb. L. J. 95, 7 Reporter 425, 8 Reporter 232.

See 7 Cent. Dig. tit. "Bills and Notes," § 1380.

Firm paper payable to member.— The indorsee of a bill or note made by a firm payable to one of its members and indorsed by him may maintain an action against the firm. Smyth *v.* Strader, 9 Port. (Ala.) 446; Hazelhurst *v.* Pope, 2 Stew. & P. (Ala.) 259; Smith *v.* Lusher, 5 Cow. (N. Y.) 688.

Where a bill is presented for acceptance by the indorsee and duly accepted, he may sue the accepter in his own name, although the bill was not payable to order and no payee was named therein. Van Staphorst *v.* Pearce, 4 Mass. 258.

Proof of special indorsement.— An indorsee may prove a special indorsement to himself from the payee, although he has averred that the note was indorsed in blank to another, by such other to the payee, and by the payee to himself. Martin *v.* Warren, 11 Ark. 285.

37. Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 488; Lyman *v.* Sherwood, 20 Vt. 42.

After dishonor.— The indorsement of a note to plaintiff after dishonor, under an agreement that he should bring action on it and give credit for whatever might be collected, invested plaintiff with the legal title to the note and authorized him to sue on it. Clark *v.* Tryon, 4 Misc. (N. Y.) 63, 23 N. Y. Suppl. 780, 53 N. Y. St. 123.

38. Jordan *v.* Thornton, 7 Ark. 224, 44 Am. Dec. 546; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

39. Lewis *v.* Hodgdon, 17 Me. 267; Mosher *v.* Allen, 16 Mass. 451. See also Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

The indorsee of a witnessed promissory note may maintain an action thereon, for his own use, in the name of the payee, against the maker, after the expiration of six years from the time when the cause of action accrued, if such action is brought with the consent of the payee, or he makes no objection thereto. Hodges *v.* Holland, 19 Pick. (Mass.) 43.

Indorser's consent question of fact.— It is for the jury to decide whether the indorser gave plaintiff permission to use his name and such permission may be implied. Lime Rock Bank *v.* Macomber, 29 Me. 564.

He cannot use the indorser's name without his consent, although he be but an agent of the previous bolder. Mitaine *v.* Ferguson, 18 La. 92; Peyroux *v.* Davis, 17 La. 479; Newton *v.* Turner, 5 La. 46, 25 Am. Dec. 173; West *v.* Wilson, 4 La. 219; Banks *v.* Eastin, 3 Mart. N. S. (La.) 291. But see Kimmins *v.* Wilson, 8 W. Va. 584; Thatcher *v.* Winslow, 5 Mason (U. S.) 58, 23 Fed. Cas. No. 13,863 (where it was held that a person cannot sue as an indorsee unless he be the owner of the note or have some legal or equitable interest therein, and that a mere agent to whom the note is indorsed by his principal for the benefit of the latter cannot maintain such suit).

40. Lewis *v.* Hodgdon, 17 Me. 267.

41. Jones *v.* Martins, 13 Pa. St. 614.

42. Bird *v.* Wooley, 23 Ala. 717; Granite Bank *v.* Ellis, 43 Me. 367.

Where a note is made payable to a bank, but is transferred to a third person, without being discounted by the bank, the holder may sue in the name of the bank for his own use. Graves *v.* Mississippi, etc., R. Co., 6 How. (Miss.) 548. See also Commercial Bank *v.* Claiborne, 5 How. (Miss.) 301.

43. Vila *v.* Weston, 33 Conn. 42; Curtis *v.* Bemis, 26 Conn. 1, 68 Am. Dec. 377; Lee *v.* Jilson, 9 Conn. 94; Planters' Bank *v.* Sharp, 4 Sm. & M. (Miss.) 17. *Compare* Comstock *v.* Savage, 27 Conn. 184, where it was held that parol evidence was admissible to show that a purchase and not a payment was intended, although made by a stranger and for an indorser of the note, and that the action might in such case continue for his benefit.

If the transfer is made with defendant's consent and with a power of attorney to the

plaintiff for the use of his transferee,[44] that the transferee may, in the discretion of the court, be substituted in the place of the transferrer,[45] or that he may be joined in the action as a party plaintiff,[46] provided in all cases that the rights of defendant are as fully protected as if no transfer had been made.[47] On the other hand an indorsee without notice of any pending suit may bring a fresh action in his own name,[48] although it has been held that an indorsee with notice could not do so.[49]

bb. *To Plaintiff.* An action on a promissory note cannot be supported by a title acquired subsequently to the commencement of the suit, but plaintiff must show that he had title when suit was commenced.[50] It is sufficient, however, if the note is indorsed or formally assigned to the real owner after the commencement of the action,[51] and, conversely, it has been held that in an action on a note brought in the name of the payee by the holder, the rights of the owner were in no wise diminished by his taking an indorsement of the note after suit brought.[52]

(c) Under Blank Indorsement. While the holder under a blank indorsement may bring suit in his own name,[53] it is necessary in some jurisdictions that he fill

indorsee to continue the suit for his own benefit, defendant will be estopped to object to its continuance. Central Bank *v.* Curtis, 26 Conn. 533.

44. *Alabama.*— Dolberry *v.* Trice, 49 Ala. 207.

Arkansas.— Ivey *v.* Drake, 36 Ark. 228.

District of Columbia.— Keyser *v.* Shepherd, 2 Mackey (D. C.) 66.

Kentucky.— Vanbuskirk *v.* Levy, 3 Metc. (Ky.) 133. But see Hall *v.* Gentry, 1 A. K. Marsh. (Ky.) 555.

Louisiana.— Duval *v.* Kellam, 1 Rob. (La.) 58.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

New York.— Arnold *v.* Keyes, 37 N. Y. Super. Ct. 135.

South Carolina.— Enston *v.* Friday, 2 Rich. (S. C.) 427.

Texas.— Dowell *v.* Mills, 32 Tex. 440.

See 7 Cent. Dig. tit. "Bills and Notes," § 1416.

If an intermediate indorser takes up a note after suit brought against the maker by his indorsee, the suit may continue for his use. Ticonic Nat. Bank *v.* Bagley, 68 Me. 249.

45. Ivey *v.* Drake, 36 Ark. 228; Jones *v.* Julian, 12 Ind. 274; Fannon *v.* Robinson, 10 Iowa 272; Ferry *v.* Page, 8 Iowa 455. *Contra*, Rothschild *v.* Bruschke, 33 Ill. App. 282 [*affirmed* in 131 Ill. 265, 23 N. E. 419].

46. Vanbuskirk *v.* Levy, 3 Metc. (Ky.) 133.

47. Fannon *v.* Robinson, 10 Iowa 272; Ferry *v.* Page, 8 Iowa 455; Duval *v.* Kellam, 1 Rob. (La.) 58; Newberry *v.* Trowbridge, 13 Mich. 263.

48. Colombies *v.* Slim, 2 Chit. 637, 18 E. C. L. 824; Jones *v.* Lane, 3 Jur. 265, 8 L. J. Exch. Eq. 41, 3 Y. & C. Exch. 281.

Prior action no defense.— The pendency of a prior action begun by his indorser will be no defense against an indorsee bringing an action in his own name. Deuters *v.* Townsend, 5 B. & S. 613, 10 Jur. N. S. 1072, 33 L. J. Q. B. 301, 10 L. T. Rep. N. S. 603, 12 Wkly. Rep. 1062, 117 E. C. L. 613.

49. Marsh *v.* Newell, 1 Taunt. 109.

50. Vila *v.* Weston, 33 Conn. 42; Moore *v.* Maple, 25 Ill. 341; Rothschild *v.* Bruschke, 33 Ill. App. 282 [*affirmed* in 131 Ill. 265, 23 N. E. 419]; Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122; Dowell *v.* Brown, 13 Sm. & M. (Miss.) 43; U. S. Bank *v.* Moore, 3 Cranch C. C. (U. S.) 330, 2 Fed. Cas. No. 930.

Indorsement after judgment against maker. — If judgment is rendered against the maker and the note is then taken up by the indorser and subsequently transferred to another indorsee the latter cannot bring suit as an ordinary indorsee against the maker. Prest *v.* Vanarsdalen, 11 N. J. L. 194.

51. Weeks *v.* Medler, 20 Kan. 57; Brown *v.* McHugh, 35 Md. 50; Weinwick *v.* Bender, 33 Mo. 80. But see Dowell *v.* Brown, 13 Sm. & M. (Miss.) 43.

52. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

53. *Alabama.*— Sawyer *v.* Patterson, 11 Ala. 523, holding that the Alabama act of 1837, prohibiting actions by one who takes a note under an assignment by delivery, does not apply to a holder by delivery under a blank indorsement.

Arkansas.— Owen *v.* Arrington, 17 Ark. 530. So too under the statute an instrument payable in cotton. Worthington *v.* Curd, 15 Ark. 491.

Georgia.— Habersham *v.* Lehman, 63 Ga. 380.

Illinois.— Palmer *v.* Gardiner, 77 Ill. 143; Burnap *v.* Cook, 32 Ill. 168; McHenry *v.* Ridgely, 3 Ill. 309, 35 Am. Dec. 110.

Indiana.— Lomax *v.* Whit, 83 Ind. 439 (a purchaser after commencement of suit); Rich *v.* Starbuck, 51 Ind. 87; White *v.* Callinan, 19 Ind. 43; Bowers *v.* Trevor, 5 Blackf. (Ind.) 24.

Kentucky.— Cope *v.* Daniel, 9 Dana (Ky.) 415.

Louisiana.—Boswell *v.* Zender, 13 La. 366; Nerault *v.* Dodd, 3 La. 430; Griffon *v.* Ja-

up the blank.[54] In others, and especially where, by statute, an action is required to be brought by the real party in interest,[55] the filling up of a blank indorsement is unnecessary in order to entitle the holder to bring suit.[56]

cobs, 2 La. 192; Allain *v.* Whitaker, 5 Mart. N. S. (La.) 511; Abat *v.* Rion, 9 Mart. (La.) 465, 13 Am. Dec. 313.

Maryland.— McNulty *v.* Cooper, 3 Gill & J. (Md.) 214.

Michigan.— Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500; Coy *v.* Stiner, 53 Mich. 42, 18 N. W. 552.

Mississippi.— Chewning *v.* Gatewood, 5 How. (Miss.) 552.

Missouri.— International Bank *v.* German Bank, 71 Mo. 183, 36 Am. Rep. 468 (a certificate of deposit); Bennett *v.* Pound, 28 Mo. 598. But see Menard *v.* Wilkinson, 3 Mo. 92, holding that a blank indorsement is only a power to the lawful holder to make an assignment to himself by filling up the blank.

New York.— Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

Tennessee.— Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805, although he is only a pledgee or trustee.

Texas.— Keller *v.* Alexander, 24 Tex. Civ. App. 186, 58 S. W. 637.

United States.— Bank of British North America *v.* Barling, 46 Fed. 357.

Canada.— Ridgeway *v.* Dansereau, 17 Quebec Super. Ct. 176.

Although the note belongs to another under a pledge as collateral this is so. Williams *v.* Jones, 79 Ala. 119; Greer *v.* Woolfolk, 60 Ga. 623. But see Alabama Terminal, etc., Co. *v.* Knox, 115 Ala. 567, 21 So. 495, where it was held that such a suit could not be brought without the pledgee's consent. And see, generally, PLEDGES.

A remote holder may sue as bearer (Emerson *v.* Cutts, 12 Mass. 78) without tracing title from the indorser (Little *v.* Obrien, 9 Mass. 423) or showing any title but possession (Mauran *v.* Lamb, 7 Cow. (N. Y.) 174).

Joint holders.— Several may sue as holders without proof of a joint interest or title (Ord *v.* Portal, 3 Campb. 239; Rordasnz *v.* Leach, 1 Stark. 446, 2 E. C. L. 172), although the bill was indorsed in blank and delivered to a partnership of which they are the surviving members (Attwood *v.* Pattenbury, 6 Moore C. P. 579, 23 Rev. Rep. 633, 17 E. C. L. 499).

Action in indorser's name may be brought by the holder under a blank indorsement for his own use (Gray *v.* Phillips, Morr. (Iowa) 430), and a note payable in specific articles may be equitably assigned by an indorsement in blank, so that the assignee may maintain an action thereon in the name of the assignor (Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307).

An agent who holds a negotiable note indorsed in blank may, as between himself and all other persons except his principal, treat the note as his own and sue thereon in his own name. Bancroft *v.* Paine, 15 Ala. 834 (a collection agent who took the note by delivery after maturity); Coy *v.* Stiner, 53 Mich. 42, 18 N. W. 552.

54. *Connecticut.*— Brewster *v.* Dana, 1 Root (Conn.) 266.

Kentucky.— Cope *v.* Daniel, 9 Dana (Ky.) 415.

Maryland.— Condon *v.* Pearce, 43 Md. 83; Lucas *v.* Byrne, 35 Md. 485; Chesley *v.* Taylor, 3 Gill (Md.) 251; Cumberland Bank *v.* McKinley, 6 Harr. & J. (Md.) 527; Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282; Day *v.* Lyon, 6 Harr. & J. (Md.) 140; Ringgold *v.* Tyson, 3 Harr. & J. (Md.) 172.

New Jersey.— Riker *v.* Corby, 3 N. J. L. 911; Snyder *v.* Hummel, 2 N. J. L. 82.

North Carolina.— Hubbard *v.* Williamson, 26 N. C. 266.

Oregon.— Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

United States.— Dennison *v.* Larned, 6 McLean (U. S.) 496, 7 Fed. Cas. No. 3,798.

See 7 Cent. Dig. tit. "Bills and Notes," § 451.

55. See *supra*, XIV, C, 1, a, (I), (A), (2), (a).

56. *Alabama.*— Miller *v.* Henry, 54 Ala. 120; Bancroft *v.* Paine, 15 Ala. 834; Riggs *v.* Andrews, 8 Ala. 628.

Arkansas.— Owen *v.* Arrington, 17 Ark. 530. See also Ashley *v.* Gunton, 15 Ark. 415, holding that in an action against the indorser of a promissory note in the probate court it is no ground of objection that the indorsement was not filled up previous to the filing of that order, it having the power to allow a *bona fide* claimant an equitable as well as a legal claim.

Illinois.— Farwell *v.* Meyer, 36 Ill. 510; Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105; Condon *v.* Bruse, 58 Ill. App. 254 (the irregular indorsement before delivery by a third party).

Indiana.— Moore *v.* Pendleton, 16 Ind. 481; Ferry *v.* Jones, 10 Ind. 226; Clark *v.* Walker, 6 Blackf. (Ind.) 82; Bowers *v.* Trevor, 5 Blackf. (Ind.) 24.

Louisiana.— Nerault *v.* Dodd, 3 La. 430; Sprigg *v.* Cuny, 7 Mart. N. S. (La.) 253; Allard *v.* Ganushau, 4 Mart. (La.) 662.

Maine.— McDonald *v.* Bailey, 14 Me. 101.

Mississippi.— Chewning *v.* Gatewood, 5 How. (Miss.) 552.

Missouri.— Bennett *v.* Pound, 28 Mo. 598. But see Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119; Menard *v.* Wilkinson, 3 Mo. 92; Wiggins *v.* Rector, 1 Mo. 478.

New York.— Wood *v.* Wellington, 30 N. Y. 218, holding that it is not necessary to fill an indorsement which reads: "Pay —— for account of the Atlas Mutual Insurance Company. Geo. H. Tracy, Secretary."

Ohio.— Greenough *v.* Smead, 3 Ohio St. 415

(d) Where Indorser May Not Sue. An indorsee may sometimes sue, although his indorser could not, as in a case where the indorser is himself one of the makers,[57] but it has been held that the assignee of such note without indorsement can sue the makers only in equity.[58]

(e) For Use of Payee. Suit may be brought by the indorsee for the use of the payee where it is not otherwise provided by statute,[59] and the payee may recover judgment in the indorsee's name upon consent given by the indorsee pending the suit.[60]

(2) Of Non-Negotiable Paper. The transferee of a non-negotiable instrument may bring suit in the name of the payee,[61] and can never maintain an action thereon except in the name of the payee,[62] unless by virtue of express statutory authority,[63] or where the maker has expressly promised to pay its contents to the assignee.[64]

(D) *Drawer.* The drawer may take up a bill and sue the accepter[65] on proof of

[*affirming* 1 Ohio Dec. (Reprint) 516, 10 West. L. J. 271].

Virginia.— Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

See 7 Cent. Dig. tit. "Bills and Notes," § 451.

57. *Alabama.*— Willis *v.* Neal, 39 Ala. 464.

Maine.— Woodman *v.* Boothby, 66 Me. 389; Hapgood *v.* Watson, 65 Me. 510; Davis *v.* Briggs, 39 Me. 304.

Massachusetts.— Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306.

Missouri.— Smith *v.* Gregory, 75 Mo. 121.

New Hampshire.— Heywood *v.* Wingate, 14 N. H. 73.

New York.— Sherwood *v.* Barton, 36 Barb. (N. Y.) 284; Smith *v.* Lusher, 5 Cow. (N. Y.) 688.

Texas.— Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196, indorsee of foreign administrator.

England.— Morley *v.* Culverwell, 1 Hurl. & W. 13, 4 Jur. 1163, 10 L. J. Exch. 35, 7 M. & W. 174.

58. Stevens *v.* Hannan, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125; Davis *v.* Merrill, 51 Mich. 480, 16 N. W. 864.

59. Walker *v.* Wait, 50 Vt. 668. See also Southard *v.* Wilson, 29 Me. 56 (holding that if the legal interest is in the payee of a note, he can authorize an action to be brought by the indorsee in the name of the latter for his benefit); Barnett *v.* Logue, 29 Tex. 282.

60. Richardson *v.* Lincoln, 5 Metc. (Mass.) 201.

A plea resisting such action must deny knowledge on the indorsee's part as well as ratification by him. Harpham *v.* Haynes, 30 Ill. 404.

61. Sater *v.* Hendershott, Morr. (Iowa) 118.

62. *Alabama.*— Howell *v.* Hallett, Minor (Ala.) 102.

Connecticut.— Backus *v.* Danforth, 10 Conn. 297.

Delaware.— Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230. Unless the transferee takes an assignment under seal in the presence of two witnesses. Kinniken *v.* Dulaney, 5 Harr. (Del.) 384.

Kentucky.— Searcy *v.* McCumpsey, 2 A. K. Marsh. (Ky.) 204.

Maryland.— Tradesmen's Nat. Bank *v.* Green, 57 Md. 602; Noland *v.* Ringgold, 3 Harr. & J. (Md.) 216, 5 Am. Dec. 435.

Massachusetts.— Costelo *v.* Crowell, 127 Mass. 293, 34 Am. Rep. 367; Haskell *v.* Lambert, 16 Gray (Mass.) 592.

New Hampshire.— Wiggin *v.* Damrell, 4 N. H. 69; Sanborn *v.* Little, 3 N. H. 539.

New Jersey.— Matlack *v.* Hendrickson, 13 N. J. L. 263.

New York.— Prescott *v.* Hull, 17 Johns. (N. Y.) 284; Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256.

Ohio.— Rhodes *v.* Lindly, 3 Ohio 51, 17 Am. Dec. 580; Moore *v.* Lancaster, Wright (Ohio) 35.

Pennsylvania.— Johnston *v.* Speer, 92 Pa. St. 227, 37 Am. Rep. 675; Raymond *v.* Middleton, 29 Pa. St. 529; Reeside *v.* Knox, 2 Whart. (Pa.) 233, 30 Am. Dec. 247; Fahnestock *v.* Schoyer, 9 Watts (Pa.) 102. But see Leidy *v.* Tammany, 9 Watts (Pa.) 353.

South Carolina.— Thompson *v.* Malone, 13 Rich. (S. C.) 252; Pratt *v.* Thomas, 2 Hill (S. C.) 654; Harmon *v.* Counts, 2 Brev. (S. C.) 476.

Vermont.— Stiles *v.* Farrar, 18 Vt. 444; Sanford *v.* Huxley, 18 Vt. 170.

United States.— Barriere *v.* Nairac, 2 Dall. (U. S.) 249, 1 L. ed. 368.

Contra, Goodman *v.* Fleming, 57 Ga. 350; Eason *v.* Locherer, 42 Tex. 173.

See 7 Cent. Dig. tit. "Bills and Notes," § 1380.

63. Birmingham Trust, etc., Co. *v.* Jackson County Mill Co., 41 Fla. 498, 27 So. 43. See also Schnier *v.* Fay, 12 Kan. 184; Williams *v.* Norton, 3 Kan. 295; Moore *v.* Foote, 34 Mich. 443; Thorn *v.* Myers, 5 Strobh. (S. C.) 210.

64. Farnum *v.* Virgin, 52 Me. 576; Hatch *v.* Spearin, 11 Me. 354; Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

65. Rice *v.* Hogan, 8 Dana (Ky.) 133; Zebley *v.* Voisin, 7 Pa. St. 527; Louviere *v.* Laubray, 10 Mod. 36; Callow *v.* Lawrence, 3 M. & S. 95 (where it was held that if transferred by the drawer after taking it up his transferee might sue); Simmonds *v.* Par-

the latter's default;[66] he may bring suit, or have suit brought for his use, in the name of the party holding the bill at maturity;[67] or he may purchase a bill before maturity and sue as indorsee.[68] He may also sue the accepter on the admission of funds implied by acceptance, without any indorsement from the payee,[69] or after striking out the payee's[70] or any subsequent[71] indorsement. He cannot, however, sue the payee as indorser without rebutting the presumption of his own prior liability arising from their relative position on the paper;[72] and where the drawer takes up a bill by voluntary payment to one who has paid upon it *supra protest*, after the drawer's discharge for want of notice, he cannot sue the payee on his indorsement.[73]

(E) *Drawee.* The drawee of a bill can, before dishonor, receive the same by indorsement and sue the drawer and indorser.[74] He may also sue the drawer for money paid, the action being brought in his own name and not in that of the payee.[75]

(F) *Indorser.* Where a bill or note is taken up[76] at maturity[77] by an indorser[78] he may at once bring suit[79] against prior parties, but he can do so only upon payment made by him;[80] and having so taken up the paper he sues upon it in his own right.[81] If the bill has been transferred in payment of a precedent debt, the holder may bring suit as a *bona fide* purchaser for the use of the indorser after payment by him,[82] but not without the indorser's consent.[83] Under the Canadian code an indorser of a note who is sued for the payment may bring an action as surety against the maker, in order to secure himself, although the note be not in his possession.[84]

minter, 1 Wils. C. P. 185 [*affirmed* in 2 Bro. P. C. 43, 1 Eng. Reprint 780].

66. Quinn *v.* Hanley, 5 Ill. App. 51.

67. Davis *v.* McConnell, 3 McLean (U. S.) 391, 7 Fed. Cas. No. 3,640. See also Williams *v.* James, 15 Q. B. 498, 14 Jur. 699, 19 L. J. Q. B. 445, 69 E. C. L. 498, holding that payment by the drawer is no defense to the accepter.

68. Louviere *v.* Laubray, 10 Mod. 36. See also Regnault *v.* Hunter, 4 W. Va. 257, holding that he may maintain debt against the accepter when the drawer was also the payee.

69. Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423; Coursin *v.* Ledlie, 31 Pa. St. 506.

70. Thompson *v.* Flower, 1 Mart. N. S. (La.) 301.

71. Pilkington *v.* Woods, 10 Ind. 432.

72. Thoms *v.* Greene, 6 Mo. 482.

73. Grosvenor *v.* Stone, 8 Pick. (Mass.) 79.

74. Desha *v.* Stewart, 6 Ala. 852; Conwell *v.* Finnell, 11 Ind. 527; Swope *v.* Ross, 40 Pa. St. 186, 80 Am. Dec. 567.

75. Balch *v.* Aldrich, 56 Vt. 68.

76. Payment by new note.— If an indorser takes up the paper by another note it will be sufficient payment to support his action. Bullard *v.* Wilson, 5 Mart. N. S. (La.) 196.

Paying a judgment rendered against himself and the maker will not entitle him to proceed summarily, under the statute as to sureties, against a prior indorser. Devinney *v.* Lay, 19 Mo. 646.

77. Payment pending suit.— If an indorser pays pending a suit against himself and the maker he may continue the suit as against the maker. Oneida County Bank *v.* Lewis, 23 Misc. (N. Y.) 34, 51 N. Y. Suppl. 826.

78. If an accommodation indorser pays the note he may recover against the maker either as purchaser of the note or in an action for money paid. Barker *v.* Parker, 10 Gray (Mass.) 339. But see Kennedy *v.* Carpenter, 2 Whart. (Pa.) 344, to the effect that the recovery can be on the note only. Such an indorser may sue in the name of the payee. Spencer Bank *v.* Simmons, 43 W. Va. 79, 27 S. E. 299.

One of two accommodation indorsers who have taken up the note may sue the maker as the party in interest. Havens *v.* Huntington, 1 Cow. (N. Y.) 387.

79. A suit already begun by the indorsee may be continued in his name for the indorser's benefit. Mechanics' Bank *v.* Hazard, 13 Johns. (N. Y.) 353.

Enforcement of collateral.— An indorser upon paying a bill or note may enforce a collateral mortgage. Page *v.* Green, 6 Conn. 338.

80. Bradford *v.* Bucknam, 12 Me. 15; Small *v.* Jones, 8 Watts (Pa.) 265.

An indorser need not prove notice of dishonor sent to himself, provided such notice has been duly received by the party sued. Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316.

Suit in name of later indorser.— An indorser taking up commercial paper cannot sue in the name of a later indorser without his consent. Coleman *v.* Biedman, 7 C. B. 871, 7 D. & L. 121, 62 E. C. L. 871.

81. Death *v.* Serwonters, Lutw. 885*b*; Bosanquet *v.* Dudman, 1 Stark. 1, 2 E. C. L. 11; Cowley *v.* Dunlop, 7 T. R. 565.

82. Bank of America *v.* Senior, 11 R. I. 376; Poirier *v.* Morris, 2 E. & B. 89, 17 Jur. 1116, 22 L. J. Q. B. 313, 1 Wkly. Rep. 349, 75 E. C. L. 89.

83. Workingmen's Bldg., etc., Assoc. *v.* Roumfort, 98 Pa. St. 85.

84. Desbarats *v.* Hamilton, 2 Montreal Leg. N. 279; Mathieu *v.* Mousseau, 5 Rev.

(II) *Action in Individual or Representative Capacity* — (A) *Agents.* The party holding the legal title to a bill or note may sue on it, although he is merely an agent and liable to account to another for the proceeds of the recovery, but the suit is open in such case to any defense which exists against the party beneficially interested.[85] Where the drawer of a bill knows of the agency of the payee, the principal may maintain an action thereon in his own name.[86]

(B) *Corporate Officers* — (1) In General. A bill or note made payable to a corporate officer may be sued on by the corporation as the real party in interest,[87] although in some cases an action by the officer in his own name has been sustained, his designation as officer being regarded as merely *descriptio personæ*,[88] and in case the company is not incorporated suit must be brought in the name of the payees, even though they have been succeeded in office by others.[89]

(2) Bank Cashiers. Where a bill or note is indorsed to the cashier of a bank he may maintain an action thereon in his own name,[90] or the bank as the real party in interest may maintain the action.[91]

(C) *Guardians.* Where a note is made to one as guardian he may sue upon it

Leg. 260. See also Macdonald *v.* Whitfield, 8 App. Cas. 733, 6 Montreal Leg. N. 278, 27 L. C. Jur. 165.

85. *Alabama.*— Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Moore *v.* Henderson, 18 Ala. 232.

Georgia.— Austell *v.* Rice, 5 Ga. 472.

Iowa.— Cottle *v.* Cole, 20 Iowa 481.

Louisiana.— Zapata *v.* Cifero, 26 La. Ann. 87; Ricard *v.* Harrison, 19 La. Ann. 181.

Massachusetts.— Buffum *v.* Chadwick, 8 Mass. 103. See also Barker *v.* Prentiss, 6 Mass. 430, holding that in an action on a bill of exchange by an indorser who was merely the agent of the payee defendant may show a request from the principal not to pay the bill to such agent.

Nebraska.— Stoll *v.* Sheldon, 13 Nebr. 207, 13 N. W. 201.

New York.— Fish *v.* Jacobsohn, 5 Bosw. (N. Y.) 514 [*affirmed* in 2 Abb. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539].

Ohio.— Smead *v.* Fay, 1 Disn. (Ohio) 531, 12 Ohio Dec. (Reprint) 771.

Pennsylvania.— Pearce *v.* Austin, 4 Whart. (Pa.) 489, 34 Am. Dec. 523.

Tennessee.— Cocke *v.* Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; Rutherford *v.* Mitchell, Mart. & Y. (Tenn.) 261.

Texas.— Mensing *v.* Ayres, 2 Tex. App. Civ. Cas. § 562.

United States.— Pacific Guano Co. *v.* Holleman, 4 Woods (U. S.) 462, 12 Fed. 61.

Canada.— See Hutchinson *v.* Munroe, 8 U. C. Q. B. 103.

See 7 Cent. Dig. tit. "Bills and Notes," § 1394.

A mere depositary of a note cannot maintain suit upon it. Woodsum *v.* Cole, 69 Cal. 142, 10 Pac. 331; Sherwood *v.* Roys, 14 Pick. (Mass.) 172.

86. Jordan *v.* Tarkington, 15 N. C. 357. See also National L. Ins. Co. *v.* Allen, 116 Mass. 398, where it was held that a principal may sue in its own name on a non-negotiable note, made in its behalf of and for its benefit, although in terms payable to an agent.

87. Southern L. Ins., etc., Co. *v.* Gray, 3 Fla. 262; Atlantic Mut. F. Ins. Co. *v.* Young, 38 N. H. 451, 75 Am. Dec. 200; Piggott *v.* Thompson, 3 B. & P. 147.

Necessity of indorsement.— Where a note is payable to the order of a corporate officer the corporation cannot maintain an action without indorsement. Fine *v.* High Bridge M. E. Church Assoc., 44 N. J. L. 148.

88. Chaplin Soc. *v.* Canada, 8 Conn. 286; Cartwright *v.* Gardner, 5 Cush. (Mass.) 273; Binney *v.* Plumley, 5 Vt. 500, 26 Am. Dec. 313.

The trustee of a military company which has no captain may maintain an action in equity on a note payable to its captain for money borrowed of the company, upon being authorized so to do by a vote of the company. Waugh *v.* Andel, 21 Ill. App. 389.

Description as officer.— A note payable to the superintendent of a certain concern may be sued on by the payee in his own name, by describing himself as such superintendent. Durfee *v.* Morris, 49 Mo. 55.

89. Davis *v.* Garr, 6 N. Y. 124, 55 Am. Dec. 387.

90. *Georgia.*— Davies *v.* Byrne, 10 Ga. 329.

Illinois.— McHenry *v.* Ridgely, 3 Ill. 309, 35 Am. Dec. 110.

Massachusetts.— Fairfield *v.* Adams, 16 Pick. (Mass.) 381.

Ohio.— White *v.* Stanley, 29 Ohio St. 423.

South Carolina.— Rose *v.* Laffan, 2 Speers (S. C.) 424, 42 Am. Dec. 376.

91. Erwin Lane Paper Co. *v.* Farmers' Nat. Bank, 130 Ind. 367, 30 N. E. 411, 30 Am. St. Rep. 246; Nave *v.* Hadley, 74 Ind. 155; Commercial Bank *v.* French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490; U. S. National Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756; Manchester Bank *v.* Slason, 13 Vt. 334. See also *supra*, I, C, 1, c, (II), (B), (2) [7 Cyc. 558, note 75].

in his own name and right[92] even after the expiration of his office,[93] and after his death his executor may sue on it.[94]

(D) *Heirs and Personal Representatives.*[95] On a bill or note indorsed in blank or where the payee is named expressly as executor or administrator, he may bring an action in his individual name, treating such additional words as merely a description of the person,[96] or he may bring suit in his representative capacity.[97] An executor can only sue as such on a note payable to the order of his testator and indorsed by him;[98] but if the note has been indorsed in blank by

92. Hightower *v.* Maull, 50 Ala. 495; Bingham *v.* Calvert, 13 Ark. 399; Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 676; Shepherd *v.* Evans, 9 Ind. 260.

Joint interest of guardian and ward.— An action on a note owned jointly by a guardian individually and his ward may be brought by the guardian in his own name and right, without making the ward a party, as a recovery by the guardian is binding on the ward. Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767.

93. Zachary *v.* Gregory, 32 Tex. 452; Wheelock *v.* Wheelock, 5 Vt. 433.

94. Chitwood *v.* Cromwell, 12 Heisk. (Tenn.) 658. And see State *v.* Greensdale, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753, where it was held that his successor in guardianship can accept it as assets only at his own peril.

95. A distributee of a decedent's estate to whom a promissory note, assets of the estate, has been allotted as a part of his share on a division of the estate, by agreement among the parties interested, may maintain an action at law on it in his own name. Carter *v.* Owens, 41 Ala. 217.

Heirs.— In Iowa the heirs may sue if there is no admission for five years (Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157) and it has been held that where a note is given payable to the heirs of a particular person, such person being alive, the presumptive heir may recover on the note (Cox *v.* Beltzhoover, 11 Mo. 142, 47 Am. Dec. 145). One of several heirs cannot sue for a debt due all the heirs, even if in possession of a negotiable instrument which is the evidence of the debt, which it is not indorsed either specifically or in blank. Hicky *v.* Sharp, 4 La. 335.

Widow of deceased holder.—In a few states it has been held that the widow or a deceased holder may bring suit on a note payable to him without administration, where she is his only heir at law. Begien *v.* Freeman, 75 Ind. 398; Spencer *v.* Millican, 31 Tex. 65. And where the heirs of a deceased payee of a promissory note have assigned the same to his widow by indorsement she may maintain an action thereon in her own name, where there are no debts and the estate has been settled without administration. Mitchell *v.* Dickson, 53 Ind. 110.

96. *Alabama.*— McGehee *v.* Slater, 50 Ala. 431: Waldrop *v.* Pearson, 42 Ala. 636; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Evans *v.* Gordon, 8 Port. (Ala.) 142.

Indiana.— Ratcliff *v.* Everman, 87 Ind. 446; Turner *v.* Burgess, 26 Ind. 195; Sheets *v.* Peabody, 6 Blackf. (Ind.) 120, 38 Am. Dec. 132; Barnes *v.* Modisett, 3 Blackf. (Ind.) 253.

Louisiana.— Gilman *v.* Horseley, 5 Mart. N. S. (La.) 661.

Maine.— Barrett *v.* Barrett, 8 Me. 353.

Massachusetts.—Wheeler *v.* Johnson, 97 Mass. 39.

Mississippi.— Eckford *v.* Hogan, 44 Miss. 398; Falls *v.* Wilson, 24 Miss. 168.

Missouri.— Smith *v.* Monks, 55 Mo. 106; Lyons *v.* Doherty, 50 Mo. 38; Thomas *v.* Relfe, 9 Mo. 377.

New York.— Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58.

North Carolina.— Blankenship *v.* Hunt, 76 N. C. 377.

Tennessee.— Wood *v.* Tomlin, 92 Tenn. 514, 22 S. W. 206.

Texas.— Moss *v.* Witcher, 35 Tex. 388; Rider *v.* Duval, 28 Tex. 622; Claiborne *v.* Yoeman, 15 Tex. 44; Peters *v.* Caton, 6 Tex. 554; Groce *v.* Herndon, 2 Tex. 410; Gayle *v.* Ennis, 1 Tex. 184.

Vermont.— Taylor *v.* Phillips, 30 Vt. 238.

See 7 Cent. Dig. tit. "Bills and Notes," § 1397.

Revocation of letters testamentary.— In an action by an executor of an estate on a note payable to him as executor, etc., an answer alleging that the note belonged to the estate and that his letters testamentary had been revoked, is good. Leach *v.* Lewis, 38 Ind. 160.

Where it has been indorsed by the payee or by his executor in his official capacity, the latter cannot recover it in his own name. Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555.

97. Sasscer *v.* Walker, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272.

Administrator de bonis non.— If a bill is indorsed to A as administrator of B for a debt to B, an action may be brought upon it by an administrator *de bonis non* of B afterward appointed. Catherwood *v.* Chabaud, 1 B. & C. 150, 2 D. & R. 271, 8 E. C. L. 65. See also Moore *v.* Randolph, 70 Ala. 575.

Note given by co-executor.— Where one of two executors gives his note or bond to the other as executor and expressly for money borrowed from the estate of the testator, the executor of the payee so named may bring suit against the maker even before settlement made by him with the original testator's estate. Alston *v.* Jackson, 26 N. C. 49.

98. Leamon *v.* McCubbin, 82 Ill. 263; Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec.

the testator and put into a bank for collection, and comes after his death into the hands of the executor, he may bring suit upon it in his own name under the blank indorsement as bearer.[99]

(E) *Public Officers.* A distinction is made between private agents[1] and public officers, and as a rule it is held that public officers cannot sue in their individual capacity on a bill or note made payable to them in their representative capacity;[2] but if a note is made payable to a public officer as agent of the beneficial owner he may himself sue thereon.[3] On the other hand the government may bring suit in its own name on a bill or note belonging to it, although it is made payable to the treasurer of the United States or other public officer.[4] This is true also of a state;[5] and even, it has been held, of a county,[6] but a note to the treasurer of a parish may be sued by him, although a subsequent indorsement by his successor in office appears on the paper.[7] If, however, a note for taxes is

555. See also Morse *v.* Clayton, 13 Sm. & M. (Miss.) 373; Nash *v.* Hogan, 45 N. J. Eq. 108, 16 Atl. 433.

If a bill or note be indorsed specially to a particular person, none but such person or his representative can sue. Burch *v.* Daniel, 109 Ga. 256, 34 S. E. 310.

99. Barlow *v.* Myers, 24 Hun (N. Y.) 286.

A foreign executor may bring suit upon a note payable to bearer in his name as bearer (Knapp *v.* Lee, 42 Mich. 41, 3 N. W. 344), and it seems that in Virginia an executor appointed in another state where the payee resided at his death may sue upon a note payable to his testator by virtue of the foreign letters (Giddings *v.* Green, 48 Fed. 489. But see Fenwick *v.* Sears, 1 Cranch (U. S.) 259, 2 L. ed. 101).

Indorsement to deceased party.— Where a note is indorsed to one who is dead at the time but not known to be so suit may be brought on it by his administrator. Murray *v.* East India Co., 5 B. & Ald. 204, 21 Rev. Rep. 278, 7 E. C. L. 118.

1. See *supra*, XIV, C, 1, a, (II), (A).

2. *Alabama.*—Yerby *v.* Sexton, 48 Ala. 311.

Florida.— Dickson *v.* Gamble, 16 Fla. 687.

Indiana.— Rogers *v.* Gibson, 15 Ind. 218. But see Robbins *v.* Dishon, 19 Fed. 204, where a note made payable to plaintiff as "trustee of French Lick township," was sued on by plaintiff in his own name, and it was held that the words "trustee," etc., were merely a description of the person and that defendant, denying plaintiff's right to recover, shall aver that he was no longer such trustee.

Maine.— State *v.* Boies, 11 Me. 474; Trustees Levant Ministerial, etc., Fund *v.* Parks, 10 Me. 441; Irish *v.* Webster, 5 Me. 171.

Minnesota.— State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; Balcombe *v.* Northup, 9 Minn. 172.

New Jersey.— Crowell *v.* Osborne, 43 N. J. L. 335.

Ohio.— Hunter *v.* Field, 20 Ohio 340.

Vermont.— See Arlington *v.* Hinds, 1 D. Chipm. (Vt.) 431, 12 Am. Dec. 704.

Wisconsin.—Oconto County *v.* Hall, 42 Wis. 59.

United States..— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; U. S. *v.* Boice, 2 McLean (U. S.) 352, 24 Fed. Cas. No. 14,619.

But see Tatum *v.* Tatum, 19 Ark. 194.

See also *supra*, I, C, 1, c, (II), (B), (8) [7 Cyc. 566, note 31]; and 7 Cent. Dig. tit. "Bills and Notes," § 1391.

An official assignee is a quasi-public officer, and a note made to "Charles Douglass, Assignee," and so indorsed by him will not render him personally liable as indorser. Bowne *v.* Douglass, 38 Barb. (N. Y.) 312.

A tax-collector cannot sue in his individual name on a note given to him as collector for taxes. Dickson *v.* Gamble, 16 Fla. 687. If, however, he has paid the taxes of the maker and the note has been given on account of such payment, it will be no bar to a suit upon the original consideration, although the note has been made originally to a particular person and altered and made void by addition of "collector" to his name. York *v.* Janes, 43 N. J. L. 332.

Note as security for execution.— An officer to whom a note has been indorsed as security for an execution in his hands against the indorser may maintain an action in his own name against the maker. Bowman *v.* Wood, 15 Mass. 534. See also Boardman *v.* Roger, 17 Vt. 589.

3. McConnel *v.* Thomas, 3 Ill. 313; Bryant *v.* Durkee, 9 Mo. 169.

4. U. S. *v.* Boice, 2 McLean (U. S.) 352, 24 Fed. Cas. No. 14,619; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517. See also U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374, holding that the United States may sue as indorsee of a note payable "to the order of the person who should thereafter endorse."

5. Esley *v.* Illinois, 23 Kan. 510 (holding that a state may bring suit upon a note in the courts of another state); State *v.* Boies, 11 Me. 474.

6. Barry County *v.* McGlothlin, 19 Mo. 307; Oconto County *v.* Hall, 42 Wis. 59. But see Linn County *v.* Holland, 12 Mo. 127, holding that the county cannot sue on a note to a particular person for the use of a named county.

7. Buck *v.* Merrick, 8 Allen (Mass.) 123.

The official successor of a particular person

given to a city treasurer who had no authority to receive it and the city never accepted it suit cannot be brought on it by the treasurer, although named in it as payee.[8]

(F) *Receivers or Assignees.* An action on a promissory note indorsed in blank belonging to a bank may be sued by receivers or assignees in their proper names as indorsees without specifying their official character.[9]

(G) *Successors in Office.* A bill or note payable to a person in his official character cannot be sued upon by his successor in office.[10]

(H) *Trustees.* It has been held that a bill or note made to one as trustee is not commercial paper and that an indorsement by the trustee transfers it subject to the trust,[11] but the payee named in the bill or note by indorsement may bring suit on it in his own name, although he holds it as trustee for another[12] and is expressly named in his representative capacity[13] as receiver,[14] as assignee in bankruptcy,[15] or as guardian;[16] and where expressly payable to a trustee the *cestui que trust* cannot sue upon it, although his interest as such appears in the instrument itself.[17] The actual party in interest, however, has been allowed to sue without indorsement, where the nominal payee was made such merely to secure a lien that has been satisfied[18] or had no interest and was named as payee by the

cannot sue in Indiana on a note payable to such person, "agent for Wells county, or his successor in office." Upton *v.* Starr, 3 Ind. 508.

8. Crowell *v.* Osborne, 43 N. J. L. 335.

9. Beckham *v.* Hague, 44 N. Y. App. Div. 146, 60 N. Y. Suppl. 767; Haxtom *v.* Bishop, 3 Wend. (N. Y.) 13.

Assignee for benefit of creditors.— Where a plaintiff on a promissory note describes himself as assignee of a certain firm and alleges a transfer of the note by the firm to him, the action must be considered as brought by plaintiff in his individual capacity, although he is a general assignee of the firm for the benefit of creditors. Butterfield *v.* Macomber, 22 How. Pr. (N. Y.) 150. See also Rossman *v.* McFarland, 9 Ohio St. 369.

10. Bumpass *v.* Richardson, 1 Stew. (Ala.) 16; Upton *v.* Starr, 3 Ind. 508; Ingersoll *v.* Cooper, 5 Blackf. (Ind.) 426. But see Tainter *v.* Winter, 53 Me. 348.

11. Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304; Sturtevant *v.* Jaques, 14 Allen (Mass.) 523.

12. *Alabama.*— Rice *v.* Rice, 106 Ala. 636, 17 So. 628.

Indiana.—Wolcott *v.* Standley, 62 Ind. 198; Musselman *v.* Cravens, 47 Ind. 1; Heavenridge *v.* Mondy, 34 Ind. 28.

Kansas.— Scantlin *v.* Allison, 12 Kan. 85.

Louisiana.— Peters *v.* Pacific Guano Co., 42 La. Ann. 690, 7 So. 790; Stanbrough *v.* McCall, 4 La. Ann. 322.

Massachusetts.— Sherwood *v.* Roys, 14 Pick. (Mass.) 172.

Missouri.— Nicolay *v.* Fritschle, 40 Mo. 67; Beck *v.* Haas, 31 Mo. App. 180 [*affirmed* in 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516].

Nebraska.— Stoll *v.* Sheldon, 13 Nebr. 207, 13 N. W. 201.

New York.— Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076, 50 N. Y. St. 15 [*affirming* 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782, 46 N. Y. St. 851]; Nelson *v.* Eaton, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113 [*reversing* 2 Abb. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539, 7 Abb. Pr. (N. Y.) 305 (*affirming* 5 Bosw. (N. Y.) 514)]; Considerant *v.* Brisbane, 22 N. Y. 389 [*reversing* 2 Bosw. (N. Y.) 471]; Fish *v.* Jacobson, 2 Abb. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539.

Pennsylvania.— Logan *v.* Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

Vermont.— Boardman *v.* Roger, 17 Vt. 589; Smith *v.* Burton, 3 Vt. 233, 23 Am. Dec. 203.

Wyoming.— Bollen *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898.

England.— Smith *v.* Kendal, 1 Esp. 231, 6 T. R. 123; Randoll *v.* Bell, 1 M. & S. 714.

See 7 Cent. Dig. tit. "Bills and Notes," § 1395.

13. Rice *v.* Rice, 106 Ala. 636, 17 So. 628; Davidson *v.* Elms, 67 N. C. 228. See also Yantis *v.* Yourie, 10 Mo. 669.

14. Haxton *v.* Bishop, 3 Wend. (N. Y.) 13. See, generally, RECEIVERS.

15. Collier *v.* Barnes, 64 Ga. 484. See, generally, BANKRUPTCY.

16. Shepherd *v.* Evans, 9 Ind. 260; Wheelock *v.* Wheelock, 5 Vt. 433. See, generally, GUARDIAN AND WARD.

17. Chaplin Soc. *v.* Canada, 8 Conn. 286; Linn County *v.* Holland, 12 Mo. 127; Grist *v.* Backhouse, 20 N. C. 496; Jungbluth *v.* Way, 1 H. & N. 71, 25 L. J. Exch. 257.

Trustee of unincorporated association.— If a note is made payable to a particular person as trustee of an unincorporated association, an action may be brought in his name without joining the other members of the association. Burbank *v.* Beach, 15 Barb. (N. Y.) 326; O'Brien *v.* Smith, 1 Black (U. S.) 99, 17 L. ed. 64; Bawden *v.* Howell, 6 Jur. 37, 3 M. & G. 638, 4 Scott N. R. 331, 42 E. C. L. 333.

18. Bean *v.* Dolliff, 67 Me. 228.

The principal may bring the action in his own name on proving his property in the bill

fraud of the plaintiff's agent,[19] and an accepter may defeat the action of the nominal payee by showing that he was really a trustee for the drawer and that the drawer has been satisfied.[20] In like manner if notes are transferred by a corporation to a particular person to secure creditors, he may sue as "trustee of an express trust" under the statute.[21] Similarly if plaintiff holds a note payable to bearer under a bequest to him in trust to another he has a right of action in himself;[22] and this is true under an agreement with a third person entitling the holder to half the proceeds.[23]

(III) *Where Paper Held as Collateral.* Where negotiable paper is transferred as collateral security the holder may maintain action thereon in his own name,[24] save where by statute it is required that action shall be brought in the name of the real party in interest.[25] With the consent of the pledgee an action may be maintained by the pledgor.[26]

(IV) *Where Paper Held For Collection.* An indorsee or assignee[27] of a bill or note for purposes of collection merely can maintain an action thereon in his own name,[28] but mere delivery without indorsement does not authorize an

or note (Southern L. Ins., etc., Co. *v.* Gray, 3 Fla. 262; Harrow *v.* Dugan, 6 Dana (Ky.) 341; Stinson *v.* Sachs, 8 Wash. 391, 36 Pac. 287) and this is true although the name of the principal is not disclosed in the instrument (Pacific Guano Co. *v.* Holleman, 4 Woods (U. S.) 462, 12 Fed. 61. See also National L. Ins. Co. *v.* Allen, 116 Mass. 398, where it was held that suit might be brought upon a non-negotiable note payable to a particular company by its principal).

19. Kansas City Bank *v.* Mills, 24 Kan. 604.

20. Thompson *v.* Clark, 56 Pa. St. 33.

21. Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178.

22. Jackson *v.* Heath, 1 Bailey (S. C.) 355.

23. Brooking *v.* Clarke, 2 Litt. (Ky.) 197.

24. *Arkansas.*— Turner *v.* Stroud, 37 Ark. 556.

Georgia.— Houser *v.* Houser, 43 Ga. 415. But there should be an indorsement or assignment in writing. Benson *v.* Abbott, 95 Ga. 69, 22 S. E. 127.

Indiana.— Jones *v.* Hawkins, 17 Ind. 550; Rowe *v.* Haines, 15 Ind. 445, 77 Am. Dec. 101.

Iowa.— McCarty *v.* Clark, 10 Iowa 588; Sheldon *v.* Middleton, 10 Iowa 17; Allensworth *v.* Moore, 3 Greene (Iowa) 273.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Lozano, 39 La. Ann. 321, 1 So. 608; Chaffe *v.* Du Bose, 36 La. Ann. 257; Louisiana State Bank *v.* Gaiennie, 21 La. Ann. 555; Dix *v.* Tully, 14 La. Ann. 456.

Maine.— Comstock *v.* Smith, 23 Me. 202; Lane *v.* Padelford, 14 Me. 94; Fisher *v.* Bradford, 7 Me. 28.

Massachusetts.—Paine *v.* Furnas, 117 Mass. 290.

Michigan.— Lobdell *v.* Merchants', etc., Bank, 33 Mich. 408.

Minnesota.— White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

New Hampshire.— Newbury Bank *v.* Rand, 38 N. H. 166.

New York.— Van Riper *v.* Baldwin, 19 Hun (N. Y.) 344; Hatch *v.* Brewster, 53 Barb. (N. Y.) 276; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279; New York City Mar. Bank *v.* Vail, 6 Bosw. (N. Y.) 421; Smith *v.* Hall, 5 Bosw. (N. Y.) 319; Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Wheeler *v.* Newbould, 5 Duer (N. Y.) 29; Bay *v.* Gunn, 1 Den. (N. Y.) 108.

North Carolina.— Triplett *v.* Foster, 115 N. C. 335, 20 S. E. 475.

South Carolina.— U. S. Bank *v.* Hammond, 2 Brev. (S. C.) 415.

Tennessee.— Johnson City First Nat. Bank *v.* Mann, 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565.

Texas.— Jackson *v.* Fawlkes, (Tex. 1892) 20 S. W. 136.

Wisconsin.— Hilton *v.* Waring, 7 Wis. 492. See 7 Cent. Dig. tit. "Bills and Notes," § 1407.

Pledgor not necessary party.— In an action brought by the pledgee on a note transferred to him before maturity in the usual course of business as collateral security for advances made at the time, it is not necessary to make the pledgor of the note a party. Curtis *v.* Mohr, 18 Wis. 615.

25. Williams *v.* Morton, 3 Kan. 295; White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

The holder of a note as collateral security for a preëxisting debt is the real party in interest within the meaning of Nebr. Code, § 29. Herron *v.* Cole, 25 Nebr. 692, 41 N. W. 765. See also Johnson *v.* Chilson, 29 Nebr. 301, 45 N. W. 462.

26. Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269.

27. **Payee for collection.**— Even though a bill of exchange be really, but not in terms, given to the payee for the purpose of collection, the payee may maintain an action in his own name against the drawee, upon the acceptance of the latter. Vanstrum *v.* Liljengren, 37 Minn. 191, 33 N. W. 555.

28. *Arkansas.*—Payne *v.* Flournoy, 29 Ark. 500 (notwithstanding the indorser's direction to the indorsee to apply the proceeds to the

agent for collection to bring an action upon the instruments in his own name,[29] unless it is indorsed in blank[30] or is payable to bearer.[31]

(v) *Where Paper Made For Discount.* The amount of a note made payable to a bank for the purpose of discount but never discounted by it and afterward discounted by a third person may, with the bank's consent,[32] be recovered in the name of the bank for the use of the holder,[33] or he may declare upon it as made payable to himself by the name of the bank, or at his election in his own name as a note payable to bearer, regarding the name of the payee as fictitious,[34] and under a statute requiring suit to be brought in the name of the real party in interest it should be brought in the name of the holder and not in that of the payee.[35] But an action cannot be maintained against the surety upon a note by

payment of a particular debt); Purdy *v.* Brown, 4 Ark. 535.

Illinois.— Illinois Conference Evangelical Assoc. *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Padfield *v.* Green, 85 Ill. 529; Brown *v.* Griffin, 40 Ill. App. 558.

Louisiana.— Klein *v.* Buckner, 30 La. Ann. 680.

Massachusetts.— Haskell *v.* Avery, 181 Mass. 106, 63 N. E. 15; Pacific Bank *v.* Mitchell, 9 Metc. (Mass.) 297; Little *v.* Ohrien, 9 Mass. 423.

Michigan.— Brigham *v.* Gurney, 1 Mich. 349.

Missouri.— Webb *v.* Morgan, 14 Mo. 428; West Plains Bank *v.* Edwards, 84 Mo. App. 462. But defendant has the right to make such defenses thereto as he might make in an action by the owner. Saulsbury *v.* Corwin, 40 Mo. App. 373.

Nebraska.—McWilliams *v.* Bridges, 7 Nebr. 419.

New York.— Poor *v.* Guilford, 10 N. Y. 273, 61 Am. Dec. 749; Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132.

North Carolina.— Drew *v.* Jacock, 6 N. C. 138.

Washington.— Riddell *v.* Pritchard, 12 Wash. 601, 41 Pac. 905.

United States.— Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589.

Contra, Denel *v.* Newlin, 131 Ind. 40, 30 N. E. 795; Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263; Rock County Nat. Bank *v.* Hollister, 21 Minn. 385.

See also *supra*, XIV, C, 1, a, (I), (A), (2), (b), note 15; Banks and Banking, 5 Cyc. 507, note 85; and 7 Cent. Dig. tit. "Bills and Notes," § 1407.

Effect upon payee's right of action.— A payee's assignment for collection merely will not transfer the title of the draft so as to defeat an action thereon in his own name. Best *v.* Nokomis Nat. Bank, 76 Ill. 608.

Recovery chargeable with trust.— Any recovery by an immediate or remote indorsee under an indorsement "for collection" will be chargeable in equity as a trust for the holder. May *v.* Nabors, 6 Ala. 24.

Payment by indorser — Action in name of holder.— Where an indorser pays a note, but leaves it with the holder for collection, he may maintain an action thereon against the prior indorser in the name of such holder, especially in the absence of any showing of prejudice to defendant. Bank of America *v.* Senior, 11 R. I. 376.

29. Nichols *v.* Gross, 26 Ohio St. 425.

30. Zapata *v.* Cifreo, 26 La. Ann. 87; State Bank *v.* Roberts, 4 La. 530; Little *v.* Obrien, 9 Mass. 423; Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844; Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589.

31. Royce *v.* Barnes, 11 Metc. (Mass.) 276; Sherwood *v.* Roys, 14 Pick. (Mass.) 172; Boardman *v.* Roger, 17 Vt. 589.

32. Skowhegan Bank *v.* Baker, 36 Me. 154; Adams Bank *v.* Jones, 16 Pick. (Mass.) 574; Allen *v.* Ayers, 3 Pick. (Mass.) 298. *Contra*, Farmers', etc., Bank *v.* Humphrey, 36 Vt. 554, 86 Am. Dec. 671.

33. Trible *v.* Granada Bank, 2 Sm. & M. (Miss.) 523; Newburg Bank *v.* Rand, 38 N. H. 166; Hunt *v.* Aldrich, 27 N. H. 31; Cross *v.* Rowe, 22 N. H. 77; Utica Bank *v.* Ganson, 10 Wend. (N. Y.) 314; Rutland Bank *v.* Buck, 5 Wend. (N. Y.) 66; Chenango Bank *v.* Hyde, 4 Cow. (N. Y.) 567; Newbury Bank *v.* Richards, 35 Vt. 281; Middlebury Bank *v.* Bingham, 33 Vt. 621. See also York Bank *v.* Asbury, 1 Biss. (U. S.) 230, 30 Fed. Cas. No. 18,142.

Note in discharge of debt — Failure to obtain discount.— A judgment debtor, in consideration of the discharge of his debt and of the payment of other debts due from him, agreed to give his creditor his note, to be discounted by an insurance company. The note was made payable to the company, which, however, refused to discount it. It was held that the note was valid and that the creditor had a beneficial interest therein entitling him to sue upon it in his own name. Spurrier *v.* Briggs, 17 Ind. 529.

Trover in name of payee.— One who has discounted a note may recover in an action of trover brought in the payee's name against the receiver of the bank at which it was made payable and to which it had been forwarded for payment. Corn Exch. Bank *v.* Blye, 2 N. Y. St. 112.

34. Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227.

35. Rhyan *v.* Dunnigan, 76 Ind. 178; Rich *v.* Starbuck, 51 Ind. 87; Spurrier *v.* Briggs, 17 Ind. 529; Rogge *v.* Cassidy, 12 Ky. L. Rep. 54, 13 S. W. 716.

But under the New York code it is suffi-

a holder, who is neither the payee nor his transferee, without proof of some privity between them.[36]

(VI) *WHERE PAPER PAYABLE TO BEARER* — (A) *In General.* Possession of a bill or note carries with it presumption of title in the holder, whether it is payable on its face to bearer or is deemed to be so payable in law,[37] and an action may be maintained by the holder in the name of any party consenting to the use of his name,[38] and even in the name of a person having no knowledge of or interest in the note, if he afterward ratifies such act and gives permission that it may be prosecuted in his name;[39] or on the other hand by another than the real owner with the consent of the latter.[40] So too an action may be maintained on a note indorsed in blank in the name of the payee for the use of the holder, although the holder has paid a valuable consideration at the time of indorsement.[41] This presumption from possession arises whether the bill is acquired before or after maturity,[42] but plaintiff must be in possession before suit brought by him,[43]

cient to aver that the payee of a note indorsed it in blank and "that there is due to the plaintiffs on the said note" so much, without other statement of his interest in the note. Lord *v.* Chesebrough, 4 Sandf. (N. Y.) 696.

36. *Maine.*— Granite Bank *v.* Ellis, 43 Me. 367; Manufacturers' Bank *v.* Cole, 39 Me. 188.

Massachusetts.— Allen *v.* Ayers, 3 Pick. (Mass.) 298.

North Carolina.— Dewey *v.* Cochran, 49 N. C. 184.

Ohio.— Clinton Bank *v.* Ayres, 16 Ohio 282.

Vermont.— Farmers, etc., Co. *v.* Hathaway, 36 Vt. 539. But see Middlebury Bank *v.* Bingham, 33 Vt. 621.

But see Commercial Bank *v.* Claiborne, 5 How. (Miss.) 301.

37. See *infra*, XIV, E, 1, d, (I).

An individual member of a firm, to the order of which a note is made payable and which it has indorsed in blank, may maintain an action on it in his own name against the maker. Dorr *v.* Jouet, 20 La. Ann. 27.

Memorandum check.— A *bona fide* holder of a memorandum check, not addressed to any particular bank or person, payable to bearer, may maintain an action on it against the drawer, in his own name, although it came into his hands five years after its date. Ellis *v.* Wheeler, 3 Pick. (Mass.) 18.

Where holder is mere trustee.— Where a negotiable note is payable to bearer or is indorsed in blank, an action may be maintained by the holder in his own name, although the note be held by him in fact as trustee and although there be no allegation as to the nature of his possession. Bacon *v.* Smith, 2 La. Ann. 441, 46 Am. Dec. 549; Jackson *v.* Heath, 1 Bailey (S. C.) 355.

Suit by agent.— An instrument indorsed in blank or payable to bearer may be sued in the name of an agent, unless it be shown that the possession is *mala fide*. Conrey *v.* Harrison, 4 La. Ann. 349; Mauran *v.* Lamb, 7 Cow. (N. Y.) 174; Pearce *v.* Austin, 4 Whart. (Pa.) 489, 34 Am. Dec. 523.

Effect of blank indorsement upon right of payee to sue.— An indorsement in blank, signed by the payee, did not divest him of title to the note so as to preclude his suing thereon, where he did not part with possession thereof. Daniel *v.* Royce, 96 Ga. 566, 23 S. E. 493. A formal objection that an action should have been brought in the bearer's and not in the payee's name cannot be taken at a late day in the suit, when a fresh suit would be barred by the statute of limitations. Jones *v.* Martins, 13 Pa. St. 614.

One of two payees of a negotiable note indorsed by the payees in blank may recover upon it under the general money counts. Malley *v.* Weinman, 48 Vt. 180.

Possession mala fides.— It is no defense to an action on a bill or note payable to bearer that the real title is in another person than plaintiff, unless his title is *mala fides* and may prejudice defendants. Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805. And see Richardson *v.* Gower, 10 Rich. (S. C.) 109.

38. Kuehne *v.* Goit, 54 Ill. App. 596; Baker *v.* Stinchfield, 57 Me. 363; Ogilby *v.* Wallace, 2 Hall (N. Y.) 553; Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805.

39. Golder *v.* Foss, 43 Me. 364; Beekman *v.* Wilson, 9 Metc. (Mass.) 434; Ogilby *v.* Wallace, 2 Hall (N. Y.) 553. But see Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438.

40. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688; Halsted *v.* Lyon, 2 McLean (U. S.) 226, 11 Fed. Cas. No. 5,968.

41. Gray *v.* Wood, 2 Harr. & J. (Md.) 328.

42. *California.*— McCann *v.* Lewis, 9 Cal. 246.

Colorado.— Woodbury *v.* Hinckley, 3 Colo. App. 210, 32 Pac. 860.

New York.— James *v.* Chalmers, 6 N. Y. 209; Smith *v.* Schanck, 18 Barb. (N. Y.) 344.

North Carolina.— Pugh *v.* Grant, 86 N. C. 39.

Pennsylvania.— Leidy *v.* Tammany, 9 Watts (Pa.) 353; Rankin *v.* Woodworth, 2 Watts (Pa.) 134.

43. Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122; Emmett *v.* Tottenham, 8 Exch. 884, 17 Jur. 509, 22 L. J. Exch. 281, 1 Wkly. Rep. 372.

although it is held to be unnecessary for him to fill the indorsement specially to himself.[44]

(B) *Fictitious Payee.* If paper is payable to a fictitious payee the holder cannot bring suit upon it as bearer against a party having no notice of the fictitious character of the payee,[45] but any holder may sue as bearer of a note made payable to order without designating any payee,[46] and the fact that a note is in terms payable to a certain bank does not prevent a holder who has furnished the consideration from treating the bank as a fictitious payee and suing thereon as upon a note payable to bearer.[47]

(C) *Note Payable to Maker.* A note made payable to the maker thereof and indorsed by him in blank can be recovered on by the holder without proof of indorsement and delivery, the production of the note by the holder with the indorsement thereon *prima facie* entitling him to recover.[48]

(D) *Note Payable or Indorsed to a Particular Person "or Bearer."* A note payable or indorsed to a particular person "or bearer" is in effect payable to bearer and may be sued upon by any holder in possession,[49] although the holder of such a note was formerly required at common law to prove his title.[50] He may bring suit either in his own name or in that of the nominal payee.[51]

(VII) *WHERE RETRANSFERRED TO FORMER HOLDER.* Where paper is retransferred to a former holder it has been held necessary in a few jurisdictions for him to show a reassignment or some receipt as evidence of his property

44. *Alabama.*— Agee *v.* Medlock, 25 Ala. 281.

Arkansas.— Owen *v.* Arrington, 17 Ark. 530.

Illinois.— Palmer *v.* Nassau Bank, 78 Ill. 380; Laflin *v.* Sherman, 28 Ill. 391.

Massachusetts.— Watson *v.* New England Bank, 4 Metc. (Mass.) 343.

United States.— Orr *v.* Lacy, 4 McLean (U. S.) 243, 18 Fed. Cas. No. 10,589.

Compare Robertson *v.* Hueback, 15 U. C. C. P. 298.

45. Foster *v.* Shattuck, 2 N. H. 446; Maniort *v.* Roberts, 4 E. D. Smith (N. Y.) 83.

46. Davega *v.* Moore, 3 McCord (S. C.) 482. But see Mutual Safety Ins. Co. *v.* Porter, 7 N. Brunsw. 230.

In Indiana, where a note is made payable to one person and delivered to another, the payee named, having had no interest in it, may be treated as fictitious and the original taker may sue upon it in his own name. Rhyan *v.* Dunnigan, 76 Ind. 178.

47. *In re* Pendleton Hardware, etc., Co., 24 Oreg. 330, 33 Pac. 544.

48. Berney *v.* Steiner, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144; Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas. § 79.

49. *Alabama.*— Kemper, etc., Nav., etc., Banking Co. *v.* Schieffelin, 5 Ala. 493. *Compare* White *v.* Joy, 4 Ala. 571; Clark *v.* Field, 1 Ala. 468, both decided under the statute of 1837.

Florida.— Gregory *v.* McNealy, 12 Fla. 578.

Iowa.— McCormick *v.* Grundy County, 24 Iowa 382; Hotchkiss *v.* Thompson, Morr. (Iowa) 156.

Kentucky.— Odenheimer *v.* Douglass, 5 B. Mon. (Ky.) 107.

Mississippi.— Fox *v.* Hilliard, 35 Miss. 160.

South Carolina.—Fort *v.* Brunson, 2 Speers (S. C.) 658.

Vermont.— Fletcher *v.* Fletcher, 29 Vt. 98.

United States.—Sackett *v.* Davis, 3 McLean (U. S.) 101, 21 Fed. Cas. No. 12,203; Halsted *v.* Lyon, 2 McLean (U. S.) 226, 11 Fed. Cas. No. 5,968. *Contra,* Bradley *v.* Trammel, Hempst. (U. S.) 164, 3 Fed. Cas. No. 1,788*a*.

An agent for collection of such a note may bring suit as bearer. Brigham *v.* Gurney, 1 Mich. 349.

The indorsee of a note payable to a certain person "or bearer" may maintain an action thereon in his own name. Kimmey *v.* Campbell, 1 Ala. 92.

Right unaffected by intermediate indorsement.— The right of the bearer of a promissory note payable to a certain person or bearer to sue thereon is not affected by an intermediate indorsement by the payee to another person. Carroll *v.* Meeks, 3 Port. (Ala.) 226.

Even where he holds as trustee for another and the note has never been delivered to the person named, the holder may bring suit for the use of the party beneficially interested. Boardman *v.* Roger, 17 Vt. 589. But see, as to a non-negotiable note, Whitwell *v.* Winslow, 134 Mass. 343, with which *compare* Cobb *v.* Bryant, 86 Ala. 316, 5 So. 586.

Receiver must sue as such.— Where a note is payable to a designated bank or bearer the receiver of the bank holding under a judicial appointment cannot sue as bearer, but must bring suit in the capacity in which he holds the note. Bradford *v.* Jenks, 2 McLean (U. S.) 130, 3 Fed. Cas. No. 1,769.

50. Hinton's Case, 2 Show. 235.

51. Ketchell *v.* Burns, 24 Wend. (N. Y.) 456; Ware *v.* Key, 2 McCord (S. C.) 373.

therein,[52] particularly where it has been specially indorsed to another;[53] but by the weight of authority such holder is regarded as *prima facie* the true owner, it being presumed from his possession that the instrument was not delivered under his former indorsement, or that it was afterward regularly taken up by him.[54] This has been held true, although the indorsement was a special one,[55] such as an indorsement for collection,[56] and the holder may, under such circumstances, strike out his own and subsequent indorsements or treat them as so canceled and bring an action thereon in his own name.[57] It has been held that the rule itself does not

52. Bright *v.* Hand, 16 N. J. L. 273; Welch *v.* Lindo, 7 Cranch (U. S.) 159, 3 L. ed. 301.

53. Lawrance *v.* Fussell, 77 Pa. St. 460.

54. *Alabama.*— Berney *v.* Steiner, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144; Anniston Pipe Works *v.* Mary Pratt Furnace Co., 94 Ala. 606, 10 So. 259; Beeson *v.* Lippman, 52 Ala. 272; Earhee *v.* Wolfe, 9 Port. (Ala.) 366; Pitts *v.* Keyser, 1 Stew. (Ala.) 154.

Colorado.— Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Georgia.— Leitner *v.* Miller, 49 Ga. 486. See also Daniel *v.* Royce, 96 Ga. 566, 23 S. E. 493. *Compare* Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

Illinois.— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560 [*affirming* 57 Ill. App. 17].

Indiana.— Hanna *v.* Pegg, 1 Blackf. (Ind.) 181.

Louisiana.— This is the later doctrine in Louisiana (Merz *v.* Kaiser, 20 La. Ann. 377; Alcock *v.* McKain, 12 La. Ann. 614), although the court were at one time disposed to hold the opposite view (Hart *v.* Windle, 15 La. 265; Robson *v.* Earley, 1 Mart. N. S. (La.) 373).

Maine.— Eaton *v.* McKown, 34 Me. 510.

Maryland.— Canton Nat. Bldg. Assoc. *v.* Weber, 34 Md. 669; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175; Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282.

Michigan.— See Kerrick *v.* Stevens, 58 Mich. 297, 25 N. W. 199.

Missouri.— Page *v.* Lathrop, 20 Mo. 589; Glasgow *v.* Switzer, 12 Mo. 395.

New York.— Stephens *v.* McNeill, 26 Barb. (N. Y.) 651; Mottram *v.* Mills, 1 Sandf. (N. Y.) 37; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Norris *v.* Badger, 6 Cow. (N. Y.) 449.

Tennessee.— Brady *v.* White, 4 Baxt. (Tenn.) 382.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131.

55. Pitts *v.* Keyser, 1 Stew. (Ala.) 154; Rider *v.* Taintor, 4 Allen (Mass.) 356; Wickersham *v.* Jarvis, 2 Mo. App. 279.

56. *Arkansas.*— Dickinson *v.* Burr, 15 Ark. 372.

California.— Naglee *v.* Lyman, 14 Cal. 450.

Connecticut.— Dann *v.* Norris, 24 Conn. 333.

Georgia.— Habersham *v.* Lehman, 63 Ga. 380.

Illinois.— Best *v.* Nokomis Nat. Bank, 76 Ill. 608.

Louisiana.— Barbarin *v.* Daniels, 7 La. 479; Dicks *v.* Cash, 6 Mart. N. S. (La.) 45.

New York.— Chautauqua County Bank *v.* Davis, 21 Wend. (N. Y.) 584; Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Texas.— Jensen *v.* Hays, 2 Tex. App. Civ. Cas. § 566.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335, 5 Fed. Cas. No. 2,502, Liv. L. Mag. 193; Leavitt *v.* Cowles, 2 McLean (U. S.) 491, 15 Fed. Cas. No. 8,171.

57. *Colorado.*— Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Connecticut.— Dann *v.* Norris, 24 Conn. 333 (holding that it was not necessary that his indorsement be struck out); Bond *v.* Storrs, 13 Conn. 412.

Illinois.— Sweet *v.* Garwood, 88 Ill. 407; Montreal Bank *v.* Dewar, 6 Ill. App. 294.

Indiana.— Mendenhall *v.* Bank, 16 Ind. 284.

Iowa.— Goddard *v.* Cunningham, 6 Iowa 400.

Kentucky.— Clark *v.* Schwing, 1 Dana (Ky.) 333. See also Hawkins *v.* Fellowes, 6 Dana (Ky.) 128.

Louisiana.— Cooper *v.* Cooper, 14 La. Ann. 665; Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Huie *v.* Brady, 16 La. 213, 35 Am. Dec. 214, the latter two holding that he might or might not strike out the indorsement as he thought proper.

Maine.— Warren *v.* Gilman, 15 Me. 70, holding that it was optional with him to strike out the indorsement.

Michigan.— Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965.

Mississippi.— Bowles *v.* Wright, 34 Miss. 409.

Missouri.— Glasgow *v.* Switzer, 12 Mo. 395.

New Hampshire.— Witherell *v.* Ela, 42 N. H. 295.

New York.— Utica Bank *v.* Smith, 18 Johns. (N. Y.) 230.

Texas.— Collins *v.* Panhandle Nat. Bank, 75 Tex. 254, 11 S. W. 1053.

United States.— Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517. *Compare* Craig *v.* Brown, Pet. C. C. (U. S.) 171, 6 Fed. Cas. No. 3,327.

Time of striking out.— It is not necessary for the payee to strike out the indorsement before bringing his action; but he may do so if he desires at the time of trial (Bond *v.* Storrs, 13 Conn. 412; Sweet *v.* Garwood, 88 Ill. 407; Parks *v.* Brown, 16 Ill. 454; Wulschner *v.* Sells, 87 Ind. 71; Bell *v.* Morehead, 3

extend to an action brought by the payee of the paper in the name and right of another.[58]

b. Joinder of Plaintiffs — (I) *In General.* It has been held that all parties having an interest in the subject-matter may be joined in the same suit,[59] but a person having merely an equitable interest in a portion of the proceeds of a bill or note should not be joined as a party plaintiff with the holder of the whole legal title.[60]

(II) *Indorsers.* To enable indorsers to join in demanding a repayment from prior parties of a note paid by them to subsequent indorsees, the payment must have been made out of a joint fund.[61]

(III) *Payee and Transferee.* Where a note has been transferred by parol the payee is a necessary party to a suit by the assignee,[62] but a nominal payee is not necessary to an action by the holder, although he has received the note by delivery merely.[63] The payee may also be joined with the transferee in case of an action by the indorsee of a non-negotiable promissory note in which the payee is made a co-plaintiff for the use of the indorsee,[64] or in an action by an assignee of a note, where a statute requires suit to be brought in the name of the real party in interest.[65] The payee and transferee should not be joined as parties plaintiff where no unity of interests subsists between them.[66]

(IV) *Transferrer and Transferee.* As a general rule there is no necessity of making the assignor or indorser of a bill or note a party to an action brought by the assignee or indorsee.[67] In the case of an equitable assignment, however, the assignor must be joined as a party plaintiff with the assignee,[68] and where, owing to the non-negotiability of a note, the assignor retains the legal title he is, in the absence of statutory authority to the contrary, a necessary party, if objection is made,[69] although in such case amendment is freely allowed.[70]

(V) *Where Made Payable to Several Persons or Transferred to Several* — (A) *In General.* Where a bill or note is made payable to several

A. K. Marsh. (Ky.) 158; Banks *v.* Brander, 13 La. 274), and if an indorser takes up the note after protest he may strike out his indorsement and bring suit in his own name (Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358; Witherell *v.* Ela, 42 N. H. 295).

Filing blank indorsements.— If on the trial several blank indorsements, including that of plaintiff, appear on the note, plaintiff may strike out his own and fill up the others to correspond with the allegations in his declaration. Pickett *v.* Stewart, 12 Ala. 202.

58. In such case he must show the title for whom he sues as against an intermediate indorsee. Frémont *v.* U. S., 4 Ct. Cl. 252.

If the holder has lost the note after indorsing it and is therefore unable to strike out the indorsement he may bring suit as the real party in interest in the indorsee's name. Leavitt *v.* Cowles, 2 McLean (U. S.) 491, 15 Fed. Cas. No. 8,171.

59. Wilson *v.* Hampton, 2 Tex. Unrep. Cas. 426, where it was held that the payees of separate notes secured by vendor's lien might join in one action.

60. Curtis *v.* Sprague, 51 Cal. 239.

Note held in individual and representative capacity.— Where a note sued on belonged jointly to plaintiff and to a minor, of whose estate plaintiff was guardian, it was held that plaintiff was the legal owner and holder of the note and could maintain the suit as such. Ezell *v.* Edwards, 2 Tex. App. Civ. Cas. § 767.

61. Doremus *v.* Selden, 19 Johns. (N. Y.) 213.

62. Perry *v.* Seitz, 2 Duv. (Ky.) 122.

63. Rogge *v.* Cassidy, 10 Ky. L. Rep. 396.

64. Tumlin *v.* Quarles, 26 Ga. 395.

65. Carpenter *v.* Miles, 17 B. Mon. (Ky.) 598. See also Heartman *v.* Franks, 36 Ark. 501, holding that, under Gantt Dig. Ark. § 4469, providing that action shall be in the name of the real party in interest, the absolute owner and holder of a note who is entitled to the money to be collected upon it need not join the payee in the suit, although he may do so if it be necessary to quiet the rights of all parties and avoid future litigation.

66. Frear *v.* Bryant, 12 Ind. 343.

67. Abshire *v.* Corey, 113 Ind. 484, 15 N. E. 685; Bondurant *v.* Bladen, 19 Ind. 160; Morehouse *v.* Potter, 15 Ind. 477; Clark *v.* Smith, 7 B. Mon. (Ky.) 273.

Necessity of making assignor party.— In a suit in equity on a note indorsed for collection only, brought by the alleged assignee, the alleged assignor must be made a party. Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671.

68. Barcus *v.* Evans, 14 Ind. 381.

69. Myers *v.* Miller, 2 Ohio Dec. (Reprint) 319, 2 West. L. Month. 420.

70. Hayne *v.* Perry, 25 Ga. 400; Costelo *v.* Crowell, 134 Mass. 280.

persons or is indorsed or assigned to several they are joint holders and must sue jointly as such.[71] A note payable to alternative payees is evidence of a joint contract, and neither can sue alone on it,[72] although they may bring a joint action.[73]

(B) *Where One Party Dies.* If a note is payable to several jointly action may be brought by the survivors on the death of one.[74] In case of the death of one of several indorsees or assignees, the right of action survives to the survivors, and the successor or representative of the deceased party cannot be joined with them in an action on the note.[75]

(C) *Where Transferred by One Party.* By the weight of authority the transfer of a bill or note by one of several payees or holders to the other or others will not be sufficient to support an action by the latter.[76] If, however, the original indorsement is to several as trustees, and one transfers his interest to the other two, they may bring suit without joining him;[77] and if a note is indorsed to three persons, one of whom indorses to the other two who indorse to plaintiff, it has been held sufficient to sustain an action by him.[78] If the note is payable to "our, and each of our, order," the indorsee of either payee may bring suit upon it.[79]

(VI) *WHERE PART INTEREST IN PAPER ASSIGNED.* A part interest in a promissory note may be assigned, and the assignee being the real party in interest can join the owner of the other interest in an action upon the note.[80]

71. Yell *v.* Snow, 24 Ark. 554; McNamee *v.* Carpenter, 56 Iowa 276, 9 N. W. 218 (holding that one joint owner cannot sue on a note alone, although the note is payable to bearer and in his possession); Bernard *v.* Barry, 1 Greene (Iowa) 388 (and they need not prove a partnership); Stauffer *v.* Doty, 2 Kan. App. 149, 43 Pac. 291 (although their interests are not equal); Quisenberry *v.* Artis, 1 Duv. (Ky.) 30 (holding, however, that if a note is made by A and B to B and C, C may bring suit as on a note made by A to him).

If payable to two persons or either of them either may sue. Hopkins *v.* Halliburton, 6 Tex. Civ. App. 451, 25 S. W. 1005.

72. Carr *v.* Bauer, 61 Ill. App. 504; Willoughby *v.* Willoughby, 5 N. H. 244; Blanckenhagen *v.* Blundell, 2 B. & Ald. 417. *Contra*, Ellis *v.* McLemoor, 1 Bailey (S. C.) 13.

Non-negotiable instrument.— Where the maker of a written contract containing no terms of negotiability promised therein to pay either of two persons a certain sum of money either of the payees may assign it and the assignee maintain an action in his own name. Record *v.* Chisum, 25 Tex. 348.

73. Westgate *v.* Healy, 4 R. I. 523.

74. *Massachusetts.*— Draper *v.* Jackson, 16 Mass. 480.

Mississippi.— Allen *v.* Tate, 58 Miss. 585.

New York.— Stelling *v.* Grobowsky, 19 N. Y. Suppl. 280, 46 N. Y. St. 700.

Pennsylvania.— Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

Tennessee.— Walker *v.* Galbreath, 3 Head (Tenn.) 315.

Texas.— Hansell *v.* Gregg, 7 Tex. 223.

75. Roane *v.* Lafferty, 5 Ark. 465.

76. Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37; Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376; Estabrook *v.* Smith, 6 Gray (Mass.) 570, 66 Am. Dec. 443; Pugh *v.* Holliday, 3 Ohio St. 284. *Contra*, Smith *v.* Gregory, 75 Mo. 121; Regan *v.* Jones, 1 Wyo. 210. See also McLeod *v.* Snyder, 110 Mo. 298, 19 S. W. 494.

77. Cartwright *v.* Gardner, 5 Cush. (Mass.) 273.

78. Goddard *v.* Lyman, 14 Pick. (Mass.) 268.

79. Absolon *v.* Marks, 11 Q. B. 19, 11 Jur. 1016, 17 L. J. Q. B. 7, 63 E. C. L. 19.

80. Groves *v.* Ruby, 24 Ind. 418; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635; Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615; Goldman *v.* Blum, 58 Tex. 630; Avery *v.* Popper, (Tex. Civ. App. 1895) 34 S. W. 325. But see Bibb *v.* Skinner, 2 Bibb (Ky.) 57; Hubbard *v.* Prather, 1 Bibb (Ky.) 178.

Separate actions cannot be maintained by different indorsees of part interest in the same note (Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37; Elledge *v.* Straughn, 2 B. Mon. (Ky.) 81; King *v.* King, 73 N. Y. App. Div. 547, 77 N. Y. Suppl. 40 [*affirming* 37 Misc. (N. Y.) 63, 74 N. Y. Suppl. 751]), and ancillary proceedings in such actions, such as writs of sequestration for property covered by a chattel mortgage securing the note, are void (Avery *v.* Popper, (Tex. Civ. App. 1895) 34 S. W. 325). In general, however, the assignee of a partial interest in commercial paper may maintain a suit in equity, although not at law (Hutchinson *v.* Simon, 57 Miss. 628), and if a fractional interest in a note is assigned to one of the payee's next of kin and the maker settles with the other parties interested and thereby severs their joint interest the assignee may bring suit alone for his share (Pratt *v.* Pratt, 22 Minn. 148).

2. Parties Defendant — a. In General. Only parties to a bill or note are necessary or proper parties defendant in an action thereon.[81]

b. Joint, or Joint and Several, Makers or Accepters — (I) *In General.* Where a note is joint, all the makers are as a rule necessary parties unless some have been legally discharged,[82] but the holder may sue the makers and indorsers at the same time and recover costs and damages separately against each.[83] Where a note is joint and several the holder may bring separate actions against the several makers without proving a joint liability,[84] but he must proceed against all jointly on their joint contract or against the several makers separately.[85]

81. Heaton *v.* Lynch, 11 Ind. App. 408, 38 N. E. 224; Blake *v.* Miller, 1 Tex. App. Civ. Cas. § 1213; Ross *v.* Codd, 7 U. C. Q. B. 64. See also Newcome *v.* Dunham, 27 Ind. 285.

82. *Indiana.*—Callahan *v.* Mitchell, 29 Ind. 418, where it was held that an action against one of the two makers of a joint and several note ought not to be delayed against the objection of plaintiff to permit defendant to bring in by cross complaint the alleged principal.

Massachusetts.— Porter *v.* Ingraham, 10 Mass. 88; Simonds *v.* Center, 6 Mass. 18.

New York.— Van Tine *v.* Crane, 1 Wend. (N. Y.) 524.

South Carolina.— Ambler *v.* Hillier, 9 Rich. (S. C.) 243; Karck *v.* Avinger, Riley (S. C.) 201.

Texas.— Head *v.* Cleburne Bldg., etc., Assoc., (Tex. Civ. App. 1893) 25 S. W. 810.

Assumption of debt by one joint maker.— The holder will be entitled to the benefit of the assumption by one of the makers of a joint note of its whole amount. In such case it will be unnecessary to join his coöbligor in the action. State Bank *v.* Lawless, 3 La. Ann. 129.

A stipulation as to the proportion which each maker is to pay renders the obligation several, and a joint action is not maintainable thereon. McBean *v.* Todd, 2 Bibb (Ky.) 320.

Note payable to joint maker.— Under the provisions of Ala. Code, §§ 2129, 2143, a payee of a promissory note, who is also one of the joint makers, and who has assigned his interest in the note to the other payees, is not a necessary party defendant in a suit on the note. The action may be maintained against the other maker. Willis *v.* Neal, 39 Ala. 464. But where a note was made by two parties, payable to one of them and a third party, in a suit by the latter against both makers, in which he abated as to the one, who was also a payee, and took judgment against the other, it was held that the note was in effect the joint note of the two makers to the third party payee, that he had the right to sue both or either of them, and that the judgment should not be reversed because he was allowed to abate as to one and take judgment against the other. Quisenberry *v.* Artis, 1 Duv. (Ky.) 30.

The curator of one joint maker may be sued in Louisiana without making the other joint maker a party. The holder of a joint note may enforce it against the curator of one of the debtors without making the other a party. *In re* O'Flaherty, 7 La. Ann. 640.

83. *Connecticut.*— Ainsworth *v.* Dyer, 2 Root (Conn.) 202.

Indiana.— Jenks *v.* Opp, 43 Ind. 108.

Kentucky.— Kinsman *v.* Dallam, 5 T. B. Mon. (Ky.) 382.

Maryland.— Pike *v.* Dashiell, 7 Harr. & J. (Md.) 466.

Oregon.— Kamm *v.* Harker, 3 Oreg. 208.

Wisconsin.— Clapp *v.* Preston, 15 Wis. 543. *Compare* Eastman *v.* Porter, 14 Wis. 39, where a joint maker who had paid his proportion of the indebtedness in accordance with the agreement reached by his co-maker and plaintiff was held not to be a necessary party to an action against such co-maker.

United States.— Woodworth *v.* Spofford, 2 McLean (U. S.) 168, 30 Fed. Cas. No. 18,020.

84. *Colorado.*— Mattison *v.* Childs, 5 Colo. 78.

Delaware.— Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Maine.— Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272.

Massachusetts.—Simonds *v.* Center, 6 Mass. 18.

Mississippi.— Crump *v.* Wooten, 41 Miss. 611.

Tennessee.— Gratz *v.* Stump, Cooke (Tenn.) 494.

In Alabama it is provided by statute that every joint promissory note shall be deemed and construed to have the same effect in law as a joint and several promissory note. Smith *v.* Clapp, 15 Pet. (U. S.) 125, 10 L. ed. 684. But see Miller *v.* Sneads, Minor (Ala.) 27.

In Iowa when two joint and several makers are sued together, and verdict had against both on their making a common defense, a new trial may be granted as to one and not as to the other. Gordon *v.* Pitt, 3 Iowa 385.

The obligation of irregular indorsers of a note, who were liable as original makers, is joint and several and not joint alone, with the obligation of the makers signing their names at the foot of the note, although the instrument is in form in other respects joint. Schultz *v.* Howard, 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470.

85. Ritchie *v.* Gibbs, 7 Ill. App. 149.

Joint judgment bars severance.—Where the holder of a joint and several note brings action against both makers jointly and takes judgment with a right of execution against their joint property he cannot then sever

(II) *As Affected by Death of Joint Party.* As a rule the executor or administrator of a deceased joint party to a bill or note cannot be sued jointly with the survivor or survivors,[86] although in some jurisdictions such joinder while not necessary is permissible.[87] In other states it is provided that on the death of any joint debtor his representatives shall remain liable upon the contract as though it were a several obligation as well as joint.[88]

(III) *As Affected by Domicile.* Where a joint maker is a non-resident[89] and has no property in the state,[90] or is without the jurisdiction of the court,[91] he

his remedy and have a separate action against either. Lane *v.* Salter, 4 Rob. (N. Y.) 239.

86. *Alabama.*— Murphy *v.* Mobile Branch Bank, 5 Ala. 421.

Colorado.— Mattison *v.* Childs, 5 Colo. 78.

Illinois.— Stevens *v.* Catlin, 152 Ill. 56, 37 N. E. 1023; Moore *v.* Rogers, 19 Ill. 347.

Iowa.— Barlow *v.* Scott, 12 Iowa 63.

Kentucky.—Williams *v.* Royle, 1 Litt. (Ky.) 77.

Mississippi.— Poole *v.* McLeod, 1 Sm. & M. (Miss.) 391.

Nevada.— Maples *v.* Geller, 1 Nev. 233.

New York.— McVean *v.* Scott, 46 Barb. (N. Y.) 379; Bentz *v.* Thurber, 1 Thomps. & C. (N. Y.) 645.

Tennessee.— Tennessee Bank *v.* Skillern, 2 Sneed (Tenn.) 698.

United States.— Harrington *v.* Herrick, 64 Fed. 468, 12 C. C. A. 231.

See 7 Cent. Dig. tit. "Bills and Notes," § 1430.

Death of joint and several maker.— Where pending a suit on a joint and several note one of the defendants dies his administrators cannot be substituted and the action be discontinued as to them. Marsh *v.* Goodrell, 11 Iowa 474; Pecker *v.* Cannon, 11 Iowa 20. See also Morehouse *v.* Ballou, 16 Barb. (N. Y.) 289, where it was held that the survivor on a joint and several note, who was appointed one of his co-maker's executors, could not be joined with himself and his co-executors in the same action.

Administrator of survivor.— A declaration in one of the short forms authorized by the Georgia code against the administrator of A did not expressly state that he was sued as administrator, but alleged that he was indebted to plaintiff on a promissory note, a copy of which was annexed, and the copy annexed was that of a joint note signed by A and B. It was held that, although the non-joinder of B, if alive and within the jurisdiction, would be a matter for plea in abatement, yet after judgment it would be presumed that A survived B, in which case the proper defendant of the action is A's administrator alone. Jennings *v.* Wright, 54 Ga. 537.

Effect of irregular joint judgment.— If a surety and the administrator of the deceased principal maker are irregularly joined in the judgment the judgment against the surety will not be rendered void thereby. Boyd *v.* Titzer, 6 Coldw. (Tenn.) 568.

87. Bostwick *v.* McEvoy, 62 Cal. 496; Stockton Bank *v.* Howland, 42 Cal. 129; Redman *v.* Marvil, 73 Ind. 593; Kelso *v.* Wolf, 70 Ind. 105; Hudelson *v.* Armstrong, 70 Ind. 99; McCoy *v.* Payne, 68 Ind. 327; Klussman *v.* Copeland, 18 Ind. 306; Foster *v.* Champlin, 29 Tex. 22; Henderson *v.* Kissam, 8 Tex. 46. *Compare* Wiley *v.* Pinson, 23 Tex. 486.

Death pendente lite.— Where one of several defendants sued jointly on a promissory note dies pending the action, his personal representatives are properly, on suggestion of his death, made parties to the action. Bennett *v.* Spillars, 9 Tex. 519. *Compare* McVean *v.* Scott, 46 Barb. (N. Y.) 379.

Surviving joint and several makers, although sureties, can be sued without joining the administrator or heirs of deceased makers. Walker *v.* Collins, 22 Tex. 189.

Voluntary appearance of representatives.— Where one maker of a joint note has died the payee is not obliged to proceed against his representatives, and if they appear voluntarily in the suit it will be a waiver of citation. Womack *v.* Shelton, 31 Tex. 592.

88. Thompson *v.* Johnson, 40 N. J. L. 220.

89. Ainsworth *v.* Dyer, 2 Root (Conn.) 202; Coldron *v.* Rhode, 7 Ind. 151.

Mississippi statute construed.— The provisions of Miss. Code (1857), p. 357, art. 11, which require all the parties to bills of exchange and promissory notes resident in the state to be sued in one action, apply only to bills of exchange and indorsed notes, when there are parties secondarily liable. They do not embrace the case of joint makers of a promissory note, even though one be a surety. In such a case all are makers and the action may be brought in the county where any of the makers reside. Moore *v.* Knox, 46 Miss. 602.

Simultaneous actions against non-residents and residents.—The holder of a note executed by several persons may prosecute his action by attachment against non-residents and by summons against those who can be served personally with process at the same time, Tenn. Acts (1812), c. 67, which prohibits the prosecution of several actions against parties jointly and severally liable on instruments for the payment of money, not embracing such a case. Sims *v.* McNeil, 10 Humphr. (Tenn.) 500.

90. Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59.

91. Booher *v.* Worrill, 43 Ga. 587; Vinson *v.* Platt, 21 Ga. 135; Hughes *v.* Gordon, 7 Mo. 297.

Michigan statute construed.—Howell Anno. Stat. Mich. § 7316, provides that when an action on a contract is brought in the circuit

is not as a rule a necessary party defendant to a suit brought to recover the amount of the note.[92]

(IV) *Effect of Failure to Serve All Joint Defendants.* The common-law rule that service of process must be had on all of several joint defendants has been modified by statute in various states. These as a rule provide that plaintiff may discontinue as to the party or parties not served and proceed against those served with process.[93]

c. Parties Severally Liable — (I) *At Common Law.* At common law the holder of a bill might bring several simultaneous actions against all or any of the prior parties liable to him.[94] He could not, however, maintain a joint action against parties severally liable.[95]

(II) *By Statute* — (A) *In General.* By statute in many of the United States, in England, and in Canada the holder of a bill of exchange or promissory note may bring suit against the drawer or maker, accepter or indorser, any or all, in the same action.[96] In other states it is provided that if a joint action is brought

court against joint defendants, one of whom does not reside in, and is not found in, the county, and one or more of whom are served with process in the county, service may be had on defendant not so found or served in the county, provided "such joint defendants are original parties thereto by being indorsers or guarantors." It has been held that one other than the payee, who indorses a note before delivery and before any advances are made thereon, is an original party to the contract and not an indorser or guarantor, within the meaning of the statute. Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152.

92. In Louisiana, under Civ. Code, arts. 2080–2082, in an action upon a joint obligation all the parties thereto must be made parties to the suit; and if one of the parties is a non-resident and has no property in Louisiana he may be cited through a *curator ad hoc* and judgment rendered against him is valid in Louisiana, although it may have no extra-territorial effect. Hyde *v.* Marcy, 22 La. Ann. 383.

93. *Indiana.*— Boots *v.* Boots, 84 Ind. 171. See also Jenks *v.* Opp, 43 Ind. 108.

Nebraska.— Beeler *v.* Larned First Nat. Bank, 34 Nebr. 348, 51 N. W. 857.

New York.— Scott *v.* Standart, 19 Wend. (N. Y.) 642.

Texas.— Look *v.* Henderson, 4 Tex. 303.

United States.— Burdette *v.* Bartlett, 95 U. S. 637, 24 L. ed. 534.

In Georgia a joint debtor who is sued but not served in the first action is liable to a further suit. Ells *v.* Bone, 71 Ga. 466. But see Graham *v.* Marks, 95 Ga. 38, 21 S. E. 986; Davison *v.* Harmon, 65 Minn. 402, 67 N. W. 1015.

In Texas the act of 1846, § 46, provides that no judgment shall be rendered against an indorser or surety unless judgment is at the same time rendered against the principal, except where plaintiff discontinues as to the principal because he resides beyond the limits of the state or because he is insolvent. Look *v.* Henderson, 4 Tex. 303. See also Burden *v.* Cross, 33 Tex. 685; Crawford *v.* Jones, 24 Tex. 382.

94. *Alabama.*— Williams *v.* Jones, 79 Ala. 119.

Delaware.— Register *v.* Casperson, 3 Harr. (Del.) 289.

Florida.— Webster *v.* Barnett, 17 Fla. 272.

Georgia.— Richardson *v.* White, R. M. Charlt. (Ga.) 53. But a party may be sued in one action as indorser and as executor of the maker. Roark *v.* Turner, 29 Ga. 455.

Kentucky.— Crisson *v.* Williamson, 1 A. K. Marsh. (Ky.) 454.

Maryland.—Halley *v.* Jackson, 48 Md. 254; Columbia Bank *v.* Ross, 4 Harr. & M. (Md.) 456.

Pennsylvania.— Fawcett *v.* Fell, 77 Pa. St. 308.

England.— Britten *v.* Webb, 2 B. & C. 483, 3 D. & R. 650, 2 L. J. K. B. O. S. 118, 9 E. C. L. 214; Knight *v.* Legh, 4 Bing. 589, 6 L. J. C. P. O. S. 128, 1 M. & P. 528, 29 Rev. Rep. 645, 13 E. C. L. 649; Bishop *v.* Hayward, 4 T. R. 470.

The same party may be sued separately as indorser and as accepter, if so liable, and the last action will not be stayed by a court of equity as vexatious. Wise *v.* Prowse, 9 Price 393.

A judgment against a defendant as executor of both maker and indorser will be good, although the relation of the parties is not specified in the judgment. Woolfolk *v.* Kyle, 48 Ga. 419.

95. Cox *v.* Mechanics' Sav. Bank, 28 Ga. 529; Pierce *v.* Eustis, 6 Blackf. (Ind.) 159; Martin *v.* Fales, 24 N. H. 242.

96. *Alabama.*— Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721.

Arkansas.— Walker *v.* Walker, 7 Ark. 542.

District of Columbia.— Hoffecker *v.* Moon, 21 D. C. 263; Young *v.* Warner, 6 App. Cas. (D. C.) 433.

Georgia.— See Davis *v.* Baker, 71 Ga. 33.

Indiana.— Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

Louisiana.— Farmers' Bank *v.* Stevens, 11 La. Ann. 189; Lambeth *v.* Caldwell, 1 Rob. (La.) 61; Millaudon *v.* Turgeau, 9 La. 541.

Missouri.— Page *v.* Snow, 18 Mo. 126.

it must be prosecuted against all of the parties liable,[97] and in Mississippi no action can be brought against parties secondarily liable on a note without joining all prior parties living in the state.[98] Conversely it has been enacted in Texas, in the case of non-negotiable instruments, that only the immediate indorser can be sued.[99]

New York.— Sawyer *v.* Chambers, 11 Abb. Pr. (N. Y.) 110.

Ohio.— Kautzman *v.* Weirick, 26 Ohio St. 330; Green *v.* Burnet, 1 Handy (Ohio) 285, 12 Ohio Dec. (Reprint) 145.

Tennessee.—Crutcher *v.* Bedford, 8 Humphr. (Tenn.) 405.

West Virginia.— See Huntington Bank *v.* Hysell, 22 W. Va. 142, holding that non-negotiable instruments are not within the purview of the West Virginia statute.

United States.— Burdette *v.* Bartlett, 95 U. S. 637, 24 L. ed. 534; Sykes *v.* Chadwick, 18 Wall. (U. S.) 141, 21 L. ed. 284; Campbell *v.* Jordan, Hempst. (U. S.) 534, 4 Fed. Cas. No. 2,362.

England.— Keene *v.* Beard, 8 C. B. N. S. 372, 6 Jur. N. S. 1248, 29 L. J. C. P. 287, 2 L. T. Rep. N. S. 240, 8 Wkly. Rep. 469, 98 E. C. L. 372; Eyre *v.* Waller, 5 H. & N. 460, 6 Jur. N. S. 512, 29 L. J. Exch. 246, 2 L. T. Rep. N. S. 253, 8 Wkly. Rep. 450, which hold that 18 & 19 Vict. c. 67, permitting all or any of the parties to a bill of exchange or promissory note to be joined in one action, applies to checks.

Canada.— Hamilton *v.* Phipps, 7 Grant Ch. (U. C.) 483. And see Kerr *v.* Hereford, 17 U. C. Q. B. 158.

See 7 Cent. Dig. tit. "Bills and Notes," § 1435.

Right given by charter.— In Georgia it has been held that the charter of a particular bank authorizing such suits upon paper held by the bank is a constitutional act. Davis *v.* Fulton Bank, 31 Ga. 69.

Right of severance.— The statute as to suing all the parties to a note in one action (N. Y. Laws (1832), c. 276), has not been repealed, and the right which it gives to sever the action at any time, to take judgment against any of the parties, should not be taken away by a mere order of the court as to adding parties. Sawyer *v.* Chambers, 11 Abb. Pr. (N. Y.) 110.

Surety signing after maturity.—Iowa Code (1851), § 1681 (Code (1873), § 2550), providing that an action may be brought against any or all persons liable on contracts, negotiable paper, orders, and checks, and sureties on the same, authorizes a recovery in the same action by the holder of a note against the maker and a surety signing after maturity. Jones *v.* Wilson, 11 Iowa 160. See also McVean *v.* Scott, 46 Barb. (N. Y.) 379.

97. **In Indiana,** under the statute of 1839, the holder of a note payable at bank may proceed against the maker and indorsers jointly, if he has a good cause of action against each of them, but not otherwise. When he has such grounds of suit and chooses to proceed under the statute, his action must be brought against all the makers and indorsers living; and the judgment for plaintiff, if any, must be rendered against all sued and served with process, except where one pleads some plea that goes to his personal discharge. Goodlet *v.* Britton, 6 Blackf. (Ind.) 500. See also Cross *v.* Pearson, 17 Ind. 612; Dillon *v.* State Bank, 6 Blackf. (Ind.) 5.

In Kentucky the statute gives a joint action in the case of foreign bills only, leaving, as to the mode of suit, the other kinds of bills as they stood at common law. In the case of a foreign bill, the statute does not restrain the holder from bringing several actions against the drawer, etc., but if he chooses to depart from the common law he must pursue the statute and unite all concerned. Crisson *v.* Williamson, 1 A. K. Marsh. (Ky.) 454.

98. Hamilton *v.* Catchings, 58 Miss. 92; Stiles *v.* Inman, 55 Miss. 469. See also, construing earlier statutes, Moore *v.* Knox, 46 Miss. 602; McGrath *v.* Hoopes, 26 Miss. 496; Gwin *v.* Mandeville, 9 Sm. & M. (Miss.) 320; Thompson *v.* Planters' Bank, 2 Sm. & M. (Miss.) 476; Stevenson *v.* Walton, 2 Sm. & M. (Miss.) 262; Wells *v.* Patterson, 7 How. (Miss.) 32; Bullit *v.* Thatcher, 5 How. (Miss.) 689, 37 Am. Dec. 175; Lillard *v.* Planters Bank, 3 How. (Miss.) 78.

Present statute construed.— Miss. Code (1871), § 2237, requiring that in suits on negotiable instruments the makers, accepters, drawers, and indorsers shall be sued jointly, is for the benefit alone of those secondarily liable, so that in an action against the accepter of a bill he cannot object that the drawers are not joined. Hamilton *v.* Catchings, 58 Miss. 92.

A subsequent indorser without recourse is not a necessary party in an action by his indorsee against the first indorser. Duncan *v.* McNeill, 31 Miss. 704.

Repugnant to Judiciary Act.— The Mississippi act of May 13, 1837, providing that, in all actions on bills and notes, "plaintiffs shall be compelled to sue the drawers and indorsers, living and resident in this State, in a joint action," is repugnant to the act of congress giving jurisdiction to the courts of the United States, and consequently, where the original parties were citizens of Mississippi, it was held that an indorsee, a citizen of Tennessee, could not join such parties in an action in the United States circuit court. Keary *v.* Farmers', etc., Bank, 16 Pet. (U. S.) 89, 10 L. ed. 897.

99. Brooks *v.* Breeding, 32 Tex. 752, construing Paschal Dig. Tex. p. 223.

(B) *Maker and Indorser.* Under the statutes above referred to the maker and indorsers of negotiable[1] paper may now in general be sued together in one action.[2] Where such an action is brought it may be discontinued on payment of costs as to one defendant and proceed as to the other.[3] It has been held that

1. **Where a non-negotiable note is transferred by indorsement,** a joint action cannot be maintained by the indorsee against the maker and indorser, since the maker must be sued by the indorsee as assignee, and the indorser by him as indorsee. White *v.* Low, 7 Barb. (N. Y.) 204. See also Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673; Mann *v.* Sutton, 4 Rand. (Va.) 253.

2. *Alabama.*— Williams *v.* Jones, 79 Ala. 119.

Arkansas.— Taylor *v.* Coolidge, 17 Ark. 454.

District of Columbia.— Hoffecker *v.* Moon, 21 D. C. 263.

Indiana.— Overshiner *v.* Martin, 87 Ind. 189; Norvell *v.* Hittle, 23 Ind. 346; Dillon *v.* State Bank, 6 Blackf. (Ind.) 5. *Compare* Couch *v.* Thorntown First Nat. Bank, 64 Ind. 92; Mix *v.* State Bank, 13 Ind. 521 (where it was held that in order to authorize such joinder the indorser must be immediately liable).

Iowa.— Stout *v.* Noteman, 30 Iowa 414.

Kentucky.— See Tennessee Bank *v.* Smith, 9 B. Mon. (Ky.) 609; Tilford *v.* Commonwealth Bank, 2 Dana (Ky.) 114; Pendleton *v.* Commonwealth Bank, 2 J. J. Marsh. (Ky.) 148; Johnson *v.* Commonwealth Bank, 5 T. B. Mon. (Ky.) 119; Farmers', etc., Bank *v.* Turner, 2 Litt. (Ky.) 13; Noble *v.* Commonwealth Bank, 3 A. K. Marsh. (Ky.) 262; Crisson *v.* Williamson, 1 A. K. Marsh. (Ky.) 454.

Louisiana.—Peretz *v.* Peretz, 1 Mart. (La.) 219.

Michigan.—Phelps *v.* Church, 65 Mich. 231, 32 N. W. 30; Green *v.* Burrows, 47 Mich. 70, 10 N. W. 111.

Missouri.—Holland *v.* Hunton, 15 Mo. 475; Hunter *v.* Hempstead, 1 Mo. 67, 13 Am. Dec. 468; Deshon *v.* Leffler, 7 Mo. App. 595.

New Jersey.— The statute authorizing the joinder of the maker and indorsers does not apply to actions in a justice's court. Craft *v.* Smith, 35 N. J. L. 302. But see the New Jersey act of March 8, 1877.

Ohio.— Kautzman *v.* Weirick, 26 Ohio St. 330; Buckingham *v.* McCracken, 2 Ohio St. 287.

Tennessee.— Holland *v.* Harris, 2 Sneed (Tenn.) 68; Planters Bank *v.* Tappan, 2 Humphr. (Tenn.) 96. But see Watson *v.* Hoge, 7 Yerg. (Tenn.) 344, decided under the Tennessee act of 1820, c. 25.

Texas.— Brooks *v.* Breeding, 32 Tex. 752.

Virginia.— Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127.

Washington.— Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67.

West Virginia.—Willis *v.* Willis, 42 W. Va. 522, 36 S. E. 515.

See 7 Cent. Dig. tit. "Bills and Notes," § 1437.

Accommodation indorser.— In a joint action against a maker and indorser of a promissory note, an answer by the indorser alleging that he was only an accommodation indorser and not a maker is insufficient. Clark *v.* Carey, 63 Ind. 105.

Administrators of maker and indorser.— D. C. Rev. Stat. § 827, providing that where money is payable by two or more jointly or severally one action may be maintained against any or all of them, the administrator of the maker of the note sued on may be joined with the indorser's administrator. Keyser *v.* Fendall, 5 Mackey (D. C.) 47. See also Eaton *v.* Alger, 47 N. Y. 345; Churchill *v.* Trapp, 3 Abb. Pr. (N. Y.) 306, in which cases it was held that the executor of an indorser may be sued jointly with the maker.

Failure of maker to answer.— Where suit is brought against the maker and indorser of a note, the maker fails to answer, and a judgment of severance is entered, the case thereafter stands as though the indorser had been sued alone. Fleischmann *v.* Stern, 24 Hun (N. Y.) 265, 61 How. Pr. (N. Y.) 124.

Restrictive indorsement.— The maker of a note and one indorsing it "to be liable in the second instance" cannot be sued together in the same action. Bartlett *v.* Byers, 35 Ga. 142.

Statute strictly construed.— A statute authorizing a joint action against the drawer and indorser of a foreign bill of exchange, being in derogation of the common law, must be strictly construed, so that such an action cannot be maintained unless brought for interest and costs of protest as well as for the principal. Pendleton *v.* Commonwealth Bank, 2 J. J. Marsh. (Ky.) 148. See also Mann *v.* Sutton, 4 Rand. (Va.) 253.

The assignor of a draft for money may be joined in a suit against the drawer. Thompson *v.* Payne, 21 Tex. 621.

3. Fuller *v.* Van Schaick, 18 Wend. (N. Y.) 547.

In Mississippi the action cannot be dismissed against the maker and proceed against the indorser. Smith *v.* Crutcher, 27 Miss. 455.

In Tennessee under the earlier statute the action must be a joint one and it could not be dismissed as to one and continued against the other. Holland *v.* Harris, 2 Sneed (Tenn.) 68.

In Texas the holder cannot discontinue his suit against the principal debtor and take judgment against the indorser or surety, unless the principal is a non-resident or is insolvent (Barnett *v.* Tayler, 30 Tex. 453), but

the provisions of such a statute make no change in the liability of the parties to the paper.[4]

(c) *Maker and Guarantor.* The statutes of some of the states expressly provide that guarantors may be joined in the same action with the maker of a promissory note,[5] but it has been held that unless the statute expressly includes guarantors, such action will not lie against the maker, indorser, and guarantor,[6] or against the maker and guarantor only.[7] Under other statutes, however, it has been held that the guarantor, although not expressly mentioned, may be sued jointly with the maker.[8]

(d) *Indorsers* — (1) In General. Independently of statute,[9] successive indorsers cannot be joined as defendants in the same action,[10] and this is still the case where an action is brought by the holder for money paid, and not on the note.[11]

(2) Immediate and Remote Indorsers. Under these statutes immediate and remote indorsers of promissory notes or bills of exchange may be joined in the same action.[12]

(e) *Indorser and Guarantor.* A joint action will not lie, independently of statute, against the indorser and guarantor of a promissory note.[13]

d. Note Made in Name of Wrong Payee. In an action on a note made payable in the name of a wrong payee, such payee is not a necessary party to a suit brought by the real owner.[14]

e. Maker as Necessary Party to Action Against Indorser. The maker of a

he may discontinue against drawer and indorser and take judgment against the accepter (Young *v.* Davidson, 31 Tex. 153).

4. Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515.

5. Phelps *v.* Church, 65 Mich. 231, 32 N. W. 30; Hammel *v.* Beardsley, 31 Minn. 314, 17 N. W. 858; Weitz *v.* Wolfe, 28 Nebr. 500, 44 N. W. 485; Tooke *v.* Taylor, 31 Tex. 1.

6. Miller *v.* Gaston, 2 Hill (N. Y.) 188.

7. *Illinois.*— Columbian Hardwood Lumber Co. *v.* Langley, 51 Ill. App. 100.

Indiana.— Cole *v.* Merchants' Bank, 60 Ind. 350.

Missouri.— Graham *v.* Ringo, 67 Mo. 324. But see Maddox *v.* Duncan, 62 Mo. App. 474, 1 Mo. App. Rep. 307.

Nebraska.— Mowery *v.* Mast, 9 Nebr. 445, 4 N. W. 69.

New York.— Barton *v.* Speis, 5 Hun (N. Y.) 60; Allen *v.* Fosgate, 11 How. Pr. (N. Y.) 218.

Wisconsin.— Stewart *v.* Glenn, 5 Wis. 14.

8. Tucker *v.* Shiner, 24 Iowa 334; Mix *v.* Fairchild, 12 Iowa 351; Marvin *v.* Adamson, 11 Iowa 371; Peddicord *v.* Whittam, 9 Iowa 471; Whittenhall *v.* Korber, 12 Kan. 618; Hendrix *v.* Fuller, 7 Kan. 331; Gagan *v.* Stevens, 4 Utah 348, 9 Pac. 706.

9. Right of joinder under statutes.— Givens *v.* Western Bank, 2 Ala. 397; Bradford *v.* Corey, 5 Barb. (N. Y.) 461, 4 How. Pr. (N. Y.) 161; Jones *v.* Ritter, 32 Tex. 717.

Diligence must be shown against maker.— Where the holder is required to use diligence against a maker in order to hold the indorser he must prove in a joint action against the indorsers that he has used such diligence. Marshall *v.* Pyeatt, 13 Ind. 255.

10. Givens *v.* Merchants' Nat. Bank, 85 Ill. 442; Brown *v.* Knower, 2 Ill. 469; Wolf *v.* Hostetter, 182 Pa. St. 292, 37 Atl. 988; Rhine *v.* Hart, 27 Tex. 94.

Successive indorsers in blank.— Where there is a first and second indorser in blank, the holder of the hill cannot support an action against them jointly, without filling up the indorsement of the first indorser, so as to show an authority in the second indorser to give a title to plaintiff as holder. The indorsement may, however, be filled up as a matter of course on the trial. Hubbard *v.* Williamson, 26 N. C. 266.

11. Barker *v* Cassidy, 16 Barb. (N. Y.) 177.

12. Marshall *v.* Pyeatt, 13 Ind. 255; Rhine *v.* Hart, 27 Tex. 94.

Non-negotiable note.— In an action upon a promissory note not negotiable, the immediate and remote indorsers cannot be joined as defendants. Ewing *v.* Sills, 1 Ind. 125, Smith (Ind.) 46.

13. Killian *v.* Ashley, 24 Ark. 511, 91 Am. Dec. 519. But see Eakin *v.* Burger, 1 Sneed (Tenn.) 417, which, however, was decided under the Tennessee statute of 1852, c. 152, providing that no suit shall be dismissed for want of proper parties, and authorizing the court to strike out or insert names of parties and to supply all proper averments.

14. Rhyan *v.* Dunrigan, 76 Ind. 178; Smith *v.* Walker, 7 Ind. App. 614, 34 N. E. 843. See also Burks *v.* Howard, 2 B. Mon. (Ky.) 66, holding that a note executed to Joseph Nevill & Co., and purporting to be assigned to plaintiff by Joseph Nevill and three others, should be taken to be *prima facie* assigned by the original payee.

promissory note is not a necessary party to an action against an indorser or assignor.[15]

f. Transfer Without Indorsement. Where a note has been assigned, but not by indorsement, the assignor should be made a party defendant in an action by the assignee.[16]

g. Notice to Defend and Calling in Warranty. A defendant, when sued upon a bill or note which he has paid, or which has been assigned after maturity, may give notice to the assignor to defend, or call him in warranty, in a suit by the holder,[17] but such right is confined to defendants[18] and to cases in which a privity exists between plaintiff and the person so called.[19]

h. Misjoinder. If two persons are sued upon a note upon which only one is liable the action is defeated as to both.[20]

D. Pleading[21] **— 1. Declaration, Petition, or Complaint**[22] **— a. In General.** It may be stated generally that a formal declaration, complaint, petition, or the

15. *Alabama.*— McGhee *v.* Importers, etc., Nat. Bank, 93 Ala. 192, 9 So. 734.

Arkansas.— Ruddell *v.* Walker, 7 Ark. 457.

Michigan.— Maynard *v.* Penniman, 10 Mich. 153.

Missouri.— Clough *v.* Holden, (Mo. 1892) 20 S. W. 695.

Ohio.— See Colver *v.* Wheeler, 11 Ohio Cir. Ct. 604, 5 Ohio Cir. Dec. 278, where it was held that an indorser may be sued alone, if the maker is no longer within the jurisdiction of the court.

Contra, Agricultural Bank *v.* Harris, 2 Sm. & M. (Miss.) 463 (under the act of 1837); Holland *v.* Harris, 2 Sneed (Tenn.) 68 (under the act of 1837, c. 5).

16. Reed *v.* Finton, 63 Ind. 288; Clough *v.* Thomas, 53 Ind. 24; Strong *v.* Downing, 34 Ind. 300; Barcus *v.* Evans, 14 Ind. 381; Myers *v.* Miller, 2 Ohio Dec. (Reprint) 319, 2 West. L. Month. 420.

In Kentucky by statute the payer of a note when sued by an assignee has not merely an equitable, but a legal, right to avail himself as matter of defense of any usury embraced in the note or of any payments made to the payee before notice of the assignment. Consequently, the assignor is not a necessary party to a suit on a note, brought by the assignee against the maker, where the defense is payment with notice before assignment and usury. True *v.* Triplett, 4 Metc. (Ky.) 57.

Action by assignee against remote assignor. — In a suit in equity by the last assignee of a note against a prior assignor plaintiff's immediate assignor is a necessary party. Turneys *v.* Hunt, 8 B. Mon. (Ky.) 401.

Representative of deceased assignor.— Where the payee of a promissory note, who has transferred it by sale and delivery without indorsement in writing, is deceased, a complaint upon it by the assignee must make his personal representatives a party or show that there are no such representatives. St. John *v.* Hardwick, 11 Ind. 251. See also Bray *v.* Black, 57 Ind. 417, where the note passed by devise and it was held that the representative of the devisor, if one existed, should be made a party to the action; and that if there were no representative the complaint should so allege.

17. Barmon *v.* Lithauer, 1 Abb. Dec. (N. Y.) 99, 4 Keyes (N. Y.) 317; Pruitt *v.* Jones, 14 Tex. Civ. App. 84, 36 S. W. 502.

18. Burbridge *v.* Andrus, 23 La. Ann. 554; Wesson *v.* Garrison, 8 La. Ann. 136, 58 Am. Dec. 674; Lanusse *v.* Massicot, 3 Mart. (La.) 261; Payne *v.* Katz, McGloin (La.) 18. But see Lafonta *v.* Poultz, 6 Mart. N. S. (La.) 391, where plaintiff, in a suit against an indorser, who pleaded that his indorsement was forged, was permitted to call his vendor in warranty.

Drawer called in by accepter.— The accepter of a bill, when sued by the payee, has a right to call the drawer of the bill in warranty, in the case where the drawee is requested to pay, not unconditionally, but in accordance with a contract, and he has been notified by the drawer, because the consideration of the draft had failed. Gilman *v.* Pilsbury, 16 La. Ann. 51.

19. **Necessity of privity.**— One sued on his note cannot, on the plea of error, and that the consideration was paid to a third person who was to save him harmless, call the latter in warranty, since there is no privity between plaintiff and such third person. Anselm *v.* Wilson, 8 La. 35. See also Hackett *v.* Schiele, 19 La. Ann. 67.

20. Cox *v.* Mechanics' Sav. Bank, 28 Ga. 529; Sands *v.* Wood, 1 Iowa 263; Corbet *v.* Evans, 25 Pa. St. 310.

21. See, generally, Pleading.

22. **For forms of declarations, petitions, and complaints** see the following cases and statutes:

Alabama.— Berney *v.* Steiner, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 114; Ala. Civ. Code (1896), § 3352.

Arkansas.— Dougherty *v.* Edwards, 25 Ark. 84; Marshall *v.* Hawkins, 13 Ark. 326; Sandels & H. Dig. Ark. (1894), p. 1637.

California.— Redemeyer *v.* Henley, 107 Cal. 175, 40 Pac. 230; Pilster *v.* Highton, (Cal. 1892) 31 Pac. 580; Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227; Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280; Hook *v.* White, 36 Cal. 299.

Colorado.— Rhodes *v.* Hutchins, 10 Colo. 258, 15 Pac. 329.

like is necessary to maintain the action;[23] but short forms of pleading on negoti-

Connecticut.— Lord *v.* Russell, 64 Conn. 86, 29 Atl. 242; Laflin *v.* Pomeroy, 11 Conn. 440; Conn. Prac. Act (1879), No. 219.

Florida.— McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Fla. Rev. Stat. (1892), 379, 380.

Georgia.— Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680.

Illinois.— Tipton *v.* Utley, 59 Ill. 25; Zimmerman *v.* Wead, 18 Ill. 304; Godfrey *v.* Buckmaster, 2 Ill. 447.

Indiana.— Lucas *v.* Baldwin, 97 Ind. 471; Garver *v.* Kent, 70 Ind. 428; Fletcher *v.* Pierson, 69 Ind. 281, 35 Am. Rep. 214; Anthony *v.* Shick, 68 Ind. 213; Hayne *v.* Fisher, 68 Ind. 158; Hall *v.* Harlow, 66 Ind. 448; Frazer *v.* Boss, 66 Ind. 1; Cromwell *v.* Barnes, 58 Ind. 20; Treadway *v.* Cobb, 18 Ind. 36; St. James Church *v.* Moore, 1 Ind. 289; Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240; Erhardt *v.* Pfeiffer, (Ind. App. 1902) 64 N. E. 885; Cooper *v.* Merchants, etc., Nat. Bank, 25 Ind. App. 341, 57 N. E. 569.

Iowa.— Grand Haven First Nat. Bank *v.* Zeims, 93 Iowa 140, 61 N. W. 483.

Kansas.— St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544; Budd *v.* Kramer, 14 Kan. 101.

Kentucky.— Bullitt Civ. Code Ky. (1899), pp. 500, 501.

Maine.— Moore *v.* McKenny, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753.

Maryland.—Hamburger *v.* Paul, 51 Md. 219, 2 Md. Pub. Gen. L. art. 75, § 23, pars. 14, 20.

Massachusetts.— Columbia Falls Brick Co. *v.* Glidden, 157 Mass. 175, 31 N. E. 801; Townsend Nat. Bank *v.* Jones, 151 Mass. 454, 24 N. E. 593; Moore *v.* Royce, 10 Allen (Mass.) 556; Mass. Pub. Stat. (1882), pp. 976, 977.

Minnesota.— Stein *v.* Passmore, 25 Minn. 256.

Mississippi.— Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137; Haynes *v.* Covington, 9 Sm. & M. (Miss.) 470; Heaverlin *v.* Donnell, 7 Sm. & M. (Miss.) 244, 45 Am. Dec. 302; Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520; Robertson *v.* Banks, 1 Sm. & M. (Miss.) 666; Fairchild *v.* Grand Gulf Bank, 5 How. (Miss.) 597.

Missouri.— Jaccard *v.* Anderson, 32 Mo. 188; Kansas City First Nat. Bank *v.* Landis, 34 Mo. App. 433; 1 Mo. Rev. Stat. (1899), appendix, pp. i, ii.

Montana.— Schuttler *v.* King, 13 Mont. 226, 33 Pac. 938.

Nebraska.— Lanning *v.* Burns, 36 Nebr. 236, 54 N. W. 427; Belcher *v.* Palmer, 35 Nebr. 449, 53 N. W. 380; Exchange Nat. Bank *v.* Capps, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. Rep. 433; Spellman *v.* Frank, 18 Nebr. 110, 24 N. W. 442; Sanborn *v.* Hale, 12 Nebr. 318, 11 N. W. 302; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306.

New Hampshire.— Educational Soc., etc., *v.* Varney, 54 N. H. 376; Swain *v.* Saltmarsh, 54 N. H. 9.

New Jersey.— Beardsley *v.* Southmayd, 14 N. J. L. 534.

New York.— Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 3 Keyes (N. Y.) 365, 1 Transcr. App. (N. Y.) 201, 5 Abb. Pr. N. S. (N. Y.) 11, 36 How. Pr. (N. Y.) 190; Conkling *v.* Gandall, 1 Abb. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228; Hendricks *v.* Wolff, 49 Hun (N. Y.) 606, 1 N. Y. Suppl. 607, 16 N. Y. St. 1014, 14 N. Y. Civ. Proc. 428; Lynch *v.* Levy, 11 Hun (N. Y.) 145; Moody *v.* Andrews, 39 N. Y. Super. Ct. 303; Genet *v.* Sayre, 12 Abb. Pr. (N. Y.) 347; Osgood *v.* Whittelsey, 10 Abb. Pr. (N. Y.) 134, 20 How. Pr. (N. Y.) 72; Phelps *v.* Ferguson, 9 Abb. Pr. (N. Y.) 206, 19 How. Pr. (N. Y.) 143; Niblo *v.* Harrison, 7 Abb. Pr. (N. Y.) 447; Waterbury *v.* Sinclair, 6 Abb. Pr. (N. Y.) 20; Lee *v.* Ainslie, 4 Abb. Pr. (N. Y.) 463.

Ohio.— Mors *v.* McCloud, 2 Ohio 5; Richmond *v.* Patterson, 3 Ohio 368; Ohio L. Ins. Co. *v.* Goodin, 1 Handy (Ohio) 31, 12 Ohio Dec. (Reprint) 10.

Pennsylvania.— Garden City Nat. Bank *v.* Fitler, 155 Pa. St. 210, 26 Atl. 372, 35 Am. St. Rep. 874; Gere *v.* Unger, 125 Pa. St. 644, 17 Atl. 511, 24 Wkly. Notes Cas. (Pa.) 7; McPherson *v.* Allegheny Nat. Bank, 96 Pa. St. 135; Numbers *v.* Shelly, 78 Pa. St. 426; Morgan *v.* Farmers' Bank, 3 Penr. & W. (Pa.) 391.

South Carolina.— Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559; Jones *v.* Garlington, 44 S. C. 533, 22 S. E. 741; Hammett *v.* Brown, 44 S. C. 397, 22 S. E. 482; Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188; Kerr *v.* Cochran, 29 S. C. 61, 9 S. E. 905; McElwee *v.* Hutchinson, 10 S. C. 436; Witte *v.* Williams, 8 S. C. 290, 29 Am. Rep. 294; Boylston *v.* Crews, 2 S. C. 422.

South Dakota.— Scott *v.* Esterbrooks, 6 S. D. 253, 60 N. W. 850.

Tennessee.— House *v.* Wakefield, 2 Coldw. (Tenn.) 325; Tenn. Code (1896), § 4660.

Texas.— Tinsley *v.* Penniman, 83 Tex. 54, 18 S. W. 718; Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537; Gilder *v.* McIntyre, 29 Tex. 89; Davis *v.* Griffith, (Tex. Civ. App. 1895) 33 S. W. 390; Daggett *v.* Lee, (Tex. Civ. App. 1894) 29 S. W. 89.

Vermont.— Wright *v.* Burroughs, 62 Vt. 264, 20 Atl. 660; Miner *v.* Downer, 20 Vt. 461; Binney *v.* Plumley, 5 Vt. 500, 26 Am. Dec. 313.

Wisconsin.— Bach *v.* Bell, 7 Wis. 433.

United States.— Henderson *v.* Anderson, 3 How. (U. S.) 73, 11 L. ed. 499.

England.— Gibson *v.* Minet, 2 Bro. P. C. 48, 1 H. Bl. 569, 3 T. R. 481, 1 Rev. Rep. 754, 1 Eng. Reprint 784.

Canada.— Dempsey *v.* Miller, 3 U. C. C. P. 431.

23. Filing note as substitute.—Where there was an appearance by defendant, who had his day in court and failed to object to the claim, the absence of a formal complaint will not

able instruments have been prescribed in this country and in England;[24] and in some of the states statutes formerly existed which permitted plaintiff under certain circumstances to file the note in suit in lieu of a declaration.[25]

b. Allegations as to Particular Matters — (i) *Description of Instrument.* The instrument upon which the recovery is sought must be declared on with reasonable certainty,[26] by setting it out *in hæc verba* or according to its legal effect,[27]

invalidate the judgment, where the note filed as a substitute was for the same principal sum and interest as the summons. Vick *v.* Pope, 81 N. C. 22. See *infra*, note 25.

Note may be declared on as a specialty, without averments of consideration, indebtedness, liability, assumption, or request of payment. Richmond *v.* Patterson, 3 Ohio 368; Mors *v.* McCloud, 2 Ohio 5.

Summary proceedings.— See Yeates *v.* Heard, 2 Ark. 459; Hilburn *v.* Paysinger, 1 Bailey (S. C.) 97.

Under the Pennsylvania act of March 21, 1806, permitting an action of debt on notes, and also authorizing a statement instead of a declaration, an indorsee may file a statement in an action of debt against the maker. Epler *v.* Funk, 8 Pa. St. 468; Camp *v.* Oswego Bank, 10 Watts (Pa.) 130.

24. Beggs *v.* Arnotte, 80 Ala. 179; Setondal *v.* Huguenin, 26 Ala. 552; Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680; Hardy *v.* White, 60 Ga. 454; Jennings *v.* Wright, 54 Ga. 537; Thompson *v.* High, 13 Ga. 311; Baldwin *v.* Humphrey, 75 Ind. 153.

In England concise forms were provided by the Rules of Trinity Term, Wm. IV. See 2 Greenleaf Ev. § 155 note; Withaus *v.* Ludecus, 5 Rich. (S. C.) 326 (where such forms were held to be sufficient).

25. Adams *v.* Kerns, 11 Ind. 346; Parry *v.* Henderson, 6 Blackf. (Ind.) 72 [*construing* 2 Ind. Rev. Stat. 456, § 35]; Jacobson *v.* Manning, 2 Greene (Iowa) 585; Nichol *v.* Mebane, 1 Yerg. (Tenn.) 201.

In debt by an assignee against the maker of a note the note and the assignment in full might be filed in the place of a declaration. Halsey *v.* Hazard, 6 Blackf. (Ind.) 265.

File-mark.— The court may direct the clerk to mark the note as filed on the day it was delivered to his deputy. Halsey *v.* Hazard, 6 Blackf. (Ind.) 265.

Where an agreement changing the terms of a note was subjoined thereto, the case was not within the statute. Taylor *v.* Meek, 4 Blackf. (Ind.) 41.

Under the Iowa practice act a note could be sued without a formal declaration if the substance of the instrument was set forth with a prayer for judgment. Jacobson *v.* Manning, 2 Greene (Iowa) 585.

The Tennessee act of 1811 permitting a plaintiff to appear and prosecute his own suit in his own name and to file the note sued on in lieu of a declaration did not dispense with the necessity of a declaration, when an attorney was employed, or when an action was brought by an assignee on an assigned note. Nichol *v.* Mebane, 1 Yerg. (Tenn.) 201.

26. Rauson *v.* Gatewood, 2 Tex. App. Civ. Cas. § 364, where a petition alleging the loss of a note given in lieu of and to take up a prior note, and charging an indebtedness on both instruments, was held to be defective for uncertainty and inconsistency. See also Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497, holding that a declaration that defendant promised to pay plaintiff or his order a sum specified does not show that the action is on a promissory note.

27. *Alabama.*—Adams *v.* McMillan, 8 Port. (Ala.) 445.

Arkansas.— Bingham *v.* Calvert, 13 Ark. 399: Roach *v.* Scogin, 2 Ark. 128.

California.— Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227.

Georgia.— See Mercier *v.* Copelan, 73 Ga. 636.

Illinois.— Archer *v.* Claflin, 31 Ill. 306.

Indiana.— Risher *v.* Morgan, 56 Ind. 172; Cooper *v.* Merchants', etc., Nat. Bank, 25 Ind. App. 341, 57 N. E. 569.

Kentucky.— Thompson *v.* Thompson, 4 B. Mon. (Ky.) 502.

Massachusetts.— Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

New York.— See Bloodgood *v.* Faxon, 24 Wend. (N. Y.) 385.

Pennsylvania.— Mitchell *v.* Welch, 17 Pa. St. 339, 55 Am. Dec. 557.

South Carolina.— McMahon *v.* Murphy, 1 Bailey (S. C.) 535.

Texas.— Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905; Bledsoe *v.* Wills, 22 Tex. 650; Wallace *v.* Hunt, 22 Tex. 647; Dewees *v.* Lockhart, 1 Tex. 535; Jones *v.* Ellison, (Tex. Civ. App. 1899) 49 S. W. 406; Davie *v.* Griffith, (Tex. Civ. App. 1895) 33 S. W. 390; Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas. § 79.

United States.— Turner *v.* White, 4 Cranch C. C. (U. S.) 465, 24 Fed. Cas. No. 14,264; Spaulding *v.* Evans, 2 McLean (U. S.) 139, 22 Fed. Cas. No. 13,216.

Canada.— Munro *v.* Cox, 30 U. C. Q. B. 363.

See 7 Cent. Dig. tit. "Bills and Notes," § 1446 *et seq.*

In Massachusetts written instruments may be declared on by setting out a copy, or the legal effect thereof, with appropriate averments to describe the cause of action. Mass. Rev. Laws, c. 173, § 6, subs. 10.

Setting out by way of inducement.— Although a draft paid by accommodation accepters cannot be the foundation of an action by them against the drawer, yet in an action of debt the draft may be annexed to the declaration or set out by way of inducement. Griffin *v.* Lawton, 54 Ga. 104; Turner *v.* Thompson, 23 Ga. 49.

or by making it a part of the complaint, declaration, or petition by appropriate reference.[28]

(II) *As to Execution and Delivery* — (A) *Necessary Allegations.* The execution of the instrument must be substantially alleged,[29] and the declaration or complaint must contain some averment or statement of facts sufficient to show a delivery of the instrument.[30]

(B) *Sufficiency of Allegations* — (1) In General. The absence of an express averment of execution is not fatal to the pleading if by other allegations and statements therein contained the fact of execution is made manifest.[31] So the

The words "without defalcation or discount" may be omitted. Archer *v.* Claflin, 31 Ill. 306.

After judgment a misdescription of the note in the declaration may be disregarded, if a true copy of the note is annexed thereto. Carothers *v.* Green, Morr. (Iowa) 429; Madera *v.* Jones, Morr. (Iowa) 204; Walker *v.* Ayres, Morr. (Iowa) 200.

A foreign bill should be declared on as such, inasmuch as the rules of law governing such bills differ from those applicable to inland bills of exchange. Armani *v.* Castrique, 14 L. J. Exch. 36, 13 M. & W. 443.

28. *California.*—Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227.

Colorado.— Rhodes *v.* Hutchins, 10 Colo. 258, 15 Pac. 329.

Indiana.— Lucas *v.* Baldwin, 97 Ind. 471; Anthony *v.* Shick, 68 Ind. 213.

Minnesota.— Elliott *v.* Roche, 64 Minn. 482, 67 N. W. 539.

Texas.— Frazier *v.* Robertson, 39 Tex. 513; Bledsoe *v.* Wills, 22 Tex. 650.

See 7 Cent. Dig. tit. "Bills and Notes," § 1446 *et seq.*

A description of notes issued by a bank by their numbers and letters and the names of the president and cashier of the bank is sufficient where the original notes are annexed to and filed with the petition, although not made a part thereof. Gray *v.* Commercial Bank, 1 Rob. (La.) 533.

Effect on other averments.— If the instrument is made a part of the pleading it will control its averments. Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824; Pyron *v.* Gruider, 25 Tex. Suppl. 159; Morrison *v.* Keese, 25 Tex. Suppl. 154.

29. *California.*— Pilster *v.* Highton, (Cal. 1892) 31 Pac. 580.

Kentucky.— Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036.

Missouri.— Seevin *v.* Reppy, 46 Mo. 606.

Nebraska.— Spellman *v.* Frank, 18 Nebr. 110, 24 N. W. 442; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306.

Pennsylvania.— Schomaker *v.* Dean, 201 Pa. St. 439, 50 Atl. 923.

Texas.— Unger *v.* Anderson, 37 Tex. 550; Belcher *v.* Wilson, 31 Tex. 139; Gilder *v.* McIntyre, 29 Tex. 89; Parr *v.* Nolan, 28 Tex. 798; Sneed *v.* Moodie, 24 Tex. 159; Gray *v.* Osborne, 24 Tex. 157, 76 Am. Dec. 99; Ross *v.* Breeding, 13 Tex. 16.

See 7 Cent. Dig. tit. "Bills and Notes," § 1474.

Erroneous designation.— A description of a maker and an indorser in one paragraph as joint makers is cured by a proper description in the other paragraphs, and in the accompanying copy of the note and indorsement. Burroughs *v.* Wilson, 59 Ind. 536.

Omission cured.— The omission of an averment of execution is cured by failure to deny the making of the instrument. Turner *v.* White, 4 Cranch C. C. (U. S.) 465, 24 Fed. Cas. No. 14,264, where there was a plea of payment.

Incompetency of maker.— An allegation that defendant was adjudged a lunatic after the execution of the note in suit is not an admission that he was incompetent at the time of its execution. Knox *v.* Knox, 30 S. C. 377, 9 S. E. 353.

30. Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036; Thigpen *v.* Mundine, 24 Tex. 282; Sneed *v.* Moodie, 24 Tex. 159; Gray *v.* Osborne, 24 Tex. 157, 76 Am. Dec. 99; Noonan *v.* Ilsley, 21 Wis. 138.

Delivery by defendant.— An averment that defendant is indebted to the petitioner "in the sum of $100, by promissory note, made, executed, signed, and delivered to petitioner for a valuable consideration," does not sufficiently allege that the note was delivered by defendant. Parr *v.* Nolen, 28 Tex. 798.

31. Thus, execution of the instrument is sufficiently charged by the following allegations: An allegation of a promise to pay. McDonald *v.* Han, 28 Ind. App. 227, 62 N. E. 501; Parsons *v.* Jones, 16 U. C. Q. B. 274. "For value received, 'defendants' jointly and severally promised to pay." Wallace *v.* Hunt, 22 Tex. 647. "By his note in writing under his hand" promised, etc. Binney *v.* Plumley, 5 Vt. 500, 26 Am. Dec. 313. That the bill in suit was "sold, discounted and endorsed to the plaintiff." Rudd *v.* Owensboro Deposit Bank, 20 Ky. L. Rep. 1276, 49 S. W. 207.

An averment of making is equivalent to an allegation of signing. Ereskine *v.* Murray, 2 Ld. Raym. 1542; Smith *v.* Jarves, 2 Ld. Raym. 1484; Elliot *v.* Cooper, 2 Ld. Raym. 1376.

Statutory form.— A complaint in the form prescribed by statute is sufficient, although it contains a superfluous averment as to the maker's signature. Baldwin *v.* Humphrey, 75 Ind. 153.

Note under seal.— In Conner *v.* Autrey, 18 Tex. 427, a petition describing the instrument sued on as a note, but alleging that it

delivery of the note or bill need not be alleged in terms, but may be implied from other statements and allegations,[32] as, that it was made, executed, drawn,[33] indorsed,[34] assigned,[35] duly assigned,[36] negotiated,[37] or that defendant promised to pay it.[38] An allegation of delivery imports a delivery to the payee.[39]

(2) SETTING OUT INSTRUMENT. If the instrument sued on, signed by the party sought to be charged, is set out in the declaration or complaint, filed, or made a part of the pleading by appropriate reference, its execution by defendant is sufficiently shown by a suitable averment connecting him therewith;[40] but unless he

was signed "R. Autrey [seal.]," was held to be a sufficient averment that the note was under seal.

32. Rudd *v.* Owensboro Deposit Bank, 20 Ky. L. Rep. 1276, 49 S. W. 207; Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537. Thus an allegation that the note having been made by one defendant, payable to her own order, was thereafter, and before the maturity thereof, duly indorsed by the other defendant, and that as thus indorsed it was delivered to a bank for value necessarily implies that the note was delivered by the maker. Odell *v.* Clyde, 38 N. Y. App. Div. 333, 57 N. Y. Suppl. 126.

Setting out and alleging ownership.— A complaint setting out the note in suit and alleging it to be the property of plaintiff sufficiently avers it to have been delivered. Lord *v.* Russell, 64 Conn. 86, 29 Atl. 242.

33. *Arkansas.*— Williams *v.* Williams, 13 Ark. 421; Mitchell *v.* Conley, 13 Ark. 414.

California.— Smith *v.* Waite, 103 Cal. 372, 37 Pac. 232; Hook *v.* White, 36 Cal. 299.

Illinois.— Chester, etc., R. Co. *v.* Lickiss, 72 Ill. 521.

Indiana.— Keesling *v.* Watson, 91 Ind. 578; Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229.

Missouri.— Meyer *v.* Feete, 31 Mo. 423.

New York.— Ketcltas *v.* Myers, 19 N. Y. 231; Prindle *v.* Caruthers, 15 N. Y. 425; Ginsburg *v.* Von Seggern, 59 N. Y. App. Div. 595, 69 N. Y. Suppl. 758; Odell *v.* Clyde, 38 N. Y. App. Div. 333, 57 N. Y. Suppl. 126; Peets *v.* Bratt, 6 Barb. (N. Y.) 662; Russell *v.* Whipple, 2 Cow. (N. Y.) 536.

Ohio.— Doane *v.* Dunlap, Tapp. (Ohio) 145.

Texas.— Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537; Blount *v.* Ralston, 20 Tex. 132.

Wisconsin.— Wochoska *v.* Wochoska, 45 Wis. 423; Burbank *v.* French, 12 Wis. 376.

England.— Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750; Churchill *v.* Gardner, 7 T. R. 596. And see Devereux *v.* Morrissey, 17 Ir. C. L. 785.

See 7 Cent. Dig. tit. "Bills and Notes," § 1474.

Leaving in maker's hands.— Where plaintiff alleges that defendant executed his note, whereby he promised, etc., a further allegation that after its execution the note was left in the maker's hands is not inconsistent with the allegation of delivery implied by the first allegation. Wochoska *v.* Wochoska, 45 Wis. 423.

34. Chester, etc., R. Co. *v.* Lickiss, 72 Ill. 521; Higgins *v.* Bullock, 66 Ill. 37; New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 262; Griswold *v.* Laverty, 3 Duer (N. Y.) 690, 12 N. Y. Leg. Obs. 316; Singleton *v.* Thornton, 26 N. Y. Wkly. Dig. 434; Burbank *v.* French, 12 Wis. 376.

35. An averment that a note payable to bearer was "assigned," etc., is a sufficient allegation of its delivery. Edison *v.* Frazier, 9 Ark. 219.

36. Hoag *v.* Mendenhall, 19 Minn. 335.

37. St. Louis Fourth Nat. Bank *v.* Mayer, 19 Mo. App. 517.

38. Fay *v.* Richmond, 18 Mo. App. 355; Binney *v.* Plumley, 5 Vt. 500, 26 Am. Dec. 313; Churchill *v.* Gardner, 7 T. R. 596.

Illustrations.— "Defendant, by his promissory note filed herewith, agreed and promised to pay." Bell *v.* Mansfield, 12 Ky. L. Rep. 89, 13 S. W. 838. "Defendant, 'by his promissory note in writing for value received, promised to pay' to the plaintiff or bearer," etc. Peets *v.* Bratt, 6 Barb. (N. Y.) 662. "For value received 'defendants' jointly and severally promised to pay." Wallace *v.* Hunt, 22 Tex. 647.

39. Topping *v.* Clay, 65 Minn. 346, 68 N. W. 34; Cabbott *v.* Radford, 17 Minn. 320; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Ginsburg *v.* Von Seggern, 59 N. Y. App. Div. 595, 69 N. Y. Suppl. 758.

Single bill.— It is not necessary in a declaration in debt on a single bill to allege delivery of the writing to the payee, although such delivery is essential to its validity. Brown *v.* Hemphill, 9 Port. (Ala.) 206.

Delivery to "defendant."— An allegation in the declaration, in a suit on a note, that it was delivered to "defendant" is a clerical misprision. Allen *v.* Claunch, 7 Ala. 788.

40. Lord *v.* Russell, 64 Conn. 86, 29 Atl. 242; Meeker *v.* Shanks, 112 Ind. 207, 13 N. E. 712; Bell *v.* Mansfield, 11 Ky. L. Rep. 89, 13 S. W. 838; Behrens *v.* Dignowitty, 4 Tex. Civ. App. 201, 23 S. W. 288. Thus the setting forth of a note, with the maker's name preceded by the word "signed," sufficiently alleges that it was made by him. Price *v.* McClave, 6 Duer (N. Y.) 544.

Copy filed.— Where it is alleged that the note was executed by defendants, the copy filed in accordance with law may be looked to to determine the character of the signatures. Jaqua *v.* Woodbury, 3 Ind. App. 289, 29 N. E. 573.

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is so connected, there should be an allegation of execution.[41] However, under statutory provisions permitting plaintiff to set out a copy of the note and to allege that there is due to him thereon a specific sum, if he so plead, an express allegation of execution is unnecessary.[42]

(C) *Joint and Several Execution.* If the promise is joint or joint and several, it must be so alleged.[43]

(D) *Execution by Agent.* The execution of the instrument by an agent may be averred to be the act of the principal.[44] And while there are decisions to the effect that the authority of the agent must be averred,[45] there are also decisions

41. Price *v.* McClave, 5 Duer (N. Y.) 670, 3 Abb. Pr. 253; Geneva Bank *v.* Gulick, 8 How. Pr. (N. Y.) 51; Jennings *v.* Moss, 4 Tex. 452; Fortune *v.* Kerr, 25 Tex. Suppl. 309.

42. Butchers', etc., Bank *v.* Jacobson, 9 Bosw. (N. Y.) 595, 15 Abb. Pr. 218, 24 How. Pr. (N. Y.) 204; Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449; Ohio L. Ins., etc., Co. *v.* Goodin, 1 Handy (Ohio) 31, 12 Ohio Dec. (Reprint) 10.

43. Brown *v.* Peirce, 2 Root (Conn.) 95; Hopkins *v.* Farwell, 32 N. H. 425.

A declaration against one joint and several maker of a note which alleges its execution by him need not aver its execution by the other. Morgan *v.* Laurenceburg Ins. Co., 3 Ind. 285.

Alleging execution and indorsement before delivery to the payee is equivalent to an allegation that the maker and indorser are jointly liable as makers. Paine *v.* Noelke, 43 N. Y. Super. Ct. 176, 54 How. Pr. (N. Y.) 333.

An allegation that defendants drew checks on a bank sufficiently avers that the checks were executed jointly. Ringo *v.* New Farmers' Bank, 101 Ky. 91, 39 S. W. 701.

An allegation that defendants made their note is an averment of joint and several execution. Reed *v.* Clark, (Tex. Civ. App. 1897) 39 S. W. 160.

An allegation that each of two indorsers promised to pay authorized a recovery as of a separate promise by each — a joint promise being unnecessary. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

A note reciting "we promise," etc., signed by a corporation and its treasurer, should be declared on as a several and not as a joint note. Gleason *v.* Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370.

In an action by a bank against a maker and indorser, on a note discounted by it, an allegation charging defendants as joint makers is sufficient, where the charter of the bank provides that all parties to a note discounted by it shall be sued jointly. Chenango Bank *v.* Curtin, 19 Johns. (N. Y.) 326.

Action against survivor.— An allegation in an action against a surviving maker of a joint note that it is joint and several is an immaterial variance. Creecy *v.* Joy, (Oreg. 1901) 66 Pac. 295. And in an action on a joint and several note, the addition of the words "survivor," etc., as description of defendant in the declaration is mere harmless surplusage and will not affect the action against him on his several liability. Bogert *v.* Vermilya, 10 N. Y. 447.

In Canada the statutory form must be followed, and the liability of the several parties stated. Upper Canada Bank *v.* Gwynne, 4 U. C. Q. B. 145. But see Acheson *v.* McKenzie, 4 U. C. Q. B. 230, holding that if a promise is alleged the specific statement of legal liability set forth in the form is immaterial and may be omitted. Under 3 Vict. c. 8, a declaration against the maker and indorser of a note should allege a joint and several liability according to the form of the act. Nordheimer *v.* O'Reilly, 6 U. C. Q. B. 413. But see Chapman *v.* Dubrey, 21 U. C. Q. B. 244, holding that in an action against maker and indorser of a note it is unnecessary to aver a joint liability. A declaration against the drawer of a bill, and accepters thereof who sign jointly, which avers a joint and several liability of all the parties is bad. Upper Canada Bank *v.* Gwynne, 4 U. C. Q. B. 145. The recital of a joint and several promise, and averment of a joint and several liability, and an averment "and being so liable, they jointly and severally promised to pay," etc., are not inconsistent. Gibb *v.* Dempsey, 3 U. C. C. P. 437.

44. Fraser *v.* Spofford, 5 Blackf. (Ind.) 207; Slevin *v.* Reppy, 46 Mo. 606; Moore *v.* McClure, 8 Hun (N. Y.) 557; Sherman *v.* Comstock, 2 McLean (U. S.) 19, 21 Fed. Cas. No. 12,764.

An allegation that a particular person "by his agent . . . made" the note, without stating that he signed it, is sufficient. Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

45. Oxford First Nat. Bank *v.* Turner, 24 N. Y. Suppl. 793.

Sufficiency of averment.— An allegation in the declaration, that the note on which the suit was brought was made by a person named acting for himself, and as joint owner with another of the boat, is not an allegation that the former had authority, as the agent of the latter, to execute the note in his name, so as to make the note evidence under the statute, unless contradicted by a sworn plea. Brooks *v.* Harris, 12 Ala. 555.

The authority is not shown by a power of attorney annexed to the complaint which does not purport to confer any authority. Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044.

Principal not disclosed by instrument.—

to the effect that where the paper is executed by an agent no averment of his authority is necessary.[46]

(E) *Execution by Copartners.* Where a note purports to be signed by two or more, an averment that they signed as partners is immaterial,[47] and it is not necessary to allege the firm-name or the style in which they do business;[48] but if necessary to charge defendants as copartners the intention should clearly appear.[49]

(F) *Corporate or Individual Execution.* Unless required by statute the authority of a domestic corporation to make commercial paper need not be expressly averred.[50] To charge a corporate liability the declaration must contain averments sufficient to show that the instrument in question was the act of the corporation through its duly authorized officers;[51] otherwise it will be taken to be the individual obligation of those whose names are signed to it.[52]

(G) *Representative or Individual Execution.* Where personal representatives execute a note or like instrument, allegations showing their intention to sign

Under a complaint charging the execution of the instrument to be that of a defendant whose name does not appear, the signer's authority to bind him may be shown. Moore *v.* McClure, 8 Hun (N. Y.) 557.

46. Hanger *v.* Dodge, 24 Ark. 208; Sherman *v.* Comstock, 2 McLean (U. S.) 19, 21 Fed. Cas. No. 12,764.

Agency admitted by demurrer.— A complaint alleging that defendant, through his agent, made his note in writing, etc., is good on demurrer, although there is nothing on the face of the note to show who the principal is. Tarver *v.* Garlington, 27 S. C. 107, 2 S. E. 846, 13 Am. St. Rep. 628.

47. Whitwell *v.* Thomas, 9 Cal. 499; Davis *v.* Abbott, 2 McLean (U. S.) 29, 7 Fed. Cas. No. 3,622.

48. Lucas *v.* Baldwin, 97 Ind. 471; Jackson *v.* Burgert, 28 Ind. 36.

49. A note containing the signature of a firm in liquidation by one of the members thereof (i. e. "Gayle & Bowers, in liquidation, by Wm. Bower") may properly be declared on as a note of the partnership. Riggs *v.* Andrews, 8 Ala. 628.

By firm-name.— In declaring against an indorser, it is sufficient to describe the note as being made by a firm in their copartnership name, without setting forth the names at large of the persons composing the firm. Bacon *v.* Cook, 1 Sandf. (N. Y.) 77.

A note executed by one partner may be averred to have been made by the firm. Porter *v.* Cumings, 7 Wend. (N. Y.) 172.

Ambiguity.— A complaint which in the caption describes defendants as two persons doing business as a firm, but in the body of the complaint alleges a cause of action against "above named defendant" without designating which of the defendants is a firm, or which of them executed the note in suit, is fatally ambiguous. Hawley Bros. Hardware Co. *v.* Brownstone, 123 Cal. 643, 56 Pac. 468.

50. Merritt *v.* Maxwell, 14 U. C. Q. B. 50.

51. Topeka Capital Co. *v.* Remington Paper Co., 61 Kan. 6, 59 Pac. 1062, 57 Pac. 504.

Authority of officer.— A petition on notes executed in the name of a corporation, by one signing himself as "business manager," an officer unknown to the law, which states that the notes "were made, executed and delivered by the corporation," sufficiently alleged the authority of the signer to act for the corporation. Topeka Capital Co. *v.* Remington Paper Co., 61 Kan. 6, 59 Pac. 1062, 57 Pac. 504.

Exhibition of note.— An averment that defendant, a corporation, executed the note sued on is supported by the exhibition of a note containing a promise of the company to pay and signed by its secretary and general manager. Wagner *v.* Brinckerhoff, 123 Ala. 516, 26 So. 117.

Intention.— An averment that the note in suit was executed for an indebtedness against a school township, taken in connection with the articles for which it purported to have been given, sufficiently shows that it was the intention of the parties to bind the school, and not the civil township. Moral School Tp. *v.* Harrison, 74 Ind. 93.

52. **An averment that defendants made the note** in suit is sufficient to charge them personally, although the instrument bears the impression of the seal of the corporation of which they are officers. Tama Water Power Co. *v.* Ramsdell, 90 Iowa 747, 52 N. W. 209, 57 N. W. 631.

A complaint alleging that the A Co., B, and C, by their joint note promised to pay, etc., and by reference making a part thereof the note in question commencing "we," etc., promise and signed: A Co., B, Pres. and C, Man. states a cause of action against B. & C. as individuals. Albany Furniture Co. *v.* Merchants' Nat. Bank, 17 Ind. App. 531, 47 N. E. 227, 60 Am. St. Rep. 178.

A petition alleging that defendant having authority, drew a bill on behalf of a corporation and for its benefit, states no right of action against the defendant individually. Hall *v.* Cook, 17 Ky. L. Rep. 606, 17 S. W. 1022.

The signers of a note reading "the directors, etc., promise, etc.," to whose signature no official designation is attached, are properly declared against as individuals. McKensey *v.* Edwards, 88 Ky. 272, 10 S. W. 815, 21 Am. St. Rep. 339, 3 L. R. A. 397.

in a representative capacity will be sufficient to bind the estate,[53] unless the declaration shows that they signed individually, although adding words descriptive of their office.[54]

(H) *Description and Identification of Maker.* The signer of commercial paper may be charged by the style in which his name appears on the instrument.[55] If the party used initial letters or contractions before his surname, he may be so described, and a statement of his name in full is unnecessary,[56] but it seems that he should be identified as the same person.[57]

(I) *Words Appended to Signature.* Words appended to the maker's signature which constitute no part thereof may be omitted.[58]

(III) *As to Payee*—(A) *In General.* The declaration or complaint must show to whom the instrument was made payable.[59]

53. Storey *v.* Nichols, 22 Tex. 87.

Acknowledgment of indebtedness in name of estate.— A declaration in assumpsit alleged that defendant made his promissory note, commonly called a "duebill," by which he acknowledged himself indebted to plaintiff by the name of "the estate of Thos. Eager, deceased," plaintiff being the administrator of said estate, in the sum of, etc., and then and there delivered the same to plaintiff. It was held that the declaration was good, and that a writing agreeing with that described in the declaration was admissible evidence for plaintiff. McKinney *v.* Harter, 7 Blackf. (Ind.) 385, 43 Am. Dec. 96.

Note made by intestate.— A declaration in one of the short forms authorized by the code against the administrator of a person named did not expressly state that he was sued as administrator, but alleged that he was indebted to plaintiff on a promissory note, a copy of which was annexed, and the copy annexed was that of a joint note signed by decedent and another. It was held that such a declaration upon its face, in the absence of anything to show that the latter was still alive, sets forth a cause of action at law against defendant, as administrator of decedent. Jennings *v.* Wright, 54 Ga. 537.

54. Descriptio personæ.— An action is against a defendant individually, although he is described in the note and writ "as trustee," etc., the latter words being merely *descriptio personæ*. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683. To same effect see Rupert *v.* Madden, 1 Chandl. (Wis.) 146.

Individual liability.— One who signs a draft as executor is liable personally; and if he be sued as executor, but there be a prayer for general relief, judgment will be given against him individually, if on the trial his liability as such be established. Russell *v.* Cash, 2 La. 185.

Claim against deceased maker.— In Bowman *v.* Citizens' Nat. Bank, 25 Ind. App. 38, 56 N. E. 39, the overruling of a demurrer interposed by an administrator to a complaint in an action on a note initiated by a claim against his intestate, as maker, was held not to constitute reversible error, since the administrator was a party by operation of law.

55. Lucas *v.* Baldwin, 97 Ind. 471; Price *v.* McClave, 6 Duer (N. Y.) 544.

56. Richardson *v.* Opelt, 60 Nebr. 180, 82 N. W. 377; Andrews *v.* Talbot, 13 U. C. Q. B. 188.

One christian name in full.— The full christian names of one who signs by one of such names in full, and by an initial as to the other need not be stated. Lomax *v.* Landells, 6 C. B. 577, 6 D. & L. 296, 13 Jur. 38, 18 L. J. C. P. 88, 60 E. C. L. 577; Upper Canada Bank *v.* Gwynne, 7 U. C. Q. B. 140; Mair *v.* Jones, 7 U. C. Q. B. 139; Dougall *v.* Reafisch, 6 U. C. Q. B. 391; Commercial Bank *v.* Roblin, 5 U. C. Q. B. 498.

57. Where the note signed by the makers by their initials is set out as a part of the complaint, an allegation that defendants, giving their full names, made it, is a sufficient identification. Humboldt Sav., etc., Soc. *v.* Burnham, 11 Cal. 343, 43 Pac. 971.

Alias.— The description of a defendant, as "J. M. Duncan, alias James M. Duncan," is sufficient. Duncan *v.* McAffee, 3 Ill. 559.

Statutory form.— A complaint is good which is in the prescribed form and contains a copy of the note showing by whom it was executed. Jackson *v.* Burgert, 28 Ind. 36.

58. Where a note was executed by one partner in the name of a firm, which was then in dissolution, and described in the note as in liquidation, it is sufficient in a declaration by an indorsee against the indorser to describe the note as made by the firm. Riggs *v.* Andrews, 8 Ala. 628; Fairchild *v.* Grand Gulf Bank, 6 Miss. 597.

59. *California.*— Hook *v.* White, 36 Cal. 299, where it is said that an allegation "that said defendant executed to this plaintiff a promissory note" is equivalent to an allegation "that defendant made his note payable to plaintiff."

Connecticut.— Sherman *v.* Glabe, 4 Conn. 246, holding that an averment that defendant promised plaintiff to pay "to his order," etc., describes a note payable to plaintiff.

Indiana.—Timmons *v.* Wiggins, 78 Ind. 297, holding that an averment of a promise to pay plaintiff's attorney fee does not show plaintiff to be the payee.

Kentucky.—Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610.

(B) *Words of Description.* A note in which the payee is referred to by description may be declared on in his individual name, or where the words of description are set out in plaintiff's pleading they may be rejected as surplusage.[60]

(C) *Designation by Description in Instrument.* It is sufficient to allege the execution of the instrument sued on to the payee or payees thereof as he or they are therein designated or described, and in the case of a firm, without an averment of their firm-name or style.[61]

(D) *Misdescription in Instrument.* So where the person intended is improperly described, the real party may be designated as payee,[62] or he may declare

Oregon.— Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

Canada.— Munro *v.* Cox, 30 U. C. Q. B. 363.

See 7 Cent. Dig. tit. "Bills and Notes," § 1456.

In Alabama the legal effect of a complaint in the statutory form is as if there were an express averment that the note was payable to plaintiff. Beggs *v.* Arnotte, 80 Ala. 179; Cumming *v.* Richards, 32 Ala. 459; Letondal *v.* Huguenin, 26 Ala. 552.

A note payable to no one cannot be declared on as payable to a designated person. Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

A note payable to the order of —— at the office of a person named is improperly described as payable to such person. Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

For use of another.— A note payable to a person named or order, for the use of another, may be declared on without noticing the trust. Munro *v.* Cox, 30 U. C. Q. B. 363.

If the note is made a part of the complaint, failure to aver to whom it was made payable is immaterial. Jaqua *v.* Woodbury, 3 Ind. App. 289, 29 N. E. 573.

Where the names of the maker and the payee are the same it need not be averred that they are different persons. Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610.

60. Wright *v.* Rice, 56 Ala. 43; McKinney *v.* Harter, 7 Blackf. (Ind.) 385, 43 Am. Dec. 96; Buffum *v.* Chadwick, 8 Mass. 103; Davis *v.* Garr, 6 N. Y. 124, 55 Am. Dec. 387.

Where plaintiff styles himself executor or administrator, and declares on a note payable to himself in that capacity, but the declaration does not aver that the note is assets of the estate, the words "executor," etc., are a mere *descriptio personæ.* Arrington *v.* Hair, 19 Ala. 243.

61. *Arkansas.*— Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105.

Illinois.— Wilcox *v.* Woods, 4 Ill. 51.

Indiana.— Lucas *v.* Baldwin, 97 Ind. 471; Smith *v.* Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Phipps *v.* Addison, 7 Blackf. (Ind.) 375; Budd *v.* Wilkinson, 5 Blackf. (Ind.) 264; Cooper *v.* Drouillard, 5 Blackf. (Ind.) 152; Stout *v.* Hicks, 5 Blackf. (Ind.) 49.

Michigan.— Shaw *v.* Fortine, 98 Mich. 254, 57 N. W. 128.

Minnesota.— Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

Missouri.— Lee *v.* Hunt, 6 Mo. 163; Dyer *v.* Sublette, 6 Mo. 14; Tabor *v.* Jameson, 5 Mo. 494.

New York.— Cochran *v.* Scott, 3 Wend. (N. Y.) 229.

Ohio.— Rice *v.* Goodenow, Tapp. (Ohio) 126.

South Carolina.— Haviland *v.* Simons, 4 Rich. (S. C.) 338.

Texas.— Edmundson *v.* Yates, 25 Tex. 373.

United States.— Thompson *v.* Cook, 2 McLean (U. S.) 122, 23 Fed. Cas. No. 13,952.

Contra, Gooderham *v.* Garden, 12 U. C. Q. B. 521; Moffatt *v.* Vance, 7 U. C. Q. B. 142; Montreal City Bank *v.* Eccles, 5 U. C. Q. B. 508.

See 7 Cent. Dig. tit. "Bills and Notes," § 1456.

Where a copy of the note is set out, an allegation that the promise was made to the payees by the style, etc., is unnecessary. Jackson *v.* Burgert, 28 Ind. 36.

Necessity of identification.— Under a statute allowing a note to be filed as the state of demand, in an action by partners, it is not sufficient to file a note payable to A & Co., without a suggestion on the record that the promise was made to plaintiffs by the name of A & Co. Hughes *v.* Walker, 4 Blackf. (Ind.) 50. Where a declaration avers that a note is made payable to plaintiffs by the name and style of C and B, such note may be read in evidence, although plaintiffs declare in the name of E C and J B, without alleging that they were partners, or that the note was made payable in any joint character. Wright *v.* Meade, 27 Ill. 515; Wright *v.* Curtis, 27 Ill. 514; Wardell *v.* Pinney, 1 Wend. (N. Y.) 217.

A declaration on an order payable to two persons by their surnames, which avers an indebtedness thereon to them, stating their names in full, sufficiently identifies plaintiffs as the payees. St. James Church *v.* Moore, 1 Ind. 289.

62. Patterson *v.* Graves, 5 Blackf. (Ind.) 593.

A corporation in an action on a note payable to its treasurer need not allege that the note was made payable to the corporation in the name of its treasurer. Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33.

Delivery to person other than payee named. — An allegation that the note in suit was executed for the purpose of delivery to the payee named therein, and that, on his refusal to accept, it was delivered to plaintiff for a

upon the instrument in his proper name and prove that he was the person intended,[63] and his assignee may make the like averment and proof.[64]

(iv) *As to Place of Making.* Except where so required by statute it is unnecessary to allege the place of making of a bill or note, unless it was made in a foreign state or country, and it is sought to recover interest or damages different from that allowed by the law of the forum,[65] and unless it is stated that the instrument was drawn or made without the state, it will be regarded as a domestic bill or note.[66] It will be presumed that the instrument was made where it bears date.[67] If, however, it is material to allege the place of making it should be set forth with substantial accuracy.[68]

(v) *As to Time of Making.* The date of the instrument is a material part thereof and should be averred,[69] although where the instrument is set out *prima facie* it will be taken to have been made at the time it bears date[70] or purports to have been drawn.[71] So an allegation that a note was made on a certain day is tantamount to alleging that it was dated on that day.[72] And there are decisions to the effect that the omission of the date or a misdescription thereof will not necessarily vitiate the pleading.[73]

valuable consideration is an averment that the note was made to the latter, by the name of the payee. Rhyan *v.* Dunnigan, 76 Ind. 179.

63. Taylor *v.* Strickland, 37 Ala. 642. See also Bonner *v.* Gordon, 63 Ill. 443, where the note in suit was payable to the order of a national bank, and plaintiff, an individual, declared on it as payable to his order by the name and style of the bank, and a demurrer to it was overruled on the ground that while the statement was extraordinary the fact was not impossible.

64. Taylor *v.* Strickland, 37 Ala. 642.

65. Matlock *v.* Purefoy, 18 Ark. 492; Swinney *v.* Burnside, 17 Ark. 38; Semon *v.* Hill, 7 Ark. 70; Houriet *v.* Morris, 3 Campb. 303.

A misdescription as to the place where a note was executed is immaterial. Watkins *v.* Weaver, 4 Ark. 556.

66. Rowland *v.* Hoover, 2 How. (Miss.) 769.

67. Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280. See also *infra*, XIV, E, 1, a, (I), (B).

The place of the date need not be averred. — Reagan *v.* Maze, 4 Blackf. (Ind.) 344.

68. The true date should be set out and the venue laid under a *videlicet*. Munroe *v.* Cooper, 5 Pick. (Mass.) 412.

Sufficiency.— An averment that the note in suit was made in "Kemper county, Mississippi," sufficiently alleges the making of the note in the state of Mississippi. Dunn *v.* Clement, 2 Ala. 392.

A mere recital that the payees are of a foreign state is not the equivalent of an averment that their office is at such place or that the note was there executed. Whitlock *v.* Castro, 22 Tex. 108.

It is not a misdescription to allege that defendant made the instrument at a specified place, although it does not appear on its face to have been made there. Anderson *v.* Brown, Morr. (Iowa) 158.

Where the place of drawing is not disclosed in an action on a bill of exchange, it will, on demurrer, be inferred to be that stated in the margin of the declaration. Moore *v.* Bradford, 3 Ala. 550. And see Swinney *v.* Burnside, 17 Ark. 38.

69. Manning *v.* Haas, 5 Colo. 37; Savage *v.* Aills, 2 T. B. Mon. (Ky.) 93; Stapp *v.* Lapsley, Litt. Sel. Cas. (Ky.) 238; Banks *v.* Coyle, 2 A. K. Marsh. (Ky.) 564; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; Church *v.* Feterow, 2 Penr. & W. (Pa.) 301; Tobler *v.* Stubblefield, 32 Tex. 188. See also Hanly *v.* Real Estate Bank, 4 Ark. 598; Withrow *v.* Wiley, 3 Ind. 379.

70. Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280; Totten *v.* Cooke, 2 Metc. (Ky.) 275 (where the petition was held sufficient, although the date of the note was omitted, the note being filed with and made a part of the pleading).

71. De la Courtier *v.* Bellamy, 2 Show. 422.

72. Walker *v.* Welch, 13 Ill. 674; Robinson *v.* Grandy, 50 Vt. 122; Giles *v.* Bourne, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646. But see Salisbury *v.* Wilson, Tapp. (Ohio) 198, holding that averring that a note was made on a particular day is not averring that it was dated on such day; and that, where the note is without date as to the year, there is no variance.

73. Smith *v.* Lord, 2 D. & L. 759, 9 Jur. 450, 14 L. J. Q. B. 112.

After verdict an omission of or a misstatement as to the date or time of the making of the note may be disregarded. Cater *v.* Hunter, 3 Ala. 30; Vandervere *v.* Ogburn, 2 N. J. L. 63.

A variance between the day on which the instrument is stated to be drawn and that on which it really is drawn is immaterial. Coxon *v.* Lyon, 2 Campb. 307 note.

Plaintiff is not estopped by a recital of the date from showing that the note was made on a different day. Banks *v.* Coyle, 2 A. K. Marsh. (Ky.) 564.

(VI) *As to Place of Payment.* If a note or bill is made payable at a particular place the place of payment must be averred.[74] It will be sufficient, however, if the place is described with substantial accuracy,[75] but if the note is set out the place of payment therein stated is sufficiently averred[76] and in the absence of an express averment the place of payment will be presumed to be the same as the place of making.[77]

(VII) *As to Time of Payment*—(A) *Time Fixed by Instrument.* Where the instrument by its terms fixes the time of payment the declaration should appropriately allege that time;[78] and unless it appears that the instrument is due the declaration is bad, because failing to show an accrued cause of action.[79]

(B) *Time Not Fixed by Instrument.* If no time of payment is specified in the instrument, it may be described in the complaint, declaration, or petition as payable on demand.[80]

(C) *Necessity of Express Averment.* If it appears from the pleading as a

74. *Arkansas.*— Sumner *v.* Ford, 3 Ark. 389.

Illinois.—Childs *v.* Laflin, 55 Ill. 156; Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742.

Kentucky.—Graham *v.* Louisville City Nat. Bank, 103 Ky. 641, 20 Ky. L. Rep. 295, 45 S. W. 870.

United States.— Covington *v.* Comstock, 14 Pet. (U. S.) 43, 10 L. ed. 346; Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160.

England.— Exon *v.* Russell, 4 M. & S. 505; Hodge *v.* Fillis, 3 Camph. 463.

See 7 Cent. Dig. tit. "Bills and Notes," § 1457.

In Kentucky to place a note on the footing of a bill of exchange it must be alleged that the bank where the note was made payable was a banking corporation organized within the state, and created under and by virtue of the national banking act. Graham *v.* Louisville City Nat. Bank, 103 Ky. 641, 20 Ky. L. Rep. 295, 45 S. W. Rep. 870.

75. A complaint on a note payable "at the First National Bank of New Albany" need not aver that New Albany is in the state, and that the bank is located at that place. Glenn *v.* Porter, 49 Ind. 500.

Presumption as to location of bank.— Where a note made in the state is payable at a bank, it will be presumed that the bank is within the state. Graham *v.* Louisville City Nat. Bank, 103 Ky. 641, 20 Ky. L. Rep. 295, 45 S. W. 870. See also Zink *v.* Dick, 1 Ind. App. 269, 27 N. E. 622, holding that in an action on a note assigned before maturity, payable at a bank, the fact that the bank was not a bank "in this state," within the meaning of Ind. Rev. Stat. (1881), § 5506, making notes payable to bearer in a bank "in this state" negotiable as inland bills of exchange, is matter of defense, and need not be negatived in the complaint.

76. Sydnor *v.* Hurd, 8 Tex. 98.

77. Dunn *v.* Clement, 2 Ala. 392. See also *infra*, XIV, E, 1, h, (VIII).

78. Osborne *v.* Fulton, 1 Blackf. (Ind.) 233; Morris *v.* Fort, 2 McCord (S. C.) 397; Seligson *v.* Hobby, 51 Tex. 147; Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160; Page *v.* Alexandria Bank, 7 Wheat. (U. S.) 35, 5 L. ed. 390; Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 3 L. ed. 317; Earhart *v.* Campbell, Hempst. (U. S.) 48, 8 Fed. Cas. No. 4,241*a*.

Election by holder.— Where the only thing necessary to the maturity of a note is the holder's election that it should mature, an averment that he has demanded payment is, unless specially excepted to, a sufficient averment of notice that he has made the election and that the debt is due. Graham *v.* Miller, (Tex. 1894) 24 S. W. 1107. An averment of a failure to pay an instalment of interest when it became due by the terms of the note, and that plaintiff elected to declare and did declare the principal sum and the interest thereon due and payable, sufficiently avers an election at the time the interest became due. Fletcher *v.* Dennison, 101 Cal. 292, 35 Pac. 868.

Misstatement.— Describing a note payable on a day certain as payable "on or before" that day is a harmless misstatement. Morton *v.* Tenny, 16 Ill. 494.

Aider by judgment.— The error of misstating the day on which the note was payable is cured by judgment by default. Crawford *v.* Camfield, 6 Ala. 153.

79. Seldonridge *v.* Connable, 32 Ind. 375; Savage *v.* Aills, 2 T. B. Mon. (Ky.) 93.

80. *Connecticut.*— Bacon *v.* Page, 1 Conn. 404.

Indiana.— Osborne *v.* Fulton, 1 Blackf. (Ind.) 233.

Iowa.—Green *v.* Drebilbis, 1 Greene (Iowa) 552.

Kentucky.— Payne *v.* Mattox, 1 Bibb (Ky.) 164.

New York.— Herrick *v.* Bennett, 8 Johns. (N. Y.) 374.

See 7 Cent. Dig. tit. "Bills and Notes," § 1458.

The words "on demand" need not be used, if words of equal import aver the time of payment. Green *v.* Drebilbis, 1 Greene (Iowa) 552.

whole that the instrument actually matured before suit brought, the absence of a positive averment is immaterial.[81]

(D) *Failure to Allege Time* — (1) PRESUMPTION. If the time of the maturity of the note is not stated it will be presumed to be due presently or on demand.[82]

(2) SUPPLY OF OMISSION — (a) BY COPY OF INSTRUMENT. The omission of an express averment of the time of payment is supplied by the note itself when it is made a part of plaintiff's pleading or is filed with it as required by statute.[83]

(b) BY RECORD. Although there is no direct averment of the time of payment, if the record shows that the action was instituted after the note matured, that fact will be deemed sufficient.[84]

(E) *Days of Grace.* It is enough to state that the note was payable as drawn without referring to days of grace.[85]

(F) *Extension of Time.* An agreement extending the time of payment need not be noticed — such an agreement being matter of defense.[86]

81. Schuttler *v.* King, 13 Mont. 226, 33 Pac. 938; Gillespie *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 448.

Illustrations.— A complaint alleging that, on a certain day and at a certain place, defendant, by his note, for value received, promised to pay to plaintiff or bearer a specified sum, and that he had not paid it, but is indebted to plaintiff, is sufficient, although it does not allege whether the same is due or not. Peets *v.* Bratt, 6 Barb. (N. Y.) 662. Where in declaring on a note, dated April 17, 1857, the note was described in its terms as "payable six months after the date thereof, 'to wit, on the 17th day of October, 1857,'" it was held that an allegation of the day on which it fell due was mere surplusage and if incorrect would not vitiate the pleading. Archer *v.* Claflin, 31 Ill. 306. A petition alleging the date of the note, and that it bore interest from date, and further that defendant, although often requested, had never paid said note, or any part thereof except thirty-five dollars heretofore mentioned, but the same remains still due and unpaid, sufficiently alleges that the debt is due, as against a general demurrer. Pennington *v.* Schwartz, 70 Tex. 211, 8 S. W. 32.

"Due."— In a statutory proceeding on an indebtedness evidenced by an unmatured note, which was described as "due," but which from other parts of the petition appeared not yet to have matured, it was held on demurrer that the word "due" must be construed to mean as it does in the saying, "*Debitum in præsenti solvendum in futuro*," and the demurrer was overruled. Kritzer *v.* Smith, 21 Mo. 296.

According to tenor of bill.— An obligation to pay on a day certain is properly described, in a declaration, as an obligation to pay on request, "according to the tenor and effect of the said bill." McMahan *v.* Murphy, 1 Bailey (S. C.) 535.

Clerical omission.— A declaration on a note payable in three months from date is not bad because averring the time of maturity to be "three from date," where it is thereafter averred that "the said three months from the date of said note have long since elapsed." Passumpsic Bank *v.* Goss, 31 Vt. 315.

82. Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97; Libby *v.* Mikelborg, 28 Minn. 38, 8 N. W. 903; Libby *v.* Husby, 28 Minn. 40, 8 N. W. 903; White *v.* Tarbell, 27 Vt. 573; Terry *v.* Milwaukee, 15 Wis. 490.

83. Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201; West *v.* Hayes, 104 Ind. 251, 3 N. E. 932; Brush *v.* Raney, 34 Ind. 416; Womack *v.* Womack, 9 Ind. 288; Postel *v.* Dard, 1 Ind. App. 252, 27 N. E. 584; Burton *v.* White, 1 Bush (Ky.) 9. *Contra*, Villiers *v.* Lewis, 1 Handy (Ohio) 38, 12 Ohio Dec. (Reprint) 15.

Contingency.—Where the note in suit stipulated that on failure to pay any of the attached interest coupons the entire amount should become immediately due, but the copy set out in the complaint, the correctness of which was not questioned, did not contain such provision it was held that equitable defenses were not available against a purchaser before the date of final maturity but after an interest coupon had become delinquent. Beach *v.* Bennett, 66 Pac. 567.

84. Where the record shows the commencement of the action after the maturity of the note on which a recovery is sought, the complaint will possibly be sufficient, although default is not specifically alleged. Cummings *v.* Citizens' Bldg., etc., Assoc., 142 Ind. 600, 42 N. E. 213.

Aider by writ.— The want of a direct averment that the note sued on became due before the commencement of the action, may be supplied by reference to the writ. Friend *v.* Pitman, 92 Me. 121, 42 Atl. 317; Hale *v.* Velper, Smith (N. H.) 283.

85. Roberts *v.* Corby, 86 Ill. 182; Padwick *v.* Turner, 11 Q. B. 124, 63 E. C. L. 124.

86. Pike *v.* Mott, 5 Vt. 108. See also Freider *v.* Lienkauff, 92 Ala. 469, 8 So. 758, a creditor's bill, where complainant sought to show the change in the time of payment of an unmatured note held by him, and in which it was held that an allegation of an offer to discount it on the most liberal terms, which offer was accepted, was too vague to

(VIII) *As to Promise* — (A) *Necessary Allegations* — (1) In General. With certain exceptions, as where a promise to pay arises from the character of the instrument and the relation thereto, of the party sought to be charged,[87] or the rule of the common law has been abrogated, such a promise must be expressly averred.[88]

(2) Action by Bearer. The holder of a note payable to bearer need not allege a promise to himself.[89]

(3) Action by Assignee. The assignee of a note, when suing the maker, need not allege a promise by the latter to pay him.[90]

(B) *Sufficiency of Allegations* — (1) In General. It is sufficient to allege a bare promise and to leave the mode of it to the proof,[91] and the absence of a specific averment of a promise to pay will not invalidate the pleading, if taken as a whole it fairly appears that a promise was in fact made or such a promise can be implied as a matter of law.[92]

(2) Exhibition of Instrument. In many jurisdictions the exhibition of the bill or note, by incorporation in the complaint or otherwise, is a sufficient averment of the promise without a distinct substantive allegation.[93]

show that the date of maturity had been changed to the time of such proposition.

An averment that "there is now due" a certain sum on the note sued on is sufficient, although the note contains a stipulation that it shall be extended if certain taxes are not collected by a specified date, without averring that such taxes have been collected. Revolving Scraper Co. *v.* Tuttle, 61 Iowa 423, 16 N. W. 353, 47 Am. Rep. 816.

87. Thus it had been held that an express promise need not be laid in a declaration against the drawer (Starke *v.* Cheesman, Carth. 509, 1 Ld. Raym. 538, 1 Salk. 128) or accepter (Wegerseoffe *v.* Keene, Str. 214) of a bill of exchange, in an action by an indorsee against successive indorsers (Aitkin *v.* Leonard, 11 U. C. Q. B. 98), or by a payee or indorsee against the maker (Whitney *v.* Woods, 5 U. C. Q. B. 572); neither need a promise to pay after protest be averred (Starke *v.* Cheesman, Carth. 509, 1 Ld. Raym. 538, 1 Salk. 128).

88. *California.*— Pilster *v.* Highton, (Cal. 1892) 31 Pac. 580.

Kentucky.— Parks *v.* Buckler, 7 Ky. L. Rep. 527.

New Jersey.— Montague *v.* Church School Dist. No. 3, 34 N. J. L. 218.

Virginia.— Cooke *v.* Simms, 2 Call. (Va.) 39.

United States.—Earhart *v.* Campbell, Hempst. (U. S.) 48, 8 Fed. Cas. No. 4,241*a*.

See 7 Cent. Dig. tit. "Bills and Notes," § 1455.

Averment of execution.— An averment of a promise to pay which is only inferentially involved in a statement that defendant "executed a note" is bad pleading, and insufficient on special exception, although good on general demurrer. Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905.

A promise to pay by the executor of a deceased indorser must be alleged, where the note has matured after his testator's death. Bank of British North America *v.* Jones, 7 U. C. Q. B. 166.

In Kentucky a petition founded on a note must so set out the promise, its terms, and its breach as to enable the court to render a judgment, on the failure of the payers to make defense, without being compelled to resort to the note on file to ascertain these facts. Huffaker *v.* Monticello Nat. Bank, 12 Bush (Ky.) 287.

89. Bond *v.* Central Bank, 2 Ga. 92; Gilbert *v.* Nantucket Bank, 5 Mass. 97; Dole *v.* Weeks, 4 Mass. 451; Waynam *v.* Bend, 1 Campb. 175.

90. Conklin *v.* Harris, 5 Ala. 213.

91. Epperly *v.* Little, 6 Ind. 344; Mahan *v.* Sherman, 8 Blackf. (Ind.) 63; Sanders *v.* Anderson, 21 Mo. 402; Montpelier Bank *v.* Russell, 27 Vt. 719.

92. Quigley *v.* Arteburn, 17 Ky. L. Rep. 565, 32 S. W. 165; Kendall *v.* Lewis, 10 Ky. L. Rep. 362; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Kansas City First Nat. Bank *v.* Landis, 34 Mo. App. 433; Schuttler *v.* King, 13 Mont. 226, 33 Pac. 938.

For example averments that plaintiffs are the holders of certain bills of exchange, drawn by the agent of defendant, and accepted by him, pursuant to a special agreement for that purpose between the parties, and that the bills were drawn on a sufficient consideration, and were duly accepted by defendant, and were protested for non-payment, sufficiently shows a promise and undertaking creating a legal liability. Central Ohio R. Co. *v.* Thompson, 2 Bond (U. S.) 296, 5 Fed. Cas. No. 2,550.

93. *Alabama.*—Adams *v.* McMillan, 8 Port. (Ala.) 445.

California.— Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280.

Indiana.— Reynolds *v.* Baldwin, 93 Ind. 57.

Texas.— Spencer *v.* McCarty, 46 Tex. 213; Fennell *v.* Morrison, 37 Tex. 156.

Wisconsin.— Noonan *v.* Ilsley, 21 Wis. 138.

(IX) *As to Consideration*—(A) *General Rule.* At common law prior to the passage of the statute of Anne an action of debt could not be maintained on a promissory note as such, but the payee was required to declare on the contract and state the real consideration;[94] but one of the effects of that statute[95] was to permit an action on a promissory note without alleging a consideration.[96] Hence where the instrument is negotiable, itself imports a consideration, or its nature is such that a consideration will be implied, unless otherwise provided by statute, a consideration therefor need not be alleged.[97] Under similar circumstances it is

See 7 Cent. Dig. tit. "Bills and Notes," § 1455.

Where the note is filed as a bill of particulars, it becomes a part of the complaint, and the complaint is deemed to allege defendant's promise as it appears in the note. Salomon *v.* Hopkins, 61 Conn. 47, 23 Atl. 716.

94. Stephens *v.* Crostwait, 3 Bibb (Ky.) 222; Peasley *v.* Boatwright, 2 Leigh (Va.) 195 [*citing* Pearson *v.* Garrett, Comb. 227]; Trier *v.* Bridgman, 2 East 359; Story *v.* Atkins, 2 Ld. Raym. 1427; Clerke *v.* Martin, 2 Ld. Raym. 757.

95. 3 & 4 Anne, c. 9, § 1, in effect provides that all notes signed by a person, promising to pay to another, his order, or bearer, any sum of money shall be construed to be by virtue thereof, due and payable to any person to whom the same is made payable.

96. Peasley *v.* Boatwright, 2 Leigh (Va.) 195.

97. *Alabama.*— Thompson *v.* Hall, 16 Ala. 204; Thompson *v.* Armstrong, 5 Ala. 383; Jones *v.* Rives, 3 Ala. 11; Hunley *v.* Lang, 5 Port. (Ala.) 154; McMahon *v.* Crockett, Minor (Ala.) 362; Bowie *v.* Foster, Minor (Ala.) 264; Allen *v.* Dickson, Minor (Ala.) 119.

California.— Younglove *v.* Cunningham, (Cal. 1896) 43 Pac. 755; Henke *v.* Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Poirier *v.* Gravel, 88 Cal. 79, 25 Pac. 962.

Colorado.— Travelers' Ins. Co. *v.* Denver, 11 Colo. 434, 18 Pac. 556.

Connecticut.— Camp *v.* Tompkins, 9 Conn. 545.

District of Columbia.— Johnson *v.* Wright, 2 App. Cas. (D. C.) 216.

Illinois.— Hulme *v.* Renwick, 16 Ill. 371; Mason *v.* Buckmaster, 1 Ill. 27. But see Connolly *v.* Cottle, 1 Ill. 364.

Indiana.— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Keesling *v.* Watson, 91 Ind. 578; Du Pont *v.* Beck, 81 Ind. 271; Durland *v.* Pitcairn, 51 Ind. 426; Tibbetts *v.* Thatcher, 14 Ind. 86; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Nichols *v.* Woodruff, 8 Blackf. (Ind.) 493; Chapman *v.* Ellison, 7 Blackf. (Ind.) 46; Findley *v.* Cooley, 1 Blackf. (Ind.) 262; Spurgeon *v.* Swain, 13 Ind. App. 188, 41 N. E. 397.

Kentucky.—Early *v.* McCart, 2 Dana (Ky.) 414; Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599; McCurdy *v.* Dudley, 1 A. K. Marsh. (Ky.) 288; Mullikin *v.* Mullikin, 15 Ky. L. Rep. 609, 23 S. W. 352, 25 S. W. 598.

Massachusetts.—Gilbert *v.* Nantucket Bank, 5 Mass. 97.

Minnesota.— Elmquist *v.* Markoe, 39 Minn. 494, 40 N. W. 825 [*following* Fronk *v.* Irgins, 27 Minn. 43, 6 N. W. 380]; Adams *v.* Adams, 25 Minn. 72; Linney *v.* King, 21 Minn. 514; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

Missouri.— Taylor *v.* Newman, 77 Mo. 257; Glasscock *v.* Glasscock, 66 Mo. 627; Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215; Bateson *v.* Clark, 37 Mo. 31; Muldrow *v.* Caldwell, 7 Mo. 563; Rector *v.* Fornier, 1 Mo. 204.

New Hampshire.— Horn *v.* Fuller, 6 N. H. 511.

New York.— Underhill *v.* Phillips, 10 Hun (N. Y.) 591; Paine *v.* Noelke, 43 N. Y. Super. Ct. 176, 54 How. Pr. (N. Y.) 333; Guggenheim *v.* Goldberger, 7 Misc. (N. Y.) 740, 27 N. Y. Suppl. 422, 58 N. Y. St. 34; Mt. Morris Bank *v.* Lawson, 7 Misc. (N. Y.) 228, 27 N. Y. Suppl. 272, 58 N. Y. St. 25; Benson *v.* Couchman, 1 Code Rep. (N. Y.) 119; Goshen, etc., Turnpike Road Co. *v.* Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273. And see Sprague *v.* Sprague, 80 Hun (N. Y.) 285, 30 N. Y. Suppl. 162, 61 N. Y. St. 862.

Ohio.— Ring *v.* Foster, 6 Ohio 279; Richmond *v.* Patterson, 3 Ohio 368; Mors *v.* McCloud, 2 Ohio 5; Dugan *v.* Campbell, 1 Ohio 115.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775.

Texas.— Henderson *v.* Glass, 16 Tex. 559; Williams *v.* Edwards, 15 Tex. 41; Perry *v.* Rice, 10 Tex. 367.

Virginia.— Peasley *v.* Boatwright, 2 Leigh (Va.) 195; Crawford *v.* Daigh, 2 Va. Cas. 521. See also Jackson *v.* Jackson, 10 Leigh (Va.) 448, where it was said that it was an open question whether assumpsit would lie under the statute without alleging a consideration.

West Virginia.— Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751; McClain *v.* Lowther, 35 W. Va. 297, 13 S. E. 1003.

England.— Bond *v.* Stockdale, 7 D. & R. 140, 16 E. C. L. 278; Coombs *v.* Ingram, 4 D. & R. 211, 16 E. C. L. 194.

Canada.— Parsons *v.* Jones, 16 U. C. Q. B. 274.

See 7 Cent. Dig. tit. "Bills and Notes," § 1477.

A note for the payment of annual sums until the execution of certain deeds is, under the statute, like a note under the statute of Anne, a debt *per se*, and may be declared on without the averment of any consideration. Arnold *v.* Brown, 3 Blackf. (Ind.) 273.

unnecessary for the transaction out of which the consideration arose to be detailed in the plaintiff's pleading.[98]

(B) *Exceptions to Rule.* Where from the nature of the action[99] or the particular circumstances it is necessary that it should appear that the instrument was given for a consideration that fact must be duly alleged to entitle plaintiff to recover.[1] Hence a consideration for the execution of the instrument must be alleged as to a stranger who is sought to be held as a surety or the like.[2]

(C) *Non-Negotiable Instruments.* In an action on an instrument not within the law merchant or negotiable by statute a consideration must be averred, either expressly or by showing an acknowledgment of a consideration on the face of the instrument.[3]

Lost note.— A statute permitting profert of the note instead of an averment of the consideration is not applicable to a lost note, as to which the consideration must be averred. Stephens *v.* Crostwait, 3 Bibb (Ky.) 222.

Married woman's note.— A declaration on a note which does not disclose defendant's coverture, which is first set up by defendant's plea or answer, is not defective as stating no cause of action, on the ground that it does not show that the note sued on was founded on such consideration as would make defendant liable. Grubbs *v.* Collins, 54 Miss. 485.

Unauthorized note.— A note, which, as appears from the complaint, was made without authority, does not import any consideration. Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044.

Forbearance.— Where a petition on a written promise to pay money alleges forbearance as the consideration thereof, it should state the time of the forbearance actually given. An allegation that the creditor gave his debtor further time and did forbear to enforce payment is insufficient. Glasscock *v.* Glasscock, 66 Mo. 627.

In declaring on a bank-note, if defendant's promise is alleged to have been made to bearer, and plaintiff is alleged to be the holder for a valuable consideration, the consideration is sufficiently set forth. Gilbert *v.* Nantucket Bank, 5 Mass. 97.

In Texas, consideration for the acceptance of an order must be alleged. Summers *v.* Sanders, (Tex. Civ. App. 1894) 28 S. W. 1038.

98. Carlisle *v.* David, 9 Ala. 858; Du Pont *v.* Beck, 81 Ind. 271; Brown *v.* Southern Michigan R. Co., 6 Abb. Pr. (N. Y.) 237.

A contemporaneous agreement which constitutes the consideration need not be set out. Perry *v.* Rice, 10 Tex. 367.

99. In assumpsit on a note not under seal, a consideration must be averred in the declaration. Hart *v.* Coram, 3 Bibb (Ky.) 26.

1. Rossiter *v.* Marsh, 4 Conn. 196. See also Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497, where it is questioned whether a complaint on a promissory note should aver a consideration.

Where a note is silent as to the consideration in an action between the original parties a consideration must be averred and proved. Bourne *v.* Ward, 51 Me. 191.

Judgment by confession.— Where the design of a statute authorizing judgments by confession is to prevent fraud, a confession which purports to describe the note confessed must set out its consideration. Plummer *v.* Plummer, 7 How. Pr. (N. Y.) 62.

Acceptance.— A petition in an action on a draft drawn by and payable to plaintiff must allege a consideration for its acceptance. Robertson *v.* Phillips, 1 Tex. App. Civ. Cas. § 447, where it is intimated that such an allegation would be unnecessary if the draft had gone into the hands of a third party.

The actual consideration alleged can alone be recovered. Brown *v.* Rouse, 93 Cal. 237, 28 Pac. 1044.

2. Stone *v.* White, 8 Gray (Mass.) 589.

Indorser after maturity.— In an action on a note, on the back of which defendant placed his name after it was due, for a new consideration, the declaration must state the whole consideration; and if this consist of several things, and especially of something to be done by plaintiff, plaintiff cannot recover without alleging and proving all of them, unless it be such as are frivolous and void. Garrett *v.* Butler, 2 Strobh. (S. C.) 193.

Indorser to give credit.— An averment that defendant put his name on the back of a note with intent to give it a credit, and to induce plaintiff to accept the same, and that the note so indorsed was delivered to plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise. Offutt *v.* Hall, 1 Cranch C. C. (U. S.) 572, 18 Fed. Cas. No. 10,450.

3. *Connecticut.*— National Sav. Bank *v.* Cable, 73 Conn. 568, 48 Atl. 428.

Indiana.— See Nichols *v.* Woodruff, 8 Blackf. (Ind.) 493.

Kentucky.— Prior *v.* Linsey, 3 Bibb (Ky.) 76.

Massachusetts.— Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497.

Minnesota.—Priedman *v.* Johnson, 21 Minn. 12.

Mississippi.— Hardin *v.* Pelan, 41 Miss. 112.

New Hampshire.— Odiorne *v.* Odiorne, 5 N. H. 315.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54.

New York.— Richardson *v.* Carpenter, 32 Sweeny (N. Y.) 360; Jerome *v.* Whitney, 7 Johns. (N. Y.) 321.

(D) *Sealed Notes.* If it is alleged that the instrument is sealed no further allegation of consideration is necessary.[4]

(E) *Sufficiency — Value Received.* It will be sufficient to set forth the instrument in terms or according to its legal effect and allege that it was given for value received,[5] or where it purports to be for value received to set it forth in full or exhibit it without a specific averment.[6]

(F) *Consideration of Guaranty.* Although it is held that there must be a distinct averment of a consideration for a guaranty by indorsement,[7] the rule seems to be that if the guaranty is a part of the original transaction no new consideration is necessary to be averred in support of it;[8] but otherwise where the guaranty is subsequently made by a third party.[9]

(G) *Aider of Defects.* The omission to state, or a defective statement of, the consideration may be aided by the subsequent pleadings, as by the answer,[10] or by production of the note, as where it is spread upon the record after oyer craved.[11]

Pennsylvania.— Shee *v.* Megargee, 4 Phila. (Pa.) 7, 17 Leg. Int. (Pa.) 20.

Tennessee.— Read *v.* Wheeler, 2 Yerg. (Tenn.) 50.

See 7 Cent. Dig. tit. "Bills and Notes," § 1477.

An averment of consideration will not convert into a valid obligation to pay an instrument which on oyer is shown to import no validity or to have any validity. Harmon *v.* James, 7 Ind. 263.

In an action on a joint note by husband and wife, a judgment by default will be set aside where the declaration contains no averment of separate benefit or that the note was given for necessaries. Covington *v.* Burleson, 28 Tex. 368; Trimble *v.* Miller, 24 Tex. 214. And see Bullock *v.* Hayter, 24 Tex. 9.

Note payable to maker.— The holder of a note payable to the order of the maker, and indorsed by him, cannot recover thereon without averring a previous independent indebtedness, and that the note was executed to bind the maker for such indebtedness, it not, of itself, creating any. Muhling *v.* Sattler, 3 Metc. (Ky.) 285, 77 Am. Dec. 172.

4. Crenshaw *v.* Bullitt, 1 Blackf. (Ind.) 41; Angier *v.* Howard, 94 N. C. 27.

Unnecessary allegation of "value received." — Where, in counting on a note under seal, plaintiff, without setting out the note *in hæc verba,* inserted the words "Value received," which were not in the note, it was held that the words were not descriptive of the note, but merely an unnecessary allegation, and therefore did not vitiate the declaration. James *v.* Scott, 7 Port. (Ala.) 30; Crenshaw *v.* Bullitt, 1 Blackf. (Ind.) 41.

5. Gaddy *v.* McCleave, 59 Ill. 182; McDonald *v.* Hare, 28 Ind. App. 227, 62 N. E. 501.

An averment that the note was "for value received" is sustained by proof of a note not containing these words, but reciting the particular consideration. James *v.* Scott, 7 Port. (Ala.) 30; Bingham *v.* Calvert, 13 Ark. 399; Bond *v.* Stockdale, 7 D. & R. 140, 16 E. C. L. 278; Coombs *v.* Ingram, 4 D. & R. 211, 16 E. C. L. 194.

6. Matlock *v.* Purefroy, 18 Ark. 492; Elmquist *v.* Markoe, 39 Minn. 494, 40 N. W. 825.

In Missouri the employment in the note of the words operative under the statute to make the note negotiable must appear in the petition. Hart *v.* Harrison Wire Co., 91 Mo. 414, 4 S. W. 123, where the vice was that the petition contained no allegation that the note was "expressed to be for value received."

It is a sufficient setting forth of a note, if, although the note described be not expressed for a consideration, a consideration be alleged in the declaration. Leonard *v.* Walker, Brayt. (Vt.) 203.

Judgment will not be arrested where no consideration is specially alleged, if the instrument declared on shows a valuable consideration. Kemble *v.* Lull, 3 McLean (U. S.) 272, 14 Fed. Cas. No. 7,683.

Variance.— In declaring on a note, the words "for value received" are regarded as descriptive, and not as an averment only, and a note not containing those words will not support the declaration. Saxton *v.* Johnson, 10 Johns. (N. Y.) 418.

Where a copy of the note filed with the complaint showed that it was given "for value received," the omission of the complaint to allege that it was so given is immaterial. Petree *v.* Fielder, 3 Ind. App. 127, 29 N. E. 271.

7. Greene *v.* Dodge, 2 Ohio 430.

8. Joslyn *v.* Collinson, 26 Ill. 61; M. V. Monarch Co. *v.* Terre Haute First Nat. Bank, 105 Ky. 336, 20 Ky. L. Rep. 1223, 49 S. W. 32. And see Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

9. Joslyn *v.* Collinson, 26 Ill. 61.

If the guaranty is by the payee it is immaterial that it was made after the execution of the note. Judson *v.* Gookwin, 37 Ill. 286.

10. A complaint which counts on promises by defendant "under his bond" is aided by an answer which describes the promises as "promissory notes," and which consequently renders an allegation in the complaint of consideration unnecessary. Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

11. An omission to aver a consideration is cured by the defendant's craving oyer, thus spreading on the record the writing which purports a consideration. Edwards *v.* Wiester, 2 A. K. Marsh. (Ky.) 382.

So too it has been held that an objection to a defect in this respect comes too late after judgment.[12]

(x) *As to Transfer, Indorsement, and Ownership* — (A) *Transfer in General* — (1) Identification of Parties to Transfer. Plaintiff must be identified as the person to whom the note was transferred[13] by a holder or indorsee having the legal title to the instrument;[14] but language substantially showing a transfer by indorsement, assignment, or delivery will be sufficient.[15] Words added to an indorser's name which do not restrict or qualify the transfer of the instrument need not be noticed.[16]

(2) Allegations as to Negotiability — (a) In General. To charge an indorser, the declaration must state facts which in law are necessary to make the instrument negotiable.[17]

12. An allegation that a note was executed and delivered "for value received" is sufficient against an objection made after judgment. Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668.

13. Gurnee *v.* Beach, 40 Hun (N. Y.) 108; Loomis *v.* Dorshimer, 8 How. Pr. (N. Y.) 9. See also Lord *v.* Chesebrough, 4 Sandf. (N. Y.) 696, 1 Code Rep. N. S. (N. Y.) 322; Huntington Bank *v.* Hysell, 22 W. Va. 142.

Duly delivered.— An allegation that an unmatured note was duly delivered to, and came into the possession of, plaintiff, without averring by whom it was delivered, or for what purpose, or that it was indorsed, is insufficient. Parker *v.* Totten, 10 How. Pr. (N. Y.) 233.

Indorsement to particular person.— An allegation that the holder by a prior indorsement "endorsed the note, by writing his name across the back thereof, . . . to the plaintiff," is an averment of an indorsement to a particular person and not of a mere blank indorsement. Toles *v.* Montague, 53 Ill. 384.

Variance with note filed.— A demurrer will not be sustained on the ground that there is no averment that plaintiff is the same person to whom the note purports to be assigned, as the note, although filed, constitutes no part of the petition, and cannot be referred to on demurrer. Baker *v.* Berry, 37 Mo. 306.

14. Mechanics' Bank *v.* Donnell, 35 Mo. 373.

Sufficiency of allegation.— An allegation that the note sued on was assigned, transferred, delivered, and indorsed to plaintiff is a sufficient allegation that it was transferred to plaintiff by the owner. Oishei *v.* Craven, 11 Misc. (N. Y.) 139, 31 N. Y. Suppl. 1021, 65 N. Y. St. 114, 24 N. Y. Civ. Proc. 301. An allegation that, in writing, and prior to the commencement of the action, the note sued on was duly assigned and transferred to plaintiff, is a sufficient allegation that it was assigned and transferred by the payee named therein. Topping *v.* Clay, 65 Minn. 346, 68 N. W. 34.

An allegation that a bill was duly indorsed to plaintiff includes within itself an averment that it was indorsed by the payee. Snelgrove *v.* Mobile Branch Bank, 5 Ala. 295.

Delivery of an indorsed note by an agent is properly averred to be the act of the principal. Metropolitan Bank *v.* Engel, 66 N. Y. App. Div. 273, 72 N. Y. Suppl. 691.

Owner or holder.— An averment that at the time of transfer the transferrer was the owner or holder of the instrument is not a legal conclusion and is sufficient. Stoutenburg *v.* Lybrand, 13 Ohio St. 228.

Aider by verdict.— The omission of the name of plaintiff's immediate indorser is cured by verdict. Strader *v.* Alexander, 9 Port. (Ala.) 441.

Capacity of indorsee.— In an action by a bank on a note indorsed to the maker to negotiate, plaintiff must disclose the capacity in which the indorsee acted in negotiating the instrument in question. Walker *v.* Ocean Bank, 19 Md. 247.

15. An allegation of possession and ownership is sufficient. Lyddam *v.* Owensboro Banking Co., 106 Ky. 706, 21 Ky. L. Rep. 320, 51 S. W. 453.

Indorsement to bank.—An allegation of indorsement to the cashier of plaintiff, a bank, sufficiently alleges an indorsement to it. Pratt *v.* Topeka Bank, 12 Kan. 570.

Joint and several guaranty.— Under Ill. Rev. Stat. (1893), c. 76, § 3, providing that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants," an averment in an action against one of two guarantors that defendants "then and there guaranteed" is no variance. Kaestner *v.* Chicago First Nat. Bank, 170 Ill. 322, 48 N. E. 998.

Transfer to firm.—An allegation that plaintiffs were copartners in trade doing business under the name of S. C. Howard and that the note in suit was transferred to said S. C. Howard, shows a transfer to the firm. Howard *v.* Boorman, 17 Wis. 459.

16. McDonald *v.* Bailey, 14 Me. 101, where the name of the indorser was immediately preceded by the words "eventually accountable."

17. Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503; Bateson *v.* Clark, 37 Mo. 31; Simmons *v.* Belt, 35 Mo. 461; Lindsay *v.* Parsons, 34 Mo. 422; Jaccard *v.* Anderson, 32 Mo. 188.

Conclusion of law.— An allegation that the note in suit was negotiable is a mere conclusion of law. Jaccard *v.* Anderson, 32 Mo. 188.

(b) To Whom Instrument Payable — aa. *To Order.* At common law an indorser in declaring against the maker of a note was required to aver that the instrument was payable to order;[18] but where the common-law rule has been changed, so that it is not essential to the valid transfer of a note that it should be so payable the omission of such an averment is immaterial.[19]

bb. *To Bearer.* A declaration on a note payable to a designated person "or bearer" is not vitiated by the omission of the words "or bearer."[20]

cc. *To Fictitious Person.* The *bona fide* holder of a bill drawn payable to a fictitious payee or order may charge the drawer as the drawer of a bill payable to bearer or may recover on a count stating the special circumstances of the case.[21]

(3) Foreign Laws. If the rights of plaintiff are in anywise dependent on the laws of a foreign state where the instrument in suit was transferred, such laws so far as applicable must be averred[22] as a fact;[23] otherwise it will be presumed that the common law there prevails.[24]

(B) *Assignment* — (1) Necessary Allegations — (a) Mode of Assignment. The declaration should show whether the instrument on which the action is based was assigned in writing or transferred by delivery,[25] where the mode of assignment affects the question of making the assignor a party;[26] but unless the form of the action is affected a mere averment of assignment will be sufficient,[27] without stating it to be under the hand of the assignor,[28] and will authorize a pre-

Assigned note.— Where a note is assignable by statute without words of negotiability, in declaring on a note containing such words as "order" or "bearer" they need not be alleged, as they do not change the legal effect of the note. Sappington *v.* Pulliam, 4 Ill. 385.

Forged note.— A note originally genuine but on which the payee's indorsement is forged is properly described as a "negotiable promissory note." Beal *v.* Roberts, 113 Mass. 525.

Custom.— Where a note is claimed to be negotiable by force of an existing custom such custom should be averred and proved. Rindskoff *v.* Barrett, 11 Iowa 172.

18. Barriere *v.* Nairac, 2 Dall. (Pa.) 249, 1 L. ed. 368.

19. Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286.

20. Matlock *v.* Purefoy, 18 Ark. 492.

21. Collis *v.* Emett, 1 H. Bl. 313.

22. Mendenhall *v.* Gately, 18 Ind. 149; Brown *v.* Bunn, 16 Ind. 406.

Illustrations.— A statement of claim based on an indorsement which is invalid in Pennsylvania is insufficient to support a recovery on the ground that the indorsement was made and delivered in New Jersey, in the absence of an allegation to that effect, and an allegation of the laws of New Jersey relative to such indorsements. Cooke *v.* Addicks, 5 Pa. Dist. 387. An averment that, by the law of the place of the contract, plaintiff alone could sue, is not sufficient. It will be presumed that a statute is referred to, which should have been set out. Wilson *v.* Clark, 11 Ind. 385. Where a note made without but payable within the state was assigned on the day of its date it will be inferred on demurrer that the note was assigned in the foreign state and the assignee may sue thereon, although he could not if the assignment was made within the state. Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126.

23. In an action against an indorser, an averment in the declaration, "that, by the laws of the state of Georgia, where said endorsement was made, the said Daniel McDougald became liable to pay said sum of money, in said note specified, to said plaintiff," is but the statement of a conclusion as to the effect of the foreign law, and the rights and liabilities of the parties under that law, and is therefore demurrable. McDougald *v.* Rutherford, 30 Ala. 253.

24. Mendenhall *v.* Gately, 18 Ind. 149.

25. An allegation that the note was "assigned over and delivered," imports an assignment by delivery. Edison *v.* Frazier, 9 Ark. 219.

An allegation of assignment after maturity will authorize a presumption of an assignment in writing. Boynton *v.* Renwick, 46 Ill. 280.

In New York the purchaser of a note who takes by delivery need not aver an indorsement by the payee. Billings *v.* Jane, 11 Barb. (N. Y.) 620.

Mode of objection.— Failure to state in the declaration whether the assignment was made by writing or by parol is matter for special demurrer only. Satterwhite *v.* Lewis, Litt. Sel. Cas. (Ky.) 60.

26. Treadway *v.* Cobb, 18 Ind. 36; Alexander *v.* Gaar, 15 Ind. 89; Barcus *v.* Evans, 14 Ind. 381.

27. Hill *v.* Shalter, 73 Ind. 459; Cooper *v.* Drouillard, 5 Blackf. (Ind.) 152; Union Bank *v.* Tillard, 26 Md. 446.

28. Harter *v.* Ellis, 6 Blackf. (Ind.) 154, [*modifying* Archer *v.* Spencer, 3 Blackf. (Ind.) 405]. See also Kern *v.* Hazlerigg, 11

sumption that the assignment was a separate instrument.[29] If, however, the assignment is required to be indorsed on the instrument an assignment in that mode must be averred,[30] but an allegation of indorsement or assignment by the payee is equivalent to an allegation of assignment by indorsement.[31]

(b) CONSIDERATION. Unless made necessary by statute, the consideration for the assignment of commercial paper, or that it was for value received, need not be alleged.[32] Such an allegation is necessary, however, where the assignee of a note seeks to recover of his assignor on the default of the maker.[33]

(2) SUFFICIENCY OF ALLEGATIONS. Assignment of the instrument in suit is sufficiently shown by averments of a transfer in that mode.[34]

(3) SETTING OUT, ATTACHING, OR FILING ASSIGNMENT. There must be a conformity with statutory provisions requiring plaintiff to set out,[35] attach,[36] or file the assignment[37] through which he claims.

(4) NON-NEGOTIABLE INSTRUMENTS. In an action on non-negotiable paper by a person other than the payee, plaintiff must allege title by way of assignment,[38] although an allegation of indorsement and delivery[39] or that plaintiff is the owner

Ind. 443, 71 Am. Dec. 360; Cooper *v.* Drouillard, 5 Blackf. (Ind.) 152.

29. Williams *v.* Osborn, 75 Ind. 280; Keeler *v.* Williams, 49 Ind. 504.

30. Keeler *v.* Campbell, 24 Ill. 287; Porter *v.* Drennan, 13 Ill. App. 362; Carskaddon *v.* Pine, 154 Ind. 410, 56 N. E. 844; Williams *v.* Osborn, 75 Ind. 280; Reed *v.* Garr, 59 Ind. 299.

Assignment in this mode is shown by making the note and an assignment reading, "For value received, I assign the within," and signed by the payee, a part of the complaint. Leedy *v.* Nash, 67 Ind. 311.

Presumption — Matured note. — An assignment on the instrument and not as a separate paper will be presumed from an averment of the assignment of a matured note. Boynton *v.* Renwick, 46 Ill. 280.

31. Hill *v.* Shalter, 73 Ind. 459; Treadway *v.* Cobb, 18 Ind. 36; Kern *v.* Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Cooper *v.* Drouillard, 5 Blackf. (Ind.) 152.

Non-negotiable note.—Such an averment is sufficient under a statute permitting the assignment of a non-negotiable note by indorsement. Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24.

32. New South Brewing, etc., Co. *v.* Price, 21 Ky. L. Rep. 11, 50 S. W. 963; Canfield *v.* McIlwaine, 32 Md. 94; Knight *v.* Holloman, 6 Tex. 153; Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408.

An allegation of assignment for a good and valuable consideration does not require proof of both kinds. Meyer *v.* Koehring, 129 Mo. 15, 31 S. W. 449.

33. Brown *v.* Summers, 91 Ind. 151; Elliott *v.* Threlkeld, 16 B. Mon. (Ky.) 341; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Dent *v.* Ashley, Hempst. (U. S.) 55, 7 Fed. Cas. No. 3,809*b*. But see Hanna *v.* Pegg, 1 Blackf. (Ind.) 181; McGee *v.* Donaphan, 2 Litt. (Ky.) 139.

34. To aver that the payee of a non-negotiable note "indorsed and delivered" it amounts to an averment that he assigned it. Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126. To same effect see May *v.* Hancock, 1 Bailey (S. C.) 299. But see *contra*, Williams *v.* Osbon, 75 Ind. 280; Keller *v.* Williams, 49 Ind. 504.

An allegation of sale and transfer will admit proof of exchange for a stock of goods. Snyder *v.* Reno, 38 Iowa 329.

Plaintiff's designation of himself as assignee is insufficient to show an assignment to him. Hogland *v.* Brown, 8 B. Mon. (Ky.) 447; Maddox *v.* Craig, 80 Tex. 600, 16 S. W. 328.

Where by statute an assignee of a non-negotiable note suing in his own name is required to style himself "assignee," his omission so to do cannot be taken advantage of after verdict. Vance *v.* Findly, 1 Nott. & M. (S. C.) 578.

35. Menard *v.* Wilkinson, 3 Mo. 92.

Allegation of ownership. — In a suit by petition and summons, on a note assigned, the note and assignment being set forth in the petition, the omission to say, "whereby plaintiff hath become proprietor thereof," is matter of form only. Rodgers *v.* Ellis, 1 Bibb (Ky.) 163.

It is unnecessary to sue "as assignee" where the assignment is sufficiently set out. Brooks *v.* Whiting, 5 Ark. 18; Kittlewell *v.* Scull, 3 Ark. 474.

36. Mainer *v.* Reynolds, 4 Greene (Iowa) 187.

37. Auburn Nat. Shoe, etc., Bank *v.* Gooding, 87 Me. 337, 32 Atl. 967.

38. Hollis *v.* Richardson, 13 Gray (Mass.) 392; Thompson *v.* Malone, 13 Rich. (S. C.) 252.

A non-negotiable note indorsed cannot be declared on as payable to order and indorsed by the payee. Burmester *v.* Hogarth, 12 L. J. Exch. 178, 11 M. & W. 97.

39. Manheimer *v.* Levy, 3 N. Y. Suppl. 130, 19 N. Y. St. 682; Freeman's Bank *v.* Ruckman, 16 Gratt. (Va.) 126.

Under Cal. Civ. Code, § 1459, which provides that a non-negotiable note may be assigned by indorsement, a complaint which, after setting out the note, adds "Indorsed:

and holder[40] have been held sufficient for this purpose without a more formal averment.

(c) *Indorsement* — (1) By Agent. Indorsement or transfer by an agent may be charged as the act of his principal, or to have been made at the instance of the latter,[41] without an allegation of the agent's authority.[42]

(2) By Copartnership. In averring an indorsement by a copartnership the individual members of the firm need not be designated;[43] but where one of several payees transfers, the transferee must allege a partnership or that the transferrer had authority from the other members of the firm.[44]

(3) Consideration For. While on the one hand it is held to be necessary in an action against an indorser to aver an inducement or consideration for the indorsement,[45] it is also held that as an indorsement imports a consideration none need be averred.[46]

'Pay to [plaintiff],' "— and alleges that the whole amount was due from defendant to plaintiff, is sufficient as against a motion to vacate a judgment entered on default. Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24.

An administratrix suing on a non-negotiable note alleged to have been delivered to her intestate need not aver that the note is in her possession. Cordier *v.* Thompson, 8 Daly (N. Y.) 172.

40. Draper *v.* Fletcher, 26 Mich. 154.

41. Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240; Youngs *v.* Perry, 42 N. Y. App. Div. 247, 59 N. Y. Suppl. 19; Perkins *v.* Bradley, 24 Vt. 66; 1 Chitty Pl. 117 note.

Transfer by corporation.— An allegation in a complaint that a company indorsed, transferred, and delivered a promissory note is not true, if the transfer was not made by the proper officer of the company, and according to law. Nelson *v.* Eaton, 15 How. Pr. (N. Y.) 305.

42. Hepburn *v.* Ratliff, 2 La. Ann. 331; Perkins *v.* Bradley, 24 Vt. 66.

Necessity of averring payee to be agent.— A declaration averring an indorsement by the payee as the agent of defendant should also state that the note was made payable to the payee as agent for defendant and for and in his behalf. Wilson *v.* Porter, 2 Cranch C. C. (U. S.) 458, 30 Fed. Cas. No. 17,827.

Action of directors.— Under a complaint, alleging that a bank indorsed, transferred, and delivered the note in suit to plaintiff, proof of the action of the board of directors authorizing the transfer is admissible, although not specially pleaded. Klein *v.* Funk, 82 Minn. 3, 84 N. W. 460.

43. Cochran *v.* Scott, 3 Wend. (N. Y.) 229; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705. And see Miller *v.* Weeks, 22 Pa. St. 89.

In Canada an indorsement in the firm-name or style must be averred. Gooderham *v.* Garden, 12 U. C. Q. B. 521; Moffatt *v.* Vance, 7 U. C. Q. B. 142; Montreal City Bank *v.* Eccles, 5 U. C. Q. B. 508.

44. De Forest *v.* Frary, 6 Cow. (N. Y.) 151, where the draft sued on was payable to either of the payees. See also Cabbott *v.* Radford, 17 Minn, 320, where an allegation of an indorsement to one Smith by one Jones of a note payable to Smith & Jones, was held to show the vesting of the entire title to the instrument in Smith. Cabbott *v.* Radford, 17 Minn. 320.

45. McInnis *v.* Rabun, 1 Port. (Ala.) 386; Cottrell *v.* Conklin, 4 Duer (N. Y.) 45; Janney *v.* Geiger, 1 Cranch C. C. (U. S.) 547, 13 Fed. Cas. No. 7,212.

Charging separate estate of married woman. —An allegation that defendant, a married woman, had a separate estate and that by indorsing she intended to and did charge her separate estate with payment of the note so indorsed, and that the consideration thereof went for the benefit of her separate estate is sufficient. Gfroehner *v.* McCarty, 2 Abb. N. Cas. (N. Y.) 76.

Credit to third persons.— A complaint is sufficient on demurrer, where it alleges that the indorsement was to procure credit for a third person, and to induce plaintiffs to extend the payment of a claim then due from defendant on the credit of such indorsement. Smith *v.* Storm, 6 Misc. (N. Y.) 627, 27 N. Y. Suppl. 143, 58 N. Y. St. 573.

Liability of payee.— A declaration in the common form, alleging that defendant became liable, and in consideration thereof promised plaintiff to pay him the note, is sufficient to show that defendant indorsed the note for value. Bartlett *v.* Leathers, 84 Me. 241, 24 Atl. 842.

Loan of money.— An allegation, in a declaration in assumpsit against an indorser in blank of a note, that the indorser, in consideration that plaintiff then lent and advanced the money to the makers, indorsed the note, is a sufficient averment that the loan was made, the note executed and the indorsement made at the same time, which implies without further specific averment that the money was loaned at the request of defendant. Rhodes *v.* Seymour, 36 Conn. 1.

46. *Illinois.*— Robertson *v.* Hamet, 19 Ill. 161.

Kentucky.—Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610.

North Carolina.— Clayton *v.* Jones, 68 N. C. 497.

Ohio.— Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

Wisconsin.— Frederick *v.* Winans, 51 Wis.

(4) Conditional Indorsement. A conditional indorsement must be specially declared on.[47]

(5) Time of Indorsement. The time of indorsement need not be alleged.[48] Nor is it necessary to aver that the instrument was negotiated or transferred before maturity.[49]

(6) Indorsement in Blank. Averments of indorsement in blank and possession or ownership of the instrument declared on sufficiently show a transfer of title by indorsement;[50] but a declaration merely alleging an indorsement in blank, without averring an actual transfer[51] or delivery to plaintiff,[52] or otherwise showing his title[53] or interest,[54] is not sufficient. It seems too that plaintiff may declare on a note so indorsed, as indorsed to himself,[55] without filling the blank.[56]

(7) Irregular or Anomalous Indorsement. One whose name irregularly appears on a promissory note, or who placed it thereon before delivery for the purpose of giving it credit, must be charged according to the actual intention by special averments showing the facts relied on to fix his liability[57] as

472, 8 N. W. 301; Davis *v.* Barron, 13 Wis. 227.

See 7 Cent. Dig. tit. "Bills and Notes," § 1486.

The Kentucky statute providing that in an action on any "assignment of a writing," it shall he necessary to aver the consideration does not apply to indorsements on notes. Krachts *v.* Ohst, 14 Bush (Ky.) 34.

47. Davis *v.* Campbell, 3 Stew. (Ala.) 319.

48. Hutchins *v.* Flintge, 2 Tex. 473, 47 Am. Dec. 659. *Contra*, Grant *v.* Eyre, 2 U. C. Q. B. 426.

A misstatement as to the time of indorsement is unimportant. Delsman *v.* Friedlander, 40 Oreg. 33, 66 Pac. 297.

Indorsement before delivery to the payee is sufficiently shown by an allegation of indorsement before maturity and when the maker delivered it to the payee. Frederick *v.* Winans, 51 Wis. 472, 8 N. W. 301; King *v.* Ritchie, 18 Wis. 554.

Indorsement dated.— That an indorsement was dated does not render it necessary for the indorsee to allege that the indorsement was made on any particular day. Caldwell *v.* Lawrence, 84 Ill. 161.

Presumption.— If the time of indorsement is not alleged it will be presumed to have been made at the time of the date of the instrument. Hutchins *v.* Flintge, 2 Tex. 473, 47 Am. Dec. 659.

49. Miller *v.* Griswold, 40 Ind. 209; McGrath *v.* Pitkin, 56 N. Y. Suppl. 398; Engld *v.* Canfield, 4 Ohio Dec. (Reprint) 274, Clev. L. Rep. 196.

50. Ft. Scott First Nat. Bank *v.* Elliott, 46 Kan. 32, 26 Pac. 487; Gildersleeve *v.* Mahony, 5 Duer (N. Y.) 383; Burrall *v.* De Groot, 5 Duer (N. Y.) 379; Mitchell *v.* Hyde, 12 How. Pr. (N. Y.) 460. See also Bowers *v.* Trevor, 5 Blackf. (Ind.) 24.

Advancement to make crop.— A draft payable to the order of the drawer and delivered to the drawees, showing on its face that it was for an advancement to make a crop, made by the drawees of the drawer, and having a blank indorsement thereon not signed by the drawer, will support a judgment and execution in favor of the drawees against the drawer, founded on a declaration in the statutory form. Lewis *v.* Harper, 73 Ga. 564.

51. Menard *v.* Wilkinson, 3 Mo. 92; Mitchell *v.* Hyde, 12 How. Pr. (N. Y.) 460. An allegation that the payee, for value and before maturity, assigned it by indorsement in blank, sufficiently shows plaintiff's title. Eames *v.* Crosier, 101 Cal. 260, 35 Pac. 873.

52. Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209.

53. Huntington Bank *v.* Hysell, 22 W. Va. 142.

54. Sistermans *v.* Field, 9 Gray (Mass.) 331.

55. Moore *v.* Pendleton, 16 Ind. 481; Ferry *v.* Jones, 10 Ind. 226.

56. Bancroft *v.* Paine, 15 Ala. 834; Riggs *v.* Andrews, 8 Ala. 628. But see Seay *v.* State Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579.

Filling in blanks at trial see *supra*, I, C, 2, c, [7 Cyc. 622].

57. *Iowa.*— Twogood *v.* Coppers, 9 Iowa 415.

Massachusetts.— Birchard *v.* Bartlet, 14 Mass. 279; Carver *v.* Warren, 5 Mass. 545.

Missouri.— Perry *v.* Barret, 18 Mo. 140.

New York.— Cromwell *v.* Hewitt, 40 N. Y. 491, 100 Am. Dec. 527; Moore *v.* Cross, 19 N. Y. 227, 75 Am. Dec. 326; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Richards *v.* Warring, 4 Abb. Dec. (N. Y.) 47, 1 Keyes (N. Y.) 576; New York Security, etc., Co. *v.* Storm, 81 Hun (N. Y.) 33, 30 N. Y. Suppl. 605, 62 N. Y. St. 539; Cawley *v.* Costello, 15 Hun (N. Y.) 303; Woodruff *v.* Leonard, 1 Hun (N. Y.) 632; Gfroehner *v.* McCarty, 2 Abb. N. Cas. (N. Y.) 76; Waterbury *v.* Sinclair, 16 How. Pr. (N. Y.) 329; Dean *v.* Hall, 17 Wend. (N. Y.) 214.

Oregon.— Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

South Carolina.— McCelvey *v.* Noble, 12 Rich. (S. C.) 167.

See 7 Cent. Dig. tit. "Bills and Notes," § 1480 *et seq.*

Necessary averments.— A complaint alleging indorsement before delivery must also allege that the indorsement was to give the maker credit or that defendant indorsed as

maker,[58] indorser,[59] guarantor,[60] or surety.[61] To overcome a presumption that defendant intended his liability to be that of a second indorser, the payee must show that defendant indorsed to give credit to the note with him and intended to charge himself as joint maker, guarantor, or surety, and that he parted with value on the faith of such indorsement.[62] It is held, however, that if a liability on defendant's

surety. McMoran *v.* Lange, 25 N. Y. App. Div. 11, 48 N. Y. Suppl. 1000.

Where defendant is privy to the consideration, and indorses a note non-negotiable or payable to order, or to plaintiff or bearer, and not negotiated, defendant may be charged directly as maker or as indorser. Dean *v.* Hall, 17 Wend. (N. Y.) 214 [*citing* Nelson *v.* Dubois, 13 Johns. (N. Y.) 175]; Herrick *v.* Carman, 12 Johns. (N. Y.) 159.

It is sufficient to show that the indorsement by defendant was not that of a second indorser, and that he became bound to plaintiff, by a legal consideration for the promise, to pay the amount of the note to him. Lynch *v.* Levy, 11 Hun (N. Y.) 145.

Aider by reply.—The omission of such averments cannot be supplied by the replication. Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

58. Carter *v.* Long, 125 Ala. 280, 28 So. 74; Stein *v.* Passmore, 25 Minn. 256; Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

A declaration against a maker and guarantor, which treats defendants as joint makers and contains no allegation of demand and notice, is insufficient. Lightstone *v.* Laurencel, 4 Cal. 277.

An averment that defendant indorsed before delivery to induce the payee to take it is sufficient to hold him as maker. Marienthal *v.* Taylor, 2 Minn. 147.

Dismissal as to one signer.— In an action on a joint and several note against two who executed it at the same time, one by signing it and the other by writing his name on the back, it is error to dismiss the petition as to the latter on the ground that he was surety and could not be held after a discontinuance as to the signer. Brooks *v.* Thrasher, 116 Ga. 62, 42 S. E. 473.

If defendant is charged as guarantor he cannot be held as principal debtor. Powell *v.* Alford, 113 Ga. 979, 39 S. E. 449.

Ignoring suretyship.— It is proper to declare on a joint and several note signed by defendant as surety for an individual or a copartnership, as the note of defendant, in a several action against him, without setting out the joint contract also, and without taking notice of the suretyship or copartnership between the principals. Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272.

Signers on the back of a sealed note may be charged as makers. Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188.

59. An allegation of indorsement in blank at and before delivery, whereby defendants "intended to be equally bound as obligors," is insufficient, accommodation indorsement not being alleged. Kellogg *v.* Dunn, 2 Metc. (Ky.) 215.

In Wisconsin it is said that a third person signing his name on the back of a note is not liable to the payee as an indorser is not so well settled as to render a complaint showing such facts frivolous on demurrer. Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290.

60. A purpose to guaranty (Kellogg *v.* Dunn, 2 Metc. (Ky.) 215) in writing (Powers *v.* Alford, 113 Ga. 979, 39 S. E. 449) must be alleged.

A conclusion of guaranty without stating facts is insufficient. Twogood *v.* Coopers, 9 Iowa 415.

Statute of frauds.— A complaint alleging that a defendant signed under a parol contract of guaranty is not demurrable because failing to show a cause of action under the statute of frauds, for the reason that without the averment of guaranty there would still be a cause of action against defendant as maker. Smucker *v.* Wright, 2 Ohio Cir. Dec. 360.

An averment of guaranty may be disregarded if indorsement is sufficiently set out. Waterbury *v.* Sinclair, 6 Abb. Pr. (N. Y.) 20.

61. Where the word "surety" follows the name of a signer, his liability must be specially pleaded. Butler *v.* Rawson, 1 Den. (N. Y.) 105. But see Vaughn *v.* Rugg, 52 Vt. 235.

Sufficiency.— A complaint alleging execution and delivery to defendant who indorsed it, and for value received, delivered it to plaintiff, who accepted it on the faith of said indorsement, sufficiently shows that defendant indorsed as surety. Smith *v.* Smith, 37 N. Y. Super. Ct. 203.

62. Coulter *v.* Richmond, 59 N. Y. 478; Phelps *v.* Vischer, 50 N. Y. 69, 10 Am. Rep. 433; Bacon *v.* Burnham, 37 N. Y. 614; Moore *v.* Cross, 19 N. Y. 227, 75 Am. Dec. 326; Edison General Electric Co. *v.* Zebley, 72 Hun (N. Y.) 166, 25 N. Y. Suppl. 389, 55 N. Y. St. 62; Draper *v.* Chase Mfg. Co., 2 Abb. N. Cas. (N. Y.) 79; Hall *v.* Newcomb, 7 Hill (N. Y.) 416, 42 Am. Dec. 82; Campbell *v.* Butler, 14 Johns. (N. Y.) 349; Nelson *v.* Dubois, 13 Johns. (N. Y.) 175; Herrick *v.* Carman, 12 Johns. (N. Y.) 159.

Sufficiency.— An allegation that after the making of the note it was indorsed by defendant and thereupon transferred for value to defendant is insufficient to admit proof to rebut the presumption that the payee was the first indorser. Draper *v.* Chase Mfg. Co., 2 Abb. N. Cas. (N. Y.) 79.

An allegation of indorsement before delivery is insufficient to overcome the legal presumption of an intention to become an in-

part is sufficiently averred, it is immaterial in what capacity the liability originated.[63]

(8) Sufficiency of Allegations — (a) In General. The fact of indorsement and the valid transfer of title by the indorser to his indorsee is sufficiently shown by the allegation of facts from which these conclusions can fairly be deduced.[64]

(b) Setting Out, Annexing, or Filing. In some jurisdictions it is sufficient to set out or file a copy of the instrument, bearing the indorsement or indorsements through which plaintiff claims,[65] and where the setting out, annexation, or filing of such a copy is necessary to its sufficiency, the indorsement must so appear and show title in plaintiff,[66] or to set out the note and allege indorse-

dorser subsequent to the payee. Edison General Electric Co. *v.* Zebley, 72 Hun (N. Y.) 166, 25 N. Y. Suppl. 389, 55 N. Y. St. 62.

63. Winslow *v.* Boyden, 1 Minn. 383; Pierse *v.* Irvine, 1 Minn. 369.

Payment by guarantor.— One who, having written his name on the back of the note before its delivery, thus becoming liable as guarantor, has paid it to the payee, who indorsed and delivered it to him, may declare on the note as indorsee. McGregory *v.* McGregory, 107 Mass. 543.

64. *Alabama.*— Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

Indiana.— Fulton *v.* Longheim, 118 Ind. 286, 20 N. E. 796; Cushing *v.* Mendall, 6 Blackf. (Ind.) 153.

New Jersey.— Elmendorf *v.* Shotwell, 15 N. J. L. 153.

New York.— Cheever *v.* Pittsburgh S., etc., R. Co., 50 N. Y. App. Div. 422, 64 N. Y. Suppl. 65 [*affirmed* in 169 N. Y. 581, 62 N. E. 1094]; Youngs *v.* Perry, 42 N. Y. App. Div. 247, 59 N. Y. Suppl. 19; New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362; Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665; Moore *v.* Chas. E. Monell Co., 27 Misc. (N. Y.) 235, 58 N. Y. Suppl. 430.

Ohio.— Snedecker *v.* Test, Tapp. (Ohio) 144. See also Wood *v.* Dillingham, 1 Handy (Ohio) 29, 12 Ohio Dec. (Reprint) 9.

South Carolina.— Rambo *v.* Metz, 5 Strobh. (S. C.) 108, 53 Am. Dec. 686.

Canada.— Griffin *v.* Latimer, 13 U. C. Q. B. 187.

See 7 Cent. Dig. tit. "Bills and Notes," § 1482.

An averment of assignment in writing is not an averment of indorsement. Keller *v.* Williams, 49 Ind. 504.

Handwriting of indorser.— It is not advisable to allege that the indorsement is the handwriting of the indorser. Simpson *v.* Ranlett, 7 Ill. 312 [*citing* 2 Chitty Bills 551; 2 Chitty Pl. 124].

In alleging separate indorsements by two defendants, and that they owe plaintiff the amount of said note, a separate and not a joint liability is stated. Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69.

Mesne indorsements.— In a declaration by an indorsee of a note it is not necessary to state the several hands through which it has passed, unless their names appear on it as indorsers or assignors. Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

On a promise to indorse another's note the declaration must aver that a note was drawn and presented for indorsement. Gallagher *v.* Brunel, 6 Cow. (N. Y.) 346.

Under the Vermont statute it is sufficient to allege that the payee or indorsee did indorse and deliver the note to plaintiff without explaining the mode or manner in which the instrument was indorsed. Brooks *v.* Edson, 7 Vt. 351.

65. Lee *v.* Mendel, 40 Ill. 359; Drumm *v.* Bradfute, 18 La. Ann. 680; Price *v.* McClave, 6 Duer (N. Y.) 544; Appleby *v.* Elkins, 2 Sandf. (N. Y.) 673; Roberts *v.* Morrison, 11 N. Y. Leg. Obs. 60; Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449; Ohio L. Ins., etc., Co. *v.* Goodin, 1 Handy (Ohio) 31, 12 Ohio Dec. (Reprint) 10; Levy *v.* Trennel, 8 Ohio Dec. (Reprint) 121, 5 Cinc. L. Bul. 793.

In addition to filing a copy of the indorsement the complaint must show it to have been filed. Sinker *v.* Fletcher, 61 Ind. 276.

66. Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Sinker *v.* Fletcher, 61 Ind. 276; Moreau *v.* Branson, 37 Ind. 195. And see Seawright *v.* Coffman, 24 Ind. 414.

In Arkansas in an action by the indorsee, profert of the indorsement is necessary. Pickett *v.* Real-Estate Bank, 8 Ark. 224; Pryor *v.* Watson, 8 Ark. 111; Merchant *v.* Slater, 6 Ark. 529; Roane *v.* Hinton, 6 Ark. 525.

Under the Indiana code the complaint must contain a copy of the indorsement, which must be suitably identified and referred to (Sinker *v.* Fletcher, 61 Ind. 276) and so where the indorsement is required to be filed (Davisson *v.* Wilson, 80 Ind. 391; Williams *v.* Osbon, 75 Ind. 280).

In Iowa since the passage of the code which requires a copy of the instrument sued on to be attached to the pleadings, the indorsement on which plaintiff bases his right of recovery should be so annexed. Mainer *v.* Reynolds, 4 Greene (Iowa) 187.

In Michigan where, by statute, a note may be given in evidence only where a copy has been served with the declaration, if the copies set out in the declaration fail to show title in plaintiff, he cannot recover, although the indorsements on the original did show title. Hamilton *v.* Powers, 80 Mich. 313, 45

ment,[67] although in some states if the assignment or indorsement is distinctly averred, a copy of it need not be set out or filed.[68] It is held that a distinct and positive allegation of indorsement is necessary, although it appear on the copy filed.[69]

(9) Delivery to Indorsee. An allegation of indorsement imports delivery; hence where such an averment is made a delivery by the indorser to the indorsee is implied.[70]

(D) *Title or Ownership* — (1) Necessary Allegations — (a) In General. Plaintiff must show title to the bill or note in suit, or privity between himself and defendant, or that as the holder thereof he has the legal right to maintain the action and recover thereon, by averments which if proved will establish that right to the exclusion of the idea of ownership in another.[71] Failure of the com-

N. W. 580. Where one brought suit individually on a note, and the copy of the note appended to the declaration under the common counts was payable to plaintiff "& Co.," and no indorsement was set forth in the copy, such declaration was equivalent to an assertion that he was in a position to sue on it without indorsement, and that on default such title was admitted, unless evidently impossible. Wilcox *v.* Sweet, 24 Mich. 355.

In Ohio, the omission to set out a copy of the indorsement relied on is equivalent to an omission to plead the indorsement; and plaintiff is not entitled, under the petition, to the protection given an indorsee for value, and before maturity, although the payee's name appears indorsed on the note introduced in evidence. Tisen *v.* Hanford, 31 Ohio St. 193.

In Oklahoma if the copy of the note set out in the complaint does not show the indorsement the complaint is bad on demurrer, although an indorsement is alleged. Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824.

In an action against the maker a copy of the indorsement need not be filed. Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127.

67. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584; Treadway *v.* Cobb, 18 Ind. 36 [*overruling* Connard *v.* Christie, 16 Ind. 427]; Mainer *v.* Reynolds, 4 Greene (Iowa) 187; Woodruff *v.* Leonard, 1 Hun (N. Y.) 632, 4 Thomps. & C. (N. Y.) 208; Levy *v.* Ley, 6 Abb. Pr. (N. Y.) 89, 15 How. Pr. (N. Y.) 395. See also Lord *v.* Chesebrough, 6 Sandf. (N. Y.) 696, 1 Code Rep. N. S. (N. Y.) 322, holding that a plaintiff who sues on a note on which his name does not appear in any manner, must allege his connection with it in some other way than to merely state that there is due him thereon a specified sum, notwithstanding N. Y. Code Civ. Proc. § 162, providing that, when an action is founded on an instrument, it shall be sufficient to give a copy, and to state that there is due a specified sum.

68. Roberts *v.* Thomson, 28 Ill. 79; Franey *v.* True, 26 Ill. 184; Short *v.* Kerns, 95 Ind. 431; Fordyce *v.* Nelson, 91 Ind. 447; Keith *v.* Champer, 69 Ind. 477; Kline *v.* Spahr, 56 Ind. 296; Tilman *v.* Harter, 38 Ind. 1; Treadway *v.* Cobb, 18 Ind. 36 [*overruling* Connard *v.* Christie, 16 Ind. 427]; Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856; Gray *v.* Phillips, Morr. (Iowa) 430; Hickok *v.* Labussier, Morr. (Iowa) 115 (decided prior to the code which changed the rule and requires the instrument sued on to be annexed to the pleading). *Contra*, Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824.

In an action by an indorser of a protested, negotiable note, against the drawers and a prior indorser, it is not necessary to copy into the petition the indorsement from plaintiff, who had paid the amount of the note as indorser. It is sufficient to aver that "as indorser" he had taken up the note. Fox *v.* Sayre, 6 Dana (Ky.) 312.

In an action on a bill of exchange, against the accepter, a copy of the bill, annexed to the declaration, is to be regarded as a bill of particulars, and nothing more; and the omission of an indorsement on the bill in such copy is immaterial. Wright *v.* Boyd, 3 Barb. (N. Y.) 523.

69. Dyer *v.* Krayer, 37 Mo. 603. See also Conkling *v.* Gandall, 1 Abb. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228.

The complaint must not only contain a copy of the indorsement but also an allegation referring thereto. Sinker *v.* Fletcher, 61 Ind. 276.

70. Chester, etc., Coal, etc., Co. *v.* Lickiss, 72 Ill. 521; Higgins *v.* Bullock, 66 Ill. 37; New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362; Griswold *v.* Laverty, 3 Duer (N. Y.) 690, 12 N. Y. Leg. Obs. 316; Singleton *v.* Thornton, 26 N. Y. Wkly. Dig. 434; Burbank *v.* French, 12 Wis. 376; Churchill *v.* Gardner, 7 T. R. 596. See also *supra*, XIV, D, 1, b, (II).

71. *Alabama.*— Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378, 28 So. 51; Douglas *v.* Beasley, 40 Ala. 142; Browder *v.* Gaston, 30 Ala. 677; McInnis *v.* Rabun, 1 Port. (Ala.) 386.

California.— Ball *v.* Lowe, 135 Cal. 678, 68 Pac. 106.

Indiana.— Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Holman *v.* Langtree, 40 Ind. 349; Harter *v.* Ellis, 6 Blackf. (Ind.) 154.

Iowa.—Montague *v.* Reineger, 11 Iowa 503.

plaint to allege sufficient facts to show title in plaintiff may be cured by the answer,[72] but not by a judgment by default.[73]

(b) TITLE OF PAYEE. The payee of a note need only allege execution and delivery by the maker, without an averment of title.[74]

Kansas.— Hadden *v.* Rodkey, 17 Kan. 429.

Kentucky.— Haney *v.* Tempest, 3 Metc. (Ky.) 95; Farmers', etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88.

Maine.— Jenness *v.* Barron, 95 Me. 531, 50 Atl. 712.

Michigan.— Sweet *v.* Woodin, 72 Mich. 393, 40 N. W. 471.

Missouri.— Mechanics' Bank *v.* Donnell, 35 Mo. 373; Menard *v.* Wilkinson, 3 Mo. 92.

New Jersey.— Crisman *v.* Swisher, 28 N. J. L. 149.

New York.— Hays *v.* Hathorn, 74 N. Y. 486; Gurnee *v.* Beach, 40 Hun (N. Y.) 108; Palmer *v.* Smedley, 28 Barb. (N. Y.) 468, 6 Abb. Pr. (N. Y.) 205; White *v.* Brown, 14 How. Pr. (N. Y.) 282; Parker *v.* Totten, 10 How. Pr. (N. Y.) 233; Geneva Bank *v.* Gulick, 8 How. Pr. 951; Loomis *v.* Dorshimer, 8 How. Pr. (N. Y.) 9.

North Carolina.—Pearce *v.* Mason, 78 N. C. 37.

Pennsylvania.— Penn Nat. Bank *v.* Kopitzsch, 161 Pa. St. 134, 28 Atl. 1077, 34 Wkly. Notes Cas. (Pa.) 447; Camp *v.* Oswego Bank, 10 Watts (Pa.) 130; Goldheck *v.* Brady, 4 Pa. Co. Ct. 169.

Tennessee.—McCandlass *v.* Polk, 10 Humphr. (Tenn.) 617.

Texas.— Unger *v.* Anderson, 37 Tex. 550; Gilder *v.* McIntyre, 29 Tex. 89; Moody *v.* Benge, 28 Tex. 545; Thigpen *v.* Mundine, 24 Tex. 282; Malone *v.* Craig, 22 Tex. 609; Frazier *v.* Todd, 4 Tex. 461; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103; Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609; Dibrell *v.* Ireland, 1 Tex. App. Civ. Cas. § 300; Fortune *v.* Kerr, 25 Tex. Suppl. 309.

Washington.— Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

West Virginia.— Huntington Bank *v.* Hysell, 22 W. Va. 142.

United States.— Earhart *v.* Campbell, Hempst. (U. S.) 48, 8 Fed. Cas. No. 4,241*a*.

England.— See Bishop *v.* Hayward, 4 T. R. 47.

See 7 Cent. Dig. tit. "Bills and Notes," § 1480.

As to right of indorser to recover on "money counts" see *infra*, XIV, D, 1, g.

Necessity of setting out assignment of sealed bill see ASSIGNMENTS, 4 Cyc. 105, note 98.

On behalf of foreign bank.— An averment in a complaint on a bill of exchange that plaintiff is duly authorized to bring an action on behalf of a foreign banking company, owning the bill, as one of its registered officers, is a conclusion of law, and insufficient. He should set forth the existence and terms of the act under which the bank was organized, and his authority as one of its registered officers to sue on its behalf. Myers *v.* Machado, 6 Duer (N. Y.) 678, 6 Abb. Pr. (N. Y.) 198, 14 How. Pr. (N. Y.) 149.

There is no right to sue on a bill of exchange, where it appears that the bill was held for collection as a matter of favor to one of defendants, who never instructed the bringing of the suit. Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310.

The right to maintain the action is shown by an exhibition of the note indorsed by the holder and an allegation that it is held as collateral, the real owner being made a co-plaintiff. Palmer *v.* Mt. Sterling Nat. Bank, 13 Ky. L. Rep. 790, 18 S. W. 234.

Want of privity.— In an action on a note indorsed to the treasurer of an academy, a declaration failing to show any privity between such treasurer and plaintiff, and containing no averment that plaintiff was the successor of such treasurer, or that the contract inured to such successor, is insufficient. Jenness *v.* Barron, 95 Me. 531, 50 Atl. 712.

Action in justice's court.— In Michigan the ownership of an indorsee suing an indorser is presumed. Wilson Sewing Mach. Co. *v.* Spears, 50 Mich. 534, 15 N. W. 894.

72. Pearce *v.* Mason, 78 N. C. 37.

Where the answer directly denies the ownership of plaintiff and alleges the ownership of another and the case is tried on that issue the absence of an express allegation of plaintiff's title in the declaration is immaterial. Downing *v.* Glenn, 26 Nebr. 323, 41 N. W. 1119.

73. Douglas *v.* Beasley, 40 Ala. 142; Hollis *v.* Richardson, 13 Gray (Mass.) 392.

74. *California.*— Shasta Bank *v.* Boyd, 99 Cal. 604, 34 Pac. 337.

District of Columbia.—Durant *v.* Murdock, 3 App. Cas. (D. C.) 114.

Iowa.— Busick *v.* Bunn, 3 Iowa 63.

New York.—Peets *v.* Bratt, 6 Barb. (N. Y.) 662.

Ohio.— Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449; Ohio L. Ins., etc., Co. *v.* Goodin, 1 Handy (Ohio) 31, 12 Ohio Dec. (Reprint) 10; Sommers *v.* Hawkins, 4 Ohio Dec. (Reprint) 293, 1 Clev. L. Rep. 219.

Texas.— Frank *v.* J. S. Brown Hardw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64; Leal *v.* Woodhouse, 2 Tex. App. Civ. Cas. § 101. But see Malone *v.* Craig, 22 Tex. 609, holding that an allegation of execution and delivery and exhibition of a copy of a note in which the payee's name appears as identical with that of plaintiff is insufficient to show ownership in the latter.

See 7 Cent. Dig. tit. "Bills and Notes," § 1480.

A declaration on a note payable to the treasurer of a parish, or his successor, without naming him, which alleges that at the time it was given plaintiff was the treasurer

(c) Title Through Deceased Payee or Holder. Ownership or title may be shown by allegations of acquisition from a deceased payee or holder, as his personal representative or by bequest or succession.[75]

(d) Instrument Payable to Bearer. A declaration on an instrument payable to a person named or bearer should show that plaintiff acquired it by transfer by appropriate averments to the effect that he is the bearer, owner, holder, or the like,[76] but need not allege the mode by which he acquired title or possession,[77]

of the parish, and that it was payable to himself, is not demurrable, although an indorsement on the note, which is copied as a part of the declaration, appears to have been made by a successor to plaintiff in the office. Buck *v.* Merrick, 8 Allen (Mass.) 123.

75. King *v.* King, 59 N. Y. App. Div. 128, 68 N. Y. Suppl. 1089.

Descent.— A petition showing acquisition of a note by descent need not aver that plaintiff is the legal owner. Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537.

Distributee.— A complaint alleging the transfer of a note to plaintiff by the executor of the payee and that plaintiff holds and owns the same as the heir of the payee, avers in substance that plaintiff acquired title to the note as a distributee, and although inartistic is sufficient. Perkins *v.* Merrill, 37 Minn. 40, 33 N. W. 3.

Successors to business.—An allegation that the holder of the bill sued on is dead, and that plaintiffs "are his successors in and to his business, and, as such, are the legal and *bona fide* holders" of the bill, is insufficient as an averment of title. Richardson *v.* Snider, 72 Ind. 425, 37 Am. Rep. 168.

Surviving spouse.— The fact that plaintiff in an action on notes alleges that she is the owner and holder of the notes only as the surviving wife of the payee does not render the complaint insufficient on general demurrer. Fant *v.* Wickes, 10 Tex. Civ. App. 394, 32 S. W. 126.

The personal representatives of a surviving partner through whom they derive title need not state the names of the members of the copartnership. Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

Transfer by executor.— A complaint alleging the death of the payee, probate of his will, issue of letters testamentary, and transfer to plaintiff by the executors prior to the action is sufficient. McWilliam *v.* Dayton, 57 N. Y. Suppl. 819.

Waiver of defect.— The omission of an administrator to plead his letters with a profert is waived by the failure to demur. Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165.

Action by administrator on check payable to third party.— A complaint by an administrator on a check alleged to have been made for the benefit of his intestate and that plaintiff is the owner is sufficient, although the check is made payable to a bank which, although made a party, does not assert any claim. Mackey *v.* Craig, 144 Ind. 203, 43 N. E. 6.

Assignment by legatee.— In an action on an agreement in writing to pay money, plaintiff alleged in the first paragraph of his complaint that the payee gave the same to his wife, when executed, and that on the payee's death he devised all his property to his wife, and that the court, by order, vested the payee's property in his wife, and that she then assigned and delivered the instrument to plaintiff. In a second paragraph he alleged that the payee devised all his property to his wife; that the court, by its decree, vested all the estate in her; and that she assigned the instrument in suit to plaintiff. It was held that the complaint showed a good title in plaintiff. McWhorter *v.* Norris, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21.

76. Creighton *v.* Gordon, Morr. (Iowa) 41; Flax, etc., Mfg. Co. *v.* Ballentine, 16 N. J. L. 454; Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 3 Keyes (N. Y.) 365, 1 Transcr. App. (N. Y.) 201, 5 Abb. Pr. N. S. (N. Y.) 11, 36 How. Pr. (N. Y.) 190; Colbertson *v.* Beeson, 30 Tex. 76. An allegation that defendant, the payee and one of the makers, indorsed it "For value received, I sign the within," and delivered it to plaintiff is in effect an allegation that the note was payable to bearer. Walker *v.* Sims, (Kan. App. 1899) 64 Pac. 81. A complaint alleging the making of a note by one defendant payable to his own order and that the other defendant indorsed the note, and before maturity, and that it was delivered to a bank for value, and came into the hands of plaintiffs as a part of the assets of the bank, sufficiently alleges negotiation by the maker, within a statute providing that a note payable to the order of the maker or a fictitious person, if negotiated by the maker, shall be of the same validity as if payable to bearer. Odell *v.* Clyde, 38 N. Y. App. Div. 333, 57 N. Y. Suppl. 126.

Indorsement.— In an action against the maker and indorser on a note made payable to the payee named, or bearer, and afterward indorsed by a subsequent holder, it is sufficient to aver that the maker executed and delivered the note, and that it was afterward indorsed to plaintiff by the other defendant. Jackson *v.* Marshall, 6 Tex. 324.

A note specially indorsed to a person named cannot be declared on as payable to bearer. Dickson *v.* Cunningham, Mart. & Y. (Tenn.) 203.

77. *Alabama.*— Carroll *v.* Meeks, 3 Port. (Ala.) 226.

Indiana.— Black *v.* Duncan, 60 Ind. 522.

or, if a transfer for value is alleged, aver by whom the transfer was made.[78] If, however, an indorsement is alleged it must be proved.[79]

(e) Bona Fides — aa. *Of Plaintiff.* Where it is incumbent on plaintiff to show that he is a *bona fide* holder, he must aver that he obtained the paper in question before maturity for value, without notice of any defense existing in favor of the maker, or state other necessary facts to negative bad faith.[80] Ignorance of any illegality affecting the instrument will be presumed, if it expressly or impliedly appears from the declaration that plaintiff obtained it before maturity and for value.[81] The holder of a note payable to a fictitious person need not allege that he is a *bona fide* holder.[82]

bb. *Of Defendant.* So where it is sought to avoid a note in the hands of a holder,[83] or to recover its amount from one who took it with notice of plaintiff's title,[84] plaintiff must allege facts sufficient to show the bad faith of defendant; but the assignee of the payee of a sealed note need not allege notice of the assignment by the maker.[85]

(f) In Action For Use of Another. An averment that plaintiff holds or sues

Iowa.— Dabney *v.* Reed, 12 Iowa 315; Elliott *v.* Corbin, 4 Iowa 564.

Vermont.— White *v.* Tarbell, 27 Vt. 573.

Canada.— Duggan *v.* Borland, 5 U. C. Q. B. O. S. 461.

See 7 Cent. Dig. tit. "Bills and Notes," § 1480.

A note payable to plaintiff or bearer for value received may be described as payable to plaintiff. Matlock *v.* Purefoy, 18 Ark. 492.

Fictitious payee.— If with the knowledge of the accepter a bill is drawn in favor of a fictitious payee, whose name is indorsed thereon, a *bona fide* holder thereof may sue as on a bill payable to bearer. Minet *v.* Gibson, 3 T. R. 481.

78. Mechanics' Bank *v.* Straiton, 3 Abb. Dec. (N. Y.) 269, 3 Keyes (N. Y.) 365, 1 Transcr. App. (N. Y.) 201, 5 Abb. Pr. N. S. (N. Y.) 11, 36 How. Pr. (N. Y.) 190.

79. Waynam *v.* Bend, 1 Campb. 175.

80. Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 378, 1055 [*citing* Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Giberson *v.* Jolley, 120 Ind. 301, 22 N. E. 306], holding that an averment that the payee became the owner of the note in due course of business, before maturity for a valuable consideration and in good faith are but legal conclusions and are not equivalent to an averment of a want of notice of the defenses such as is required. See also *supra*, XIV, D, 1, b, (x), (c), (5).

Assignment before maturity is shown by stating the date of the note, that it was payable in twelve months, and that it was then and there assigned. Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854.

Preëxisting debt.—Under the Pennsylvania procedure act of 1887, a statement, in an action on a note by persons other than the payee, that said payee, by delivery, transferred the same to plaintiffs, without showing any of the facts of the transaction, does not entitle plaintiffs to a summary judgment, where the affidavit of defense avers that the note was delivered to plaintiffs "in payment and satisfaction of an old debt." Gere *v.* Unger, 125 Pa. St. 644, 24 Wkly. Notes Cas. (Pa.) 7, 17 Atl. 511.

Unauthorized purpose.— Where a note secured by mortgage and payable to a corporation or order was transferred as collateral to a bond of the company which was payable to bearer and contained a clause transferring the note and mortgage, it was held that a complaint by the assignee which failed to show that the note was attached to the bond would not protect plaintiff as a *bona fide* indorsee, should it be claimed that the note was given for an unauthorized purpose. Howard *v.* Boorman, 17 Wis. 459 [*distinguishing* Crosby *v.* Roub, 16 Wis. 16, 84 Am. Dec. 720, where the note was attached to the bond].

Anticipation of defense.— A complaint alleging that the note in suit was transferred to plaintiff in the usual course of business, before its maturity, and that plaintiff purchased it in good faith without notice of any legal or equitable defense thereto, is not objectionable because anticipating the defenses and failing to aver sufficient facts to avoid them. Cooper *v.* Merchants', etc., Nat. Bank, (Ind. 1900) 57 N. E. 569.

81. Press Co. *v.* Hartford City Bank, 58 Fed. 321, 7 C. C. A. 248.

82. Farnsworth *v.* Drake, 11 Ind. 101.

83. Preëxisting debt.— A petition to avoid a note in the hands of the holder, which alleges that the payee, with knowledge of its illegality, indorsed it to the holder who paid no value therefor, but credited him with it on an account, in effect avers that the note was taken in payment of a preëxisting debt. Draper *v.* Cowles, 27 Kan. 484.

84. Where an assignee of a note seeks to recover its amount from one who purchased it at a judicial sale of the payee's property, and who has collected it, he must allege that defendant had notice of the assignment before the purchase. Allison *v.* King, 21 Iowa 302 [*distinguishing* Allison *v.* Barrett, 16 Iowa 278, where the maker had notice of plaintiff's interest before payment of the note].

85. Helms *v.* Sisk, 8 Blackf. (Ind.) 503.

on the instrument in question for the use of another is unnecessary and may be treated as surplusage.[86]

(2) SUFFICIENCY OF ALLEGATIONS — (a) IN GENERAL. The right to maintain the action as the owner, holder, or party in interest is sufficiently shown by alleging facts as to transfer from which the title of plaintiff can be deduced.[87]

(b) ALLEGATIONS OF OWNERSHIP AND POSSESSION. Although there are decisions to the effect that a direct averment by an indorsee that he is the owner and holder of the instrument sued on is the averment of a mere conclusion of law,[88] there are other holdings to the effect that such an allegation is sufficient to show a *prima facie* right to recover, and that the mode of acquisition may be supplied by proof.[89] If the complaint or declaration otherwise shows title in plaintiff,

86. Zimmerman *v.* Wead, 18 Ill. 304.

Variance in caption.—Where the caption of the petition was: "Armstrong Beattie . . . to the use of B. W. Lewis & Bros., plaintiffs, against Henry C. Lett . . . defendants," but plaintiff alleged title in himself by indorsement from B. W. Lewis & Bros., the words "to the use of B. W. Lewis & Bros.," in the caption, were held to be mere surplusage. Beattie *v.* Lett, 28 Mo. 596.

87. *Alabama.*— Woodlawn *v.* Purvis, 108 Ala. 511, 18 So. 530.

Arkansas.— Kittlewell *v.* Scull, 3 Ark. 474.

California.— Pryce *v.* Jordan, 69 Cal. 569, 11 Pac. 185.

Illinois.— Higgins *v.* Bullock, 66 Ill. 37; Simpson *v.* Ranlett, 7 Ill. 312.

Indiana.— Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735; Zotter *v.* Lawrence, 95 Ind. 346; Simpkins *v.* Smith, 94 Ind. 470; Marvin *v.* Slaughter, 4 Blackf. (Ind.) 529.

Maine.— Ware *v.* Webb, 32 Me. 41.

Minnesota.— Hoag *v.* Mendenhall, 19 Minn. 335; Frasier *v.* Williams, 15 Minn. 288.

New York.— Farmers', etc., Bank *v.* Wadsworth, 24 N. Y. 547; Billings *v.* Jane, 11 Barb. (N. Y.) 620; Lee *v.* Ainslee, 1 Hilt. (N. Y.) 277, 4 Abb. Pr. (N. Y.) 463; Thorn *v.* Alvord, 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587; Phelps *v.* Ferguson, 9 Abb. Pr. (N. Y.) 206, 19 How. Pr. (N. Y.) 143; Connecticut Bank *v.* Smith, 9 Abb. Pr. (N. Y.) 168; Holstein *v.* Rice, 15 How. Pr. (N. Y.) 1; Louisville Bank *v.* Edwards, 11 How. Pr. (N. Y.) 216.

Pennsylvania.— Garden City Nat. Bank *v.* Titler, 155 Pa. St. 210, 26 Atl. 372, 35 Am. St. Rep. 874; Mitchell *v.* Welch, 17 Pa. St. 339, 55 Am. Dec. 557.

Texas.— Rutherford *v.* Smith, 28 Tex. 322; Simpson *v.* Masterson, (Tex. Civ. App. 1895) 31 S. W. 419.

Vermont.— Brooks *v.* Edson, 7 Vt. 351.

Washington.—Osborne *v.* Stevens, 15 Wash. 478, 46 Pac. 1027.

Canada.— Brown *v.* Gordon, 16 U. C. Q. B. 342.

See 7 Cent. Dig. tit. "Bills and Notes," § 1480 *et seq.*

An allegation that plaintiff, a corporation, is the successor of the payee and is the holder and owner of the note in suit is sufficient to show title. Robinson Female Seminary *v.* Campbell, 60 Kan. 60, 55 Pac. 276.

Came lawfully into possession.— An averment that before maturity the bill "came lawfully into the possession of those plaintiffs for value," is a sufficient allegation of ownership. Phelps *v.* Ferguson, 9 Abb. Pr. (N. Y.) 206, 19 How. Pr. (N. Y.) 143.

Contradictory allegations.— A complaint alleging the transfer of a note to plaintiff in the usual course of business, before maturity, and for value, sufficiently alleges title, although it also contained an allegation importing only a holding for collection. Farmers, etc., Bank *v.* Wadsworth, 24 N. Y. 547.

Indorsement to bank.— An averment that the note in suit was indorsed to a bank is equivalent to an averment that it was discounted there, and shows title in the bank. Farmers', etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88.

Surviving partner.— An averment that plaintiff owns the note in suit "as surviving partner" is equivalent to an allegation that it was partnership property. Howard *v.* Boorman, 17 Wis. 459.

88. Eames *v.* Crosier, 101 Cal. 260, 35 Pac. 873; Topping *v.* Clay, 62 Minn. 3, 63 N. W. 1038; White *v.* Brown, 14 How. Pr. (N. Y.) 282; Beach *v.* Gallup, 2 Code Rep. (N. Y.) 66.

89. *Alabama.*— Morris *v.* Poillon, 50 Ala. 403; Clark *v.* Moses, 50 Ala. 326.

Kentucky.— Rice *v.* Hogan, 8 Dana (Ky.) 133; New South Brewing, etc., Co. *v.* Price, 21 Ky. L. Rep. 11, 50 S. W. 963.

New York.—New York Marbled Iron Works *v.* Smith, 4 Duer (N. Y.) 362; Genet *v.* Sayre, 12 Abb. Pr. (N. Y.) 347.

Texas.— Gunter *v.* McEntire, (Tex. Civ. App. 1893) 24 S. W. 590.

Wisconsin.— Reeve *v.* Fraker, 32 Wis. 243.

See 7 Cent. Dig. tit. "Bills and Notes," § 1481 *et seq.*

"Holder."— An averment that plaintiff is owner amounts to an averment that he is holder. Rollins *v.* Forbes, 10 Cal. 299.

"Owner."— An allegation in a complaint on a note that plaintiff is the "lawful holder" thereof, in connection with the words "value received," is a sufficient allegation of ownership. Benson *v.* Couchman, 1 Code Rep. (N. Y.) 119.

an additional allegation that he is the owner and holder is unnecessary and superfluous.[90]

(c) Setting Out, Annexing, or Filing. Where the instrument is set out substantially or *in hæc verba*, or is exhibited in connection with the complaint, by annexation or filing, ownership or title is sufficiently shown by referring thereto and averring that plaintiff is the owner and holder thereof,[91] or that defendant is indebted thereon to him.[92]

(3) Negativing Transfer to Another. Where plaintiff has shown title he need not aver a continuous holding and ownership or negative a transfer by himself.[93]

(4) Negativing Payment to Original Payee. While it has been held that the declaration should negative payment to the assignor or original payee before assignment[94] it has also been held that an averment of such non-payment before indorsement or assignment is unnecessary.[95]

(5) Subsequent Indorsement. Unless plaintiff claims through subsequent indorsements he need not aver them.[96]

(6) Reacquisition. A payee or indorsee of a note which has been transferred by him, and who seeks to recover thereon, must show that he has taken up or reacquired the instrument, as well as his right to maintain an action thereon.[97]

90. *California.*—Kennedy, etc., Lumber Co. *v.* Steamship Constr. Co., 123 Cal. 584, 56 Pac. 457; Hook *v.* White, 36 Cal. 299; Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90; Wedderspoon *v.* Rogers, 32 Cal. 569.

Nevada.— Allen *v.* Reilly, 15 Nev. 452.

New York.— Connecticut Bank *v.* Smith, 9 Abb. Pr. (N. Y.) 168; Niblo *v.* Harrison, 7 Abb. Pr. (N. Y.) 447; Lowville Bank *v.* Edwards, 11 How. Pr. (N. Y.) 216.

Texas.— Simpson *v.* Masterson, (Tex. Civ. App. 1895) 31 S. W. 419; Frank *v.* J. S. Brown Hardware Co., 10 Tex. Civ. App. 430, 31 S. W. 64; Kinsey *v.* Bellas, 1 Tex. App. Civ. Cas. § 96.

Wisconsin.— See Geilfuss *v.* Gates, 87 Wis. 395, 58 N. W. 742.

See 7 Cent. Dig. tit. "Bills and Notes," § 1481 *et seq.*

91. Owen *v.* Moore, 14 Ala. 640; Continental Bank *v.* Bramhall, 10 Bosw. (N. Y.) 595.

92. Nesbitt *v.* Pearson, 33 Ala. 668; Butler *v.* Stewart, 18 La. Ann. 554; Sanborn *v.* Hale, 12 Nebr. 318, 11 N. W. 302. But see Richter *v.* Kramer, 1 N. Y. City Ct. 348.

93. Pryce *v.* Jordan, 69 Cal. 569, 11 Pac. 185; Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90; Wedderspoon *v.* Rogers, 32 Cal. 569; Durant *v.* Murdock, 3 App. Cas. (D. C.) 114; Wilkins *v.* McGuire, 2 App. Cas. (D. C.) 448; Niblo *v.* Harrison, 7 Abb. Pr. (N. Y.) 447; Taylor *v.* Corbiere, 8 How. Pr. (N. Y.) 385; Smith *v.* McClure, 5 East 476, 2 Smith K. B. 43, 7 Rev. Rep. 750.

94. Merchant *v.* Slater, 6 Ark. 529; Norvell *v.* Hudgins, 4 Munf. (Va.) 496.

Sufficiency.— In an action by the assignee of a note against the maker, the allegation that "before payment, it was assigned to plaintiff," is a sufficient averment that it was not paid to the assignor. Gay *v.* Hanger, 3 Ark. 436.

95. Lowe *v.* Needham, 5 Ind. 140. In a declaration by an assignee on a note, where it is averred that the obligation was unpaid at the time of the assignment, and that the obligor at the time had notice of the assignment, it is not necessary to aver non-payment to the assignor. Neal *v.* Durrett, 7 J. J. Marsh. (Ky.) 101.

96. Thierry *v.* Laffon, 4 La. Ann. 347; Abat *v.* Tournillon, 6 Mart. N. S. (La.) 648; Bank of America *v.* Senior, 11 R. I. 376.

"Or order."— A note payable to a particular person "or order" may be sued on without alleging indorsement by him. Durant *v.* Murdock, 3 App. Cas. (D. C.) 114.

97. Brotherton *v.* Street, 124 Ind. 599, 24 N. E. 1068; Lawrance *v.* Fussell, 77 Pa. St. 460.

If plaintiff avers an indorsement to another, he must also allege an indorsement by such other to himself. Cunliffe *v.* Whitehead, 3 Bing. N. Cas. 828, 32 E. C. L. 380, where plaintiff alleged an indorsement by him to another who "delivered" it to him.

Indorsement without recourse by subsequent indorser.—A petition by a payee showing an indorsement by him to one who thereafter indorsed it without recourse is sufficient to show that plaintiff is the real party in interest. Whittenhall *v.* Korber, 12 Kan. 618.

Retransfer.— Where it is shown that the note was given to plaintiff, and by indorsement transferred to another, who by like means transferred it back to plaintiff, delivery to and title in plaintiff are sufficiently shown. Smith *v.* Thurston, 8 Ind. App. 105, 35 N. E. 520.

Taking up.— An allegation that plaintiff's indorsee sued him on the indorsement, but that before judgment plaintiff paid the note and costs, sufficiently shows his right to sue the maker. Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201. Averments in effect that at the

(XI) *As to Presentment, Demand, Protest, and Notice* — (A) *To Charge Maker or Accepter.* The English and the American rules respecting the necessity of averring presentment to a maker or accepter of a note or bill payable at a specified time and place are in direct conflict. In England such an averment is held necessary,[98] while in the United States the contrary doctrine prevails.[99]

special instance and request of, and for the exclusive benefit of, defendant plaintiff drew on the latter, that the draft was dishonored, and that for defendant's exclusive benefit plaintiff paid off and took up the bill, are sufficient. Tinsley *v.* Penniman, 83 Tex. 54, 18 S. W. 718. In an action on a bill to which there are several parties, indorsed by the holder to the accepter and by the latter to plaintiff, the declaration must show the assent of the other parties to the indorsement by the accepter so as to avoid the legal presumption that the bill was taken up and extinguished by the latter. Beebe *v.* Real Estate Bank, 4 Ark. 546. In an action by a payee against the maker and the accepter of a bill of exchange, an averment that plaintiff indorsed the bill before maturity "by procurement of defendants," and that he had been obliged to pay the same, is unnecessary and improper because the mere anticipation of a defense. List *v.* Kortepeter, 26 Ind. 27. An averment, in an action on a note indorsed to a third party, that, on failure of the payer to discharge the same at maturity, plaintiff paid the indorsee the amount thereof, does not sufficiently allege that plaintiff is the owner thereof, although his name appears as payee; and the mere introduction of the note is insufficient evidence to justify a verdict for plaintiff. Johnson *v.* Arlidge, (Tex. 1891) 17 S. W. 28.

Action by guardian on note transferred by ward.— In a complaint by a guardian, to recover the amount of a note due to the estate of his ward, which shows, as an excuse for non-production of the note that the infant has transferred it to a third person it is not necessary to aver that the infant has subsequently disaffirmed the transfer or that the infant has tendered back the consideration which was received upon such transfer. Briggs *v.* McCabe, 27 Ind. 327, 89 Am. Dec. 503.

98. Cowie *v.* Halsall, 4 B. & Ald. 197, 6 E. C. L. 449, 3 Stark. 36, 3 E. C. L. 584; Rowe *v.* Young, 2 B. & B. 165, 2 Bligh 391, 4 Eng. Reprint 372, 6 E. C. L. 83; Williams *v.* Germaine, 7 B. & C. 468, 6 L. J. K. B. O. S. 90, 1 M. & R. 394, 31 Rev. Rep. 248, 14 E. C. L. 212; Hodge *v.* Fillis, 3 Campb. 463; Callaghan *v.* Aylett, 2 Campb. 549, 3 Taunt. 397; Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812; Spindler *v.* Grellett, 5 D. & L. 191, 1 Exch. 384, 17 L. J. Exch. 6; Rushton *v.* Aspinall, Dougl. 654; Hoare *v.* Cazenove, 16 East 391, 14 Rev. Rep. 370; Dickinson *v.* Bowes, 16 East 110; Saunderson *v.* Bowes, 14 East 500, 13 Rev. Rep. 299; Lewin *v.* Brunetti, Lutw. 896; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Trecothick *v.* Edwin, 1 Stark. 469, 2 E. C. L. 180; Bowes *v.* Howe, 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29; Ambrose *v.* Hopwood, 2 Taunt. 61. The doctrine announced in the text and which at present is the English rule was finally settled by the case of Rowe *v.* Young, 2 B. & B. 165, 6 E. C. L. 83, decided by the house of lords in 1820. Among the decisions contrary to the holding of that case and in accord with the American decisions are Price *v.* Mitchell, 4 Campb. 200, 16 Rev. Rep. 775; Nicholls *v.* Bowes, 2 Campb. 498; Wild *v.* Rennards, 1 Campb. 425 note; Lyon *v.* Sundius, 1 Campb. 423; Fenton *v.* Goundry, 13 East 459; Smith *v.* Delafontaine [*cited* in Fenton *v.* Goundry, 13 East 459, 470]; Saunderson *v.* Judge, 2 H. Bl. 509; Rowe *v.* Williams [*cited* in Richards *v.* Wilsington, 1 Holt 364, 366 note, 3 E. C. L. 147]; Richards *v.* Wilsington, Holt 364 note, 3 E. C. L. 147; Head *v.* Sewell, Holt 363, 3 E. C. L. 147.

99. *Alabama.*— Sims *v.* National Commercial Bank, 73 Ala. 248; Connerly *v.* Planters', etc., Ins. Co., 66 Ala. 432; Clark *v.* Moses, 50 Ala. 326; Montgomery *v.* Elliott, 6 Ala. 701; Irvine *v.* Withers, 1 Stew. (Ala.) 234.

Arkansas.— Pryor *v.* Wright, 14 Ark. 189; Sumner *v.* Ford, 3 Ark. 389.

California.— Montgomery *v.* Tutt, 11 Cal. 307 [*overruling* Wild *v.* Van Valkenburgh, 7 Cal. 166].

Colorado.— Erdman *v.* Hardesty, 14 Colo. App. 395, 60 Pac. 360.

Delaware.— Martin *v.* Hamilton, 5 Harr. (Del.) 314; Allen *v.* Miles, 4 Harr. (Del.) 234.

Florida.— Greeley *v.* Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286.

Georgia.— Hardy *v.* White, 60 Ga. 454; Dougherty *v.* Western Bank, 13 Ga. 287.

Illinois.— Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Yeaton *v.* Berney, 62 Ill. 61; Hunt *v.* Divine, 37 Ill. 137; Humphreys *v.* Matthews, 11 Ill. 471; New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443; Armstrong *v.* Caldwell, 2 Ill. 546; Butterfield *v.* Kinzie, 2 Ill. 445, 30 Am. Dec. 657.

Indiana.— Geatt *v.* Fortman, 120 Ind. 384, 22 N. E. 300; Dunkle *v.* Nichols, 101 Ind. 473; Hinkley *v.* St. Louis Fourth Nat. Bank, 77 Ind. 475; Mitchell *v.* American Ins. Co., 51 Ind. 396; Hall *v.* Allen, 37 Ind. 541; Frank *v.* Kessler, 30 Ind. 8. See *contra,* Palmer *v.* Hughes, 1 Blackf. (Ind.) 328; Gilly *v.* Springer, 1 Blackf. (Ind.) 257, decided prior to Ind. Rev. Stat. (1881), § 368, by which it is sufficient to show readiness to pay.

Iowa.— Tarbell *v.* Stevens, 7 Iowa 163.

(B) *To Charge Drawer or Indorser.* Where it is sought to charge the drawer or indorser, presentment, demand, non-payment or non-acceptance, protest, and notice thereof, being conditions precedent to his liability, must be substantially alleged,[1]

Kentucky.— Baker *v.* Phelps, 12 Ky. L. Rep. 387. See also Keeton *v.* Scantland, Hard. (Ky.) 149; Grant *v.* Groshon, Hard. (Ky.) 85, 3 Am. Dec. 725.

Louisiana.— Thiel *v.* Conrad, 21 La. Ann. 214; Letchford *v.* Starns, 16 La. Ann. 252; McCalop *v.* Fluker, 12 La. Ann. 551; Ripka *v.* Pope, 5 La. Ann. 61, 52 Am. Dec. 579; Maurin *v.* Perot, 16 La. 276, overruling the earlier cases to the contrary.

Maine.— Dockray *v.* Dunn, 37 Me. 442; Lyon *v.* Williamson, 27 Me. 149; McKenney *v.* Whipple, 21 Me. 98; Remick *v.* O'Kyle, 12 Me. 340; Bacon *v.* Dyer, 12 Me. 19.

Maryland.— Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Massachusetts.— Knowles *v.* Byrnes, 5 Metc. (Mass.) 115; Payson *v.* Whitcomb, 15 Pick. (Mass.) 212; Carley *v.* Vance, 17 Mass. 389; Ruggles *v.* Patten, 8 Mass. 480.

Michigan.— Reeve *v.* Pack, 6 Mich. 240.

Minnesota.— Michaud *v.* Lagarde, 4 Minn. 43.

Mississippi.—Washington *v.* Planters' Bank, 1 How. (Miss.) 230, 28 Am. Dec. 333.

Missouri.— State Bank *v.* Parris, 35 Mo. 371; Baltzer *v.* Kansas Pac. R. Co., 3 Mo. App. 574.

New Hampshire.— Otis *v.* Barton, 10 N. H. 433; Eastman *v.* Fifield, 3 N. H. 333, 14 Am. Dec. 371.

New Jersey.— Weed *v.* Van Houten, 9 N. J. L. 189, 17 Am. Dec. 468.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Dec. 568; Ferner *v.* Williams, 37 Barb. (N. Y.) 9; Wells *v.* Simpson, 29 Misc. (N. Y.) 665, 61 N. Y. Suppl. 56; Caldwell *v.* Cassidy, 8 Cow. (N. Y.) 271; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; Foden *v.* Sharp, 4 Johns. (N. Y.) 183.

North Carolina.— Nichols *v.* Pool, 47 N. C. 23.

Ohio.— Conn *v.* Gano, 1 Ohio 483, 13 Am. Dec. 639.

Pennsylvania.— North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Fitler *v.* Beckley, 2 Watts & S. (Pa.) 458; Collins *v.* Naylor, 10 Phila. (Pa.) 437, 32 Leg. Int. (Pa.) 248.

South Carolina.— McKenzie *v.* Durant, 9 Rich. (S. C.) 61; Clarke *v.* Gordon, 3 Rich. (S. C.) 311, 314, 45 Am. Dec. 768 [*citing* Smith *v.* Burrell].

Tennessee.— Mulherrin *v.* Hannum, 2 Yerg. (Tenn.) 81; McNairy *v.* Bell, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454.

Texas.— Hubbell *v.* Lord, 9 Tex. 472; Frosh *v.* Holmes, 8 Tex. 29; Andrews *v.* Hoxie, 5 Tex. 171; Edwards *v.* Hasbrook, 2 Tex. 578.

Vermont.— Hart *v.* Green, 8 Vt. 191.

Virginia.— Armistead *v.* Armistead, 10 Leigh (Va.) 512; Watkins *v.* Crouch, 5 Leigh (Va.) 522; Barrett *v.* Wills, 4 Leigh 114, 26 Am. Dec. 315.

West Virginia.— Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

Wisconsin.— Howard *v.* Boorman, 17 Wis. 459.

United States.—Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; Covington *v.* Comstock, 14 Pet. (U. S.) 43, 10 L. ed. 346 (holding, however, that the place of payment must be averred); Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95. See also U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443; U. S. Bank *v.* Bussard, 3 Cranch C. C. (U. S.) 173, 2 Fed. Cas. No. 911; Smith *v.* Johnson, 2 Cranch C. C. (U. S.) 645, 22 Fed. Cas. No. 13,067; Beverley *v.* Beverley, 2 Cranch C. C. (U. S.) 470, 3 Fed. Cas. No. 1,376; Brown *v.* Piatt, 2 Cranch C. C. (U. S.) 253, 4 Fed. Cas. No. 2,026; Kendall *v.* Badger, 1 McAll. (U. S.) 523, 14 Fed. Cas. No. 7,691; Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854; Thompson *v.* Cook, 2 McLean (U. S.) 122, 23 Fed. Cas. No. 13,952.

See 7 Cent. Dig. tit. "Bills and Notes," § 1494 *et seq.*

In an action on interest coupons payable at a particular time and place it is not necessary to allege a demand. New South Brewing, etc., Co. *v.* Price, 21 Ky. L. Rep. 11, 50 S. W. 963.

Mode of payment.— In an action on an order payable in money and accepted by a municipality payable in city warrants, an allegation of demand and refusal of payment is unnecessary. Superior *v.* Ripley, 138 U. S. 93, 11 S. Ct. 288, 34 L. ed. 914 [*affirming* 41 Fed. 113].

The failure to allege demand and notice cannot be taken advantage of by the maker. Belcher *v.* Palmer, 35 Nebr. 449, 53 N. W. 380.

1. *Alabama.*— Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657; Mims *v.* Georgia Cent. Bank, 2 Ala. 294; Kennon *v.* McRae, 3 Stew. & P. (Ala.) 249.

Arizona.— Dowling *v.* Hunt, (Ariz. 1885) 7 Pac. 496.

Arkansas.— Rogers *v.* James, 33 Ark. 77; Grace *v.* McDaniel, 13 Ark. 394.

California.— Reeves *v.* Howe, 16 Cal. 152; Lightstone *v.* Lawrence, 4 Cal. 277.

District of Columbia.— Bond *v.* Shepherd, 3 MacArthur (D. C.) 367.

Georgia.— Davies *v.* Byrne, 10 Ga. 329.

Illinois.— Hart *v.* Otis, 41 Ill. App. 431.

Indiana.— Pollard *v.* Bowen, 57 Ind. 232; Ford *v.* Booker, 53 Ind. 395; Griffin *v.* Kemp, 46 Ind. 172; Blacklege *v.* Benedick, 12 Ind. 389; St. James Church *v.* Moore, 1 Ind. 289; Offutt *v.* Rucker, 2 Ind. App. 350, 27 N. E. 589.

and it is immaterial that the instrument indorsed was past due at the time

Iowa.— Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454; Jones *v.* Middleton, 29 Iowa 188; Nollen *v.* Wisner, 11 Iowa 190.

Kansas.— Malott *v.* Jewett, 1 Kan App. 14, 41 Pac. 674.

Kentucky.— Randle *v.* Paducah City Nat. Bank, 5 Ky. L. Rep. 185.

Louisiana.— Garnier *v.* Caucheix, 9 Mart. (La.) 584; Abat *v.* Rion, 7 Mart. (La.) 562.

Michigan.— Barber *v.* Taylor, 1 Mich. 352.

Minnesota.— Michaud *v.* Lagarde, 4 Minn. 43.

Missouri.— Taylor *v.* Newman, 77 Mo. 257; Jamison *v.* Copher, 35 Mo. 483; State Bank *v.* Haden, 35 Mo. 358; Jaccard *v.* Anderson, 32 Mo. 188; Mechanics' Sav. Inst. *v.* Finn, 1 Mo. App. 36.

New Jersey.—Ribble *v.* Jefferson, 10 N. J. L. 139 (non-acceptance); Disborough *v.* Vanness, 8 N. J. L. 231.

New York.— Cook *v.* Warren, 88 N. Y. 37 [*overruling* Woodbury *v.* Sackrider, 2 Abb. Pr. (N. Y.) 402, and *distinguishing* Coddington *v.* Davis, 1 N. Y. 186]; Conkling *v.* Gandall, 1 Abb. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228; Ahr *v.* Marx, 44 N. Y. App. Div. 391, 60 N. Y. Suppl. 1091; Alleman *v.* Bowen, 61 Hun (N. Y.) 30, 15 N. Y. Suppl. 318, 39 N. Y. St. 822; Judd *v.* Smith, 3 Hun (N. Y.) 190, 5 Thomps. & C. (N. Y.) 255; Alder *v.* Bloomingdale, 1 Duer (N. Y.) 601; Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. Y.) 291; Shultz *v.* Depuy, 3 Abb. Pr. (N. Y.) 252; Geneva Bank *v.* Gulick, 8 How. Pr. (N. Y.) 51; Spellman *v.* Weider, 5 How. Pr. (N. Y.) 5; Turner *v.* Comstock, 1 Code Rep. (N. Y.) 102, 7 N. Y. Leg. Obs. 23; Richter *v.* Kramer, 1 N. Y. City Ct. 348; Frisbee *v.* Jacobs, 1 N. Y. City Ct. 235; Dean *v.* Hall, 17 Wend. (N. Y.) 214. See also Harker *v.* Anderson, 21 Wend. (N. Y.) 372. But see Requa *v.* Guggenheim, 3 Lans. (N. Y.) 51; Adams *v.* Sherrill, 14 How. Pr. (N. Y.) 297; Gay *v.* Paine, 5 How. Pr. (N. Y.) 107, 3 Code Rep. (N. Y.) 162.

Ohio.— Blackwell *v.* Montgomery, 1 Handy (Ohio) 40, 12 Ohio Dec. (Reprint) 16. See Wood *v.* Dillingham, 1 Handy (Ohio) 29, 12 Ohio Dec. (Reprint) 9; Levy *v.* Trennel, 8 Ohio Dec. (Reprint) 121, 5 Cinc. L. Bul. 793; Tousley *v.* Schwind, 4 Ohio Dec. (Reprint) 235, 1 Clev. L. Rep. 148.

Pennsylvania.— Peale *v.* Addicks, 174 Pa. St. 543, 38 Wkly. Notes Cas. (Pa.) 101, 34 Atl. 201; Penn. Nat. Bank *v.* Kopitsch Soap Co., 161 Pa. St. 134, 34 Wkly. Notes Cas. (Pa.) 447, 28 Atl. 1077.

South Carolina.— Treadway *v.* Nicks, 3 McCord (S. C.) 195.

Tennessee.— Tumley *v.* Clarksville, etc., R. Co., 2 Coldw. (Tenn.) 327; Harlan *v.* Dew, 3 Head (Tenn.) 505; Knott *v.* Hicks, 2 Humphr. (Tenn.) 162.

Texas.— Forrest *v.* Rawlings, 35 Tex. 626; Beal *v.* Alexander, 6 Tex. 531; Riker *v.* Freeman, Dall. (Tex.) 584; Gillespie *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 448.

Virginia.— Tidball *v.* Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. 318; Watkins *v.* Crouch, 5 Leigh (Va.) 522; Early *v.* Preston, 1 Patt. & H. (Va.) 228.

West Virginia.— Steubenville Nat. Exch. Bank *v.* McElfish Clay Mfg. Co., 48 W. Va. 406, 37 S. E. 541; Huntington Bank *v.* Hysell, 22 W. Va. 142.

Wisconsin.— Dolph *v.* Rice, 18 Wis. 397, 86 Am. Dec. 778; Catlin *v.* Jones, 1 Pinn. (Wis.) 130.

United States.— U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443; Slacum *v.* Pomeroy, 6 Cranch (U. S.) 221, 3 L. ed. 204; Dwight *v.* Williams, 4 McLean (U. S.) 581, 8 Fed. Cas. No. 4,218; January *v.* Duncan, 3 McLean (U. S.) 19, 13 Fed. Cas. No. 7,217; Lewis *v.* Brewster, 2 McLean (U. S.) 21, 15 Fed. Cas. No. 8,318; Sherman *v.* Comstock, 2 McLean (U. S.) 19, 21 Fed. Cas. No. 12,764; Baker *v.* Gallagher, 1 Wash. (U. S.) 461, 2 Fed. Cas. No. 768.

Canada.— Davis *v.* Dunn, 6 U. C. Q. B. 327; Commercial Bank *v.* Cameron, 3 U. C. Q. B. 363; Goldie *v.* Maxwell, 1 U. C. Q. B. 425. See also Small *v.* Rogers, 6 U. C. Q. B. O. S. 476.

See 7 Cent. Dig. tit. "Bills and Notes," § 1495 *et seq.*

If a stranger indorsing in blank before the payee is sued with the maker, protest and notice of dishonor need not be averred as against him. Hardy *v.* White, 60 Ga. 454.

Indorsement of check presented.— A complaint against a bank for refusal to pay a check presented must allege that the check was indorsed by the payee before presentment, and an averment of the presentment of a bank check in the usual course of business is insufficient; but this is unnecessary where it is alleged that the bank to whom presentment was made refused to pay it on the ground that it was not indebted to the drawer. Eichner *v.* Bowery Bank, 20 Misc. (N. Y.) 90, 45 N. Y. Suppl. 68.

Plaintiff need not allege a continued refusal to pay, by the maker, up to the time of suit brought. Crenshaw *v.* McKiernan, Minor (Ala.) 295.

Presentment to the particular person named in the instrument need not be averred. St. James Church *v.* Moore, 1 Ind. 289.

Money counts.— Under N. Y. Laws (1816), c. 223, § 2, providing that all notes in the form of bank-bills, issued by any person, payable in bills of any incorporated company, may, in case of default in payment according to the tenor thereof, be sued by the holder, a declaration by the latter on such a note need not specially aver demand of payment, proof thereof being admissible under the common money counts. Throop *v.* Cheeseman, 16 Johns. (N. Y.) 264.

Bill accepted by drawer.— In an action

of indorsement.[2] If presentment and the subsequent steps are not conditions precedent, or a party is liable without notice,[3] as where he is a surety,[4] assignor,[5] or unconditional guarantor,[6] where recovery is sought on non-negotiable paper,[7] or where formal averments are not required, as in summary proceedings,[8] averments of this character are unnecessary; and there are cases holding that under certain circumstances, demand, non-payment, or notice will be presumed in the absence of an express averment thereof,[9] as, for example, where protest there-

against the drawer of a bill of exchange, who was also the accepter, it is not necessary to allege a demand and notice. Smith *v.* Paul, 8 Port. (Ala.) 503.

A custom of giving notice to residents through the post-office need not be alleged. Gindral *v.* Mechanics' Bank, 7 Ala. 324.

An averment of a personal demand is unnecessary where it can be shown that by agreement and usage a demand at the bank where the instrument was negotiable would be sufficient. Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65.

An averment that the owner personally presented the note is not necessary. White *v.* Low, 7 Barb. (N. Y.) 204.

Production of the instrument at the time of presentment is properly alleged. Smith *v.* Gibbs, 2 Sm. & M. (Miss.) 479. A declaration averring that notices of non-payment and protest were mailed to defendants in an envelope addressed to the accepter, and that the holder believes and charges that the latter at once notified defendants is insufficient. Sibree Deposit Bank *v.* Moreland, 96 Ky. 150, 16 Ky. L. Rep. 404, 28 S. W. 153, 29 L. R. A. 305.

An averment of notice of non-payment is not a sufficient averment of notice of dishonor. Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. Y.) 291.

Filing protest.— The protest or a copy thereof need not be filed. Rice *v.* Derby, 7 Ind. 649.

A copy of the protest will not aid the averments of the complaint. Pollard *v.* Bowen, 57 Ind. 232.

Defects — Objections.— The omission to allege protest is not available on general demurrer (Hart *v.* Otis, 41 Ill. App. 431), and such an omission, or the failure to aver presentment or notice, or insufficient allegations in respect thereto are immaterial after default (Jordan *v.* Bell, 8 Port. (Ala.) 53; Crocker *v.* Gilbert, 9 Cush. (Mass.) 131; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65), although it is also held that such omissions are not cured by verdict (Disborough *v.* Vanness, 8 N. J. L. 231; Knott *v.* Hicks, 2 Humphr. (Tenn.) 162; Slacum *v.* Pomeroy, 6 Cranch (U. S.) 221, 3 L. ed. 204) or by judgment by default (Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454; Tumley *v.* Clarksville, etc., R. Co., 2 Coldw. (Tenn.) 327; Harlan *v.* Dew, 3 Head (Tenn.) 505; Mullaly *v.* Ivory, (Tex. Civ. App. 1895) 30 S. W. 259).

A clerical error, alleging notice to defendant in an action against several, is not fatal.

German Exch. Bank *v.* Kroder, 13 Misc. (N. Y.) 192, 34 N. Y. Suppl. 133, 68 N. Y. St. 219.

Remedies for defects.— Objection for indefiniteness should be made by motion (Heaver *v.* Beatty, 3 Ohio Dec. (Reprint) 61, 2 Wkly. L. Gaz. 388), but if the protest and notice are made a part of the complaint and fail to show a legal demand and notice of non-payment the remedy is by appeal (Kohler *v.* Montgomery, 17 Ind. 220).

2. Kennon *v.* McRae, 3 Stew. & P. (Ala.) 249; Jones *v.* Middleton, 29 Iowa 188; Alleman *v.* Bowen, 61 Hun (N. Y.) 30, 15 N. Y. Suppl. 318, 39 N. Y. St. 822.

3. Marvin *v.* Adamson, 11 Iowa 371.

A declaration on a bill drawn in the United States and payable in Europe to recover on a protest for non-payment need not aver a protest for non-acceptance. Brown *v.* Barry, 3 Dall. (Pa.) 365, 1 L. ed. 638.

Note not payable at chartered bank.— A declaration on a note payable at "Hoyt & Jones," against the indorsers by Hoyt & Jones, who were described as "lately bankers doing business . . . under the name, style, and firm of Hoyt & Jones," is not sufficient to show that Hoyt & Jones was a chartered bank, so as to require notice of dishonor to the indorsers. Salmons *v.* Hoyt, 53 Ga. 493.

4. McDougald *v.* Rutherford, 30 Ala. 253; Chorn *v.* Merrill, 9 La. Ann. 533; Dismukes *v.* Wright, 20 N. C. 74; Williams *v.* Irwin, 20 N. C. 70.

5. Peddicord *v.* Whittam, 9 Iowa 471; Long *v.* Smyser, 3 Iowa 266.

6. Clay *v.* Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422.

7. Stapp *v.* Bacon, 1 A. K. Marsh. (Ky.) 535.

8. In summary proceedings against an indorser technical pleading is not required. It is sufficient to state that defendant is "indebted as indorser" instead of formally averring demand on and refusal by the maker, and notice thereof to defendant. Hilburn *v.* Paysinger, 1 Bailey (S. C.) 97. In an action on a bank check payable after date, against the drawer, plaintiff's affidavit of the cause of action need not allege that notice of its dishonor for non-payment when due was served on defendant, where no affidavit of defense is filed. Work *v.* Tatman, 2 Houst. (Del.) 304.

9. In McConeghy *v.* Kirk, 68 Pa. St. 200, it was held that if a copy of a note is filed with the complaint in an action against an indorser, the complaint need not allege de-

for is averred.[10] Although there are cases to the contrary,[11] the weight of authority is to the effect that general averments of the performance of the requisites necessary to fix the liability will be sufficient.[12]

(c) *Place of Presentment* — (1) In General. Although questioned, or held to the contrary in some of the cases,[13] the English rule appears to require an averment of presentment at the place of payment designated in the instrument,[14] and

mand and notice of non-payment, since they will be presumed until denied by defendant. But this case is disapproved in Vulcanite Paving Co. *v.* Philadelphia Traction Co., 115 Pa. St. 280, 8 Atl. 777.

Action on judgment in favor of last holder. — In an action by an indorsee against his immediate indorser, for money paid on a judgment in favor of the last holder of the note against all the parties to it, it is not necessary to aver that notice of protest was served either in the first or second action, the presumption being that all parties to the judgment who were entitled to it received notice. Hamilton *v.* Veach, 19 Iowa 419.

Implied notice.—An allegation in an action on a corporate note executed by an agent who indorsed it that the indorser was the sole agent of the corporation, and that no other person was authorized to pay the note for the corporation, is insufficient to show that the indorser was the sole agent to pay the note, so as to raise the inference that he had notice of its dishonor. Winter *v.* Coxe, 41 Ala. 207.

10. Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703; Eastman *v.* Turman, 24 Cal. 379; Rudd *v.* Owensboro Deposit Bank, 105 Ky. 443, 20 Ky. L. Rep. 1497, 49 S. W. 207, 971.

An allegation of due notice imports protest. Upper Canada Bank *v.* Parsons, 3 U. C. Q. B. 383; Commercial Bank *v.* Cameron, 3 U. C. Q. B. 363.

Special stipulation.—A petition on a foreign bill of exchange containing the stipulation that "protest shall be evidence of due presentment" sufficiently shows that there had been a presentment for payment, and a protest, by an averment that a notice of protest had been served, in view of a statute, declaring that a notarial protest shall be evidence of the fact of presentment and non-payment. Lail *v.* Kelly, 3 B. Mon. (Ky.) 10.

11. Cook *v.* Warren, 88 N. Y. 37 [*overruling* Woodbury *v.* Sackrider, 2 Abb. Pr. (N. Y.) 402]; Price *v.* McClave, 5 Duer (N. Y.) 670; Peale *v.* Addicks, 174 Pa. St. 543, 38 Wkly. Notes Cas. (Pa.) 101, 34 Atl. 201.

12. *Alabama.*— Carrington *v.* Odom, 124 Ala. 529, 27 So. 510; Battle *v.* Weems, 44 Ala. 105; Winter *v.* Coxe, 41 Ala. 207; Cullum *v.* Casey, 9 Port. (Ala.) 131, 33 Am. Dec. 304.

Arkansas.— Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703.

Connecticut.— Hinsdale *v.* Miles, 5 Conn. 331.

Indiana.— Henshaw *v.* Root, 60 Ind. 220. See also Offutt *v.* Rucker, 2 Ind. App. 350, 27 N. E. 589.

Kentucky.— Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599.

Louisiana.— Ducros *v.* Jacobs, 10 Rob. (La.) 453.

New York.— Spencer *v.* Rogers Locomotive, etc., Works, 8 Bosw. (N. Y.) 612, 17 Abb. Pr. (N. Y.) 110; Chemical Nat. Bank *v.* Carpentier, 9 Abb. N. Cas. (N. Y.) 301; Adams *v.* Sherrill, 14 How. Pr. (N. Y.) 297; Gay *v.* Paine, 5 How. Pr. (N. Y.) 107; Boos *v.* Franklin, 3 Johns. (N. Y.) 207.

Tennessee.— Hill *v.* Planters' Bank, 3 Humphr. (Tenn.) 670.

Utah.— Smith *v.* McEvoy, 8 Utah 58, 29 Pac. 1030.

Wisconsin.— Cutler *v.* Ainsworth, 21 Wis. 381; Frankfort Bank *v.* Countryman, 11 Wis. 398.

England.— Halstead *v.* Skelton, 5 Q. B. 86, Dav. & M. 664, 2 Dowl. N. S. 961, 7 Jur. 680, 13 L. J. Exch. 177, 48 E. C. L. 86; De Bergareche *v.* Pillin, 3 Bing. 476, 11 E. C. L. 235; Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 267, 8 E. C. L. 383; Salomons *v.* Stavely, 3 Dougl. 298, 26 E. C. L. 200; Harris *v.* Packer, 3 Tyrw. 370 note.

See 7 Cent. Dig. tit. "Bills and Notes," § 1495 *et seq.*

Insufficient averment of due notice.— An averment of "all of which the defendant had due notice," is insufficient, where the defendant named immediately before these words is the maker. Hommel *v.* Washburn, 49 N. Y. App. Div. 119, 62 N. Y. Suppl. 1095.

13. Lyon *v.* Sundius, 1 Campb. 423; Parks *v.* Edge, 1 Cr. & M. 429, 1 Dowl. P. C. 643, 2 L. J. Exch. 94, 3 Tyrw. 364; Fenton *v.* Goundry, 13 East 459; Saunderson *v.* Judge, 2 H. Bl. 509; Head *v.* Sewell, Holt 363, 3 E. C. L. 147; Rowe *v.* Williams [*cited* in Richards *v.* Wilsington, Holt N. P. 364, 366 note, 3 E. C. L. 147]. See also Bush *v.* Kinnear, 6 M. & S. 210.

14. Cowie *v.* Halsall, 4 B. & Ald. 197, 6 E. C. L. 449, 3 Stark. 36, 3 E. C. L. 584; Rowe *v.* Young, 2 B. & B. 165, 2 Bligh 391, 4 Eng. Reprint 372, 6 E. C. L. 83; Callaghan *v.* Aylett, 2 Campb. 549, 3 Taunt. 397; Dickinson *v.* Bowes, 16 East 110; Saunderson *v.* Bowes, 14 East 500, 13 Rev. Rep. 299; Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182; Garnett *v.* Woodcock, 1 Stark. 475, 2 E. C. L. 182; Bowes *v.* Howe, 5 Taunt. 30, 14 Rev. Rep. 700, 1 E. C. L. 29; Ambrose *v.* Hopwood, 2 Taunt. 61.

this rule has been adopted to some extent in this country,[15] and in Canada;[16] but in many of the states the English rule is not followed, and an averment of presentment at the place of payment is held to be unnecessary.[17]

(2) NOTES PAYABLE ON DEMAND. A declaration or complaint on a promissory note or bank-note payable on demand at a particular place, need not aver a demand at that place.[18]

15. *Alabama.*— Winter *v.* Coxe, 41 Ala. 207.

Delaware.— People's Nat. Bank *v.* Houston, 2 Marv. (Del.) 250, 43 Atl. 93; Wilmington, etc., Bank *v.* Cooper, 1 Harr. (Del.) 10.

Indiana.— Brown *v.* Jones, 113 Ind. 46, 13 N. E. 857, 3 Am. St. Rep. 623; Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404; Goodlet *v.* Britton, 6 Blackf. (Ind.) 500; Hartwell *v.* Candler, 5 Blackf. (Ind.) 215.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327.

New York.— Ferner *v.* Williams, 37 Barb. (N. Y.) 9, 14 Abb. Pr. (N. Y.) 215; Spellman *v.* Weider, 5 How. Pr. (N. Y.) 5. But see Adams *v.* Sherrill, 14 How. Pr. (N. Y.) 297; Gay *v.* Paine, 5 How. Pr. (N. Y.) 107, 3 Code Rep. (N. Y.) 162.

Pennsylvania.— Tradesmen's Bank *v.* Johnson, 12 Pa. Co. Ct. 6.

Virginia.— Watkins *v.* Crouch, 5 Leigh (Va.) 522.

West Virginia.— Huntington Bank *v.* Hysell, 22 W. Va. 142.

Draft on treasurer of corporation.—A declaration on a draft drawn by the president of a corporation on its treasurer should allege presentment to the latter. Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404.

A note payable at a chartered bank within the state must be averred to have been there presented. Hartwell *v.* Candler, 5 Blackf. (Ind.) 215.

In Alabama, by statute, a declaration is not defective for the failure to set out a particular place of payment, unless the instrument is payable at a certain place and there only. Clark *v.* Moses, 50 Ala. 326; Montgomery *v.* Elliott, 6 Ala. 701.

Where a note is made payable at "any bank in the state," an averment of presentment at any particular bank in the state is sufficient. Besancon *v.* Shirley, 9 Sm. & M. (Miss.) 457.

Particularity.— An averment of presentment at the maker's office and that payment was then and there duly demanded, etc., is sufficient, without further alleging that the demand was made during business hours, or personally, or on some one authorized to act for the maker. Wallace *v.* Crilley, 46 Wis. 577, 1 N. W. 301.

Place of business.— It is sufficient to allege demand of payment to have been made at the place of business of the drawee, without alleging such place to be in the place of his alleged residence. Cullum *v.* Casey, 9 Port. (Ala.) 131, 33 Am. Dec. 304.

Aider by verdict.—Where a declaration on a note payable at a particular place contains no averment of a special demand at that place, the defect, if any, will be cured by verdict. Irvine *v.* Withers, 1 Stew. (Ala.) 234.

In an action by a bank on a note made payable at its place of business presentment at that place need not be averred. U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443 [*reversing* 2 Cranch C. C. (U. S.) 319, 2 Fed. Cas. No. 935].

16. Ferrie *v.* Rykman, Draper (U. C.) 61.

17. *Alabama.*— Carrington *v.* Odom, 124 Ala. 529, 27 So. 510.

Indiana.— Brown *v.* Jones, 113 Ind. 46, 13 N. E. 857, 3 Am. St. Rep. 623.

Kentucky.— Keeton *v.* Scantland, Hard. (Ky.) 149; Grant *v.* Groshon, Hard. (Ky.) 85, 3 Am. Dec. 725.

Massachusetts.—Carley *v.* Vance, 17 Mass. 389.

Montana.— Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654.

New Jersey.— Weed *v.* Van Houten, 9 N. J. L. 189, 17 Am. Dec. 468.

New York.— Gay *v.* Paine, 5 How. Pr. (N. Y.) 107; Wolcott *v.* Van Santvoord, 17 Johns. (N. Y.) 248, 8 Am. Dec. 396.

United States.— See U. S. Bank *v.* Smith, 11 Wheat. (U. S.) 171, 6 L. ed. 443.

Proof under money counts.—Demand at the place where the note is payable may be proved under the money counts, without being specially averred. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683.

If the instrument is not payable at any particular place a general averment of presentment is sufficient. St. James Church *v.* Moore, 1 Ind. 289, 1 Smith (Ind.) 181.

18. *Arkansas.*— Rust *v.* Reives, 24 Ark. 359.

Georgia.— Dougherty *v.* Western Bank, 13 Ga. 287.

Illinois.— New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

Iowa.— Tarbell *v.* Stevens, 7 Iowa 163.

Kentucky.— Commonwealth Bank *v.* Hickey, 4 Litt. (Ky.) 225.

Maine.— Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683.

New York.— Haxton *v.* Bishop, 3 Wend. (N. Y.) 13; Throop *v.* Cheeseman, 16 Johns. (N. Y.) 264.

Washington.— Hardin *v.* Sweeney, 14 Wash. 129, 44 Pac. 138.

United States.— Chillicothe Branch Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683.

Demand of payment of a certificate of de-

(D) *Time of Presentment.* Unless the instrument declared on is not payable at any particular time[19] the day of presentment[20] or facts showing the exercise of reasonable diligence in making a demand must be alleged.[21] Where there is a special usage that presentment may be made on a certain day after the expiration of the days of grace that usage must be alleged;[22] but where a note falling due on Sunday is protested on the preceding day the fact of maturity on Sunday need not be averred.[23] An averment of presentment at maturity will be sufficient, however, although the date stated under a *videlicet* is incorrect;[24] but an averment showing a premature presentment is insufficient.[25]

posit must be averred and proved. Brown *v.* McElroy, 52 Ind. 404.

19. St. James Church *v.* Moore, 1 Ind. 289, 1 Smith (Ind.) 181.

Qualified acceptance.— If the drawee of a bill of exchange drawn payable at sight promises to pay it if it be presented at a particular time, in an action against him on such acceptance, plaintiff need not aver or prove presentment of the bill for payment at that time. Its non-presentment is matter of defense. Clarke *v.* Gordon, 3 Rich. (S. C.) 311, 45 Am. Dec. 768.

20. Peabody *v.* Fisher, 8 Ohio 535 [*citing* Chitty Bills 494, note *k*]; Huntington Bank *v.* Hysell, 22 W. Va. 142.

An averment that presentment was duly made is good against a demurrer. Kohler *v.* Montgomery, 17 Ind. 220; Gibb *v.* Dempsey, 3 U. C. C. P. 437.

An averment of the presentment of a check after maturity according to the custom of merchants must state the day. Glenn *v.* Noble, 1 Blackf. (Ind.) 104.

Control of averments by terms of acceptance.— In an action upon a bill of exchange payable to and indorsed by the drawer, the acceptance not being the foundation of the action, a copy thereof filed with the complaint cannot control its averments as to the time of presentment and protest. Brown *v.* Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

21. Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 373; Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

An averment of "due" presentment is an averment of presentment within a reasonable time. Hall *v.* Francis, 4 U. C. C. P. 210.

Aider by verdict.— The omission of, or an erroneous or defective statement of, the day of presentment is cured by verdict. Hall *v.* Crandall, Kirby (Conn.) 402; Wells *v.* Woodley, 5 How. (Miss.) 484; Leffingwell *v.* White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; Frank *v.* Townsend, 9 Humphr. (Tenn.) 724.

22. Jackson *v.* Henderson, 3 Leigh (Va.) 196; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

23. Mechanics', etc., Bank *v.* Gibson, 7 Wend. (N. Y.) 460.

Due presentment.— It is sufficient to aver that a bill or note was "duly" presented, without setting out that it became due on Sunday and was actually presented on Saturday. Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 266, 8 E. C. L. 383.

24. *Alabama.*— Smith *v.* Robinson, 11 Ala. 270; Crawford *v.* Decatur Branch Bank, 6 Ala. 574; Crawford *v.* Camfield, 6 Ala. 153; Smith *v.* Raymond, 9 Port. (Ala.) 459.

Arkansas.— See Rozelle *v.* Pennington, 24 Ark. 277.

Connecticut.— Norton *v.* Lewis, 2 Conn. 478.

Indiana.— Harbinson *v.* State Bank, 28 Ind. 133, 92 Am. Dec. 308.

Mississippi.— Wells *v.* Woodley, 5 How. (Miss.) 484.

Missouri.— Rude *v.* Harvey, 83 Mo. 188; Mercantile Bank *v.* McCarthy, 7 Mo. App. 318.

Montana.— Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654.

New York.— Ferner *v.* Williams, 37 Barb. (N. Y.) 9.

Ohio.— Peabody *v.* Fisher, 8 Ohio 535.

Tennessee.— Frank *v.* Townsend, 9 Humphr. (Tenn.) 724.

Virginia.— Jackson *v.* Henderson, 3 Leigh (Va.) 196.

United States.— Hyslop *v.* Jones, 3 McLean (U. S.) 96, 12 Fed. Cas. No. 6,990.

England.— Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 267, 8 E. C. L. 383.

Contra, Beck *v.* Thompson, 4 Harr. & J. (Md.) 531.

Presumption.—An allegation that a bill was presented when due authorized a presumption of conformity to the general rule requiring presentment on the last day of grace. Jackson *v.* Henderson, 3 Leigh (Va.) 196, where proof of a local custom allowing presentment on the last day of grace was excluded.

25. Beck *v.* Thompson, 4 Harr. & J. (Md.) 531, where presentment before the expiration of the days of grace was averred.

Demurrer not sustained.— In an action on a sight draft indorsed for deposit in a bank within a foreign state it appeared by the complaint that the bill was made within the state March 15, and was presented and protested on March 19, in another foreign state. There was an allegation of due presentment, and the court refused to sustain an objection that the complaint showed on its face a premature presentment, as it could not say that the draft did not pass to a party in the state of deposit and reach such other state in time to be presented to the drawee on the sixteenth in order to fix the time of actual ma-

(E) *Time of Notice.* The time of giving notice of dishonor must be averred,[26] although it is not necessary that the precise date should be stated,[27] and there are holdings that a general averment of notice will be sufficient.[28]

(F) *Exhaustion of Remedies Against Maker.* In some of the states to charge an indorser or assignor of paper which is not governed by the law merchant, it is a prerequisite that the holder should first exhaust his remedies against the maker. Consequently the declaration or complaint must contain suitable averments of facts showing a compliance with such requirements, the efforts made to comply therewith, or sufficient reasons for non-compliance or for the failure to collect or enforce payment of the maker.[29] Thus, although no suit was instituted against him, inability to proceed against the maker because of his non-residence[30] or

turity on the nineteenth. Wards *v.* Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703.

26. Hall *v.* Crandall, Kirby (Conn.) 402 (holding that the time must be stated with precision); Halsey *v.* Salmon, 3 N. J. L. 916; Lewis *v.* Brewster, 2 McLean (U. S.) 21, 15 Fed. Cas. No. 8,318.

Aider by verdict.—The failure to allege the time of giving notice of dishonor is not cured by verdict. Halsey *v.* Salmon, 3 N. J. L. 916.

27. Holleville *v.* Patrick, 14 Ark. 208; Norton *v.* Lewis, 2 Conn. 478; Loose *v.* Loose, 36 Pa. St. 538.

Aider by verdict.—An erroneous statement of the date of notice is cured by verdict. Loose *v.* Loose, 36 Pa. St. 538.

28. Jones *v.* Robinson, 8 Ark. 484; Fisk *v.* Miller, 63 Cal. 367; Dwight *v.* Wing, 2 McLean (U. S.) 580, 8 Fed. Cas. No. 4,219.

29. *Alabama.*— Winter *v.* Coxe, 41 Ala. 207; McDougald *v.* Rutherford, 30 Ala. 253; Lindsay *v.* Williams, 17 Ala. 229; Fulford *v.* Johnson, 15 Ala. 385; Murphy *v.* Gee, 9 Ala. 276; Howze *v.* Perkins, 5 Ala. 286; Hammett *v.* Smith, 5 Ala. 156; Woodward *v.* Harbin, 1 Ala. 104; Ivey *v.* Sanderson, 6 Port. (Ala.) 420; Alday *v.* Jamison, 3 Port. (Ala.) 112.

Connecticut.— Rhodes *v.* Seymour, 36 Conn. 1.

Illinois.— Sherman *v.* Smith, 20 Ill. 350; Crouch *v.* Hall, 15 Ill. 263.

Indiana.— Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. 224; Brown *v.* Summers, 91 Ind. 151; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Fryharger *v.* Cockefair, 17 Ind. 404; Hanna *v.* Pegg, 1 Blackf. (Ind.) 181.

Kentucky.—Elliott *v.* Threlkeld, 16 B. Mon. (Ky.) 341; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Anderson *v.* Penick, 23 Ky. L. Rep. 2146, 66 S. W. 732.

Missouri.— Simmons *v.* Bret, 35 Mo. 461; Collins *v.* Warburton, 3 Mo. 202.

New Jersey.— Disborough *v.* Vanness, 8 N. J. L. 231.

Texas.— Hutchins *v.* Flintge, 2 Tex. 473, 47 Am. Dec. 659; Mullaly *v.* Ivory, (Tex. Civ. App. 1895) 30 S. W. 259. See also Frosh *v.* Holmes, 8 Tex. 29.

United States.— Dent *v.* Ashley, Hempst. (U. S.) 55, 7 Fed. Cas. No. 3,809*b*.

Time of instituting action.—It is not necessary to allege that the action was brought at the first term of the district court, which is the diligence prescribed by the statute, but the court will take judicial notice of that fact. Hutchins *v.* Flintge, 2 Tex. 473, 47 Am. Dec. 659.

Time of issuing execution.—A declaration stating that the term of the court at which plaintiff obtained judgment against the maker was adjourned on September 7, and that a fieri facias issued on the judgment on the twenty-first of the same month shows *prima facie* sufficient diligence in taking out execution. Clark *v.* Spears, 8 Blackf. (Ind.) 302.

Request of indorser to assist in prosecution. — Where, in an action against the maker, the indorser is notified of its pendency and of the plea interposed and is requested to appear and assist in the prosecution of the suit, but fails so to do, an action may be maintained against him without notice of the result of the action or any demand on him to pay the loss sustained. Hazzard *v.* Citizens' State Bank, 72 Ind. 130.

Record of action against maker.— In a suit by the assignee of a note against his assignor, alleging that in an action on such note by the assignee against the maker the latter had judgment, the complaint need not contain a copy of the pleadings, proceedings, and judgment in such action. White *v.* Webster, 58 Ind. 233.

30. Miller *v.* McIntyre, 9 Ala. 638.

"Left the state."—An allegation that since the indorsement and before maturity of the note sued on the maker "left the state" is not equivalent to an averment that the maker became a non-resident. Holton *v.* McCormick, 45 Ind. 411.

Non-residence at accrual of right of action. —An allegation that the maker and another indorser "are nonresidents and have been for a long time" is insufficient because failing to state that they were non-residents when the right of action accrued. Mullaly *v.* Ivory, (Tex. Civ. App. 1895) 30 S. W. 259. An averment that the maker at the time of the indorsement was a non-resident and has since continued so to be and that the fact of his non-residence was at the time unknown to plaintiff is insufficient. Fulford *v.* Johnson, 15 Ala. 385.

Diligence.—An averment excusing the in-

insolvency,[31] or because of coverture,[32] a request by the assignor or indorser not to sue,[33] or an express promise to pay by the party sought to be charged,[34] when appropriately averred, will sustain the action against an indorser or assignor. So an allegation of presentment, demand, refusal to pay, and notice thereof to the indorser is sufficient without an averment that suit was instituted against the maker within a prescribed time.[35]

(G) *Waiver — Excuse.* If presentment, protest, or notice thereof has been expressly or impliedly waived no averment in respect thereto is necessary.[36] Where, however, plaintiff seeks to excuse actual presentment, demand, or notice, and relies on matters which are equivalent thereto or which obviated or dispensed with the necessity of these formal requisites, rendered them useless or unnecessary,[37] or operated as a waiver thereof, the waiver or the facts so relied on must

stitution of an action against the maker "in the county, where he ordinarily resided, but that he could not, on diligent search and inquiry, there, and elsewhere, in said State, be found," is not a sufficient averment of diligence. Fulford *v.* Johnson, 15 Ala. 385.

31. Miller *v.* McIntyre, 9 Ala. 638; Cowles *v.* Litchfield, 3 Ill. 356; Harmon *v.* Thornton, 3 Ill. 351; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21.

Time of insolvency.— The insolvency must be alleged to have existed at the time when suit should have been brought. Fisher *v.* Phelps, 21 Tex. 551.

Negativing transfer to assignee in bankruptcy.—A complaint against an indorser in which the ground of recovery is the insolvency and not the bankruptcy of the maker need not show that a sufficient amount of property to pay the note or the principal part thereof was not transferred to the assignees in bankruptcy of the maker. Hayne *v.* Fisher, 68 Ind. 158.

32. Huston *v.* Centerville First Nat. Bank, 85 Ind. 21.

33. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21.

34. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

Promise with knowledge of delay.—A declaration alleging that with knowledge of delay in suing the maker defendant, an indorser, expressly promised to pay need not also excuse a want of diligence in proceeding against the maker. Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Unnecessary averments.—A complaint is not objectionable because, after sufficiently averring a request not to sue and a promise to pay, it further alleges a suit against the maker and the return, unsatisfied, of a judgment recovered therein. Brown *v.* Fowler, 133 Ala. 310, 32 So. 584.

35. Fisher *v.* Phelps, 21 Tex. 551.

Effect of giving notice of dishonor.— It is not necessary to aver the insolvency of the maker, where, by statute, the liability of the indorser attaches on his receiving notice of dishonor. Jones *v.* Robinson, 8 Ark. 484.

36. *Alabama.*— Burt *v.* Parish, 9 Ala. 211.

Indiana.— Henderson *v.* Ackelmire, 59 Ind. 540; Burroughs *v.* Wilson, 59 Ind. 536.

Kentucky.— Citizens' Bank *v.* Millett, 20 Ky. L. Rep. 5, 44 S. W. 366, 44 L. R. A. 664.

Maine.— Patterson *v.* Vose, 43 Me. 552.

New York.— Singleton *v.* Thornton, 9 N. Y. St. 600.

If notice is alleged an express waiver on the face of the bill will render proof of the averment unnecessary. Smith *v.* Lockridge, 8 Bush (Ky.) 423.

37. *California.*— Jerome *v.* Stebbins, 14 Cal. 457.

Delaware.— People's Nat. Bank *v.* Houston, 2 Mar. (Del.) 250, 43 Atl. 93; Wilmington Bank *v.* Cooper, 1 Harr. (Del.) 10.

Indiana.— Griffin *v.* Kemp, 46 Ind. 172; Marion, etc., R. Co. *v.* Dillon, 7 Ind. 404; Curtis *v.* State Bank, 6 Blackf. (Ind.) 312, 38 Am. Dec. 143.

Minnesota.— Michaud *v.* Lagarde, 4 Minn. 43.

Mississippi.— Hunt *v.* Nugent, 10 Sm. & M. (Miss.) 541.

Missouri.— Jaccard *v.* Anderson, 32 Mo. 188.

Nebraska.— Nicholson *v.* Barnes, 11 Nebr. 452, 9 N. W. 652, 38 Am. Rep. 373.

New York.— Conkling *v.* Gandall, 1 Abb. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228; Clift *v.* Rodger, 25 Hun (N. Y.) 39; Williams *v.* Matthews, 3 Cow. (N. Y.) 252.

Pennsylvania.— Baumgardner *v.* Reeves, 35 Pa. St. 250.

Tennessee.— Gilroy *v.* Brinkley, 12 Heisk. (Tenn.) 392; Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375.

Texas.— Fisher *v.* Phelps, 21 Tex. 551; Mullaly *v.* Ivory, (Tex. Civ. App. 1895) 30 S. W. 259.

Virginia.—McVeigh *v.* Old Dominion Bank, 26 Gratt. (Va.) 785.

United States.— Lewis *v.* Brewster, 2 McLean (U. S.) 21, 15 Fed. Cas. No. 8,318.

England.—Allen *v.* Edmonson, 2 C. & K. 547, 2 Exch. 719, 17 L. J. Exch. 291, 61 E. C. L. 547.

Inability to find.—Averments that the maker has absconded (Michaud *v.* Legarde, 4 Minn. 43), or that he could not be found in the city (Haber *v.* Brown, 101 Cal. 445, 35 Pac. 1035) or county (Tarlton *v.* Miller, 1 Ill. 68) where the note was executed are insufficient.

be specially pleaded and cannot be proved under the usual allegations of demand or notice.[38] There are, however, many decisions to the effect that such averments may be supported by proof of that character.[39]

(H) *New Promise.* A drawer or indorser who, with knowledge that proper

Inquiry and search.— An allegation in a declaration "that the notary, at," etc., "aforesaid, made diligent search, and inquiry for the said acceptor," is a sufficient allegation that inquiry and search were made at the place to which the bill was directed. Hazzard *v.* Shelton, 15 Ala. 62, 48 Am. Dec. 129.

If want of funds or effects or the fact that the note was indorsed or bill drawn without expectation of funds to meet it is relied on as an excuse facts sufficient to constitute the excuse must be averred.

Kentucky.— Frazier *v.* Harvie, 2 Litt. (Ky.) 180.

New Jersey.— Blenderman *v.* Price, 50 N. J. L. 296, 12 Atl. 775.

New York.— Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665.

England.— Cory *v.* Scott, 3 B. & Ald. 619, 5 E. C. L. 356; Fitzgerald *v.* Williams, 6 Bing. N. Cas. 68, 9 L. J. C. P. 41, 8 Scott 271, 37 E. C. L. 512; Kemble *v.* Mills, 9 Dowl. P. C. 446, 1 Dunkw. 22, 1 M. & G. 757, 2 Scott N. R. 121, 39 E. C. L. 1011; Bird *v.* Legge, 7 Dowl. P. C. 814, 8 L. J. Exch. 258, 5 M. & W. 418. And see Carter *v.* Flower, 4 D. & L. 529, 11 Jur. 313, 16 L. J. Exch. 199, 16 M. & W. 743.

Canada.— Goldie *v.* Maxwell, 1 U. C. Q. B. 425.

An allegation of the insolvency of the maker at the time of giving a note will not excuse the failure to give notice (Winter *v.* Coxe, 41 Ala. 207), although an averment of acceptance of a note in reliance on the indorser's fraudulent representations as to the maker's solvency will obviate the necessity of allegations of demand and notice (Jamison *v.* Copher, 35 Mo. 483).

No loss or detriment.—Averments that before presentment of an order the drawer had withdrawn all his funds from the hands of the drawee, and that he suffered no loss by the delay of presentment and want of notice (Spangler *v.* McDaniel, 3 Ind. 275) or that one deemed a guarantor and sought to be charged as such had received no detriment because of the insolvency of the maker and payee (Grier *v.* Irwin, (Iowa 1901) 86 N. W. 273) have been held sufficient; but, where protest and notice have been waived, an averment that the lack of notice was without detriment is unnecessary and immaterial (Star Wagon Co. *v.* Swezy, 63 Iowa 520, 19 N. W. 298).

Accommodation indorser.—An allegation that the indorsement was for the accommodation of the indorser is sufficient (Blenderman *v.* Price, 50 N. J. L. 296, 12 Atl. 775); but an allegation that at the time of the execution of the note defendant indorsed it to plaintiff, who, for defendant's sole benefit and accommodation, paid to the maker its face value is not sufficient to show that defendant was the party accommodated, and therefore does not show any excuse for not giving notice of non-payment (People's Nat. Bank *v.* Winton, 13 Ind. App. 110, 41 N. E. 75).

Diligence.—An express averment of due diligence is not necessary (Williams *v.* Matthews, 3 Cow. (N. Y.) 252); but such an averment may be supported by proof of matters of excuse (Blakely *v.* Grant, 6 Mass. 386).

Sufficiency a question of law.— The sufficiency of the diligence alleged to have been exercised is a question of law determinable on a demurrer. Hartford Bank *v.* Green, 11 Iowa 476.

Partnership of drawer and drawee.— If plaintiff relies on the fact that the drawer and drawee were partners he must aver such fact in his declaration. Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375.

Foreign laws.— In an action against an indorser of a note made in another state which has dispensed with the necessity of demand and notice by statute such facts must be alleged. Mims *v.* Central Bank, 2 Ala. 294.

Under the common counts an excuse for the failure to give notice may be shown without special allegation. Brower *v.* Rupert, 24 Ill. 182.

38. *Iowa.*— Closz *v.* Miracle, 103 Iowa 198, 72 N. W. 502; Lumbert *v.* Palmer, 29 Iowa 104.

Massachusetts.— Colt *v.* Miller, 10 Cush. (Mass.) 49.

Minnesota.— Michaud *v.* Lagarde, 4 Minn. 43.

New York.— Bird *v.* Kay, 40 N. Y. App. Div. 533, 58 N. Y. Suppl. 170; Clift *v.* Rodger, 25 Hun (N. Y.) 39.

South Carolina.— Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

England.—Cordery *v.* Colvin, 14 C. B. N. S. 374, 9 Jur. N. S. 1200, 32 L. J. C. P. 210, 8 L. T. Rep. N. S. 245, 108 E. C. L. 374; Bird *v.* Legge, 7 Dowl. P. C. 814, 8 L. J. Exch. 258, 5 M. & W. 418.

The maker cannot object that the waiver is not alleged. Belcher *v.* Palmer, 35 Nebr. 449, 53 N. W. 380.

The facts constituting the waiver need not be detailed. Meyer *v.* Bergholz, 56 N. Y. App. Div. 617, 67 N. Y. Suppl. 623; Bay View Brewing Co. *v.* Grubb, 24 Wash. 163, 63 Pac. 1091.

39. *Alabama.*— Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; Shirley *v.* Fellows, 9 Port. (Ala.) 300.

Connecticut.— Norton *v.* Lewis, 2 Conn. 478.

steps have been taken to charge him, promises to pay may be declared against on the original contract as if his liability had been legally fixed;[40] but if in ignorance of the laches of the holder he promises to pay on a new consideration he must be declared against on a special count framed on the promise.[41]

(XII) *As to Acceptance*—(A) *In General.* The acceptance of a draft or order by defendant sought to be charged must be appropriately alleged,[42] but the cause or reason for giving the order or the capacity in which the accepter incurred liability need not be averred.[43]

(B) *Agreement to Accept or Promise to Pay.* If a recovery is sought because of an agreement to accept the instrument before it was drawn or a promise to pay it thereafter, or because of any conduct on the part of defendant amounting to an acceptance, such agreement, promise, or conduct and that by reason thereof the payee was induced to take it, must be averred,[44] although it

Florida.— Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Illinois.— Tobey *v.* Berly, 26 Ill. 426.

Massachusetts.— Armstrong *v.* Chadwick, 127 Mass. 156; Harrison *v.* Bailey, 99 Mass. 620, 97 Am. Dec. 63; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436.

Mississippi.— Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402 [*affirming* 23 Hun (N. Y.) 628]; Tebbitts *v.* Dowd, 23 Wend. (N. Y.) 379; Duryee *v.* Dennison, 5 Johns. (N. Y.) 248; Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222; Cummings *v.* Fisher, Anth. N. P. (N. Y.) 1.

Pennsylvania.— Berg *v.* Abbott, 83 Pa. St. 177, 24 Am. Rep. 158.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775.

Tennessee.— People's Nat. Bank *v.* Dibrell, 91 Tenn. 301, 18 S. W. 626.

Vermont.— Bundy *v.* Buzzell, 51 Vt. 128; Blodgett *v.* Durgin, 32 Vt. 361; Farmers', etc., Bank *v.* Day, 13 Vt. 36. See also U. S. Bank *v.* Lyman, 1 Blatchf. (U. S.) 297, 2 Fed. Cas. No. 924, 20 Vt. 666, 11 Law Rep. 156.

England.— Greenway *v.* Hindley, 4 Campb. 52; Gibbon *v.* Coggon, 2 Campb. 188, 11 Rev. Rep. 622; Killby *v.* Rochussen, 18 C. B. N. S. 357, 114 E. C. L. 357; Lundie *v.* Robertson, 7 East 231.

Dilatory objection.—An objection that, under a count alleging notice, plaintiff was allowed to give in evidence circumstances excusing notice, cannot be urged for the first time in support of a rule for new trial. Williams *v.* Hood, 1 Phila. (Pa.) 205, 8 Leg. Int. (Pa.) 111.

40. Tobey *v.* Berly, 26 Ill. 426; Martin *v.* Ewing, 2 Humphr. (Tenn.) 559.

Evidence to show character of liability.— Where defendant is charged in distinct counts as indorser, guarantor, and surety, evidence of an express promise to pay may be given to show that he was properly charged as indorser or that he guaranteed the note. Bundy *v.* Buzzell, 51 Vt. 128.

41. Martin *v.* Ewing, 2 Humphr. (Tenn.) 559.

42. Noble *v.* Burton, 38 Ind. 206.

An introductory statement naming one of defendants as "accepter" is not a sufficient averment of the fact that he accepted the bill. Lail *v.* Coram, 3 B. Mon. (Ky.) 414.

In declaring against a principal on a bill accepted by his agent the agent's authority must be averred. It is not sufficient to aver that he was the agent, and as such agent accepted for the principal. May *v.* Kelly, 27 Ala. 497.

Setting out copy.— See Andrews *v.* Astor Bank, 2 Duer (N. Y.) 629, an action on a bill addressed "to John Lloyd, Esq., President of the Astor Bank," and accepted by him as president, where a complaint containing a copy of the bill showing its acceptance, but not averring that defendant bank accepted it, or that Lloyd was president or as such had authority to accept, was held sufficient.

In suing on an accepted order for the amount of a subscription it is not necessary that the subscription should be made part of the complaint. Stockton *v.* Creager, 51 Ind. 262.

Funds in the accepter's hands at the time of acceptance need not be alleged. Spurgeon *v.* Swain, 13 Ind. App. 188, 41 N. E. 397.

That the acceptance was unconditional need not be alleged. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

Where the action is on a protest for nonpayment the silence of the declaration as to whether the bill was accepted or not will not vitiate it. Brown *v.* Barry, 3 Dall. (Pa.) 365, 1 L. ed. 638.

New promise.— In an action on the acceptance a new promise to pay need not be alleged. Nesbit *v.* Bendheim, 15 N. Y. Suppl. 300, 39 N. Y. St. 109.

43. Seward *v.* Vandergrift, 3 N. J. L. 922.

44. Stafford *v.* Bratcher, 4 Ky. L. Rep. 996. See also Smith *v.* Milton, 133 Mass. 369.

Promise by agent.—An allegation that a person named as agent for defendant accepted in writing and promised and agreed to pay the bill in suit is an averment of an express promise by the agent. Rudd *v.* Owens-

has been held that a valid agreement to accept may be declared on as an acceptance.[45]

(c) *Conditional Acceptance.* In declaring on a conditional acceptance the condition must be stated and its performance averred.[46] In declaring against the drawer if a conditional acceptance postponing the time of payment is averred, it must also be alleged that the drawer consented to it and that its terms were not kept or that as between the drawer and drawee the former had no right to draw it.[47]

(d) *Payment Out of Particular Fund.* Where a draft or order is drawn on or payable out of a particular fund the existence of such fund must be averred.[48] If an order is payable out of moneys properly applicable thereto it is sufficient to allege the accepter's control of sufficient funds so applicable without averring their actual receipt by him.[49]

(e) *Time of Acceptance.* An acceptance before the drawer has signed the bill may be declared on as an acceptance after the signature.[50]

(f) *Necessity of Alleging Written Acceptance or Promise.* It is not necessary to allege that the acceptance, the promise to accept, or the promise to pay was in writing.[51]

(g) *Non-Acceptance.* When so required by statute a demand for the return of a non-accepted bill must be alleged.[52]

(xiii) *As to Non-Payment*—(a) *Necessary Allegations.* Non-payment of the instrument on which the action is brought, in whole or in part, must be duly averred;[53] but an indorsee suing the maker need not negative payment to inter-

boro Deposit Bank, 105 Ky. 443, 20 Ky. L. Rep. 1276, 1497, 49 S. W. 207, 971.

Proof of express or implied promise.— Under an allegation that defendant "accepted and agreed and undertook and promised to pay" certain drafts, evidence of an express or implied promise to accept is admissible. Smith *v.* Clark, 12 Iowa 32.

45. Ontario Bank *v.* Worthington, 12 Wend. (N. Y.) 593; Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 4 L. ed. 185.

46. Bertrand *v.* Byrd, 4 Ark. 187; Myrick *v.* Merritt, 22 Fla. 335; Stabler *v.* Gund, 35 Nebr. 648, 53 N. W. 570; Langston *v.* Corney, 4 Campb. 176; Ralli *v.* Sarell, D. & R. N. P. 33, 16 E. C. L. 422; Swan *v.* Cox, 1 Marsh. 176, 4 E. C. L. 460.

Sufficiency.—A complaint against one who indorsed a bill for services "Accepted, payable out of . . . my note to him, payable July 1, 1893, provided the note can be gotten here by that date," is sufficient if it allege that the conditions of the acceptance were complied with and the note taken up, and that defendant in paying it had reserved out of the amount due the amount of the bill sued on. Taylor *v.* Insley, 7 Colo. App. 175, 42 Pac. 1046.

47. Taylor *v.* Newman, 77 Mo. 257.

48. Garrett *v.* Marshall, 1 Tex. App. Civ. Cas. § 565.

Proceeds of collection.— To maintain an action on an accepted order, payable out of certain notes in the hands of the accepter for collection, plaintiff must aver the collection of the notes. Van Vacter *v.* Flack, 1 Sm. & M. (Miss.) 393, 40 Am. Dec. 100.

49. Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. 1900) 59 S. W. 470.

50. Molloy *v.* Deloes, 7 Bing. 428, 20 E. C. L. 194, 4 C. & P. 492, 19 E. C. L. 617, 9 L. J. C. P. O. S. 171, 5 M. & P. 275.

51. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Wakefield *v.* Greenhood, 29 Cal. 597; Lowville Bank *v.* Edwards, 11 How. Pr. (N. Y.) 216; Challe *v.* Belshaw, 6 Bing. 529, 8 L. J. C. P. O. S. 176, 4 M. & P. 275, 19 E. C. L. 240; Ereskine *v.* Murray, 2 Str. 817.

52. A demand for the return of the bill must be alleged where by statute it is provided that the drawee must refuse to return the bill, accepted or non-accepted, within twenty-four hours after delivery or such time as the holder may allow, in order to be charged as accepter. Rousch *v.* Duff, 35 Mo. 312, where the petition merely alleged presentment to the drawee, his promise to pay, and retention of the bill in his possession.

53. *California.*— Pitston *v.* Highton, (Cal. 1892) 31 Pac. 580; Barney *v.* Vigoreaux, 92 Cal. 631, 28 Pac. 678; Notman *v.* Green, 90 Cal. 172, 27 Pac. 157; Scroufe *v.* Clay, 71 Cal. 123, 11 Pac. 882; Roberts *v.* Treadwell, 50 Cal. 520; Davanay *v.* Eggenhoff, 43 Cal. 395; Frisch *v.* Caler, 21 Cal. 71.

Indiana.— Friddle *v.* Crane, 68 Ind. 583; Stafford *v.* Davidson, 47 Ind. 319; Pace *v.* Grove, 26 Ind. 26; Lawson *v.* Sherra, 21 Ind. 363.

Kentucky.—Fenwick *v.* Pearl, Hard. (Ky.) 6.

Montana.— Hershfield *v.* Aiken, 3 Mont. 442.

Nevada.— See Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

New York.— Hernandez *v.* Stilwell, 7 Daly (N. Y.) 360; Wright *v.* Deering, 2 Misc.

mediate holders[54] and one suing on an instrument made to him in his official capacity for the use of his successor in office need not negative payment to the latter.[55] Neither is it necessary to allege non-payment by a joint and several maker,[56] by an indorser not sued,[57] by a representative, not made a party, of a maker who predeceased his co-maker, defendant's testator,[58] or by a deceased partner, where a recovery is sought against the survivor on a firm note.[59] However, in an action on a note by a deceased maker, in the execution of which his wife improperly joined, non-payment by the husband in his lifetime must be averred;[60] and the drawer when seeking to recover of the accepter of a bill must allege not only non-payment by the latter, but also that because thereof he, the drawer, became liable and paid the bill.[61]

(B) *Sufficiency of Allegations.* The fact of non-payment will be deemed to be sufficiently shown, if facts are stated from which the default of the adverse party, and that there is an indebtedness from him to the adverse party can fairly be inferred,[62] but averments of a legal conclusion should be avoided.[63]

(C) *Aider of Omissions and Defects.* The omission to allege, or a defective

(N. Y.) 296, 21 N. Y. Suppl. 929, 50 N. Y. St. 328.

Oregon.—Williams *v.* Knighton, 1 Oreg. 234.

Pennsylvania.— See Penn Nat. Bank *v.* Kopitzsch Soap Co., 161 Pa. St. 134, 34 Wkly. Notes Cas. (Pa.) 447, 28 Atl. 1077.

Texas.—Whitaker *v.* Record, 25 Tex. Suppl. 382.

Mode of payment.—Where a note is given for the payment of a sum certain in money, with a permission to defendant to discharge it in bank paper, the declaration in an action thereon ought to contain an averment that it was not paid in bank paper. Campbell *v.* Weister, 1 Litt. (Ky.) 30.

54. The allegation of non-payment at the end of the declaration is sufficient. Robertson *v.* Hamet, 19 Ill. 161.

55. King *v.* Griffin, 6 Ala. 387.

56. Perkins *v.* Conley, 4 Blackf. (Ind.) 187.

57. Page *v.* Snow, 18 Mo. 126.

58. Newkirk *v.* Johnson, 5 Blackf. (Ind.) 362.

59. Silver *v.* Henderson, 3 McLean (U. S.) 165, 22 Fed. Cas. No. 12,854.

60. Brown *v.* Orr, 29 Cal. 120.

61. Smith *v.* Bryan, 33 N. C. 418.

62. Douthit *v.* Mohr, 116 Ind. 482, 18 N. E. 449; Downey *v.* Whittenberger, 60 Ind. 188; Deutsch *v.* Korsmeier, 59 Ind. 373; Womack *v.* Dunn, 9 Ind. 183; Evans *v.* Secrest, 3 Ind. 545; Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520; Fennell *v.* Morrison, 37 Tex. 156; Gillespie *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 448.

The following allegations have been held sufficient.— That "no part of said note, principal or interest has been paid" (Jones *v.* Frost, 28 Cal. 245); of a promise and failure (Roach *v.* Scogin, 2 Ark. 128) or refusal to pay (Rogers *v.* Lovett, 104 Ga. 665, 30 S. E. 801; Ahr *v.* Marx, 44 N. Y. App. Div. 391, 60 N. Y. Suppl. 1091 [*affirmed* in 167 N. Y. 582, 60 N. E. 1105]. But see Scroufe *v.* Clay, 71 Cal. 123, 11 Pac. 882, holding it insufficient to allege that defendant "has refused and still refuses to pay"); that "defendant did not pay the same" (Wilkins *v.* McGuire, 2 App. Cas. (D. C.) 448); of due presentment and dishonor (Ninimo *v.* Flanigan, 3 U. C. L. J. 8); of non-payment of judgment against the maker (Clifford *v.* Keating, 4 Ill. 250, an action against the indorser); an allegation on information and belief (Stanton *v.* Guinan, 91 Cal. 1, 27 Pac. 517); that the accepter, although often requested, has not paid to plaintiff the amount of an order and acceptance or any part thereof, and that there is due and unpaid upon the same the entire amount thereof (Superior *v.* Ripley, 138 U. S. 93, 11 S. Ct. 288, 34 L. ed. 914 [*affirming* 41 Fed. 113]).

An allegation that "defendant has not paid," etc., is not indefinite for the reason that there are other defendants in the cause. Sanford *v.* Litchenberger, 62 Nebr. 501, 87 N. W. 305.

In declaring against the drawer of an order the refusal of the drawee to pay is sufficiently alleged by an averment of a refusal to settle the order on presentation. Barker *v.* Seaman, 61 N. Y. 648.

The omission of the usual formal allegation "by means whereof, etc. said defendants then and there became indebted, etc.," is not bad on general demurrer. Adams *v.* McMillan, 8 Port. (Ala.) 445.

Redemption of coupon bond.— It is not necessary to allege that the bond from which interest coupons sued on were taken has not been redeemed. New South Brewing & Ice Co. *v.* Price, 21 Ky. L. Rep. 11, 50 S. W. 963.

Clerical omission.—See Notman *v.* Green, 90 Cal. 172, 27 Pac. 157, where the complaint was held insufficient, the pleader having evidently inadvertently stated that "no part of the principal sum mentioned in said promissory note . . . still remains due and unpaid."

63. Hershfield *v.* Aiken, 3 Mont. 442. As where it is averred that the note or the amount thereof is due. Roberts *v.* Treadwell, 50 Cal. 520; Frisch *v.* Caler, 21 Cal. 71.

allegation of non-payment, may be supplied or aided by other averments,[64] or by unchallenged proof of the fact,[65] or cured by verdict[66] or a judgment by default.[67]

(XIV) *As to Amount Due* — (A) *Necessary Allegations.* The amount claimed to be due from the adverse party must appear by direct averment or by implication in the body of the pleading,[68] or in the prayer or demand for judgment,[69] and with reasonable certainty.[70]

(B) *Sufficiency of Allegations.* Unless otherwise provided by statute, the pleading will be deemed sufficient if the facts set forth show an indebtedness of defendant to plaintiff, on the instrument in suit, in a specific amount.[71]

64. A defective allegation is cured by a sufficient allegation of a breach at the end of the declaration. Somerville *v.* Grim, 17 W. Va. 803.

65. Wright *v.* Deering, 2 Misc. (N. Y.) 296, 21 N. Y. Suppl. 929, 50 N. Y. St. 328.

66. Howorth *v.* Scarce, 29 Ind. 278; Crocker *v.* Gilbert, 9 Cush. (Mass.) 131.

67. Thus an allegation that a sum stated "is now due and owing," although a legal conclusion, is sufficient to sustain a judgment by default. Penrose *v.* Winter, 135 Cal. 289, 67 Pac. 772.

68. *Mississippi.*— Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

Nebraska.— Spellman *v.* Frank, 18 Nebr. 110, 24 N. W. 442; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306. And see Collingwood *v.* Merchants' Bank, 15 Nebr. 118, 17 N. W. 359.

Pennsylvania.— Penn Nat. Bank *v.* Kopitzsch Soap Co., 161 Pa. St. 134, 34 Wkly. Notes Cas. (Pa.) 447, 28 Atl. 1077.

Texas.— Wood *v.* Evans, 43 Tex. 175.

United States.— Brownson *v.* Wallace, 4 Blatchf. (U. S.) 465, 4 Fed. Cas. No. 2,042.

69. Archer *v.* Ward, 9 Gratt. (Va.) 622.

Under the Missouri code, art. 6, § 1, providing that, where a recovery of money is demanded, the amount thereof shall be stated, or such facts be given as will enable the court to ascertain the amount demanded, in an action on a note it is sufficient to pray judgment "for the amount of the promissory note, with interest." Page *v.* Snow, 18 Mo. 126.

Alleging less than demanded.—An allegation of damages in a sum less than the amount of the note may be disregarded where judgment for such amount is specifically demanded. French *v.* Davis, 38 Miss. 218.

Sufficiency.—A complaint on notes aggregating three hundred and ninety dollars and eighty cents and concluding "Plaintiff, therefore, demands judgment for 800 dollars" is a sufficient demand of judgment for a given sum. Gage *v.* Woodruff, 13 Ind. 293.

70. Uncertainty.— Where the statement of the sum promised to be paid by the note sued on is illegible, as where a word may be read "four," "five," or "fine," a demurrer should be sustained. Noel *v.* Clark, 3 Ark. 432, where the defect was cured by inspection of the note placed in record on oyer being craved.

Actual liability not expressed on face of note.— Where an indorser declines to indorse for the whole amount expressed in an accommodation note, but becomes liable for a less amount the note may be declared on as being for such lesser sum. Douglass *v.* Wilkinson, 17 Wend. (N. Y.) 431 [*affirmed* in 22 Wend. (N. Y.) 559]. See also Merchants', etc., Bank *v.* Evans, 9 W. Va. 373. So an arbitration note, indorsed down, by the arbitrators, to the amount of the award, may be declared on as a note for the sum expressed on its face. Gregory *v.* Allyn, 10 Conn. 133.

Dollar-mark.—Expression of the amount in figures prefixed by the dollar-mark is insufficient. Clark *v.* Stoughton, 18 Vt. 50, 44 Am. Dec. 361.

Foreign money.— In an action on a note payable in pounds sterling, it is not necessary to aver or prove the value of such pound in money of the United States, but the court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by statute. King *v.* Hamilton, 8 Sawy. (U. S.) 167, 12 Fed. 478. See also Gibb *v.* Morisette, 4 U. C. Q. B. 205, where an averment of a promise to pay the sum of two hundred louis current money, meaning thereby the sum of two hundred pounds of lawful money of Canada, was held good. If the declaration on a protested bill state that the bill was for so much sterling money, "for value in current money there received," without naming the sum of current money, plaintiff can only recover the sum mentioned in the bill, as current money. Proudfit *v.* Murray, 1 Call (Va.) 394. In an action on a bill for sterling money, the damages must also be expressly laid in the declaration in that money. Scott *v.* Call, 1 Wash. (Va.) 115.

71. *Alabama.*— Cumming *v.* Richards, 32 Ala. 459.

Georgia.— Rogers *v.* Lovett, 104 Ga. 665, 30 S. E. 801.

Illinois.— Wadsworth *v.* Ætna Nat. Bank, 84 Ill. 272.

Massachusetts.— Moore *v.* Royce, 10 Allen (Mass.) 556.

Nebraska.— Dodds *v.* McCormick Harvesting Mach. Co., 62 Nebr. 759, 87 N. W. 911; Downing *v.* Glenn, 26 Nebr. 323, 41 N. W. 1119.

New York.— Keteltas *v.* Myers, 19 N. Y. 231 [*reversing* 1 Abb. Pr. (N. Y.) 403]; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Smith *v.* Fellows, 26 Hun (N. Y.) 384; Oishei *v.* Craven, 11 Misc. (N. Y.) 139, 31 N. Y. Suppl. 1021, 65 N. Y. St. 114, 24 N. Y. Civ. Proc. 301.

(c) *Setting Out Credits.* Credits being matters of defense need not be set forth by plaintiff.[72]

(xv) *As to Interest*—(a) *Stipulation in Instrument*—(1) Legal Rate—(a) In General. Where the instrument contains a stipulation for the payment of interest before maturity, the interest is a part of the contract and must be declared for,[73] as a single cause of action,[74] specifying the principal and interest separately;[75] but the failure to negative payment of the stipulated interest cannot be reached by general demurrer,[76] nor is an objection for that reason available after default.[77]

(b) Omission of Stipulation. A promissory note containing immaterial omissions in the stipulation respecting interest may be declared on according to the evident intention of the parties thereto;[78] and it has been held that the failure of such a note to contain a stipulation for interest is remedied by recitals in a mortgage which was given to secure it, where both instruments are attached to a bill for foreclosure.[79]

(2) Special Agreement. When by agreement as permitted by statute a note bears interest at a rate greater than the ordinary legal rate a breach of the agreement must be assigned,[80] and if the promise is to pay more than the ordinary rate after maturity by way of penalty there must be an allegation of special damage.[81]

Texas.— Page *v.* Carson, (Tex. 1891) 16 S. W. 1036.

Several notes.—A complaint on three sealed notes, which alleges and demands at the close the aggregate amount sued for, is not demurrable because it fails to give, at the close of each of the three separate causes of action into which the pleading is divided, the particular sum claimed in that clause. Holland *v.* Kemp, 27 S. C. 623, 3 S. E. 83.

Legal conclusion.—An averment that a certain amount is due is insufficient, because a legal conclusion. Frisch *v.* Caler, 21 Cal. 71. But see Creecy *v.* Joy, 40 Oreg. 28, 66 Pac. 295, holding that such an averment, although perhaps a conclusion of law, is no more than a defective statement of a material allegation which is waived by answering over.

72. Hendrie *v.* Rippey, 9 Iowa 351; McRea *v.* Purvis, 12 La. Ann. 85.

In Ohio a petition is not defective for failure to allege that a copy of the note is set forth, "with all the indorsements and credits thereon," as, in the absence of such allegation, it will be presumed that there are no indorsements or credits. Ives *v.* Strickland, 6 Ohio Dec. (Reprint) 810, 8 Am. L. Rec. 309; Ingersoll *v.* Craw, 4 Ohio Dec. (Reprint) 76, Clev. L. Rep. 1.

Certainty.—A complaint setting forth a copy of the note sued on, showing indorsements of payments of a date later than that of the note, and alleging payment of a sum equal to the amounts indorsed, is not uncertain because conveying the idea that the indorsements were not part of the note as originally made but were added subsequently. Riverside First Nat. Bank *v.* Holt, 87 Cal. 158, 25 Pac. 272.

73. Causin *v.* Taylor, 4 Ark. 408; Brooks *v.* Palmer, 4 Ark. 159; Chinn *v.* Hamilton, Hempst. (U. S.) 438, 5 Fed. Cas. No. 2,685. See also Talcott *v.* Marston, 3 Minn. 339.

Form of declaration.—A formal demand of the amount claimed in the beginning of the declaration is usual, but the omission of it is not cause of demurrer, or fatal on error. Hence in declaring on a note bearing interest it is not necessary to demand the interest in the beginning of the declaration. Mitchell *v.* Conley, 13 Ark. 414.

Summary proceedings.— In petition and summons on a note bearing interest, it is sufficient to set out the note, aver that the debt remains unpaid, and demand judgment for the debt, damages, and costs. It is not necessary specially to negative the payment of the interest. Cail *v.* Brookfield, 4 Ark. 554.

74. Daniels *v.* Bradley, 4 Minn. 158.

75. Butler *v.* Limerick, Minor (Ala.) 115. See also Boddie *v.* Ely, 3 Stew. (Ala.) 182.

76. Brooks *v.* Palmer, 4 Ark. 159.

77. Causin *v.* Taylor, 4 Ark. 408.

78. Fitzgerald *v.* Lorenz, 181 Ill. 411, 54 N. E. 1029 (where a note reading "interest six per" was declared on as payable with interest at six per cent per annum); Ohm *v.* Yung, 63 Ind. 432 (an action on a note expressed to pay a specified sum "with ten per cent" in which no allegation or proof respecting the omission of the word "interest," after the words "per cent," was held necessary).

In Pennsylvania, there being no court of chancery, where an agreement for interest has been omitted from the note by mistake, plaintiff may declare on the note according to its equitable effect. Reichart *v.* Beidleman, 17 Serg. & R. (Pa.) 41.

79. Prichard *v.* Miller, 86 Ala. 500, 5 So. 784.

80. Clary *v.* Morehouse, 3 Ark. 261.

81. Wilson *v.* Dean, 10 Iowa 432; Talcott *v.* Marston, 3 Minn. 339. See also Draper *v.* Horton, 22 R. I. 592, 48 Atl. 945.

It seems, however, that the note and the interest which has accrued after maturity constitute but a single cause of action.[82]

(3) Illegal Rate. If the instrument provides for illegal interest it may be declared on as without interest.[83]

(B) *Interest as Damages* — (1) In General. Where the instrument contains no stipulation as to interest, it is unnecessary to demand the interest that is due or to negative its payment. The debt alone should be declared for, and interest is recoverable as damages for its detention.[84]

(2) Foreign Laws. Where the rate of interest sought to be recovered is governed by the laws of a foreign state where the note was made, such laws must be pleaded in the same manner as any other necessary fact,[85] and with reasonable certainty,[86] as well as the fact that such laws were in force at the time the instrument was made,[87] otherwise the rate of interest recoverable will be that of the state where the action is brought.[88]

(3) Amount Claimed. The amount claimed as interest should be specified or facts should be stated from which the amount can be ascertained by calculation.[89]

(XVI) *As to Attorney's Fees* — (A) *In General.* A stipulation for the payment of attorney's fees must be specially pleaded,[90] although plaintiff need not

82. Daniels *v.* Bradley, 4 Minn. 158, where it was held that the statement as to interest could not be reached by demurrer, but that the remedy was by motion to strike.

83. Justice *v.* Charles, 1 Ind. 32, Smith (Ind.) 67.

84. State Bank *v.* Clark, 2 Ark. 375; Hall *v.* Foster, 114 Mass. 18; Chinn *v.* Hamilton, Hempst. (U. S.) 438, 5 Fed. Cas. No. 2,685.

Interest provided for in note.—Where a petition on a note drawing interest sets forth in full a copy of the note, alleges that the amount specified therein is wholly due and unpaid, and asks "judgment for the amount due by said note," interest accrued on the note at the date of the rendition of judgment may be included therein. Smith *v.* Watson, 28 Iowa 218.

85. Surlott *v.* Pratt, 3 A. K. Marsh. (Ky.) 174; Thomas *v.* Bruce, 20 Ky. L. Rep. 1818, 50 S. W. 63; Cummings *v.* Wagstaff, 1 Baxt. (Tenn.) 399.

Period covered.—An allegation that the laws of the state where the note was executed authorized contracts for the payment of the rate specified in the note, without stating "until paid," authorized a recovery of that rate to the time of maturity only. Thomas *v.* Bruce, 20 Ky. L. Rep. 1818, 50 S. W. 63.

86. Brackenridge *v.* Baxton, 5 Ind. 501.

87. Cummings *v.* Wagstaff, 1 Baxt. (Tenn.) 399.

88. Where a note is declared on as made at Fayetteville, it is to be intended that Fayetteville is in the state where suit is brought, and hence that interest should be recovered under the laws of that state. Garner *v.* Tiffany, Minor (Ala.) 167.

89. Gottfried *v.* German Nat. Bank, 91 Ill. 75.

Sufficient allegation.—An allegation that the note in suit bears interest at a stated rate per annum sufficiently describes in this respect a note bearing interest at a rate stated, payable annually (Rees *v.* Clark, (Tex. Civ. App. 1897) 39 S. W. 160); and a declaration alleging a note to be payable one day after date, with interest at a specified per cent until paid, and that defendant became liable to pay such interest from the time the note fell due until paid, is good against a demurrer (Watkins *v.* Weaver, 4 Ark. 556).

Allegation construed.—A claim of the amount of the note with interest is a claim of interest from the time of the commencement of the action only. Barton *v.* Smith, 7 Iowa 85.

In the federal courts a demand for judgment for the amount of the note sued on and interest in the form permitted by the New York code is not a sufficient demand of damages. Brownson *v.* Wallace, 4 Blatchf. (U. S.) 465, 4 Fed. Cas. No. 2,042.

90. Prescott *v.* Grady, 91 Cal. 518, 27 Pac. 755; Wolff *v.* Dorsey, 38 Ill. App. 303; Altman *v.* Fowler, 70 Mich. 57, 37 N. W. 708.

Aider by prayer.— The necessary allegation of a promise to pay such fees is not supplied by a prayer therefor in the petition. Williams *v.* Harrison, (Tex. Civ. App. 1901) 65 S. W. 884.

The incorporation in the petition of the note containing the stipulation is sufficient. Chowning *v.* Chowning, 3 Tex. App. Civ. Cas. § 150.

Sufficiency to charge indorser.—A count in a declaration alleging that a third person executed his certain note, payable to the order of defendant; that defendant indorsed and delivered the note to a certain bank, whereby she promised to pay the bank one hundred dollars for attorney's fees in the event the note was not paid at maturity, and was placed in the hands of an attorney for collection; that the note was not paid at maturity, and had been placed in the hands of an attorney for collection — does not show a liability for attorney's fees on the part of defendant to the bank, or to one claiming

allege that they are due,[91] and a complaint otherwise good is not invalidated by averments respecting attorney's fees for which defendant is not liable,[92] or where the stipulation for their payment is invalid.[93]

(B) *Resort to Legal Proceedings.* If the collection of the note by legal proceedings is a condition of liability for attorney's fees a complaint on the note which also seeks to recover such fees need not aver a resort to legal proceedings.[94]

(C) *Employment of Attorney.* If the liability depends upon the employment of an attorney, an averment of such employment is absolutely necessary,[95] unless the record shows the employment of an attorney.[96] If the amount of the fees is fixed by the stipulation, or is deducible from the note itself, it is sufficient to state the amount, without averring its reasonableness or the value of the attorney's services.[97]

(D) *Amount of Fees Not Fixed.* If the amount is not fixed, the reasonable value of the attorney's services should be averred[98] or it will be sufficient to allege a breach of the agreement and to state the damages generally, leaving the question of value to the proof.[99]

(XVII) *As to Protest Fees.* To authorize a recovery of protest fees the fact of protest,[1] the necessity therefor,[2] and the amount of the protest fees or

through it, since an ordinary indorsement of a note does not carry with it an original obligation to pay attorney's fees for collecting it. Robinson *v.* Aird, (Fla. 1901) 29 So. 633.

Prerequisites.—Where no presumption arises that a plea may be filed and not sustained it is error to refuse to permit an amendment of the prayer by adding a claim for attorney's fees — the statute providing for a recovery of such fees only where a plea filed is not sustained. Baxley Banking Co. *v.* Carter, 112 Ga. 529, 37 S. E. 728.

Supplemental complaint.—Where after suit the maker pays the note to one to whom the payee has assigned it as security a supplemental complaint claiming attorney's fees provided for is insufficient, because not showing facts accruing since the original pleadings were filed. Davis *v.* Erickson, 3 Wash. 654, 29 Pac. 86.

91. Smiley *v.* Meir, 47 Ind. 559.

92. Taylor *v.* Hearn, 131 Ind. 537, 31 N. E. 201.

93. Stingley *v.* Lafayette Second Nat. Bank, 42 Ind. 580.

94. Smiley *v.* Meir, 47 Ind. 559; Kerr *v.* Morrison, (Tex. Civ. App. 1894) 25 S. W. 1011; Dignowity *v.* Staacke, (Tex. Civ. App. 1894) 25 S. W. 824; McKelligon *v.* State Nat. Bank, (Tex. Civ. App. 1894) 24 S. W. 688.

95. Maddox *v.* Craig, 80 Tex. 600, 16 S. W. 328; Smith *v.* Board, 21 Tex. Civ. App. 213, 51 S. W. 520; Lay *v.* Cardwell, (Tex. Civ. App. 1896) 33 S. W. 595; Jones *v.* Smith, 4 Tex. Civ. App. 353, 26 S. W. 240.

In Indiana there may be a recovery, although there is no direct averment of the employment of an attorney. Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 223.

Sufficient averment.—A petition signed by plaintiff's attorneys and alleging that the note was given to an attorney for collection sufficiently shows that fact without further proof thereof. Roe *v.* Bridges, (Tex. Civ. App. 1895) 31 S. W. 317.

96. Smiley *v.* Meir, 47 Ind. 559.

97. Cowan *v.* Campbell, 131 Ala. 211, 31 So. 429; Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24; Smiley *v.* Meir, 47 Ind. 559.

A petition which admits part payment, and then alleges that the note was placed in the hands of attorneys for collection, whereby ten per cent attorney's fees on the face of the note became due and payable, as stipulated for therein, is broad enough to admit evidence that the part payment was made after the notes were placed in the attorney's hands. Kendall *v.* Page, 83 Tex. 131, 18 S. W. 333.

98. **Necessity of separate count.**—An agreement to pay a reasonable attorney's fee may be enforced by averring the value of the reasonable attorney's services in the same paragraph or count of the complaint as that on the note itself. It need not be set out as a separate cause of action. Mathews *v.* Norman, 42 Ind. 176.

99. Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222. See also Glenn *v.* Porter, 72 Ind. 525 (holding that the value of attorney's fees may be included in the judgment, although no allegation of their value or specific claim for their recovery is contained in the complaint); Boyd *v.* Smith, (Ind. App. 1894) 39 N. E. 208 (holding that in an action on a note providing for an attorney's fee, on which there is due less than two hundred dollars, where the complaint alleges a reasonable attorney's fee to be thirty dollars, and demands generally a judgment for three hundred dollars, plaintiff is not limited in his right to recover such fee to thirty dollars).

1. Jordan *v.* Dell, 8 Port. (Ala.) 53; Rose *v.* Perry, 8 Yerg. (Tenn.) 156. See also Tinsley *v.* Penniman, 8 Tex. Civ. App. 495, 29 S. W. 175.

2. Cramer *v.* Eagle Mfg. Co., 23 Kan. 399.

Sufficiency of allegation.—An allegation of two indorsements, a demand, and refusal of payment, and notice to the indorsers, is sufficient to authorize a recovery of protest fees

charges[8] must be appropriately alleged; but it has been held that the claims for such fees or charges need not be set forth as a separate and distinct cause of action.[4]

(XVIII) *As to Statutory Damages — Protested Bills.* While it has been held that statutory damages on protested bills of exchange need not be specially demanded,[5] it has also been held that they must be specifically claimed, but need not be set forth as a separate and distinct cause of action.[6] However, as the fact of protest is indispensable to the right of recovery that fact must be averred.[7]

(XIX) *As to Revenue Stamp.* A revenue stamp is no part of a note or bill, and in declaring on such an instrument, it need not be alleged that it was properly stamped, nor need a copy of the stamp be set out.[8]

(XX) *As to Mistake.* A note or bill may be declared on according to its true intent and meaning without adverting to mistakes or omissions occurring therein,[9] unless the error is of such a character as to require the mistake to be shown as a fact.[10]

c. Annexation and Filing — (I) *In General.* In a number of the states there exists provisions to the effect that where an action is founded on a written instrument charged to have been executed by defendant, the instrument itself or a copy thereof must be attached to or filed with the declaration or like pleading, or that it must be both attached and filed, and substantial compliance with such requirements is necessary to the sufficiency of the declaration or complaint.[11]

under Kan. Gen. Stat. c. 116, § 114. Knowles *v.* Armstrong, 15 Kan. 371.

3. Wilson *v.* Lenox, 1 Cranch (U. S.) 193, 2 L. ed. 79. See also Tinsley *v.* Penniman, 8 Tex. Civ. App. 495, 29 S. W. 175.

4. Summit County Bank *v.* Smith, 1 Handy (Ohio) 575, 12 Ohio Dec. (Reprint) 297.

5. Lloyd *v.* McGarr, 3 Pa. St. 474, an action on a foreign bill.

6. Summit County Bank *v.* Smith, 1 Handy (Ohio) 575, 12 Ohio Dec. (Reprint) 297.

7. French *v.* Davis, 38 Miss. 218; Thompson *v.* Wright, 3 Ohio Dec. (Reprint) 337.

8. *Illinois.*— See Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840.

Indiana.— Smith *v.* Hunter, 33 Ind. 106.

Iowa.— Knight *v.* Fox, 1 Morr. (Iowa) 305.

Maryland.— Ebert *v.* Gitt, (Md. 1902) 52 Atl. 900.

Massachusetts.— Trull *v.* Moulton, 12 Allen (Mass.) 396.

Minnesota.— Cabbott *v.* Radford, 17 Minn. 296. See also Owsley *v.* Greenwood, 18 Minn. 386.

Texas.— Giles *v.* State, (Tex. Crim. 1900) 57 S. W. 99.

United States.— Campbell *v.* Wilcox, 10 Wall. (U. S.) 421, 19 L. ed. 973.

9. Error in date.— A note mistakenly dated as of the previous year may be declared on according to its true date, without any averment of the mistake. Phœnix Ins. Co. *v.* Walden, Anth. N. P. 172. And in petition and summons by an administrator on a note bearing date subsequent to the date of the letters of administration, it is not necessary, as in an action at common law, to aver that the note was incorrectly dated. Hamilton *v.* Stewart, 5 Mo. 266.

Maturity of note.—When a note is intended to read, "twelve months after I promise," but the word "date" is omitted, the complaint in an action thereon need not allege the omission and the intent of the parties, if the note itself be set out. McPherson *v.* Biscoe, 3 Ark. 90.

Error in the erasure of an indorser's signature may as against him be shown without being alleged. Any circumstance showing that the erasure affected or destroyed his liability must be pleaded by him. Cantrelle *v.* Percy, 17 La. 520.

Amount due.—Where by mistake but part of the amount due is sued for and recovered, in a subsequent action for the remainder the plaintiff need only allege the amount due, without averring the mistake respecting his former claim. Conklin *v.* Field, 37 How. Pr. (N. Y.) 455.

10. Error in signature.—A declaration in an action against Downer & Co. is sufficient which describes the note sued on as being the note of that firm, but alleges that the note was by mistake signed Downer & Dana, although it ought to have been signed Downer & Co., as the note was given for the benefit of the latter firm, and for property which went to their use. Miner *v.* Downer, 20 Vt. 461.

Erroneous designation of payee.—A complaint in an action on a note alleging that at the time of its execution to plaintiff defendant, through inadvertence and the mutual mistake of parties, wrote therein as payee the name of defendant's father instead of plaintiff's name states sufficiently as against a general demurrer that the mistake was a mistake of fact. Smith *v.* Walker, 7 Ind. App. 614, 34 N. E. 843.

11. *Indiana.*— Rairden *v.* Winstandley, 99 Ind. 600; Randles *v.* Randles, 39 Ind. 555; Sayres *v.* Linkhart, 25 Ind. 145.

However, matters which properly constitute no part of the instrument may be disregarded.[12]

(II) *IDENTIFICATION OF INSTRUMENT.* The instrument filed must be referred to and identified by the complaint that it may appear that the instrument on which that pleading is based and the instrument or copy filed are the same.[13]

(III) *REFERENCE TO COPY ANNEXED OR FILED.* In some jurisdictions the instrument or copy thereof filed or annexed is not regarded as a part of the pleading or record and will not aid plaintiff's pleading, which must be complete in itself.[14] In others the note when filed becomes a part of the record.[15]

Kentucky.— Burton *v.* White, 1 Bush (Ky.) 9.

Missouri.— Missouri Pac. R. Co. *v.* Atkinson, 17 Mo. App. 484.

Ohio.— Stewart *v.* Big Sund Iron Co., 2 Ohio Dec. (Reprint) 150, 1 West. L. Month. 583.

Oklahoma.— Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824.

See 7 Cent. Dig. tit. "Bills and Notes," § 1448 *et seq.*

In Kansas, under a code section requiring a copy of the note to be "attached to and filed with the pleading" and another section authorizing plaintiff "to give a copy of the instrument" and state the amount due thereon which he claims, it is sufficient to set out the note in full without attaching it. Budd *v.* Kramer, 14 Kan. 101.

An action will not be dismissed for failure to file the note with the petition, since the note forms no part of the petition, and is when filed but an exhibit which the statute requires to be filed with the petition. Collum *v.* Fahrner, 3 Mo. App. 110.

Attaching a copy of a note to the back of a petition sufficiently sets forth the instrument sued on, although it is not referred to by letters or figures, so as to designate it as part of the petition. Ives *v.* Strickland, 6 Ohio Dec. (Reprint) 810, 8 Am. L. Rec. 310. 310.

Attachment to each paragraph.—A copy note filed with and made part of each paragraph of the complaint is sufficiently described. Firestone *v.* Daniels, 71 Ind. 570.

If profert is duly made, the omission to file the instrument or a copy is unimportant. Williams *v.* Bryan, 5 Coldw. (Tenn.) 104; Anderson *v.* Allison, 2 Head (Tenn.) 122.

If the instrument sued on be set out in the petition it will be sufficient, without filing a separate copy. Bostwick *v.* Fleming, 2 Ark. 462.

Several notes.—A complaint in two paragraphs, on two similar notes, must be accompanied with a copy of each note, filed with the paragraph declaring on it. Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515.

In an action on a large number of bank-bills of different denominations it is sufficient to attach one of each denomination. Tarbell *v.* Stevens, 7 Iowa 163.

Where no copy of the instrument appears of record an averment that a copy was filed will not cure the omission. Randles *v.* Randles, 39 Ind. 555; Erhardt *v.* Pfeiffer, (Ind. App. 1902) 64 N. E. 885.

Where the petition is amended a properly verified copy of the note may be filed with the amendment. Gewe *v.* Hanszen, 85 Mo. App. 136.

12. *Arkansas.*— Hall *v.* Bonville, 36 Ark. 491; Dillard *v.* Noel, 2 Ark. 449, credits indorsed on the note.

Indiana.— Keith *v.* Champer, 69 Ind. 477; Treadway *v.* Cobb, 18 Ind. 36, assignments of note.

Iowa.— Dunning *v.* Rumbaugh, 36 Iowa 566, agreement having note written on its back.

Kentucky.— Maxwell *v.* Goodrum, 10 B. Mon. (Ky.) 286, seal affixed to original.

Massachusetts.— Way *v.* Batchelder, 129 Mass. 361, a memorandum at the bottom of a note written before delivery.

See 7 Cent. Dig. tit. "Bills and Notes," § 1450.

13. Stafford *v.* Davidson, 47 Ind. 319; Bennett *v.* Wainwright, 16 Ind. 211. See also Kunkler *v.* Turnting, 10 Ind. 418.

"Herewith filed."— The copy filed is sufficiently referred to and identified by a statement, following a description of the instrument, that a copy thereof is "herewith filed," or by equivalent language, where the note or other writing actually filed corresponds with that described in the complaint. Dunkle *v.* Nichols, 101 Ind. 473; Whitworth *v.* Malcomb, 82 Ind. 454; Carper *v.* Kitt, 71 Ind. 24; Friddle *v.* Crane, 68 Ind. 583; Reed *v.* Broadbelt, 68 Ind. 91; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305; Totten *v.* Cooke, 2 Metc. (Ky.) 275.

Determination of identity.— The proper method of raising the question whether the copy filed for suit is at variance with the original note is by rule to produce the original for inspection and comparison by the court. Bancroft *v.* Haines, 2 Pa. Dist. 373.

14. Harlow *v.* Boswell, 15 Ill. 56; Bogardus *v.* Trial, 2 Ill. 63; Gale *v.* Lancaster, 44 Miss. 413; Blackwell *v.* Reid, 41 Miss. 102 (decided prior to Miss. Code, § 1540). But see Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137 [*distinguishing* Gale *v.* Lancaster, 44 Miss. 413]; Phillips *v.* Evans, 64 Mo. 17; Baker *v.* Berry, 37 Mo. 306; Deitz *v.* Corwin, 35 Mo. 376; Chambers *v.* Carthel, 35 Mo. 374; Commercial Bank *v.* Norton, 1 Hill (N. Y.) 501.

15. Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137 [*distinguishing* Gale *v.* Lancaster, 44 Miss.

(iv) *Excusing Omission to File or Annex.* The omission to file or annex the note or a copy may be excused, where the original has been lost or destroyed or the failure to produce it is otherwise satisfactorily explained.[16]

(v) *Waiver and Aider.* The failure to attach or file the instrument may be waived by pleading to the merits,[17] by admitting the execution of the writing in question,[18] or by the omission to make seasonable objection.[19] Likewise such failure may be cured by verdict.[20]

d. Setting Out Instrument and Claiming Specific Sum. In some of the states plaintiff may set forth a copy of the instrument and state that there is due to him thereon from the adverse party a specified sum which he claims, and this is equivalent to setting forth the instrument according to its legal effect.[21] This mode of pleading is permissive and does not preclude a resort to other modes.[22]

e. Profert and Oyer — (i) *Profert.* At common law, an unsealed promissory note being neither a specialty nor a debt, but merely evidence of a collateral liability arising out of a simple contract, no profert of it was required to be made or laid, nor was it necessary to assign any reason for the omission.[23] In some jurisdictions, however, by statute, plaintiff is required to produce the note and make profert in his declaration.[24]

413, decided prior to Miss. Code, § 1540]. See also Arkansas City First Nat. Bank *v.* Jones, 2 Okla. 353, 37 Pac. 824, where it is said that this is the rule in Indiana.

16. Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057.

Destroyed instrument.— If a copy of the note in suit is filed with the complaint, no allegation in respect to its destruction is necessary. Cunningham *v.* Hoff, 118 Ind. 263, 20 N. E. 756.

Possession of adverse party.—An allegation that the note is in possession of the maker sufficiently excuses a failure to exhibit a copy of it with the complaint. Keesling *v.* Watson, 91 Ind. 578.

Note held in escrow.—The Missouri statute does not apply to a suit on a note held in escrow to await the performance of certain conditions which plaintiff claims have been performed. Missouri Pac. R. Co. *v.* Atkinson, 17 Mo. App. 484.

17. White *v.* Collier, 5 Mo. 82.

18. Cummings *v.* Kohn, 12 Mo. App. 585.

19. Galvin *v.* Woollen, 66 Ind. 464; Peterson *v.* Allen, 12 Iowa 366.

20. Galvin *v.* Woollen, 66 Ind. 464; Eigenmann *v.* Backof, 56 Ind. 594; Purdue *v.* Stevenson, 54 Ind. 161; Westfall *v.* Stark, 24 Ind. 377.

But where the defect has been demurred to before verdict the rendition of a verdict will not cure it. Rairden *v.* Winstandley, 99 Ind. 600.

21. *Nebraska.*— Collingwood *v.* Merchants' Bank, 15 Nebr. 118, 17 N. W. 359; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306.

New York.— Keteltas *v.* Myers, 19 N. Y. 231 [*reversing* 3 E. D. Smith (N. Y.) 83, 1 Abb. Pr. (N. Y.) 403]; Hendricks *v.* Wolff, 49 Hun (N. Y.) 606, 1 N. Y. Suppl. 607, 16 N. Y. St. 1014, 14 N. Y. Civ. Proc. 428; Thorn *v.* Alvord, 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587 [*affirmed* in 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1147]; Greenbury *v.* Wilkins, 9 Abb. Pr. (N. Y.) 206 note; Marshall *v.* Rockwood, 12 How. Pr. (N. Y.) 452.

South Carolina.— Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188.

South Dakota.— Scott *v.* Esterbrooks, 6 S. D. 253, 60 N. W. 850.

Wisconsin.— Leggett *v.* Jones, 10 Wis. 34.

In Alabama a declaration on a promissory note need only describe the note and allege non-payment. Adams *v.* McMillan, 8 Port. (Ala.) 445.

In Kansas it is sufficient to attach the instrument and by reference make it a part of the pleading. Budd *v.* Kramer, 14 Kan. 101.

In Nebraska it is sufficient to attach a copy of the note to the pleading. Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848; Gage *v.* Roberts, 12 Nebr. 276, 11 N. W. 306.

Under the Massachusetts practice act it was sufficient to set out a copy of the instrument. Lincoln *v.* Butler, 14 Gray (Mass.) 129.

Where the copy of a destroyed note is set forth its destruction need not be averred. Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449.

22. Collingwood *v.* Merchants' Bank, 15 Nebr. 118, 17 N. W. 359.

23. Hinsdale *v.* Miles, 5 Conn. 331.

It is sufficient excuse for the omission to make profert of a single bill to allege that defendant wrongfully and illegally obtained possession of the bill from plaintiff's attorney, and on demand refused to return it to plaintiff. Robinson *v.* Curry, 6 Ala. 842.

24. Merchant *v.* Slater, 6 Ark. 529; Beebe *v.* Real Estate Bank, 4 Ark. 546; Buckner *v.* Real Estate Bank, 4 Ark. 440; Beebe *v.* Real Estate Bank, 4 Ark. 124; Smith *v.* Simms, 9 Ga. 418; Anderson *v.* Allison, 2 Head (Tenn.) 122; Everly *v.* Marable, 2 Yerg. (Tenn.) 113.

Where there are two counts on two notes,

(II) *OYER.* Technically oyer cannot be craved of an unsealed promissory note,[25] although in some jurisdictions it is permitted,[26] or at least in its discretion the court may grant the request;[27] and when granted the instrument becomes a part of the declaration.[28]

f. Causes and Counts — (I) *SINGLE CAUSE AND COUNT* — (A) *In General.* In some jurisdictions, in an action on several notes or bills to which the parties are the same, they are regarded as a single cause of action embracing several items, which may be stated in a single count,[29] so where several instalments of the instrument are sued for,[30] where distinct defaults have occurred according to its tenor,[31] or where parties to the note are sought to be held in different capacities,[32] although where a single cause of action is erroneously set forth in separate counts, after a general verdict they may be treated as one.[33]

(B) *Unnecessary Averments.* A complaint which unnecessarily recites facts as to the consideration of the note sued on, or contains a history of the transaction out of which the note grew, or other irrelevant matter, and which also sets out the note upon which the recovery is sought, states but a single cause of action.[34]

profert of both at the conclusion of the last count is sufficient. Hynson *v.* Ruddell, 1 Ark. 33.

25. Gatton *v.* Dimmitt, 27 Ill. 400; Chapman *v.* Harper, 7 Blackf. (Ind.) 333; Spaulding *v.* Evans, 2 McLean (U. S.) 139, 22 Fed. Cas. No. 13,215.

26. Brown *v.* Peirce, 2 Root (Conn.) 95; Anderson *v.* Allison, 2 Head (Tenn.) 122. See also Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 449, also holding that where oyer is craved of the note declared on, and it is spread upon the record, but oyer is not craved of the indorsements, the indorsements make no part of the record, notwithstanding the clerk may have copied the same into another part of the record.

Under the Louisiana code of practice oyer may be craved, when the note is not annexed. Lee *v.* Lacoste, 3 La. Ann. 223.

In Tennessee if plaintiff fails to file the notes sued on defendant may have his demand of oyer entered and have the judgment of the court whether he is bound to answer until the notes are filed. Anderson *v.* Allison, 2 Head (Tenn.) 122.

In order to take advantage on demurrer of a variance between the note set out in the declarations and the copy of the note filed therewith, oyer should be craved and the note set out *in hæc verba.* Harlow *v.* Boswell, 15 Ill. 56; Bogardus *v.* Trial, 2 Ill. 63.

Effort of failure to crave oyer.— The court will not take judicial notice of the writing sued on unless oyer of it is prayed. Stapp *v.* Lapsley, Litt. Sel. Cas. (Ky.) 238.

27. Chapman *v.* Harper, 7 Blackf. (Ind.) 333.

28. Chapman *v.* Harper, 7 Blackf. (Ind.) 333.

Where oyer is granted of an instrument by filing it it becomes a part of the record without being set out in any pleading. Hanly *v.* Real Estate Bank, 4 Ark. 598.

29. *Alabama.*— Bird *v.* Daniel, 9 Ala. 302; Dade *v.* Bishop, Minor (Ala.) 263.

Connecticut.— Morse *v.* Frost, 54 Conn. 84, 6 Atl. 182.

Illinois.— Godfrey *v.* Buckmaster, 2 Ill. 447.

Indiana.— Ball *v.* Nash, 55 Ind. 9.

Iowa.— Ragan *v.* Day, 46 Iowa 239; Merritt *v.* Nihart, 11 Iowa 57; Stadler *v.* Parmlee, 10 Iowa 23.

South Carolina.— Latimer *v.* Mahaffey, 30 S. C. 612, 8 S. E. 642; Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639.

Sufficiency.—A count on several notes which alleges that they bear the same date, stating it, the time of payment, and the amount of each, and that plaintiff is the payee, is sufficiently precise. Bird *v.* Daniel, 9 Ala. 302, where plaintiff having produced all the notes but one, there was held to be no variance and a recovery *pro tanto* was permitted.

30. Tucker *v.* Randall, 2 Mass. 283.

31. Hardon *v.* Ongley Electric Co., 89 Hun (N. Y.) 487, 35 N. Y. Suppl. 405, 69 N. Y. St. 791, where it was alleged that defendant agreed that if he should make default in payment of interest, or should at any time before the note was due permit an attachment against his property, then the principal sum should become instantly due and payable, and that defendant had defaulted, and had permitted an attachment to be sued out against his property.

32. **A count against a maker and an indorser** must show a good cause of action against both. Goodlet *v.* Britton, 6 Blackf. (Ind.) 500.

33. Oley *v.* Miller, 74 Conn. 304, 50 Atl. 744.

34. Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411; Lash *v.* Christie, 4 Nebr. 262; Selye *v.* Zimmer, 15 N. Y. Suppl. 881, 40 N. Y. St. 604.

Note and judgment thereon.—Plaintiff may in a narrative form set forth a note and a judgment recovered thereon, claiming only a recovery on the note. Thompson *v.* Minford, 11 How. Pr. (N. Y.) 273.

(II) *Separate Counts.* In other jurisdictions, however, each note or bill,[35] or each distinct obligation on the same instrument is regarded as a distinct and complete cause of action, which must be stated in a separate count or paragraph.[36]

(III) *Joinder of Counts* — (A) *In General.* A count on the note may be joined with a count on an agreement to indorse it,[37] but a count against all the joint and several makers cannot be joined with a count against less than all.[38] Nor can a cause on a promise to pay by one whose name has been forged, be joined with a cause against him as indorser and also against the maker,[39] or a cause against the maker and indorser with one against the indorser on an account to which the note was given as collateral.[40] Plaintiff cannot declare both in case and debt on a single bill,[41] and it has been held that the drawer of a check cannot join a cause of action against the payee for failure to present the check within a reasonable time with a cause for damages, because of a breach of the payee's contract to present the same with due diligence.[42]

(B) *Special and Money Counts.* The money counts may be added to a special count,[43] and if for any reason the instrument is inadmissible under that count it may be introduced in evidence under the money counts.[44]

35. Dawson *v.* Lail, 1 Ariz. 490, 3 Pac. 399; McCoy *v.* Yager, 34 Mo. 134; Jones *v.* Cox, 7 Mo. 173; Van Namee *v.* Peoble, 9 How. Pr. (N. Y.) 198.

Note due and note not due.—A paragraph upon two notes, one of which has not matured, avers a good cause of action as to the one due. Simpkins *v.* Smith, 94 Ind. 470.

Mode of objection.— The failure to state the causes separately is not a ground of demurrer under a provision that a demurrer may be interposed where several causes of action have been improperly united. The remedy is by motion. Bass *v.* Comstock, 38 N. Y. 21, 5 Transcr. App. (N. Y.) 22, 36 How. Pr. (N. Y.) 382.

Aider by judgment.— In Dawson *v.* Lail, 1 Ariz. 490, 3 Pac. 399, the court declined to disturb the judgment, where the bills sued on bore the same date, were payable to the same party, and matured at the same time.

36. A complaint against the maker and the guarantor should set forth the separate contracts in separate counts. Tucker *v.* Shiner, 24 Iowa 334.

Separate indorsements —Averment of joint liability.—A declaration against indorsers, alleging separate contracts of indorsement, does not allege a joint liability in the concluding averment that they owe plaintiff the amount of said note. Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69.

Objection to a declaration against two indorsers in blank on the ground that it fails to contain separate counts must be taken by demurrer and not by motion. Foster *v.* Leach, 160 Mass. 418, 36 N. E. 69.

37. Wilmington Bank *v.* Houston, 1 Harr. (Del.) 225.

38. Claremont Bank *v.* Wood, 12 Vt. 252.

39. Ohio Valley Nat. Bank *v.* Ronsheim, 31 Cinc. L. Bul. 99.

40. Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581.

41. Higgins *v.* Bogan, 4 Harr. (Del.) 330.

42. The first cause being in case and the second in assumpsit. Morris *v.* Eufaula Nat. Bank, 122 Ala. 580, 25 So. 499, 82 Am. St. Rep. 95.

43. *Alabama.*— Kirkpatrick *v.* Bethany, 1 Ala. 201.

Connecticut.— Vila *v.* Weston, 33 Conn. 42.

Illinois.— Boyle *v.* Carter, 24 Ill. 49.

Massachusetts.— Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48; Payson *v.* Whitcomb, 15 Pick. (Mass.) 212.

New York.— Steuben County Bank *v.* Stephens, 14 Wend. (N. Y.) 243; People *v.* Munroe Ct. C. Pl., 4 Wend. (N. Y.) 200; Arnold *v.* Crane, 8 Johns. (N. Y.) 79.

Ohio.— Mitchell *v.* McCabe, 10 Ohio 405.

Wisconsin.— Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

Causes of action on a bill of exchange and on an account stated may be joined under Ala. Code, § 2672. Woodlawn *v.* Purvis, 108 Ala. 511, 18 So. 530.

44. *Alabama.*— Talladega Ins. Co. *v.* Landers, 43 Ala. 115; Spence *v.* Barclay, 8 Ala. 581; Kirkpatrick *v.* Bethany, 1 Ala. 201.

Arkansas.— Jordan *v.* Ford, 7 Ark. 416.

Connecticut.— Vila *v.* Weston, 33 Conn. 22.

Illinois.— Boxberger *v.* Scott, 88 Ill. 477; Williams *v.* Baker, 67 Ill. 238; Streeter *v.* Streeter, 43 Ill. 155; Gilmore *v.* Nowland, 26 Ill. 200; Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269.

Maryland.— Hopkins *v.* Kent, 17 Md. 113.

Massachusetts.— Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48.

Michigan.— See Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575.

New Mexico.— Orr *v.* Hopkins, 3 N. M. 25, 1 Pac. 181.

New York.— Halleran *v.* Field, 23 Wend. (N. Y.) 38; Douglass *v.* Wilkinson, 22 Wend. (N. Y.) 559 [*affirming* 17 Wend. (N. Y.) 431]; Steuben County Bank *v.* Stephens, 14 Wend. (N. Y.) 243; People *v.* Munroe Ct. C. Pl., 4 Wend. (N. Y.) 200; Williams *v.* Allen, 7 Cow. (N. Y.) 316.

Pennsylvania.— Dilworth *v.* Hurst, 1 Phila. (Pa.) 222, 8 Leg. Int. (Pa.) 127; Williams

(c) *Enforcement of Collateral Security.* A complaint which seeks to recover on a note and to enforce payment out of collateral given to secure the same is not objectionable for misjoinder.[45]

(iv) *Election of Counts.* Where plaintiff declares on a special count and also on the money counts, he may elect under which to proceed,[46] but will not be required to elect between a count charging an acceptance and one charging a breach of a promise to accept,[47] or where the complaint states the execution and delivery of the note in suit for different purposes.[48]

g. Recovery on Money Counts. At common law, and where the rule in this respect has been preserved, bills of exchange between the drawer and payee and promissory notes may be declared on and are evidence under counts for money lent, money had and received, and money paid for the use of defendant.[49] So

v. Hood, 1 Phila. (Pa.) 205, 8 Leg. Int. (Pa.) 111.

West Virginia.— See Merchants, etc., Bank *v.* Evans, 9 W. Va. 373.

United States.— Henckley *v.* Hendrickson, 5 McLean (U. S.) 170, 11 Fed. Cas. No. 6,348; Stone *v.* Lawrence, 4 Cranch C. C. (U. S.) 11, 23 Fed. Cas. No. 13,484.

Contra, Fant *v.* Gadberry, 5 Rich. (S. C.) 10, holding, where A executed a note, signing it A & B as partners, and plaintiff declared on it as the note of A and proved there was no such firm as A & B, that the variance was fatal and that the note could not be given in evidence under one of the money counts.

In Canada it is improper to add the money counts in a declaration against the maker and indorser as a several cause of action, sued as joint under the statute. Biggar *v.* Scott, 3 Ont. Pr. 268.

45. Foreclosure of mortgage.— There is no misjoinder of causes of action, where a mortgage incidental to and given to secure the note in suit is sought to be foreclosed in the same action. Pate *v.* Aurora First Nat. Bank, 63 Ind. 254.

46. Burdick *v.* Green, 18 Johns. (N. Y.) 14.

Choice of counts.— The New York Revised Statutes provided that the parties to a bill or note might be sued jointly, and that plaintiff might declare on the money counts. Under this provision it was held that plaintiff might declare on the money counts, stating a joint contract and serving a copy of the note with the declaration, or that he might declare in a special count, so framed as to show the particular contract of each class of defendants, and allege breaches of the same. Fuller *v.* Van Schaick, 18 Wend. (N. Y.) 547.

Striking out special count.—A payee or indorsee of a bill in possession may strike out the subsequent indorsements, and recover against the drawee upon the special count or give the bill in evidence under the money counts. Neederer *v.* Barber, 17 Fed. Cas. No. 10,079.

47. Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492.

48. Birdseye *v.* Smith, 32 Barb. (N. Y.) 217, where a note was declared on as having been given as and for a part of the capital stock of an insolvent insurance company, and as a premium note amounting to an agreement to contribute ratably to the loss and expenses.

49. *Alabama.*— Catlin *v.* Gilder, 3 Ala. 536.

California.— Leeke *v.* Hancock, 76 Cal. 127, 17 Pac. 937.

Connecticut.— By the practice act the use of the common counts is permitted where appropriate to show the real cause of actions, and where the consideration of a note is goods sold the note is a proper item of a bill of particulars under the money counts. See Cummings *v.* Gleason, 72 Conn. 587, 45 Atl. 353.

Illinois.— Howes *v.* Austin, 35 Ill. 396; Swift *v.* Whitney, 20 Ill. 144; Lane *v.* Adams, 19 Ill. 167.

Indiana.— Indianapolis Ins. Co. *v.* Brown, 6 Blackf. (Ind.) 378.

Iowa.— Knight *v.* Fox, Morr. (Iowa) 305.

Maryland.— Hopkins *v.* Kent, 17 Md. 113; Merrick *v.* Metropolis Bank, 8 Gill (Md.) 59; Penn *v.* Flack, 3 Gill & J. (Md.) 369; Coursey *v.* Baker, 7 Harr. & J. (Md.) 28.

Massachusetts.— Lincoln *v.* Buller, 14 Gray (Mass.) 129; Goodwin *v.* Morse, 9 Metc. (Mass.) 278; Dana *v.* Underwood, 19 Pick. (Mass.) 99; Webster *v.* Randall, 19 Pick. (Mass.) 13; Hodges *v.* Holland, 16 Pick. (Mass.) 395; Ramsdell *v.* Soule, 12 Pick. (Mass.) 126; Ellsworth *v.* Brewer, 11 Pick. (Mass.) 316; Wild *v.* Fisher, 4 Pick. (Mass.) 421; Ellis *v.* Wheeler, 3 Pick. (Mass.) 18; Cushing *v.* Gore, 15 Mass. 69; State Bank *v.* Hurd, 12 Mass. 172.

Michigan.—Brown *v.* McHugh, 35 Mich. 50; Cate *v.* Patterson, 25 Mich. 191.

Mississippi.— Hughes *v.* Grand Gulf Bank, 2 Sm. & M. (Miss.) 115. See also Dowell *v.* Brown, 13 Sm. & M. (Miss.) 43.

New Hampshire.— Rushworth *v.* Moore, 36 N. H. 188; Tenney *v.* Sanborn, 5 N. H. 557.

New York.— Baker *v.* Martin, 3 Barb. (N. Y.) 634; Rockefeller *v.* Robinson, 17 Wend. (N. Y.) 206; Butler *v.* Wright, 2 Wend. (N. Y.) 369, 20 Johns. (N. Y.) 367; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126. See also Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542.

Ohio.— Mitchell *v.* McCabe, 10 Ohio 405; Harris *v.* Clark, 10 Ohio 5; Hart *v.* Ayres, 9 Ohio 5.

recovery may be had of an accepter on the money counts;[50] or on a bill[51] or check[52] naming no drawee; on a check given with knowledge that there are no funds to meet it, and with no intention of presenting it;[53] or on a non-negotiable instrument.[54] But it has been held that no recovery can be had on the common money counts of an indorser of an accommodation note;[55] of the maker or drawer; by a holder of an instrument, the indorsement of which is a forgery;[56] or although the contrary has been decided,[57] against a guarantor or surety.[58] Where privity of contract exists, the holder of a note may waive his right to proceed thereon and declare for the original consideration[59] under the money counts.[60]

Pennsylvania.— Williams *v.* Hood, 1 Phila. (Pa.) 205, 8 Leg. Int. (Pa.) 111.

South Carolina.— Mathews *v.* Fogg, 1 Rich. (S. C.) 369, 44 Am. Dec. 257.

Vermont.— Austin *v.* Burlington, 34 Vt. 506; Brigham *v.* Hutchins, 27 Vt. 569.

United States.— Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, 13 L. ed. 419; King *v.* Phillips, Pet. C. C. (U. S.) 350, 14 Fed. Cas. No. 7,802.

England.— Chitty Bills 578.

A note of two joint makers may be given in evidence under money counts against one of the joint makers alone. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

Foreign note.— Under the statute of Anne a foreign note may be declared on under the common counts. Kirk *v.* Tannahill, Taylor (U. C.) 448.

A dormant partner may be held under the money counts on an individual partner's note. Graeff *v.* Hitchman, 5 Watts (Pa.) 454.

Since the Pennsylvania act of May 25, 1887, the common counts have no place in pleading, hence a statement containing merely a copy of the check sued on, with a common count for money had and received is insufficient. Penn Nat. Bank *v.* Kopitzsch Soap Co., 161 Pa. St. 134, 34 Wkly. Notes Cas. (Pa.) 447, 28 Atl. 1077.

50. Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622; King *v.* Phillips, Pet. C. C. (U. S.) 350, 14 Fed. Cas. No. 7,802; Tatlock *v.* Harris, 3 T. R. 174. And see Vere *v.* Lewis, 3 T. R. 182.

Fictitious payee and indorser.—An accepter with knowledge that the names of the payee and indorser are fictitious is liable to a *bona fide* holder on the money counts. Tatlock *v.* Harris, 3 T. R. 174.

The acceptance of an order to pay money to be deducted from a payment to become due under a building contract is a promise to the payee on which a recovery may be had under the money counts. McClellan *v.* Anthony, Edm. Sel. Cas. (N. Y.) 284.

51. Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166, holding that an instrument in form a bill of exchange, but naming no drawee, is in effect a draft by the drawee on himself, and that a recovery may be had thereon under the common counts.

52. Ellis *v.* Wheeler, 3 Pick. (Mass.) 18, holding that an action for money had and received will lie on a bank check payable to bearer, addressed to no particular person, in favor of a *bona fide* holder thereof.

53. Cushing *v.* Gore, 15 Mass. 69.

54. Townsend *v.* Derby, 3 Metc. (Mass.) 363; Port Huron, etc., R. Co. *v.* Potter, 55 Mich. 627, 22 N. W. 70. *Contra*, Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637; Saxton *v.* Johnson, 10 Johns. (N. Y.) 418; Barnes *v.* Gorman, 9 Rich. (S. C.) 297.

The drawer of a dishonored order payable in goods may be sued on the money counts. Pleiss *v.* Maule, 2 Miles (Pa.) 186.

55. U. S. Bank *v.* Jackson, 9 Leigh (Va.) 221; Page *v.* Alexandria Bank, 7 Wheat. (U. S.) 35, 5 L. ed. 390.

56. Dana *v.* Underwood, 19 Pick. (Mass.) 99.

57. **That the word "surety" appeared appended** to the signature of the maker of a note does not so characterize his relation to the original transaction as to preclude a recovery against him on one of the common counts. Vaughn *v.* Rugg, 52 Vt. 235.

58. Butler *v.* Rawson, 1 Den. (N. Y.) 105; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Wells *v.* Gorling, 3 Moore C. P. 79, 8 Taunt. 737, 4 E. C. L. 360.

59. Hanna *v.* Pegg, 1 Blackf. (Ind.) 181; Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461; U. S. Bank *v.* Lyman, 1 Blatchf. (U. S.) 297, 2 Fed. Cas. No. 924, 20 Vt. 666, 11 Law Rep. 156 [*affirmed* in 12 How. (U. S.) 225, 13 L. ed. 965]. See also Ford *v.* Hopkins, 1 Salk. 283, an action of trover to recover lottery tickets for which a goldsmith's or banker's note had been given, and in which the note was admitted in evidence.

Although a renewal note has been given therefor the original note may be declared on. Covington First Nat. Bank *v.* Gaines, 87 Ky. 597, 10 Ky. L. Rep. 451, 9 S. W. 396, where the petition alleged that the notes sued on were renewal notes, defendants pleaded *non est factum*, and plaintiff joined issue thereon, and it was held that the petition did not set up a cause of action on the original notes.

Return of forged notes.— An offer to return notes, valueless because forgeries as to the supposed makers, is not a condition precedent to the right to recover from the transferrer. Snyder *v.* Reno, 38 Iowa 329.

60. **Where the payee elects to treat the note as void** as to the maker, he may recover on the original transaction under the money counts. National Granite Bank *v.* Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447. And see National Granite Bank *v.* Tyndale, 179 Mass. 390, 60 N. E. 927.

Real consideration.—In an action on a note

h. Non-Negotiable Instruments. An instrument which is not a promissory note, but which is of the same legal effect, may be declared on as such;[61] and there are decisions that a non-negotiable instrument may be declared on as if negotiable.[62] However, in the absence of statutory authority the proper practice seems to require that such instruments should be declared on as specialties.[63]

i. Notes Payable on Condition or Contingency — (i) *In General.* A note payable or a bill accepted on a condition or contingency cannot be declared on as a negotiable instrument, but must be sued on as a special agreement[64] and the condition or contingency set out.[65] After the contingency has happened, how-

to which the signature of the maker was procured in the belief that it was for a less amount borrowed of the payee there can be no recovery of the smaller sum without a count for money had and received. Griffith *v.* Short, 14 Nebr. 259, 15 N. W. 335.

Note not given.— There can be no recovery for the original consideration under a single count on a note, where it appears that although goods were sold no note was given for the purchase-price. Lewis *v.* Myers, 3 Cal. 475.

61. *Georgia.*— Patillo *v.* Mayer, 70 Ga. 715; Thompson *v.* High, 13 Ga. 311; Lowe *v.* Murphy, 9 Ga. 338.

Missouri.— McGowen *v.* West, 7 Mo. 569, 58 Am. Dec. 468.

New York.— Russell *v.* Whipple, 2 Cow. (N. Y.) 536.

Virginia.— Peasley *v.* Boatwright, 2 Leigh (Va.) 195.

Wisconsin.— Leggatt *v.* Jones, 10 Wis. 34.

An instrument having the dual character of a bill or note may be declared on as either. Brazelton *v.* McMurray, 44 Ala. 323.

Waiver of right.— The right of the holder of an instrument for the payment of money to treat the same as a bill of exchange, and subject to the rules governing such paper, is not waived by an averment that it was drawn by an officer of a railroad company in payment for work done in the construction of the road. Burnheisel *v.* Field, 17 Ind. 609.

A note payable in notes of a designated bank or of a branch thereof cannot be declared on as payable in money. Osborne *v.* Fulton, 1 Blackf. (Ind.) 233.

A contract for the hire of a slave may be declared on as a promissory note, notwithstanding, besides the promise to pay a sum certain in money, there is also a promise in the same instrument to furnish the slave with certain articles of clothing, to pay his taxes, and to return him to the owner at a stipulated time. Gaines *v.* Shelton, 47 Ala. 413.

62. *Maine.*— Whittier *v.* Graffam, 3 Me. 92.

Massachusetts.— Sanger *v.* Stimpson, 8 Mass. 260; Jones *v.* Fales, 4 Mass. 245.

New Hampshire.— Troy Cong. Soc. *v.* Goddard, 7 N. H. 430; Odiorne *v.* Odiorne, 5 N. H. 315. But see Drown *v.* Smith, 3 N. H. 299.

New York.— Downing *v.* Backenstoes, 3 Cai. (N. Y.) 137, decided under a statute.

Pennsylvania.— Pleiss *v.* Maule, 2 Miles (Pa.) 186.

In Kentucky a bill payable in current funds, and which by statute is to be treated as if payable in money and negotiable, may be declared on as if negotiable. Morrison *v.* Tate, 1 Metc. (Ky.) 569.

In Massachusetts the form of declaring on negotiable promissory notes resulting from 3 & 4 Anne, c. 9, was extended to notes not negotiable. Jones *v.* Fales, 4 Mass. 245.

A note, partly destroyed, may be declared on as entire. Duckwall *v.* Weaver, 2 Ohio 13.

63. Higgins *v.* Bogan, 4 Harr. (Del.) 330; Barnes *v.* Gorman, 9 Rich. (S. C.) 297. See also *infra*, XIV, D, 1, i.

64. *Delaware.*— Kennedy *v.* Murdick, 5 Harr. (Del.) 263.

Illinois.— Swift *v.* Whitney, 20 Ill. 144.

New York.— See Wait *v.* Morris, 6 Wend. (N. Y.) 394.

North Carolina.— Stamps *v.* Graves, 11 N. C. 102.

South Carolina.— Coggeshall *v.* Coggeshall, 1 Strobh. (S. C.) 43.

Vermont.— Goss *v.* Barker, 22 Vt. 520.

England.— Langston *v.* Corney, 4 Campb. 176; Ralli *v.* Sarell, D. & R. N. P. 33, 16 E. C. L. 422.

A written promise to pay one of the persons in the alternative is payable on a contingency and cannot be declared on as a promissory note. Osgood *v.* Pearsons, 4 Gray (Mass.) 455; Walrad *v.* Petrie, 4 Wend. (N. Y.) 575; Blanckenhagen *v.* Blundell, 2 B. & Ald. 417.

In Massachusetts and New York, by statute, such a writing may be declared as a written instrument and given in evidence under the money counts. Osgood *v.* Pearsons, 4 Gray (Mass.) 455; Walrad *v.* Petrie, 4 Wend. (N. Y.) 575.

65. Busch *v.* Columbia City German Bldg., etc., Assoc. No. 2, 75 Ind. 348; Titlow *v.* Hubbard, 63 Ind. 6; Hyer *v.* Norton, 26 Ind. 269; Whitaker *v.* Smith, 4 Pick. (Mass.) 83.

Making the note a part of the complaint without otherwise noticing the condition therein contained is not sufficient. Hyer *v.* Norton, 26 Ind. 269.

Note due absolutely.—A complaint in an action on a note for the payment of a specified sum of money "six months after date, or before, if made out of" certain sales, need not allege that the money was made out of the sales, where the action is brought after the expiration of the six months. Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639.

Negativing matters of defense.— In an action by the assignee against the maker, on a

ever, the instrument becomes an absolute promise to pay the sum mentioned and may be declared on as a promissory note.[66]

(11) *Performance of Condition — Happening of Contingent Event.* To hold the party against whom a recovery is sought the happening of the contingency or the performance of the condition or a readiness to perform must be suitably alleged.[67]

j. Contemporaneous Agreements. Although there are decisions to the contrary,[68] it appears to be the rule that a contemporaneous agreement varying the

note reciting, "This note given for purchase-money on real estate. If title defective, note void," the complaint need not allege that the title to the land was not defective as to the assignor. Bringham *v.* Leighty, 61 Ind. 524.

Characterization of instrument.—A declaration on a writing which is not one "whereby money is promised or secured to be paid" within the statute (Thompson Dig. Fla. 348, §§ 33, 34), must aver the existence of some extrinsic fact which will render it intelligible and capable of enforcement as a contract or promise to pay money. Bellas *v.* Keyser, 17 Fla. 100, where the writing was: "I hold for account ship Kalliope the sum of one hundred and eighty-three dollars and twenty cents, for towage to sea of said ship," signed by Bellas, which was delivered to the master of the ship, and by him indorsed to Kalliope, who towed the ship to sea, and sued Bellas on it.

66. McGehee *v.* Childress, 2 Stew. (Ala.) 506. And see Williams *v.* Smith, 4 Ill. 524.

67. *California.*— Naftzger *v.* Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; Rogers *v.* Cody, 8 Cal. 324.

Colorado.— Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731.

Delaware.— Kennedy *v.* Murdick, 5 Harr. (Del.) 263.

Illinois.— Williams *v.* Smith, 4 Ill. 524.

Iowa.— Ary *v.* Chesmore, 113 Iowa 63, 84 N. W. 965.

Kansas.— Friedenberg *v.* Auld, 5 Kan. 452.

New York.— Vanderbeek *v.* Hemmel, 26 Misc. (N. Y.) 714, 57 N. Y. Suppl. 156; Considerant *v.* Brisbane, 14 How. Pr. (N. Y.) 487.

Ohio.— Niswanger *v.* Staley, 1 Ohio Dec. (Reprint) 382, 8 West. L. J. 493.

Texas.— Perry *v.* Rice, 10 Tex. 367.

West Virginia.— Harris *v.* Lewis, 5 W. Va. 575.

England.—Ralli *v.* Sarell, D. & R. N. P. 33, 16 E. C. L. 422.

Generality.—A declaration, on a note to be paid on a contingency, that averred that the contingency had happened, as appeared by an indorsement thereon, was held sufficient to warrant a judgment by default. McGehee *v.* Childress, 2 Stew. (Ala.) 506.

Immaterial matters.— In an action on a note, payable on the contingency that the child of a particular person shall live two years, it is not necessary to aver what was the name or the sex of the child, the time of its birth, or how long it lived, these facts not being material to plaintiff's case. It is sufficient to aver that the said child lived two years. Littleton *v.* Hutchins, 20 N. H. 425.

Videlicet.—Where, in a declaration on a note payable in one year after the decease of a particular person, the decease of the said person was alleged under a *videlicet*, the declaration was held sufficient on general demurrer. Ladue *v.* Ladue, 16 Vt. 189.

Notes for goods sold conditionally.—A complaint on "promissory notes" for the purchase-price of goods, with reservation of title to the payee, need not aver a sale and delivery. Beaudrias *v.* Walck, 17 N. Y. Suppl. 716, 45 N. Y. St. 7.

Payment out of profits.— In an action on a due-bill which was to be paid out of the profits of a partnership it was not necessary to aver the payment of the firm's debts, where it was alleged that the profits exceeded the amount of the bill. Helton *v.* Wells, 12 Ind. App. 605, 40 N. E. 930.

Existence of overdraft.—Where a note recites that it was given to secure an overdraft the existence of an overdraft at the time of the institution of the action must be alleged. San Luis Obispo County Bank, etc. *v.* Greenberg, 116 Cal. 467, 48 Pac. 386, 127 Cal. 26, 59 Pac. 139.

Delivery of other note.— The holder of an instrument directing the payment of a stated sum on delivery of a promissory note must aver his readiness to deliver it up. Cook *v.* Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432.

Uncertain amount.—A declaration on an order accepted by the drawee, payable on a contingency, and uncertain as to the amount to be ultimately paid, which states the facts on which the debt arose, the consideration, the happening of the contingency on which it became payable, and the amount which has in fact accrued, is sufficient. Goss *v.* Barker, 22 Vt. 520.

The time of the happening of the contingency need not be alleged. Allen *v.* Dickson, Minor (Ala.) 119.

68. Cartwell *v.* John Williams Co., 10 Ky. L. Rep. 1062. See also Black *v.* Epstein, 93 Mo. App. 459, 67 S. W. 736.

An allegation of an "understanding" respecting the liabilities of the signers of a note, which is elsewhere referred to as an "agreement and arrangement" is a sufficient allegation of a contract. Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559.

Mode of payment.—A count in a declaration by the indorsee against the personal rep-

terms of a negotiable instrument, but not contained therein, need not be noticed[69] and that no notice need be taken of collateral agreements contained in the instrument which do not affect plaintiff's right of action.[70]

k. Notes Secured or Given as Collateral Security. It is not necessary to allege that the note in suit was given as collateral security, although the instrument recites that fact.[71] Where no recovery is permitted on a note secured by mortgage, except in a suit to foreclose the mortgage, a complaint which seeks a recovery on the note alone is insufficient if it shows that the instrument is so secured.[72]

l. Service of Copy of Instrument. In some jurisdictions it is required that service of a copy of the instrument sued on with a prescribed notice be made on defendant,[73] and when service is so made the copy is regarded as a part of the declaration[74] and as equivalent to the insertion of a special count therein.[75]

m. Bill of Particulars. Ordinarily the note or bill is of itself a sufficient bill of particulars,[76] but where a recovery is sought by plaintiff on the common money

resentatives of the indorser of a negotiable note averred that by an agreement between the maker and indorser the surplus value of certain slaves held by the latter as an indemnity was after the payment of a certain sum to be applied to the discharge of several notes, of which the note sued on was one, and in the event the indorser should keep the slave, etc., the surplus should be ascertained by three disinterested persons, etc., and further averred that the said surplus was sufficient fully to indemnify the indorser, etc. It was held that the count was not defective because it failed to aver that the surplus had been ascertained in the mode designated by the agreement. Cockrill *v.* Hobson, 16 Ala. 391.

Aider by answer.—Where a petition merely declared on a note, without more, and the answer set forth the note and a supplemental agreement, the omission of the petition was obviated by the answer. Citizens' State Bank *v.* Pettit, 85 Mo. App. 499.

69. *Alabama.*— Lockhard *v.* Avery, 8 Ala. 502.

Massachusetts.— Sexton *v.* Wood, 17 Pick. (Mass.) 110.

Michigan.— Smalley *v.* Bristol, 1 Mich. 153.

New York.— Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076, 50 N. Y. St. 15.

Oregon.— Sperry *v.* Lewis, 19 Oreg. 250, 23 Pac. 961.

70. It is immaterial that a collateral promise by the maker contained in a note is not recited in the complaint founded thereon, where no claim is made for the breach of the promise. Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394.

Mode of payment.— In declaring on a note promising to pay a certain sum at maturity, but containing a memorandum that the payee may, if he chooses, take a commodity previous to the day of payment, it is sufficient to allege the promise to pay. Owen *v.* Barnum, 7 Ill. 461.

71. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683.

72. A recital "this note secured by a mortgage of even date herewith" requires the dismissal of a complaint based on the note alone. Hibernia Sav., etc., Soc. *v.* Thornton, 127 Cal. 575, 60 Pac. 37.

Where there is no averment that the note was secured by mortgage a recital to that effect in the note which is set forth is not the equivalent of such an averment. Hibernia Sav., etc., Soc. *v.* Thornton, 117 Cal. 481, 49 Pac. 573.

73. Under the New York act of 1832, p. 489, a copy of the bill or note was required to be served with the declaration and proof of service made on the trial. Steuben County Bank *v.* Stephens, 14 Wend. (N. Y.) 243.

Sufficiency of copy.—A receipt written on the note in suit for a part of the amount and a memorandum that it had been protested for non-payment need not appear in the copy served. Buhl *v.* Trowbridge, 42 Mich. 44, 3 N. W. 245.

Proof of service.—Where the declaration was indorsed with a notice that at the trial a note, a copy of which was given and referred to in the notice, would be read in evidence and the sheriff returned that he had served a copy of the declaration and notice it was held that service of a copy of the note was implied. Bliss *v.* Paine, 11 Mich. 92. Failure to make proof of service must be objected to before the note is received in evidence. Steuben County Bank *v.* Stephens, 14 Wend. (N. Y.) 243.

74. Cooper *v.* Blood, 2 Wis. 62.

75. Peck *v.* Cheney, 4 Wis. 249.

76. Filing copy note.— Under a statute only requiring plaintiff to file his declaration together with a copy of the instrument on which the action is brought, no bill of particulars is required other than a copy of the note. Galloway *v.* Trout, 2 Greene (Iowa) 595.

Sufficiency — Attorney's letter.—Where defendant's attorney requested of the attorney of plaintiff a bill of particulars, and the latter wrote to him that the claim was on the note specified in the declaration, and no

counts,[77] or the circumstances are such that the adverse party is unable to defend without further information,[78] a bill of particulars or statement of like character should be furnished.

2. Plea or Answer[79] **— a. Pleas to Several Counts or Causes.** A single plea appropriate to separate counts is not objectionable because directed to the complaint as a whole and not to each count,[80] and where two or more notes are sued on a plea or answer directed to one must identify it with reasonable certainty.[81]

order for a bill was obtained, it was held that plaintiff was bound by the letter, as a bill of particulars. Williams *v.* Allen, 7 Cow. (N. Y.) 316.

77. Reynolds *v.* Woods, 22 Wend. (N. Y.) 642, where the declaration contained the money counts, and notice was given that "this suit is brought against you as a party to a promissory note of which the following is a copy" setting out the note, and it was held to be insufficient as a bill of particulars. To same effect see Garrett *v.* Teller, 22 Wend. (N. Y.) 643.

Under the Mississippi statute, where an indorsee seeks to recover against his immediate indorser under the common counts alone, he must furnish a bill of particulars. Jennings *v.* Thomas, 13 Sm. & M. (Miss.) 617.

Where there is a special count on a note, a copy of which is filed with the declaration, and the common counts are also inserted no account need be filed for the common counts. People *v.* Pearson, 2 Ill. 473; People *v.* Pearson, 2 Ill. 458.

78. **Right to bill.**—A statute entitling defendant in an action on an account to a bill of particulars has no application to an action on a promissory note, the consideration of which is denied. Doss *v.* Peterson, 82 Ala. 253, 2 So. 644. A statute permitting a motion for a more specific statement, where the facts on which the pleading is founded are stated too generally, has no application to indefiniteness in the prayer or demand for judgment. I. F. Sieberling Co. *v.* Dujardin, 38 Iowa 403.

Name of payee.— In an action against the executrix of the maker of a note payable to bearer, if the complaint fails to state the name of the payee through whom plaintiff derived title, a disclosure may be required of the name of the person to whom the note was delivered upon the making thereof. Chapman *v.* Walkerman, 75 Hun (N. Y.) 285, 26 N. Y. Suppl. 1006, 58 N. Y. St. 199.

Identification of instrument.— In an action by an accommodation accepter against the drawer, based on an account to receive moneys advanced in payment of bills of exchange and other moneys advanced, the bills must be so described in the account sued upon as to identify them. Curry *v.* Kurtz, 33 Miss. 24.

If the bill of particulars confined the claim to a particular note or notes, no recovery can be had for a preëxisting claim or for the original consideration. U. S. Bank *v.* Lyman, 1 Blatchf. (U. S.) 297, 2 Fed. Cas. No. 924, 20 Vt. 666, 11 Law Rep. 156 [*affirmed* in 12 How. (U. S.) 225, 13 L. ed. 965].

Where defendant pleads "payment, with leave to give special matter in evidence," plaintiff is entitled to a specification of the particular matters relied on. Hale *v.* Fenn, 3 Watts & S. (Pa.) 361.

Set-off.— In Mississippi in an action by an accommodation accepter against the maker of a bill for moneys paid thereon, plaintiff is entitled, by statute, to a bill of particulars of a set-off claimed by defendant. Curry *v.* Kentz, 33 Miss. 24. Where the action is based on a promissory note given for the balance of an account, an unsettled counterclaim cannot be proved as a set-off unless it is incorporated in a bill of particulars. Graham *v.* Chubb, 39 Mich. 417.

79. For forms of pleas and answers see the following cases:

Connecticut.— Dale *v.* Gear, 39 Conn. 89; Williams *v.* Taylor, 35 Conn. 592.

District of Columbia.— Lulley *v.* Morgan, 21 D. C. 88; Thornton *v.* Weser, 20 D. C. 233; Lawrence *v.* Hammond, 4 App. Cas. (D. C.) 467.

Florida.— Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

Georgia.— Beazley *v.* Gignilliat, 61 Ga. 187.

Illinois.— Mann *v.* Smyser, 76 Ill. 365; Fuller *v.* Robb, 26 Ill. 246.

Indiana.—Parkinson *v.* Finch, 45 Ind. 122; Detwiler *v.* Bish, 44 Ind. 70.

Kansas.— Deitz *v.* Regnier, 27 Kan. 94; Withers *v.* Berry, 25 Kan. 373.

Michigan.— McRobert *v.* Crane, 49 Mich. 483, 13 N. W. 826.

Mississippi.— Martin *v.* Smith, 65 Miss. 1, 3 So. 33.

Nebraska.— Colby *v.* Parker, 34 Nebr. 510, 52 N. W. 693.

New York.— Saxton *v.* Dodge, 57 Barb. (N. Y.) 84; Sammet *v.* Monsheimer, 27 N. Y. Suppl. 279; Elizabethport Mfg. Co. *v.* Campbell, 13 Abb. Pr. (N. Y.) 86; Duncan *v.* Lawrence, 6 Abb. Pr. (N. Y.) 304.

Pennsylvania.— Penn Nat. Bank *v.* Kopitzsch Soap Co., 161 Pa. St. 134, 34 Wkly. Notes Cas. (Pa.) 447, 28 Atl. 1077; Gere *v.* Unger, 125 Pa. St. 644, 24 Wkly. Notes Cas. (Pa.) 7, 17 Atl. 511.

South Carolina.— Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188.

80. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

81. Downey *v.* Lee, 86 Ind. 260; Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y.) 67.

b. Inconsistent Pleas. Where two or more pleas are interposed they must set up consistent defenses,[82] but pleas are not inconsistent if the proof in support of one will not necessarily dispose of the defense set up by the other.[83]

82. *Illinois.*— Murtaugh *v.* Colligan, 28 Ill. App. 433, holding that in an action against the maker of a renewal note to recover the amount paid thereon by plaintiff as surety, defendant cannot repudiate the second note on the ground that its amount was raised after he executed it, and at the same time allege that the first note was paid by the proceeds of a transfer of the second.

Indiana.— Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240, holding that a plea in an action by the assignee of a note before maturity that it was made without consideration and that it was obtained by fraud is unavailable under the law merchant.

Iowa.— Sherman *v.* Elder, 12 Iowa 433, holding that a plea to a suit on a note that it was given for money loaned by plaintiff through the indorsers as his agents, and that they as such negotiated said loan to defendant, who was the maker of the note, without consideration, and that it was understood and agreed at the time that if the indorsers would indorse the note plaintiff would look to the maker only for payment, is bad.

Missouri.— Sheppard *v.* Starret, 35 Mo. 367, holding that an answer denying execution of the note in suit and averring payment sets up inconsistent defenses.

Washington.— Lamberton *v.* Shannon, 13 Wash. 404, 43 Pac. 336, holding that an answer by makers denying execution of the note as principals and also denying "each and every part . . . of the complaint except as herein expressly admitted, explained or qualified," followed by an affirmative defense that they signed as sureties, presents inconsistent defenses.

Canada.— Hawke *v.* Salt, 3 U. C. C. P. 97, holding that where, in an action against maker and the indorsers, under the statute, the defenses clash or the facts set up are not equally a defense to all the parties they should plead separately; and that therefore a plea by all the defendants that there was no consideration for the making of the note, or for the respective indorsements or either of them, and that plaintiff holds the note without any consideration or value, is bad.

A joint plea by a maker and indorser which is bad as to one is bad as to both. Ward *v.* Bennett, 20 Ind. 440.

83. **Non est factum or non-execution and want of consideration** are not inconsistent. Barnes *v.* Scott, 29 Fla. 285, 11 So. 48; Paducah First Nat. Bank *v.* Wisdom, 23 Ky. L. Rep. 530, 63 S. W. 461; Mullikin *v.* Mullikin, 15 Ky. L. Rep. 609, 23 S. W. 352, 25 S. W. 598; Patrick *v.* Booneville Gas Light Co., 17 Mo. App. 462; Booco *v.* Mansfield, 66 Ohio St. 121, 64 N. E. 115; Pavey *v.* Pavey, 30 Ohio St. 600.

Non est factum, and payment, release, or discharge are not inconsistent. Nelson *v.* Brodhaek, 44 Mo. 596, 100 Am. Dec. 328.

Non est factum and alteration.— In an action on a bill single, payable to a firm of which one of the obligors is a partner, defendant may plead *non est factum*, and a special plea that the name and seal of one of the obligors have been canceled without his consent. Tindal *v.* Bright, Minor (Ala.) 103. And an answer pleading *non est factum* and admitting the signing, but alleging certain subsequent unauthorized alterations, is not demurrable, as containing at the same time an admission and a denial of the execution of the note. Wiltfong *v.* Schafer, 121 Ind. 264, 23 N. E. 91.

Non-execution and fraud.— One sued as maker of a note may deny its execution, and also set up that, if the signature is genuine, it was obtained by fraud. Citizens' Bank *v.* Closson, 29 Ohio St. 78.

General denial and statute of limitations are not inconsistent. Lawrence *v.* Peck, 3 S. D. 645, 54 N. W. 808.

Failure of consideration and purchase after maturity.—Where in an action by the transferee of a note against the maker the latter pleads failure of consideration and also that plaintiff purchased the note after maturity, both pleas may stand, although on its face the transfer appears to have been made before maturity. Pinson *v.* Bass, 114 Ga. 575, 40 S. E. 747.

Want of consideration and payment are not inconsistent. Roche *v.* Union Trust Co., (Ind. App. 1899) 52 N. E. 612.

Separate pleas of payment made in different ways are not improper. Babcock *v.* Callender, 17 Conn. 34.

Payment and denial of plaintiff's title.—A plea of payment is not inconsistent with a denial of plaintiff's ownership, nor is it an admission thereof. Cavitt *v.* Tharp, 30 Mo. App. 131.

Fraud and special agreement.—A plea of fraudulent procuration of the note in suit is not inconsistent with a further defense that there was an agreement between plaintiff and defendant that the latter should not be concluded by the note, but that he might afterward show that it did not correctly represent the amount due by him. Gates *v.* Dundon, 18 N. Y. Suppl. 149, 42 N. Y. St. 660.

Set-off and denial of plaintiff's title.— In an action on notes given for the price of a machine, brought by plaintiff as a transferee of the notes without indorsement by the payee, the answer denied the transfer and set up a counter-claim for a false warranty of the machine, by way of set-off. It was held that such claim of set-off was in no way inconsistent with the denial of plaintiff's ownership of the note, and did not operate as

e. Duplicity. The plea should not be in the alternative or double.[84] Thus a plea alleging failure of consideration and that plaintiff is not a *bona fide* holder is duplicitous,[85] as is a plea by an indorsee that plaintiff priorly indorsed the note in suit, negotiated it, subsequently paid it, and discharged defendant;[86] but a plea which sets up a good defense is not duplicitous because it also narrates the attendant circumstances or states matter explanatory of the defense relied on.[87]

d. Non-Execution — (1) *Specific Allegations.* Although there are decisions to the contrary,[88] it is the general rule and in some states it is so provided, that the execution or indorsement of a promissory note is not put in issue by a general denial or plea of the general issue,[89] but that the denial must be specific.[90]

an admission of his ownership. Wilson *v.* Reedy, 32 Minn. 256, 20 N. W. 153.

84. An affidavit of a want of or failure of consideration should be drawn in issuable terms and confined to a single allegation. It should not be in the alternative or double. White *v.* Camp, 1 Fla. 94.

85. Burrass *v.* Hewitt, 4 Ill. 224.

86. Wilson *v.* Johnson, (N. J. 1894) 29 Atl. 419.

87. Deford *v.* Hewlett, 49 Md. 51; Bingham *v.* Sessions, 6 Sm. & M. (Miss.) 13.

Plea held good.— In an action against the indorser of a note, negotiable and payable at a chartered bank in Indiana, a plea by defendant that the indorsement was made without consideration, and stating also that the note was not designed to be negotiated in bank is not duplicitous. Niles *v.* Porter, 6 Blackf. (Ind.) 44.

88. Williams *v.* Miami Powder Co., 36 Ill. App. 107; McCormick Harvesting Mach. Co. *v.* Doucette, 61 Minn. 40, 63 N. W. 95 [But see Cowing *v.* Peterson, 36 Minn. 130, 3 N. W. 461]; Monitor Plow Works *v.* Born, 33 Nebr. 747, 51 N. W. 129; Donovan *v.* Fowler, 17 Nebr. 247, 22 N. W. 424; Hill *v.* Manchester, etc., Waterworks Co., 5 B. & Ad. 866, 27 E. C. L. 364.

Refiling plea.— Where defendant pleads the general issue, and also that he signed the note as surety, and is discharged by an extension of time granted the maker by plaintiff, and then by leave of court withdraws the general issue, after defendant has testified that a material alteration was made in the note after he signed it, it is not error to allow him to refile the general issue so as to put in issue the signature to the note and the alleged alteration therein. Truesdell *v.* Hunter, 28 Ill. App. 292.

As to the necessity of denying execution under oath see *infra*, XIV, D, 2, q.

89. *California.*— Grogan *v.* Ruckle, 1 Cal. 193.

Iowa.— Morton *v.* Coffin, 29 Iowa 235.

Kansas.— Kimble *v.* Bumny, 61 Kan. 665, 60 Pac. 746.

Louisiana.— Tyler *v.* Marcelin, 8 La. Ann. 312; Austin *v.* Latham, 19 La. 88; Beach *v.* Wagner, 19 La. 86; Vairin *v.* Palmer, 14 La. 361; Hyde *v.* Brown, 5 La. 33; Bennett *v.* Allison, 2 La. 419; Miller *v.* Cohea, 1 La. 486; Hughes *v.* Harrison, 8 Mart. N. S. (La.) 297.

Mississippi.— Robinson *v.* Bohn Mfg. Co., 71 Miss. 95, 14 So. 460; Green *v.* Robinson, 3 How. (Miss.) 105.

"Not guilty."— In assumpsit on a note, a plea that defendant "is not guilty of the matters therein alleged" is inappropriate. Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649.

Execution and delivery by a decedent may be denied generally. Carthage Nat. Bank *v.* Butterbaugh, 116 Iowa 657, 88 N. W. 954.

90. Marshall Field Co. *v.* Oren Ruffcorn Co., (Iowa 1902) 90 N. W. 618; Cowing *v.* Peterson, 36 Minn. 130, 30 N. W. 461; Johnson Harvester Co. *v.* Clarker, 30 Minn. 308, 15 N. W. 252.

Sufficiency.—In Schwenk *v.* Yost, 9 Wkly. Notes Cas. (Pa.) 16, which was an action on a note in which defendant's name appeared after that of the makers, with the addition of the printed word "indorser," an affidavit of defense that defendant did not sign as maker but had agreed to indorse and that his signature was affixed thereto as an indorser was held sufficient. So an affidavit of defense denying that defendant gave the note, or authorized or received any consideration for it, or that he owed its amount to the payee or to plaintiff is sufficient to prevent judgment for want of a sufficient affidavit. Anchor Sav. Bank *v.* Stoneham Tannery Co., 8 Pa. Co. Ct. 303. And the answer of one sued on a note that he never made it and that if his name appears on it the signature is a forgery sufficiently and specifically denies his signature. Ludlow *v.* Berry, 62 Wis. 78, 22 N. W. 140. An affidavit of defense alleging that defendant had carefully examined the notes on which suit was brought, "and that he has no recollection whatever of having ever signed the same, or delivered the same to the plaintiff," without stating that the signatures were or were not his, is not a compliance with the rule requiring defendant, in his affidavit of defense, "to state specifically, and at length, the nature and character of the same." Woods *v.* Watkins, 40 Pa. St. 458.

Alteration.— Defendant admitted the execution of a note of the tenor of the one described in the complaint, but alleged that plaintiff had materially altered the same, without his knowledge and consent, by adding the sum of sixty dollars thereto, and that the note so altered was the note sued on, but by reason of said alteration it was not his note, and that he had never made or delivered it. It was held that this did not

(II) *NON FECIT, NON EST FACTUM, OR NON ASSUMPSIT.* In modern practice execution is sufficiently denied by a plea of *non fecit, non est factum*, or a plea to that effect,[91] or by a plea of *non assumpsit.*[92]

constitute a denial of the making of the note which plaintiff alleged as his cause of action. Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837.

Denial of identity of note.—An answer which admits the making of a note similar to the one sued on, but leaving it to plaintiff to prove the identity of the notes, is not a sufficient denial of the execution of the note to put plaintiff to proof of the same. Sheldon *v.* Middleton, 10 Iowa 17.

A denial that "for any consideration whatsoever" defendant made, executed, and delivered to plaintiff, etc., is insufficient. Farmers', etc., Bank *v.* Copsey, 134 Cal. 287, 66 Pac. 324.

Amendment of petition — Necessity of second denial.—Where after denying the signature, plaintiff amends and pleads ratification, and by reference makes the original a part of his amended pleading, and defendant simply denies generally, the original denial of execution is sufficient. Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950.

Where the general issue with notice is substituted for a special plea the defense must be proved as stated in the notice. Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642.

91. *Illinois.*—Walter *v.* School Trustees, 12 Ill. 63; Williams *v.* Miami Powder Co., 36 Ill. App. 107; Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642.

Indiana.— See Hine *v.* Shiveley, 84 Ind. 136, holding that an answer concluding, "and he [defendant] says that he did not execute said note in manner and form as set out in said plaintiff's complaint herein, and that the same is not his note," contains a sufficient general *non est factum.*

Iowa.—Carthage Nat. Bank *v.* Butterbaugh, 116 Iowa 657, 88 N. W. 954.

Kentucky.— Isaack *v.* Porter, 2 A. K. Marsh. (Ky.) 452.

Maryland.— Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965.

New York.— Sawyer *v.* Warner, 15 Barb. (N. Y.) 282.

Texas.— Stowe *v.* Kempner, 23 Tex. Civ. App. 276, 56 S. W. 116.

Refusal of obligee to accept.—Where a sealed note is presented to the obligee for discount and he refuses to accept it, a plea of *non est factum*, in an action brought in his name, is good. Brooks *v.* Bobs, 4 Strobh. (S. C.) 38.

Fraudulent procurement.— In an action on a note due one day after date a plea by the maker that he was illiterate, and owed plaintiff a portion of the amount, which was not to be paid until a later date, that the balance was due a short time prior to the commencement of the suit, and that he did not intend to give the note payable at the time it was, but that the payee took advantage of his illiteracy in making it, amounts to a plea of *non est factum.* Alexander *v.* Foster, 16 Ark. 660.

Defendant is not compelled to plead non est factum generally with an absolute affidavit of facts supporting, but he may state in a special plea the particular facts and circumstances which amount to a denial of the legal effect or validity of the note, or deny the authority of the agent who made it. Martin *v.* Dortch, 1 Stew. (Ala.) 479.

Conclusions of law.—An answer alleging that the note sued on "is *non est factum* as to defendant, it not being a legal promissory note against defendant in this action," and that, owing to sickness, the defendant "was in no condition to execute a legal promissory note," avers only legal conclusions, and is insufficient as a plea of *non est factum.* Templeton *v.* Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507, 696.

Denial of legal effect.—A plea not denying the execution of a note sued on, but denying its obligation according to its legal import, is bad. Trask *v.* Roberts, 1 B. Mon. (Ky.) 201.

Alteration.—Where the note declared on was for two thousand eight hundred and fifty dollars, and defendant alleged that, when he signed the note, it was for one hundred and fifty dollars, a plea of *non est factum* is good, although the signature and the paper were that of the original note. Stephens *v.* Anderson, (Tex. Civ. App. 1896) 36 S. W. 1000.

At common law the plea of *non est factum* is only used in actions on instruments under seal, and is not applicable in an action on a note or bill. Luna *v.* Mohr, 3 N. M. 56, 1 Pac. 860.

A plea of non-assignavit does not deny execution. Klyce *v.* Black, 7 Baxt. (Tenn.) 277.

92. Hinton *v.* Husbands, 4 Ill. 187; Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642; Gray *v.* Tunnstall, Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730.

In Canada the rule making this plea bad is confined to actions between the parties to the instrument and does not extend to their personal representatives. Masson *v.* Hill, 5 U. C. Q. B. 60.

Action by joint maker for indemnity.— Defendant having been arrested, requested plaintiff to join him as maker of a note to M, his creditor, for the debt, which he did, and plaintiff was obliged to pay the same with costs, etc. Plaintiff then sued to recover this amount, alleging in his declaration that in consideration of plaintiff joining defendant in signing as maker, a note jointly and severally promising to pay M, or order, the sum of, etc., for defendant's use and benefit, defendant promised plaintiff to indemnify him, and that he did join him accordingly. It was held that the making of the note by

(III) *Denial of Genuineness of Signature*—(A) *In General.* By statute in some of the states to put plaintiff to proof of execution the genuineness of the signature must be denied,[93] and provisions exist debarring from other defenses a defendant whose signature shall have been proved after his denial of the same.[94]

(B) *Who May Deny.* The genuineness of the signature may be denied by a person other than the one whose signature it purports to be.[95]

(IV) *Negativing Authority of Another.* It is held that it is not enough to deny the signing or execution, but that defendant must go further and deny that the instrument was signed or executed by his authority.[96] So where a note purports to have been made by a corporation a denial of corporate execution must state facts sufficient to show that the instrument is not its act and deed.[97]

plaintiff was not put in issue by the plea of *non assumpsit*. Blake *v.* Harvey, 2 U. C. C. P. 310.

93. A denial of execution made by an administrator sufficiently denies the genuineness of the signature. Ashworth *v.* Grubbs, 47 Iowa 353.

Denial of signature.—An answer that "defendant denies the signature of the alleged note described in plaintiff's declaration" does not, under Mass. Pub. Stat. c. 167, § 21, contain such "a special denial of the genuineness" of the signature to the note, "and a demand that" it "shall be proved at the trial," as to require the plaintiff to prove the signature. Spooner *v.* Gilmore, 136 Mass. 248.

An allegation, upon information and belief, that the note declared on is a forgery, is not a specific denial of defendant's signature under the Wisconsin statute. Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26.

Alteration.—A denial that defendant signed the note as it reads above his name is insufficient. Ela *v.* Sprague, 3 Pinn. (Wis.) 323, 4 Chandl. (Wis.) 52.

94. A denial of having made the note sued on will not incur the penalty. Stockton *v.* Truxton, 8 La. 224.

The denial by an administrator of the genuineness of the signature of his testator is not within the purview of such a statute. Bradford *v.* Cooper, 1 La. Ann. 325.

95. Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440.

In Maine, by rule of court, counsel for defendant is not permitted to deny the signature, unless he shall have been specially instructed that it is not genuine, or unless defendant in court shall deny the signature to be his, or that it was placed there by his authority. See Libby *v.* Cowan, 36 Me. 264; McDonald *v.* Bailey, 14 Me. 101.

96. Richardson *v.* Finney, 6 Dana (Ky.) 319; Hawkins *v.* Fellows, 6 Dana (Ky.) 128; Ephraim *v.* Pollock, 1 Wkly. Notes Cas. (Pa.) 102. See also Marshall Field Co. *v.* Oren Ruff-Corn Co., (Iowa 1902) 90 N. W. 618; and *infra*, XIV, D, 2, d, (VI).

An express denial of authority is sufficient. Hunter *v.* Reilly, 36 Pa. St. 509. See also Marshall Field Co. *v.* Oren Ruff-Corn Co., (Iowa 1902) 90 N. W. 618, holding that an allegation that a person who assumed to sign for another did so without authority is sufficiently specific.

Lack of positiveness.— In an action on a note signed K, per N, it is not sufficient to aver that defendant had no recollection of ever delegating power to N to sign the note in question and that he never gave him general power to sign notes. Mitchener *v.* Kimball, 1 Wkly. Notes Cas. (Pa.) 111.

A denial of authority in writing is not enough. Authority by parol should also be negatived. Garritt *v.* Ashcraft, 19 Ky. L. Rep. 38, 39 S. W. 51. It is no defense that defendant did not authorize any one in writing to sign the note for him, unless he also alleges that he was only a surety. Goodpaster *v.* Triplett, 13 Ky. L. Rep. 638.

In New Hampshire by rule where an individual intends to contest the authority or competency of a party to affix the signature to a note, he must give notice on the record, at the first term of court, that the signature is denied; otherwise it will be regarded as admitted to be executed by competent authority. Williams *v.* Gilchrist, 11 N. H. 535.

97. Thus in an action on a note signed by a person as president of a corporation and also by him personally, an answer denying corporate execution is insufficient to put in issue the genuineness of the actual signature and is no more than a denial of the subscription of the instrument by the corporation. McCormick *v.* Stockton, etc., R. Co., 130 Cal. 100, 62 Pac. 267.

Denial of extrinsic matter pleaded to show corporate execution.—Where a note sued on does not on its face purport to be made by defendant, and the extrinsic matter contained in the petition is essential to make out a cause of action, a denial of such matter presents a good defense. Spencer *v.* Shakers Soc., 23 Ky. L. Rep. 854, 64 S. W. 468.

Denial of authority of corporate officer.— In an action against a corporation on its note signed by its president as such, an answer that the note was given for stock in another corporation subscribed for by him as trustee to avoid the statute, which subscription was not authorized, states a good defense in view of a statute prohibiting a corporation from using its funds in the purchase of stock in another corporation without the written consent of all the stock-holders of each corporation. Midland Steel Co. *v.* Citizens Nat. Bank, 26 Ind.

(v) *Incapacity.* Where the legal effect of signing commercial paper is sought to be avoided on the ground of want of capacity to incur the liability charged, the particular facts relied on to establish the defense must be specially pleaded.[98] This rule is applicable to the defenses of coverture,[99] insanity, lunacy,[1] or intoxication.[2] With respect to the defense of infancy it is held that it may be proved under a plea of *non assumpsit*, but not under a plea of *nil debet*.[3]

(vi) *Joint and Several Execution*—(a) *In General.* In an action on a note purporting to have been made jointly or by several, it will be sufficient for a defendant who seeks to avoid liability to specifically deny execution by himself or to allege such facts as will preclude the idea of his individual liability as maker.[4]

App. 71, 59 N. E. 211. In an action on a corporate note, an allegation that it was executed and delivered in pursuance of a fraudulent conspiracy between plaintiff and an officer of the corporation is an admission of the authority of such officer. Raines *v.* Coos Bay Nav. Co., 41 Oreg. 135, 68 Pac. 397.

A plea denying the authority of the president of a corporation to sign the note in suit, but not denying his authority to sign such paper generally, is in effect an admission of his general authority. Dexter Sav. Bank *v.* Friend, 90 Fed. 703.

Specificness.— An answer in an action on a note signed O. R. Co. per O. R. Prest. that O. R. had no authority to sign is sufficiently specific and a good denial of the corporate signature. Marshall Field Co. *v.* Oren Ruff-Corn Co., (Iowa 1902) 90 N. W. 618.

98. Inability to transact business.— In an action on notes, where the defense was incapacity of the maker to contract, an answer which alleges that defendant's weakness had reached the point of incapacity to contract, and disability to manage or transact the ordinary affairs of business, was a sufficient allegation of the incapacity of the maker. Nichols, etc., Co. *v.* Hardman, 62 Mo. App. 153.

99. Hughes *v.* Brown, 3 Bush (Ky.) 660.

If not pleaded the judgment will not be arrested as to defendant's separate property. Phelps *v.* Brackett, 24 Tex. 236.

If one joint maker pleads coverture, the action may be discontinued as to her and proceeded with against the others. McGuire *v.* Johnson, 2 Lans. (N. Y.) 305; Shipman *v.* Allee, 29 Tex. 17.

1. Harrison *v.* Richardson, 1 M. & Rob. 504. But see Mitchell *v.* Kingman, 5 Pick. (Mass.) 431.

The plea of lunacy must set up incapacity at the time of execution. Taylor *v.* Dudley, 5 Dana (Ky.) 308.

A plea that defendant's intestate was insane when he made the note in suit is a plea of *non est factum*. Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620.

2. Gore *v.* Gibson, 9 Jur. 140, 14 L. J. Exch. 151, 13 M. & W. 623. But see Pitt *v.* Smith, 3 Campb. 33, 13 Rev. Rep. 741, holding evidence in support of this defense to be admissible under the general issue. An answer denying that defendant ever, at any time or place, made, executed, or delivered the note described, and averring that the note was obtained from him while he was so intoxicated as to be unable to understand or know what he was doing, is in effect a denial of the validity of the instrument, but not of its execution. Henry *v.* Hinman, 21 Minn. 378.

3. Young *v.* Bell, 1 Cranch. C. C. (U. S.) 342, 30 Fed. Cas. No. 18,152.

4. Lucas *v.* Baldwin, 97 Ind. 471; Ludlow *v.* Berry, 62 Wis. 78, 22 N. W. 140 (where an allegation by one defendant that he made or joined in the making of the note in suit, and that if his name appeared thereon the signature was a forgery, was held to be a specific and sufficient denial of the signature within the statute); City Bank *v.* Kellar, 2 U. C. C. P. 508 (where a plea that defendant did not make the note mentioned in the declaration as therein alleged, was held not to contain a negative pregnant and to be good). See also Leslie *v.* Emmons, 25 U. C. Q. B. 243, where it was questioned whether the unexplained interlineation of the words "jointly and severally" in a declaration so characterizing the making of a note, could be taken advantage of under a plea of *non facit*, or whether a special plea was necessary.

Allegation of indorsement for accommodation.—An allegation by one apparent indorser that "he placed his name on the back of the note sued on in this action, as an indorser thereof, for the accommodation and at the request of D. H. Mears, the maker of said note, with the understanding that John Mears should also indorse the same. That there never was any agreement, or understanding that he should be liable on said note in any other manner, or to any greater extent, than as an accommodation indorser thereof," is a sufficient denial of an allegation that he was a joint maker. Parrish *v.* Mears, 1 Handy (Obio) 492, 12 Ohio Dec. (Reprint) 253.

A plea of the general issue by joint makers is insufficient to admit evidence that one signed as surety and that the other agreed with the maker for an extension of the time of payment without the surety's consent. Rawlings *v.* Cole, 67 Mich. 431, 35 N. W. 66. And a plea by one defendant that the note is the separate note of one of the defendants, and was given to and accepted by plaintiff in full satisfaction of the debt, is bad on special demurrer, because it amounts to the general issue. Van Ness *v.* Forrest, 8 Cranch (U. S.) 30, 3 L. ed. 478.

Denial of execution by coöbligor in default.—A plea by one denying execution by himself

(B) *Partnership Execution.* The denial of execution by a firm must exclude the idea that any member thereof made the instrument on its behalf.[5] A mere denial by one that he is a copartner is not a denial of execution;[6] nor is a denial by one that he made the note in suit or authorized its execution a denial of its execution by the firm whose name it bears.[7]

(VII) *ADMISSION OF EXECUTION.* Execution is admitted by failure to deny the making;[8] and this omission is not supplied by a denial of delivery[9] or of indebtedness,[10] or by averments of illegal consideration[11] or payment.[12] So where defendant answers denying the execution of the instrument but alleging matter in avoidance of its legal effect,[13] or extrinsic matters of defense,[14] his

and a coöbligor who has suffered a default is bad. Isaack *v.* Porter, 2 A. K. Marsh. (Ky.) 452.

Denial of inference from descriptive words. — Where a count charging several persons as makers adds the descriptive word "partners" without alleging that they executed the note as such, a plea denying a partnership presents an immaterial issue. Karch *v.* Emerick, 59 Ill. 184.

If the answer set out the note which on its face shows a joint and several liability, such a liability is admitted notwithstanding other allegations to the contrary. Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461.

5. A plea that the firm did not execute and deliver the note, which elsewhere states that a member of the firm did execute and deliver it, without negativing the authority of such member, taken as a whole, is not a plea of *non est factum.* Wingate *v.* Atlanta Nat. Bank, 95 Ga. 1, 22 S. E. 37.

6. Hawkins *v.* Fellowes, 6 Dana (Ky.) 128; Isaack *v.* Porter, 2 A. K. Marsh. (Ky.) 452; Ferguson *v.* Wood, 23 Tex. 177. So in an action on a note signed by defendant with the addition of "& Co." if defendant instead of pleading the non-joinder of a copartner, files a sworn plea of no partnership, a recovery may be had against him on a proper declaration, if he executed the note whether in fact he had a copartner or not. Hirsch *v.* Oliver, 91 Ga. 554, 18 S. E. 354, where it did not appear that any person was sued except defendant.

7. Collier *v.* Cross, 20 Ga. 1.

8. Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430; Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Edson *v.* Dillaye, 8 How. Pr. (N. Y.) 273.

In Indiana in an action originating before a justice of the peace, where there was no plea in abatement or denial of the execution of the note, all other matter of defense, except the statute of limitations and set-off, may be given in evidence without a plea. Union Cent. L. Ins. Co. *v.* Evans, 28 Ind. App. 518, 63 N. E. 389.

Individual execution of corporate note.— Where defendant signed a note, adding to his signature "Pres't of the Henderson Coal Co.," and was sued thereon, his failure to traverse the petition charging him as personally liable on the note admitted its truth. Burbank *v.* Posey, 7 Bush (Ky.) 372.

Anomalous indorsement.—An answer by defendant, sued as the maker of a note, that he signed it as an indorser, without averring that he made any agreement with anybody that his liability should be that of an indorser, and without denying that he signed it before delivery and at the time of its execution, is defective, since under such circumstances the presumption of law is that he signed it as maker or guarantor. Bartlett *v.* Jones, 4 Ohio Dec. (Reprint) 292, Clev. L. Rep. 219.

Denying agreement below signature.—An answer admitting the execution of a note but averring that an agreement below the signature is no part of the instrument admits the whole writing. Black *v.* Epstein, 93 Mo. App. 459, 67 S. W. 736.

Identification of note.—An admission "that at the time mentioned in the complaint, they [the defendants] made and endorsed a note like that set forth therein," unaccompanied by anything tending to show that it was a distinct note from that described in the complaint, must be held to refer to the note sued on. Moody *v.* Andrews, 39 N. Y. Super. Ct. 302.

Refusal to admit.—An answer which does not deny that defendant is maker, but simply refuses to admit the making is insufficient. Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188.

9. Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Cogswell *v.* Hayden, 5 Oreg. 22.

10. Kinney *v.* Osborne, 14 Cal. 112; Reed *v.* Arnold, 10 Kan. 102; Framingham Bank *v.* Gray, 9 Gray (Mass.) 241.

11. Bass *v.* Shurer, 2 Heisk. (Tenn.) 216, a plea that the note was given for Confederate money.

12. *Colorado.*— Mohr *v.* Barnes, 4 Colo. 350.

Oregon.— Creecy *v.* Joy, 40 Oreg. 28, 66 Pac. 295.

Tennessee.— Bass *v.* Shurer, 2 Heisk. (Tenn.) 216.

West Virginia.— Rand *v.* Hale, 3 W. Va. 495, 100 Am. Dec. 761.

United States.— Murphy *v.* Byrd, Hempst. (U. S.) 221, 17 Fed. Cas. No. 9,947*b*.

13. Woolen *v.* Whitacre, 73 Ind. 198; Graham *v.* Rush, 73 Iowa 451, 35 N. W. 518; Dinsmore *v.* Stimbert, 12 Nebr. 433, 11 N. W. 872. See also Thomas *v.* Page, 3 McLean (U. S.) 167, 23 Fed. Cas. No. 13,906.

14. A plea setting up a discharge in bankruptcy admits the averments of the declara-

answer will be treated as admitting the making of the instrument as charged in plaintiff's pleading.

e. Want of Consideration — (I) *Necessity of Specific Averments.* There are many decisions to the effect that want of consideration must be specially pleaded and facts stated from which it may appear that there never was any consideration for the instrument in suit.[15]

tion as to the execution of the note. Rozet *v.* Harvey, 26 Ill. App. 558.

15. *Alabama.*— See Webb *v.* Ward, 122 Ala. 355, 25 So. 48.

California.— Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

District of Columbia.— See Randle *v.* Davis Coal, etc., Co., 15 App. Cas. (D. C.) 357.

Indiana.— Osborne *v.* Hanlin, 158 Ind. 325, 63 N. E. 372; Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Coffing *v.* Hardy, 86 Ind. 369.

Kentucky.— Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472; Farmers', etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88; Clay *v.* Johnson, 5 Litt. (Ky.) 176.

Louisiana.— *In re* Lafourche Transp. Co., 52 La. Ann. 1517, 27 So. 958; Turner *v.* O'Neal, 24 La. Ann. 543.

Michigan.— Walbridge *v.* Fuller, 125 Mich. 218, 84 N. W. 133.

Mississippi.— Boone *v.* Boone, 58 Miss. 820; Tittle *v.* Bonner, 53 Miss. 578.

Nebraska.— Sharpless *v.* Griffen, 47 Nebr. 146, 66 N. W. 285; McCormick *v.* Barry, 10 Nebr. 207, 4 N. W. 1014.

New York.— Sprague *v.* Sprague, 80 Hun (N. Y.) 285, 30 N. Y. Suppl. 162, 61 N. Y. St. 862.

Pennsylvania.— Woods *v.* Watkins, 40 Pa. St. 458; Hale *v.* Fenn, 3 Watts & S. (Pa.) 361; Root *v.* Fox, 2 Pa. Dist. 339; Seabold *v.* Ducomb, 1 Wkly. Notes Cas. (Pa.) 83.

Texas.— See Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157.

Vermont.— State University *v.* Baxter, 42 Vt. 99; Hatch *v.* Hyde, 14 Vt. 25; Potter *v.* Stanley, 1 D. Chipm. (Vt.) 243.

United States.— Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

England.— Hunter *v.* Wilson, 7 D. & L. 221, 4 Exch. 489, 19 L. J. Exch. 8.

Canada.— Lundy *v.* Carr, 7 U. C. C. P. 371; Osborne *v.* Pierson, 36 U. C. Q. B. 457; Muir *v.* Cameron, 10 U. C. Q. B. 356; Blanchfield *v.* Birdsall, 7 U. C. Q. B. 141; Bradford *v.* O'Brien, 6 U. C. Q. B. 417; Bank of British North America *v.* Sherwood, 6 U. C. Q. B. 213; Anderson *v.* Jennings, 2 U. C. Q. B. 422. See also Montreal Bank *v.* Cameron, 17 U. C. Q. B. 46.

A plea of want of consideration implies that plaintiff is a holder of the note in suit without value or consideration paid therefor. Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649.

An accepter should not only state facts to show a want of consideration, but should also negative the idea that there was some benefit or advantage to the drawer of the bill at whose request it was accepted. Tittle *v.* Bonner, 53 Miss. 578.

Aider by other averments.— Where the specific facts pleaded are insufficient to establish the defense, the pleading is not aided by a general averment of want of consideration. Parker *v.* Jewett, 52 Minn. 514, 55 N. W. 56.

The following have been held to be good pleas of a want of consideration: That the note was given for a pretended indebtedness. Hall *v.* Morrison, 92 Ga. 311, 18 S. E. 293; Dunning *v.* Pond, 5 Minn. 302; Herklotz *v.* Chase, 32 Fed. 433. That a promised loan for which the note was given was never made. Lewis *v.* Simon, 101 Ala. 546, 14 So. 331; Ballard *v.* Turner, 58 Ind. 127. That the note was a gratuity. Poulton *v.* Dalmage, 6 U. C. Q. B. 277. That the due-bill sued on was given by defendant merely to show the receipt of the amount expressed as a gift. Burk *v.* Kerr, 12 Wkly. Notes Cas. (Pa.) 191. That defendant signed as surety after delivery without consideration moving to the principal or himself. Hartman *v.* Redman, 21 Mo. App. 124. That in consideration that a machine, purchased on plaintiff's representation that it would do certain work, defendant had paid plaintiff a sum of money, for which he had received no consideration, because of the plaintiff's misrepresentations and the failure of the machine to work as represented. Keystone Mfg. Co. *v.* Forsyth, 85 N. W. 262. That the acceptance on which a recovery was sought was for a debt due plaintiffs by a third person; that defendant did not promise to pay the debt when made, or request plaintiffs to give credit to the third person; that the acceptance was not in consideration of any forbearance to, or release of, the third person; that no security for the debt was given up; and that defendant has received no advantage, and plaintiffs no detriment, from the acceptance. Ohleyer *v.* Bernheim, 67 Miss. 75, 7 So. 319 [*citing* Nelson *v.* Serle, 1 H. & H. 456, 3 Jur. 290, 8 L. J. Exch. 305, 4 M. & W. 795].

The following pleas have been held to be insufficient: That the note was given for a pretended indebtedness — defendant admitting a purchase of the payee prior to the date of the note and failing to allege payment for the goods purchased. Dunning *v.* Pond, 5 Minn. 296. That by a parol contemporaneous agreement payment was not to be enforced, as the note was only a memorandum of an advancement by a parent to his child. Weaver *v.* Fries, 85 Ill. 356. That defendant indorsed for the accommodation of the maker who received no sufficient consideration for the note.

(II) *Sufficiency of General Averments.* There are decisions, however, some of them based on statutory provisions, which hold that general averments of want of jurisdiction, or pleas of the general issue, are sufficient to require proof of consideration on the part of plaintiff or to permit defendant to show that there was no consideration in fact,[16] especially where the consideration is fully averred in the declaration.[17]

(III) *Right to Plead to Part of Instrument.* Want of consideration may be pleaded to a part as well as to the whole of a cause of action evidenced by the instrument sued on, when limited to that part,[18] but a plea of want of consideration is improper if there was any consideration whatever.[19]

(IV) *Plea by Joint Maker.* A plea by one joint maker that the note in suit was without consideration as to him is bad unless it negative a consideration to a third party with his knowledge or detriment to the promisee.[20]

Dunning *v.* Pond, 5 Minn. 296. That defendant was only security on the note, and received no consideration for his suretyship (Brokaw *v.* Kelsey, 20 Ill. 303); and so where defendant pleads that he was only a guarantor, and the contract of guaranty was a part of the same transaction as the making of the note (Hippach *v.* Makeever, 166 Ill. 136, 46 N. E. 790). That the note in suit was executed in consideration of defendant's liability on another note on which there was in fact no liability, because of failure to give defendant notice of protest, it not appearing that the original note was discounted, in which case only would notice be required under the statute. Farmers', etc., Bank *v.* Small, 2 T. B. Mon. (Ky.) 88. That the note in suit was given in renewal of a note for like amount given for stock in a corporation of which the plaintiff was an officer; that the officers had fraudulently represented the property of the corporation to be worth a certain sum, free of encumbrance, when in fact it was encumbered to nearly its full value; that the corporation was insolvent when the note was given, and the capital stock was worthless, it not appearing that the encumbrances rendered the stock valueless, that the company is still insolvent, or that defendant was ignorant of the encumbrances when the renewal was given. Long *v.* Johnson, 15 Ind. App. 498, 44 N. E. 552.

Necessity of alleging notice to or knowledge of infirmity by plaintiff see *infra*, XIV, D, 2, l.

16. *Alabama.*— Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Kolsky *v.* Enslen, 103 Ala. 97, 15 So. 558 [*distinguishing* McAfee *v.* Glen Mary Coal, etc., Co., 97 Ala. 709, 11 So. 881; Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31]. See also Giles *v.* Williams, 3 Ala. 316, 37 Am. Dec. 692.

Arkansas.— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567; Dickson *v.* Burk, 6 Ark. 412, 44 Am. Dec. 521.

California.— Farmer's, etc., Bank *v.* Copley, 134 Cal. 324, 66 Pac. 287.

Illinois.— Honeyman *v.* Jarvis, 64 Ill. 366; Poole *v.* Vanlandigham, 1 Ill. 47; Taft *v.* Meyerscough, 92 Ill. App. 560; Massey *v.* Robertson, 5 Ill. App. 476.

Indiana.— Osborne *v.* Hanlin, 158 Ind. 325, 63 N. E. 572; Fisher *v.* Fisher, 113 Ind. 474, 15 N. E. 832; Moore *v.* Boyd, 95 Ind. 134; Hunter *v.* McLaughlin, 43 Ind. 38; Parker *v.* Morton, 29 Ind. 89; Kirkpatrick *v.* Hinkle, 19 Ind. 269; Swope *v.* Fair, 18 Ind. 300; Webb *v.* Bowless, 15 Ind. 242; Clark *v.* Harrison, 5 Blackf. (Ind.) 302; Kernodle *v.* Hunt, 4 Blackf. (Ind.) 57; Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716. See also Parker *v.* Morton, 29 Ind. 89.

Kansas.— Miller *v.* Brumbaugh, 7 Kan. 343.

Kentucky.— Evans *v.* Stone, 80 Ky. 78; Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472.

Massachusetts.— Davis *v.* Travis, 98 Mass. 222.

Michigan.— Keystone Mfg. Co. *v.* Forsyth, 126 Mich. 98, 85 N. W. 262; Perkins *v.* Brown, 115 Mich. 41, 72 N. W. 1095.

Minnesota.— See Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82.

New York.— Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Sill *v.* Rood, 15 Johns. (N. Y.) 230; White *v.* Sherman, 2 N. Y. Leg. Obs. 90.

Texas.— Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157.

Compelling statement of facts.— Defendant may be required by motion to set forth the specific facts relied on. Eagle Ins. Co. *v.* Blymyer, 10 Ohio S. & C. Pl. Dec. 417.

Where there is a supposed consideration and an alleged insufficiency of it to support the instrument, the pleader may set it out for the purpose of referring its want of sufficiency directly to the judgment of the court, but he is not required to do so, and it will be sufficient if he aver in the language of the statute or in any other equivalent language that defendant made the note without any good or valuable consideration therefor. Honeyman *v.* Jarvis, 64 Ill. 366.

17. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131.

18. Moore *v.* Boyd, 95 Ind. 134 (where a plea that as to all in excess of a certain part of a note it "was given without any consideration therefor" was held to be sufficient); Webster *v.* Parker, 7 Ind. 185.

19. Wheelock *v.* Barney, 27 Ind. 462.

20. McAfee *v.* Glen Mary Coal, etc., Co., 97 Ala. 709, 11 So. 881; Bingham *v.* Kimball, 33

(v) *Plea of Failure as Plea of Want of Consideration.* A plea drawn as a plea of failure of consideration may be upheld as a plea of want of consideration, where the facts alleged so warrant.[21]

(vi) *Contradictory Averments.* A plea otherwise good, is nullified by other averments showing a good consideration in fact.[22]

f. Total or Partial Failure of Consideration — (i) *In General.* At common law, and on the ground that the terms of a written instrument could not be varied by parol, a total or partial failure of consideration could not be pleaded, but the remedy of defendant was by a distinct action.[23] The common-law rule, however, has been generally abrogated or relaxed by statute or judicial action. These pleas when permissible should be framed on the theory that originally there was a consideration, which wholly or partially fails because of something occurring subsequently, and must state facts sufficient to defeat or diminish a recovery.[24]

Ind. 134; Anderson *v.* Meeker, 31 Ind. 245; Wright *v.* McKitrick, 2 Kan. App. 508, 43 Pac. 977. See also Moyer *v.* Brand, 102 Ind. 301, 26 N. E. 125 [*distinguishing* Bingham *v.* Kimball, 33 Ind. 184; Anderson *v.* Meeker, 31 Ind. 245], where the allegation was that "as to him, it [the note] was executed without any consideration whatever," which was held to be in effect an averment that so far as he, defendant, was concerned there was absolutely no consideration, the defense being limited to himself.

"His agreement" to pay.— The separate answer of one defendant that his agreement to pay the note was without consideration is not demurrable, if he also allege that the note itself was without consideration. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

Denial of copartnership.—A plea to a complaint on an alleged firm note that defendant was not a member of the firm when it was made, that plaintiff had notice of its dissolution, and that the note was made by another defendant without consideration, or the consent of defendant answering, sufficiently alleges a want of consideration, although double and inartificial. Starr *v.* Hunt, 25 Ind. 313.

21. Thus a plea that the note in suit was given to secure the support and maintenance of the mother of one of the defendants during her life, with a contemporaneous agreement that on her death the note should be surrendered as null and void; that the beneficiary was dead and that there was no other consideration, wherefore the consideration had failed, was held to be good as a plea of want of consideration, the agreement, presumably oral, being treated as surplusage. Kirkpatrick *v.* Taylor, 43 Ill. 207. See also Armstrong *v.* Webster, 30 Ill. 333, where the plea in substance was that the note in suit was given to prevent a distress for rent claimed by plaintiff to be due from one of the defendants when in fact no rent was due and he was not otherwise indebted.

Proof of a partial failure of consideration will not support a plea of no consideration in an action on a note. Yeomans *v.* Lane, 101 Ill. App. 228.

22. Henderson *v.* Farrelly, 16 Ill. 137; McCormick *v.* Barry, 10 Nebr. 207, 4 N. W. 1014; McGrath *v.* Pitkin, 56 N. Y. Suppl. 398.

Where it is shown on the trial that there was a sufficient consideration for the note in suit a plea of want of consideration is properly stricken out. Hirsch *v.* Oliver, 91 Ga. 554, 18 S. E. 354.

23. See Albertson *v.* Halloway, 16 Ga. 377; Mann *v.* Smyser, 76 Ill. 365.

A failure of consideration to be a defense must be total and where some portion of the consideration still remains the defense can only come in by way of recoupment of damages for the partial failure. Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656 [*citing* Reese *v.* Gordon, 19 Cal. 147; Harrington *v.* Stratton, 22 Pick. (Mass.) 510; Barber *v.* Rose, 5 Hill (N. Y.) 76; Batterman *v.* Pierce, 3 Hill (N. Y.) 171; Spalding *v.* Vandercook, 2 Wend. (N. Y.) 431].

24. *Alabama.*— McAfee *v.* Glen Mary Coal, etc., Co., 97 Ala. 709, 11 So. 881; Manness *v.* Henry, 96 Ala. 454, 11 So. 410; Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913.

Arkansas.— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567; Pike *v.* Frasier, 17 Ark. 597; Desha *v.* Robinson, 17 Ark. 228; Smith *v.* Capers, 13 Ark. 9; Wheat *v.* Dotson, 12 Ark. 699.

Colorado.— Cooper *v.* Hunter, 8 Colo. App. 101, 44 Pac. 944.

District of Columbia.— Durant *v.* Murdock, 3 App. Cas. (D. C.) 114.

Florida.— White *v.* Camp, 1 Fla. 94.

Georgia.— Greer *v.* Pate, 85 Ga. 552, 11 S. E. 869.

Illinois.— Mann *v.* Smyser, 76 Ill. 365; Hough *v.* Gage, 74 Ill. 257; Honeyman *v.* Jarvis, 64 Ill. 366; Christopher *v.* Cheney, 64 Ill. 26; Wisdom *v.* Becker, 52 Ill. 342; Jones *v.* Buffum, 50 Ill. 277; Great Western Ins. Co. *v.* Rees, 29 Ill. 272; Morgan *v.* Fallenstein, 27 Ill. 31; Parks *v.* Holmes, 22 Ill. 522; Baldwin *v.* Banks, 20 Ill. 48, 71 Am. Dec. 249; Hill *v.* Enders, 19 Ill. 163; Valandingham *v.* Ryan, 17 Ill. 25; Kinney *v.* Turner, 15 Ill. 182; Evans *v.* Greene County School Com'rs, 6 Ill. 654; Sims *v.* Klein, 1 Ill. 302;

(II) *Necessity of Alleging Fraud.* A plea of failure of consideration need not allege fraud, misrepresentation, or deceit on the part of the payee in obtaining the note sued on.[25]

(III) *Plea of Total as Inclusive of Plea of Partial Failure.* While it has been held that partial failure of consideration must be pleaded as such, and

Bradshaw *v.* Newman, 1 Ill. 133, 12 Am. Dec. 149; Poole *v.* Vanlandingham, 1 Ill. 47; Cornelius *v.* Vanorsdall, 1 Ill. 23; Taylor *v.* Sprinkle, 1 Ill. 17; Taft *v.* Myerscough, 92 Ill. App. 560; Lake Superior Mineral Land Development Co. *v.* Clapp, 50 Ill. App. 301; Massey *v.* Robertson, 5 Ill. App. 476. See also Mann *v.* Smyser, 76 Ill. 365.

Indiana.— Osborne *v.* Hanlin, 158 Ind. 325, 63 N. E. 372; Tyler *v.* Anderson, 106 Ind. 185, 6 N. E. 600; Moore *v.* Boyd, 95 Ind. 134; Franklin Life Ins. Co. *v.* Cardwell, 65 Ind. 138; Jones *v.* Frost, 51 Ind. 69; McCormick *v.* Klingensmith, 29 Ind. 296; Swope *v.* Fair, 18 Ind. 300; Thompson *v.* Voss, 16 Ind. 297; Smith *v.* Baxter, 13 Ind. 151; Conard *v.* Dowling, 7 Blackf. (Ind.) 481; Mullikin *v.* Latchem, 7 Blackf. (Ind.) 136; Thomas *v.* Page, 6 Blackf. (Ind.) 78. See also Hankins *v.* Shoup, 2 Ind. 342, holding that facts constituting the failure may be shown under the general issue.

Louisiana.—Lafourche Transp. Co. *v.* Pugh, 52 La. Ann. 1517, 27 So. 958; Langstaff *v.* Lees, 11 La. Ann. 271; Denegre *v.* Bayly, 1 McGloin (La.) 51.

Mississippi.— Ray *v.* Woolfolk, 1 Sm. & M. (Miss.) 523.

Missouri.—Lyman *v.* Campbell, 34 Mo. App. 213.

New York.— Union Foundry, etc., Works *v.* New York Lumber Drying Co., 13 N. Y. St. 701; Herman *v.* Bencke, 8 N. Y. St. 345.

Pennsylvania.— Canfield *v.* Ditman, (Pa. 1889) 16 Atl. 739; Garsed *v.* Rutter, (Pa. 1886) 10 Atl. 357; Brown *v.* Rogers, 3 Wkly. Notes Cas. (Pa.) 12; Bright *v.* Hewitt, 2 Wkly. Notes Cas. (Pa.) 626; Kirk *v.* Benner, 2 Wkly. Notes Cas. (Pa.) 67. See also Coil *v.* Pittsburgh Female College, 40 Pa. St. 439.

Vermont.— Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693.

Wisconsin.— Gregory *v.* Hart, 7 Wis. 532.

United States.— Central Ohio R. Co. *v.* Thompson, 2 Bond (U. S.) 296, 5 Fed. Cas. No. 2,550; Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320.

Failure and partial failure of consideration generally see CONTRACTS.

The object of the Georgia act of 1836 was to allow a plea of partial failure "in such cases, under such circumstances, and between such parties" as would render proper a plea of total failure if there had been such total failure of consideration. Simmons *v.* Blackman, 14 Ga. 318.

Sealed note.— The rule that a plea of failure of consideration cannot be used as a defense to a specialty has reference to such instruments as are executed with the ceremonies necessary to specialities at common law, and does not apply to a promissory note purporting to be over the hand and seal of the makers but signed and sealed by one, the other signing only as security. Albertson *v.* Holloway, 16 Ga. 377.

Time of failure.— In an action on a note, where the defense is a failure of consideration, a demurrer that the answer does not show that such failure occurred at or before the commencement of the suit is bad. Lewellen *v.* Crane, 113 Ind. 289, 15 N. E. 515.

The plea should allege the actual consideration and that there was never any other. Grunninger *v.* Philpot, 5 Biss. (U. S.) 82, 11 Fed. Cas. No. 5,852. And see Garriott *v.* Abbott, 28 Ind. 9, where an allegation of the failure to fulfil a promise was held insufficient, because not stating that such promise constituted the entire or only consideration.

Between the original parties to a note a partial failure of consideration must be pleaded as a partial defense. Union, etc., Works *v.* New York, etc., Co., 13 N. Y. St. 701. See also Fisher *v.* Sharpe, 5 Daly (N. Y.) 214.

Several notes.—A plea of partial failure of consideration, in a suit on different notes of different dates, should specify to which of the notes the plea is intended to apply. Brooks *v.* Fassett, 19 Ark. 666.

Effect of plea.—A plea of failure of consideration admits the original existence of a consideration. Denegre *v.* Bayly, 1 McGloin (La.) 51.

The plea of failure of consideration was held good in the following cases, arising upon different sets of facts:

Georgia.— Eskridge *v.* Barnwell, 106 Ga. 587, 32 S. E. 635.

Illinois.— Purkett *v.* Gregory, 3 Ill. 44; Bourland *v.* Gibson, 21 Ill. App. 43.

Indiana.— Lewellen *v.* Crane, 113 Ind. 289, 15 N. E. 515; Stanford *v.* Davis, 54 Ind. 45; Kansas City First Nat. Bank *v.* Grindstaff, 45 Ind. 158; Miller *v.* Gibbs, 29 Ind. 228.

New York.—Chase *v.* Senn, 13 N. Y. Suppl. 266, 36 N. Y. St. 36.

Pennsylvania.— Leberman *v.* Kagerman, 19 Wkly. Notes Cas. (Pa.) 448.

Texas.— Donaldson *v.* Cleburne First Nat. Bank, (Tex. Civ. App. 1893) 22 S. W. 543.

United States.— Hoopes *v.* Northern Nat. Bank, 102 Fed. 448, 42 C. C. A. 436.

Necessity of alleging notice to or knowledge of infirmity by plaintiff see *infra*, XIV, D, 2, l.

25. Aultman, etc., Co. *v.* Trainer, 80 Iowa 451, 45 N. W. 757, where the court said that "a failure of consideration may be consistent with an honest purpose by both parties."

cannot be shown under a plea of total failure,[26] it has also been held that the latter plea includes the former.[27]

(IV) *AVERMENTS AS TO EXTENT OF FAILURE AND DAMAGE.* In pleading a partial failure of consideration the extent of the failure as well as the specific damage sustained should be appropriately averred.[28]

g. Illegal Consideration. A plea of illegality of consideration must sufficiently and with reasonable certainty set out the specific facts which are claimed to constitute the illegality.[29]

26. Christopher *v.* Cheney, 64 Ill. 26; Lake Superior Mineral Land Development Co. *v.* Clapp, 50 Ill. App. 301; Manly *v.* Hubbard, 9 Ind. 230.

27. Otis *v.* Holmes, 109 Ga. 775, 35 S. E. 119; Morgan *v.* Printup, 72 Ga. 66.

Under a plea of total failure defendant is entitled to an abatement for only so much of the consideration as had failed. Petillo *v.* Hopson, 23 Ark. 196.

Redundancy.— In an action by an indorsee, a plea setting forth partial failure of consideration and want of good faith in the indorsement is not redundant, although the failure of consideration is also set up in another plea, since that matter must be repeated in order to make out a good defense against the indorsee. Sturdivant *v.* Memphis Nat. Bank, 60 Fed. 730, 736, 9 C. C. A. 256, 261.

28. *Illinois.*— Taft *v.* Myerscough, 92 Ill. App. 560.

Indiana.— Burr *v.* Wilson, 26 Ind. 389; Harrison *v.* Bryant, 5 Ind. 160.

New York.— Bookstaver *v.* Jayne, 3 Thomps. & C. (N. Y.) 397.

Wisconsin.— Herman *v.* Gray, 79 Wis. 182, 48 N. W. 113.

United States.— Grunninger *v.* Philpot, 5 Biss. (U. S.) 82, 11 Fed. Cas. No. 5,852.

29. *Georgia.*— Johnson *v.* Ballingall, 1 Ga. 58.

Illinois.— Bradshaw *v.* Newman, 1 Ill. 133, 12 Am. Dec. 149.

Indiana.— Fisher *v.* Fisher, 113 Ind. 474, 15 N. E. 832; Bowser *v.* Spiesshofer, 4 Ind. App. 348, 30 N. E. 942; Kain *v.* Rinker, 1 Ind. App. 86, 27 N. E. 328.

Kentucky.— Powell *v.* Flanary, 22 Ky. L. Rep. 908, 59 S. W. 5.

Nebraska.— Dillon *v.* Darst, 48 Nebr. 803, 67 N. W. 783.

New York.— Hatch *v.* Brewster, 53 Barb. (N. Y.) 276.

Pennsylvania.— Crowell *v.* McCready, 15 Wkly. Notes Cas. (Pa.) 531.

Texas.— Turner *v.* Gibson, 2 Tex. App. Civ. Cas. § 744.

Washington.— Lyts *v.* Keevey, 5 Wash. 606, 32 Pac. 534.

United States.—See Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320.

In Michigan under the plea of *non assumpsit* it may be shown that the instrument sued on was never valid without giving special notice of the defense. Hill *v.* Callaghan, 31 Mich. 424.

Alleged illegality by reason of intended aid to the enemy in time of war must be particularly pleaded. Kimbro *v.* Fulton Bank, 49 Ga. 419.

Consideration invalid by operation of law. — A plea which is open to the construction that there was a consideration in fact, but that the consideration was invalid by operation of law, is bad. Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472, where the plea was that the note in suit was not executed on a consideration good and valid in law.

Uncertainty.—A plea alleging that the consideration of the note sued on was certain tickets, checks, or notes purporting that money would be paid to the receiver, holder, or bearer, which said tickets, notes, or checks were intended to be used as a currency, or medium of trade, in lieu of money, the said tickets, notes, or checks not being authorized so as to be used or put in circulation, was demurrable for uncertainty in not showing the character of the tickets, etc., or by whom they were issued. Ford *v.* Ragland, 25 Ark. 612.

Sale of fertilizers not inspected, etc.— In an action on a note given for the purchase-price of fertilizers, an answer alleging failure to comply with the Alabama act of March 2, 1871, requiring the inspection, stamping, and branding of fertilizers, need not further allege that the sale was made in this state; if made elsewhere that fact is matter for replication. Renfro *v.* Loyd, 64 Ala. 94.

The statute against gambling contracts need not be specially pleaded. Watson *v.* Bayley, 2 Cranch C. C. (U. S.) 67, 29 Fed. Cas. No. 17,276.

Lottery tickets.—An affidavit of defense, stating that the consideration of a check is for lottery tickets, but omitting to add that the sale was in this state, is insufficient. Bows *v.* White, 2 Miles (Pa.) 140.

Money lost on wager.—Where, by statute, a note for which the consideration is money or property won on a bet or wager is void and a recovery is authorized of the person winning, provided that action therefor be commenced within ninety days after payment thereof, an answer alleging that an indorsement was made as a bet on a horse-race presents a good defense, although in effect it is an attempt to recover the property lost on the race and was filed more than ninety days after payment of the bet. Roff *v.* Harmon, (Indian Terr. 1901) 64 S. W. 755.

h. Fraud — (1) *In General.* The facts constituting the alleged fraud should be pleaded specifically. It is not sufficient to charge fraud generally or to state its commission as a conclusion,[30] but the answer will be sufficient if it sets out facts from which the fraud is apparent or makes out a complete or partial defense on that ground.[31] There are a number of decisions, however, to the effect that fraud may be pleaded generally or shown under the general issue.[32]

Suppression of prosecution.—Objection that a note was void because a part of the consideration was to suppress a criminal prosecution, and to suppress evidence in a pending prosecution, was bad, where the plea contained no notice of such a defense. Barger *v.* Farnham, (Mich. 1902) 90 N. W. 281.

30. *Arkansas.*— Catlin *v.* Horne, 34 Ark. 169; Keller *v.* Vowell, 17 Ark. 445.

California.— Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

Illinois.—Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240.

Indiana.— Brown *v.* Nichols, 123 Ind. 492, 24 N. E. 339; Marion, etc., Gravel Road Co. *v.* Kessinger, 66 Ind. 549; Murphy *v.* Lucas, 58 Ind. 360; Parker *v.* Morton, 29 Ind. 89.

Mississippi.— Tittle *v.* Bonner, 53 Miss. 578.

Montana.— Helena First Nat. Bank *v.* How, 1 Mont. 604.

Nebraska.— Crosby *v.* Ritchey, 47 Nebr. 924, 66 N. W. 1005.

New York.— McMurray *v.* Gifford, 5 How. Pr. (N. Y.) 14.

Pennsylvania.— Freeman's Nat. Bank *v.* Butler, 4 Kulp (Pa.) 99; Coon *v.* Moore, 2 Pa. Co. Ct. 246; Snyder *v.* Whann, 1 Chest. Co. (Pa.) 169. See also Schwarzkopf *v.* Hill, (Pa. 1886) 3 Atl. 799.

Texas.— Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157; Morgan *v.* Vandermark, 1 Tex. App. Civ. Cas. § 511.

Utah.— Voorhees *v.* Fisher, 9 Utah 303, 34 Pac. 64.

Wisconsin.— Eau Claire New Bank *v.* Kleiner, 112 Wis. 287, 87 N. W. 1090; Dickerman *v.* Bowman, 14 Wis. 388; Gregory *v.* Hart, 7 Wis. 532.

United States.— Grunninger *v.* Philpot, 5 Biss. (U. S.) 82, 11 Fed. Cas. No. 5,852. See Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

See 7 Cent. Dig. tit. "Bills and Notes," § 1525.

31. Carithers *v.* Levy, 111 Ga. 740, 36 S. E. 958; Huffstetter *v.* Buzett, 32 Ind. 293; Felleman *v.* Cassler, 198 Pa. St. 407, 48 Atl. 275; Schwarzkopf *v.* Hill, (Pa. 1886) 3 Atl. 799; Gorman *v.* Gillen, 5 Wkly. Notes Cas. (Pa.) 127; Bardsley *v.* Delp, 12 Phila. (Pa.) 325, 35 Leg. Int. (Pa.) 474.

Evidence of fraud is inadmissible under a plea of want of consideration, hence it is error to strike out a good plea of fraud on the ground that it is the same as a prior plea of want of consideration. Hawkins *v.* Nation, 39 Ind. 50. In Collins *v.* Townsend, 58 Cal. 608, a plea that the note sued on was obtained by false and fraudulent representations of the payee, "and without consideration therefor," was construed to allege that the note was without consideration because of the fraudulent representations.

Fraud is not shown by allegations that plaintiff neglected to deduct for short weight from the amount for which the note was to be given as the purchase-price of merchandise. Kooker *v.* Addis, 1 Wkly. Notes Cas. (Pa.) 327.

Illiteracy.—An answer that defendant, a surety, was unskilled in business, unable to read or write, and ignorant of the form of note which he signed, and that at the time of its execution plaintiff was present and failed to read or explain the instrument to defendant, although the latter relied upon him so to do, does not allege fraud. Goodacre *v.* Skinner, 47 Kan. 575, 28 Pac. 705.

Failure to make promised loan.— That the note was executed on plaintiff's promise to make a loan to defendant which he failed to keep does not show fraud. Lewis *v.* Simon, 101 Ala. 546, 14 So. 331.

Partial defense.— A plea of fraud is sufficient if it sets forth facts constituting a partial defense and presents enough to enable defendant to go to the jury. Higginbotham *v.* Conway, 113 Ga. 1155, 39 S. E. 550.

Identification of note in suit.— An averment that the payees claimed to have had two of defendant's notes, of similar date and amount, one of which was a forgery or fraudulently obtained, but without an averment that the note in suit was not the one actually given by him is insufficient. Black *v.* Halstead, 39 Pa. St. 64.

Negativing truth of representations.— An allegation that the note in suit was given on the fraudulent representation that defendant was liable on a certain bond, and to avoid litigation, should also allege that he was not liable on the bond. Howe Mach. Co. *v.* Brown, 78 Ind. 209.

32. *Indiana.*— Jones *v.* Baum, 5 Blackf. (Ind.) 154.

Iowa.— Strawser *v.* Johnson, 2 Greene (Iowa) 373; Hildreth *v.* Tomlinson, 2 Greene (Iowa) 360, 50 Am. Dec. 510; Hampton *v.* Pearce, Morr. (Iowa) 489. But see Ockendon *v.* Barnes, 43 Iowa 615; Blake *v.* Graves, 18 Iowa 312.

Kentucky.— Evans *v.* Stone, 80 Ky. 78; Ross *v.* Braydon, 2 Dana (Ky.) 161, 26 Am. Dec. 445.

Maryland.— Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478.

Mississippi.—Brewer *v.* Harris, 2 Sm. & M. (Miss.) 84, 41 Am. Dec. 587.

(II) *INDUCEMENT.* It should also be averred that the representations were made with a fraudulent intent to deceive or with knowledge of their falsity,[33] and that defendant relied on or was influenced by the fraud practised.[34]

(III) *KNOWLEDGE OF FRAUD BY PLAINTIFF.* In an action by one who is presumably a *bona fide* holder, it must be alleged that he took the instrument with knowledge of the fraud.[35]

i. Mistake. Where mistake is relied on, the answer must set forth the facts and circumstances of the transaction that it can be seen that there was mistake in fact.[36] A plea in abatement setting up a mistake should ask for reformation or for affirmative relief.[37]

j. Duress. Like pleas of fraud or mistake the plea of coercion or duress must specifically state the facts which are relied on to establish the defense.[38] Where another than the payee sues it must be alleged that he took the note after maturity or that he had notice of the circumstances under which it was procured.[39]

k. Transfer or Ownership — (I) *NECESSITY OF DENYING.* Transfer or owner-

Ohio.— Saunders *v.* Stotts, 6 Ohio 380, 27 Am. Dec. 263.

United States.— McClintick *v.* Johnston, 1 McLean (U. S.) 414, 15 Fed. Cas. No. 8,700.

A general plea is sufficient, where the fraud only refers to matters stated in the petition. Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393.

Failure to question sufficiency.— A general plea of fraud is sufficient to present an issue, in the absence of a demurrer. Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157.

33. Palmer *v.* Smedley, 18 How. Pr. (N. Y.) 321.

34. Voorhees *v.* Fisher, 9 Utah 303, 34 Pac. 64; Grunninger *v.* Philpot, 5 Biss. (U. S.) 82, 11 Fed. Cas. No. 5,852.

Sufficiency.— In an action on a note given for an interest in certain processes for making paint, it appeared that the note was one of several which by agreement were deposited with a third person, to be by him handed to the payee on the demonstration, by a test of the paints and processes, that former representations made in regard to them by the payee were correct. It was held that defendant, having substantially alleged in his answer that the note was delivered in reliance on false representations, was not bound to allege further the payee's fraudulent conduct in conducting and reporting on the test, as that was merely evidence to rebut plaintiff's allegation that the notes were given, not on the payee's representations, but on an actual test of their truth, which was satisfactory to defendant. Pelly *v.* Naylor, 139 N. Y. 598, 35 N. E. 317, 55 N. Y. St. 453.

35. Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; Wisenogle *v.* Powers, 4 Ohio Dec. (Reprint) 232, Clev. L. Rep. 141.

As against the assignee an allegation that the note was obtained by false representations of the payee and that the assignee was aware of their falsity prior to and at the time of the assignment is sufficient. Hickson *v.* Early, 62 S. C. 42, 39 S. E. 782.

Necessity of alleging notice to or knowledge of infirmity by plaintiff see *infra*, XIV, D, 2, l, (VII).

36. Carr *v.* Dickson, 58 Ga. 144; Brown *v.* Nichols, 123 Ind. 492, 24 N. E. 339; Seeley *v.* Engell, 17 Barb. (N. Y.) 530.

Negativing negligence.— Where defendant alleged that he indorsed the note in suit by mistake and without consideration it was not necessary to aver that the mistake was not due to his negligence. Hardison *v.* Davis, 131 Cal. 635, 63 Pac. 1005.

37. Scott *v.* Norris, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

Necessity of prayer for reformation.— Where the answer sets up facts to show that the amount named in the note was inserted by mutual mistake, and that a lesser sum expressed the real contract of the parties, they are available as a defense in the reduction of plaintiff's demand without a prayer for reformation. Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482.

38. Richardson *v.* Hittle, 31 Ind. 119; Donaldson *v.* Woodward, (Pa. 1887) 8 Atl. 192.

Duplicity.—A plea which after stating that the note in suit was obtained by duress details the circumstances is not objectionable for duplicity. Bingham *v.* Sessions, 6 Sm. & M. (Miss.) 13.

Sufficiency.— A bill to cancel notes upon the ground that they were given under duress is sufficient if it set out facts showing in what the alleged duress consisted, although it fails to set out with great particularity the immediate injury which the notes were given to prevent. Glass *v.* Haygood, 133 Ala. 489, 31 So. 973.

39. Pate *v.* Allison, 114 Ga. 651, 40 S. E. 715.

Aider by denial of bona fides.— A general denial of an allegation that plaintiff is a *bona fide* holder will not aid a plea defective because failing to allege that plaintiff took the note after maturity or had notice of the threats. Pate *v.* Allison, 114 Ga. 651, 40 S. E. 715.

ship is admitted by failure to deny the same,[40] or by pleading immaterial matters which are insufficient to require proof of title;[41] but is not admitted by setting off matters arising out of the original transaction,[42] or after denying the transfer by alleging that if it were in fact made, the assignee had notice of existing defenses.[43]

(II) *Specific or General Averments.* In many cases it has been held that the transfer to or the title or interest of plaintiff to the instrument in suit and his consequent right to maintain the action may be put in issue by a general denial or a denial which is tantamount thereto.[44] In others it is held to be necessary to plead affirmatively and to set out the facts and circumstances relied on to defeat plaintiff's claim of title, to explicitly deny ownership or possession, or facts by which they could have been lawfully acquired.[45]

40. *Alabama.*—Breitling *v.* Marx, 123 Ala. 222, 26 So. 203.

California.— Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Indiana.— Woollen *v.* Wise, 73 Ind. 212; Woollen *v.* Whitacre, 73 Ind. 198.

New York.— New York City Twelfth Ward Bank *v.* Brooks, 63 N. Y. App. Div. 220, 71 N. Y. Suppl. 388.

Wisconsin.— Manegold *v.* Dulan, 30 Wis. 541.

41. **Indorsement for collection.**— A plea that plaintiff's only connection with the note in suit is that it was indorsed to him for collection admits his possession and right to sue as trustee for collection. McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407.

Power of corporation to indorse.—In an action by an indorsee against the maker of a note made payable to an insurance company, the declaration averred that the note was duly indorsed, and the answer averred that the corporation never had any legal existence or power to transfer the note by indorsement or otherwise. It was held, upon proof having been made of the incorporation of the company, with authority to indorse notes, that the making and due indorsement of the note were admitted by the pleadings. Ogden *v.* Raymond, 5 Bosw. (N. Y.) 16.

Joint admission.— A joint answer admitting that defendants indorsed the notes in suit is a mutual acknowledgment of their respective signatures. McDonough *v.* Thompson, 11 La. 566.

Admission of transfer and denial of title.— If an assignment to plaintiff is admitted, his title cannot be denied without a special averment of facts tending to call it in question. Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

42. The admission implied by a counterclaim by way of set-off, which is alleged to have arisen out of the original transaction of which the notes are a part, goes no further than the original transaction, and does not admit ownership of the notes. Wilson *v.* Reedy, 32 Minn. 256, 20 N. W. 153.

43. Nunnemacher *v.* Johnson, 38 Minn. 390, 38 N. W. 351.

44. *California.*—Mahe *v.* Reynolds, 38 Cal. 560; Hastings *v.* Dollarhide, 18 Cal. 390.

Indiana.—Scribner *v.* Bullit, 1 Blackf. (Ind.) 112; Bates *v.* Hunt, 1 Blackf. (Ind.) 67.

Minnesota.— Nunnemacher *v.* Johnson, 38 Minn. 390, 38 N. W. 351.

Missouri.— Mechanics' Bank *v.* Fowler, 36 Mo. 33; Saville *v.* Huffstetter, 63 Mo. App. 273; Worrell *v.* Roberts, 58 Mo. App. 197.

Nebraska.— Graves *v.* Norfolk Nat. Bank, 49 Nebr. 437, 68 N. W. 612; Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.

Ohio.—Louisville Banking Co. *v.* McDonald, 4 Ohio Dec. (Reprint) 255, Clev. L. Rep. 173.

Texas.— Ford *v.* Oliphant, (Tex. Civ. App.) 1895) 32 S. W. 437.

Washington.— Tullis *v.* Shannon, 3 Wash. 716, 29 Pac. 449.

Note made to corporation.— On plea of the general issue to an action by a corporation upon a note made payable to the corporation, plaintiff must prove its corporate existence. Owen *v.* Farmers' Bank, 2 Dougl. (Mich.) 134 note.

That an indorsement was made by one partner to his copartners for collection and with no intent to transfer it may be shown under the general issue. Denton *v.* Peters, L. R. 5 Q. B. 475, 23 L. T. Rep. N. S. 281.

That indorsement was for the purpose of taking up another bill and on the condition of so doing may be shown under the general issue. Bell *v.* Ingestre, 12 Q. B. 317, 19 L. J. Q. B. 71, 64 E. C. L. 317.

45. *California.*— Monroe *v.* Fohl, 72 Cal. 568, 14 Pac. 514.

Indiana.— Hereth *v.* Smith, 33 Ind. 514; Kirkpatrick *v.* Hinkle, 19 Ind. 269; Elder *v.* Smith, 16 Ind. 466; Lung *v.* Sims, 14 Ind. 467; Hankins *v.* Shoup, 2 Ind. 342.

Iowa.— Allen *v.* Newberry, 8 Iowa 65.

Louisiana.— Peyroux *v.* Davis, 17 La. 479; Rost *v.* Byrne, 14 La. 372.

Mississippi.— Bingham *v.* Sessions, 6 Sm. & M. (Miss.) 13; Anderson *v.* Patrick, 7 How. (Miss.) 347.

New York.— New York City Twelfth Ward Bank *v.* Brooks, 63 N. Y. App. Div. 220, 71 N. Y. Suppl. 388; Seeley *v.* Engell, 17 Barb. (N. Y.) 530; McKnight *v.* Hunt, 3 Duer (N. Y.) 615 (where the complaint did not allege that the indorsement or delivery was by defendant to plaintiff); Jones *v.* Brown,

(III) *NATURE OF PLEA DENYING TITLE.* A plea denying plaintiff's title or interest is a plea in bar.[46]

(IV) *TITLE OR INTEREST IN ANOTHER.* Although it has been held that an answer to the effect that plaintiff is not the owner and holder of the note in suit is a mere traverse which creates no issue,[47] in some jurisdictions ownership or the

29 Misc. (N. Y.) 517, 61 N. Y. Suppl. 972; Kamlah *v.* Salter, 6 Abb. Pr. (N. Y.) 226.

Ohio.— Christie *v.* Drennon, 1 Ohio S. & C. Pl. Dec. 374.

Canada.— City Bank *v.* Smith, 20 U. C. C. P. 93.

Failure to deny possession.— Where a complaint alleges that a note was indorsed by defendant, and afterward transferred to plaintiff, and that the latter is possessed thereof, an answer denying the transfer to him puts his title in issue, although it does not specially deny his possession of the note. Chadwick *v.* Booth, 22 How. Pr. (N. Y.) 23, 13 Abb. Pr. (N. Y.) 249.

An allegation of an agreement to receive certain stock and to cancel and deliver up the note in suit is not an allegation of the non-existence of the note or a denial of an allegation that plaintiff then held it. Diven *v.* Spicer, 1 Kan. 103.

Payment by original holder.— An answer that the holder of a note payable to bearer deposited it as collateral security with one who transferred it to plaintiff as collateral security; that the original holder paid the note and is entitled to its return states no defense. Canadian Bank of Commerce *v.* Ross, 22 U. C. C. P. 497.

Redundant averment of fraud.— In an action by a person other than the payee of the note, the answer averred substantially that plaintiff never was its lawful holder or owner; that before suit defendant had paid it in full to the payee, who was then its lawful owner and holder. It was held that a further averment as to the fraudulent practices by which plaintiff had obtained the note was redundant and properly stricken out. Carpenter *v.* Reynolds, 58 Wis. 666, 17 N. W. 300.

Note obtained by false representations.— An answer alleging that a person deceased held obligations which thereafter came into plaintiff's possession, that plaintiff demanded payment thereof and defendant, believing him to be the personal representative of the deceased creditor, gave to him the note in suit, that plaintiff was not the personal representative of the deceased, that the obligations in question were not transferred to him, and that he was not entitled to receive payment on account thereof is a sufficient denial of the right to maintain the action. Quinlan *v.* Fairchild, 76 Hun (N. Y.) 312, 27 N. Y. Suppl. 689, 59 N. Y. St. 84.

In an action on a bill of exchange payable to the drawer's order and unindorsed by him, an answer denying that plaintiff is the owner and holder of the bill in suit and alleging that he did not get it in the due course of trade is a sufficient denial of its transfer. Louisville Banking Co. *v.* McDonald, 4 Ohio Dec. (Reprint) 255, Clev. L. Rep. 173.

Identification of note.— An answer that at the time alleged in the complaint, defendant "made and endorsed a note like that set forth therein," without anything to show that it was a distinct note, does not put in issue an allegation that plaintiff is the lawful holder, etc. Moody *v.* Andrews, 39 N. Y. Super. Ct. 302.

Suing without authority.— A plea that the payee of a note wrote his name on the back thereof and instituted suit in the name of plaintiff without the knowledge or consent of the latter is insufficient, unless it is further stated that plaintiff had not subsequently sanctioned or approved the use of his name. Harpham *v.* Haynes, 30 Ill. 404.

Corporate capacity to contract.— In an action by a bank on a note payable to it, a plea of the general issue *prima facie* admits the capacity of the bank to contract and sue. Herbert *v.* Nashville Bank, 1 Stew. & P. (Ala.) 286.

Aider by complaint.—Where by statute actions upon promissory notes payable at a bank or banking house must be brought in the name of the person having legal title, a plea denying legal title in plaintiff, but failing to aver that the note was payable at a bank or banking house is not defective, when that fact appears from the complaint. Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444.

46. Pixley *v.* Van Nostern, 100 Ind. 34; McConnell *v.* Morrison, 1 Litt. (Ky.) 206; Lanning *v.* Lockett, 10 Fed. 451.

In Louisiana a plea admitting the execution of a promissory note, but denying that it was legally transferred to plaintiff so as to enable him to sue on it, is a general defense, not a mere dilatory or declinatory exception. Questi *v.* Griffe, 3 La. 306.

That the party suing is liable as payer upon the note sued on is matter in bar and not of abatement. Stone *v.* Brooks, 6 How. (Miss.) 373.

47. Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62; Plant *v.* Schuyler, 7 Rob. (N. Y.) 271, 4 Abb. Pr. N. S. (N. Y.) 146; Brown *v.* Ryckman, 12 How. Pr. (N. Y.) 313.

An allegation that plaintiffs are not in possession of the note in suit, but that when the action was commenced it is in the possession of a third party, is immaterial. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

Under a plea of not the holder of a check exchanged with another for mutual accommodation defendant cannot set up any sup-

right to maintain the action is put in issue by a denial that plaintiff is the owner and holder or the real party in interest, or by averments to that effect,[48] supplemented by an allegation of transfer to or ownership of another,[49] who should be identified with reasonable particularity.[50]

(v) *Denial of Immaterial Averments.* Allegations merely characterizing plaintiff's title need not be controverted,[51] and the denial of an allegation contained in the complaint, which is no more than a legal conclusion of title or ownership, and for that reason immaterial, does not raise a material issue without specially controverting the facts upon which the conclusion rests, or showing other facts inconsistent therewith.[52]

(vi) *Denial on Information and Belief.* Where to controvert a material allegation it is sufficient to deny knowledge or information in respect thereto sufficient to form a belief, the transfer or indorsement may be denied in that form,[53] although the sufficiency of a plea in this form has been denied.[54]

(vii) *Indorsement* — (a) *In General.* By the law merchant in an action by an indorsee against a maker, drawer, or accepter plaintiff was required to prove his interest or title without a special plea;[55] but in many of the states, by statute or by a practice which has sprung up without legislative sanction, no such proof

posed right in the payee's assignee. City Bank *v.* Smith, 20 U. C. C. P. 93.

Suit in fictitious name.— A plea that the suit is brought by the true owner in a fictitious name, it not appearing by the plea that defendant has any defense to the note, is bad. Epting *v.* Jones, 47 Ga. 622.

48. Ebersole *v.* Morrison First Nat. Bank, 36 Ill. App. 267.

In Louisiana an allegation that plaintiff is not the real and *bona fide* holder, and has no right to sue, is an answer to the merits, and not an exception. Burns *v.* Haynes, 13 La. 12.

49. Oliver *v.* Depew, 14 Iowa 490; Merritt *v.* Daniels, 10 Iowa 196; Thompson *v.* Clark, 56 Pa. St. 33; Boys *v.* Joseph, 8 U. C. Q. B. 273. See also McDonald *v.* McDonald, 21 U. C. Q. B. 52.

In the federal courts a plea that plaintiff is not the owner of the note on which suit is brought and alleging it to be the property of a citizen of the state where the action was commenced is good, notwithstanding a statute of that state providing that the title of a *bona fide* holder cannot be inquired into except to let in some defense. Lanning *v.* Lockett, 10 Fed. 451.

50. Christian name.— An allegation of assignment to a person whose christian name was unknown to defendant is bad for uncertainty. Doyle *v.* Watt, 12 Ind. 342.

Designation of different person on record.— A plea averring who is the real owner of the note sued upon, and that the suit is instituted for his benefit, and pleading an offset against him, is a good plea, although a different person is indicated on the record as the beneficiary of the note in suit. Bowen *v.* Snell, 9 Ala. 481.

Negotiation by plaintiff.— In an action by the payee of a note against the maker, a plea that the payee procured it to be negotiated in bank for his own benefit, whereby the note became the property of the bank, and that the right to demand and receive the money accrued to, and became vested in, the bank, is sufficient as an allegation that the bank has absolute ownership of the note. Tuggle *v.* Adams, 3 A. K. Marsh. (Ky.) 429.

51. Downer *v.* Read, 17 Minn. 493.

An allegation that plaintiffs are partners, or the denial of an immaterial allegation to that effect, does not form a material issue where the complaint contains no allegation that the note was made to plaintiffs as partners. Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

If defendant takes issue on a defective allegation of ownership, proof thereof is admissible. Gould *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 525, 8 Cinc. L. Bul. 281.

52. Wedderspoon *v.* Rogers, 32 Cal. 569; Elder *v.* Smith, 16 Ind. 466; Holbrook *v.* Sims, 39 Minn. 122, 39 N. W. 74, 140; Downer *v.* Read, 17 Minn. 493; Frasier *v.* Williams, 15 Minn. 288; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Allen *v.* Reilly, 15 Nev. 452.

53. Duncan *v.* Laurence, 6 Abb. Pr. (N. Y.) 304.

In New York an allegation that defendant "has not sufficient knowledge or information to form a belief as to whether the plaintiff is now the lawful owner and holder of said note, therefore cannot admit or deny the same," puts the ownership of the note in issue. Temple *v.* Murray, 6 How. Pr. (N. Y.) 329.

In Ohio an answer in which defendant says he is ignorant as to whether plaintiff is the owner or indorsee of the note sued on, and therefore denies the same, is a good denial that the note was ever indorsed to plaintiff or that he is the holder of it. Roberts *v.* Glenn, 4 Ohio Dec. (Reprint) 269, Clev. L. Rep. 194.

54. Kamlah *v.* Salter, 6 Abb. Pr. (N. Y.) 226.

55. Richardson *v.* Cato, 9 Humphr. (Tenn.) 464.

is required in the absence of an appropriate plea putting the title or interest in issue,[56] as by general averments,[57] by a denial of the authenticity of the signature,[58] or by a denial of ownership or title,[59] and an assertion that the same is in a third person.[60] The effect of denying indorsement is to deny the signature, delivery, and transfer.[61] It has also been held that a plea of *non assumpsit*,[62] an averment that plaintiff is not the owner[63] and holder of the instrument sued on[64] or the real party in interest,[65] or an averment that the instrument was never indorsed so as to transfer title[66] is not sufficient. Neither is an allegation of indorsement met by an averment of an assignment by the payee to plaintiff and others.[67]

(B) *Conditional Indorsement.* The condition of an indorsement should be pleaded,[68] although it may be shown under a denial of the indorsement.[69]

(C) *Alteration by Filling Blanks.* Where it is sought to question the identity of the instrument because of alleged unauthorized additions or filling in of blanks *non est factum* is the proper plea.[70]

(D) *Agreement as to Nature of Liability.* A plea by an indorser that he and the other indorser were cosureties is insufficient to show an agreement that they were to be liable jointly and not severally.[71]

56. *Illinois.*— Burnap *v.* Cook, 32 Ill. 168.
Michigan.— Reynolds *v.* Kent, 38 Mich. 246.
Missouri.— Mechanics' Bank *v.* Fowler, 36 Mo. 33.
Nebraska.— Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.
New York.— Green *v.* Swink, 26 N. Y. Wkly. Dig. 574.
Tennessee.— Richardson *v.* Cato, 9 Humphr. (Tenn.) 464.

In Tennessee an objection in a justice's court to reading the assignment without proof is equivalent to a plea. Richardson *v.* Cato, 9 Humphr. (Tenn.) 464.

57. McIntosh *v.* Robison, 68 Ind. 120; Reynolds *v.* Kent, 38 Mich. 246; Kenny *v.* Lynch, 61 N. Y. 654; Taylor *v.* Smith, 55 Hun (N. Y.) 608, 8 N. Y. Suppl. 519, 29 N. Y. St. 365. But see Hankins *v.* Shoup, 2 Ind. 342, where it is held that a plea denying the indorsement is bad because amounting to the general issue.

A denial of indorsement or transfer before maturity is not objectionable as a legal conclusion. Stoutenburg *v.* Lybrand, 13 Ohio St. 228.

58. Carthage Nat. Bank *v.* Butterbaugh, 116 Iowa 657, 88 N. W. 954.

In Texas indorsement is regarded as fully proved unless defendant specifically deny that the same is genuine. Grounds *v.* Sloan, 73 Tex. 662, 11 S. W. 898.

59. Frazer *v.* Brownrigg, 10 Ala. 817; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466.

60. Frazer *v.* Brownrigg, 10 Ala. 817; Carthage Nat. Bank *v.* Butterbaugh, 116 Iowa 657, 88 N. W. 954; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466.

An averment of delivery of the instrument to plaintiff as agent, and its detention by him in fraud of his principal is tantamount to a denial of its indorsement to plaintiff (Adams *v.* Jones, 12 A. & E. 455, 9 L. J. Q. B. 407, 4 P. & D. 174, 40 E. C. L. 229) and will be good defense against subsequent holders with notice (Lloyd *v.* Howard, 15 Q. B. 995, 15 Jur. 218, 20 L. J. Q. B. 1, 69 E. C. L. 995), but not against a *bona fide* holder for value before maturity (Barber *v.* Richards, 6 Exch. 63, 15 Jur. 41, 20 L. J. Exch. 135, 2 L. M. & P. 1).

61. Marston *v.* Allen, 1 Dowl. N. S. 442, 11 L. J. Exch. 122, 8 M. & W. 494.

62. Sinclair *v.* Gray, 9 Fla. 71.

63. Agee *v.* Medlock, 25 Ala. 281, holding that a plea, averring that the plaintiff was not at the commencement of the suit the legal owner of the note sued on, puts in issue only the genuineness of the indorsement. State Bank *v.* Smith, 33 Mo. 364.

64. Walden *v.* Webber, 15 Ky. L. Rep. 846.

65. Shafer *v.* Bronenberg, 42 Ind. 89.

66. Richmond Second Nat. Bank *v.* Martin, 82 Iowa 442, 48 N. W. 735.

67. Shafer *v.* Bronenberg, 42 Ind. 89.

68. Robinson *v.* Little, 9 Q. B. 602, 18 L. J. Q. B. 29, 58 E. C. L. 602.

Averment construed.— In Collom *v.* Bixby, 33 Minn. 50, 21 N. W. 855, an answer of an indorser alleging an agreement with his indorsee that he should not be liable for the payment or collection of the note was construed to allege a written agreement that the indorser should not be held liable.

69. Austin *v.* Farmer, 30 U. C. Q. B. 10.

70. An unauthorized writing over the signature of an indorser must be questioned by a special plea of *non est factum.* Harding *v.* Waters, 6 Lea (Tenn.) 324.

Necessity of pleading knowledge of want of authority.— A plea of *non est factum* filed by the accommodation indorser of a note which was left to be filled up by the maker should aver that the indorsee knew at the time he received the note that the maker was not authorized to insert the amount with which the note was filled up. Grissom *v.* Fite, 1 Head (Tenn.) 332. And see Waldron *v.* Young, 9 Heisk. (Tenn.) 777.

71. McCarty *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

(E) *Denial of Immediate Indorsement.* An indorser of a bill is not estopped from denying the making or indorsement by the drawer,[72] although the right of an indorsee to deny the indorsement of the party from whom he directly derives title has been positively denied.[73]

(VIII) *ASSIGNMENT*—(A) *In General.* Assignment to plaintiff is denied by a plea of *non-assignavit*,[74] or by a denial of the assignment in general terms,[75] but not by a plea of *non est factum*.[76] Nor is it sufficient to deny that the instrument was assigned in writing or that it was assigned for a valuable consideration.[77]

(B) *Incapacity to Assign.* The incapacity of the assignor to transfer the instrument in question must be pleaded in abatement.[78]

(C) *Incapacity to Acquire.* An allegation of sale, discount, and transfer to a national bank simply questions the right of the bank to acquire the instrument by purchase.[79]

(D) *Transfer by Plaintiff.* A plea that the instrument in suit was transferred by plaintiff is not broad enough. Defendant must go further and negative a reacquisition of it by plaintiff, or allege that he had no title to or interest in it at the time of suit,[80] or set up a defense to the instrument,[81] and a plea that the note in suit was assigned, which fails to name the assignee, is in effect an allegation of indorsement in blank and is insufficient if it does not aver delivery.[82]

1. Bona Fides—(I) *IN GENERAL.* To question the *bona fides* of plaintiff or of the transaction whereby the note was obtained or by which he acquired the instrument in suit, or to enable defendant to avail himself of a defense which would have been good but for the transfer, he must allege specific facts sufficient to compel plaintiff to show that he is a *bona fide* holder for value or to defeat a recovery by him.[83] The allegations must be positive. Mere alle-

72. Armani *v.* Castrique, 14 L. J. Exch. 36, 13 M. & W. 443.

73. Griffin *v.* Latimer, 13 U. C. Q. B. 187.

74. Klyce *v.* Black, 7 Baxt. (Tenn.) 277.

75. **Denial of each and every allegation.**— Where a complaint by the assignees alleged assignment and delivery before suit, and that they were the owners thereof, an answer denying each and every allegation of the complaint, except execution and delivery to the payees, presents a material issue as to ownership. Tullis *v.* Shannon, 3 Wash. 716, 29 Pac. 449. See also Wilson *v.* Black, 6 Blackf. (Ind.) 509, holding a denial of assignment to be bad because amounting to the general issue.

Special plea appropriate.— In an action against the maker of a sealed note by an assignee thereof, defendant may deny the assignment by special plea. Gully *v.* Remy, 1 Blackf. (Ind.) 69.

76. Ison *v.* Ison, 6 Rich. (S. C.) 380; Barnett *v.* Logue, 29 Tex. 282.

77. Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Musselman *v.* Hays, (Ind. App. 1902) 62 N. E. 1022.

An allegation that the assignment of the note in suit was without consideration is insufficient to show that plaintiff is not the beneficial owner. Treadway *v.* Cobb, 18 Ind. 36, further holding that the answer would be good if it also averred that the assignment was intended as a gift.

78. **In Mississippi** the defense to an action on a note that it has been assigned to plaintiff by a bank in violation of the statute of 1840, prohibiting banks from assigning their credits and choses in action, can be made only by a plea in abatement. Commercial Bank *v.* Thompson, 7 Sm. & M. (Miss.) 443; Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641, 45 Am. Dec. 293; Planters Bank *v.* Sharp, 4 Sm. & M. (Miss.) 17.

79. Toll *v.* Farmers' Nat. Bank, 13 Ky. L. Rep. 682.

80. Johnson *v.* Washburn, 98 Ala. 258, 13 So. 48; Hawkins *v.* Fellowes, 6 Dana (Ky.) 128; Eckert *v.* Conrad, 1 Wkly. Notes Cas. (Pa.) 414. So an answer, in a suit on a note held as collateral, alleging that the security was assigned to secure plaintiff and another not joined in the suit, and not averring that the other's interest existed at the time of the suit, is bad, as to the interest of the latter. Jones *v.* Hawkins, 17 Ind. 550.

81. **Redelivery to payee.**— In an action by the indorsee, an allegation that he redelivered the note to the payee is insufficient, where no defense to the note as against the payee is set up and the legal title to the note is still in plaintiff. Caldwell *v.* Lawrence, 84 Ill. 161.

82. Watson *v.* Higgins, 7 Ark. 475.

83. Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652; Reamer *v.* Bell, 79 Pa. St. 292; Stitt *v.* Garrett, 3 Whart. (Pa.) 281; Poultney *v.* Baird, 6 Wkly. Notes Cas. (Pa.) 486; Sherman *v.* Allender, 1 Wkly. Notes Cas. (Pa.) 554; Purves *v.* Cor-

gations of belief, or by way of inference, or made as conclusions of law are insufficient.[84]

(II) *Want of Consideration For Transfer.* Thus defendant must aver facts from which it positively appears or from which it can reasonably be inferred that plaintiff acquired the instrument in suit without consideration [85] and in some jurisdictions the answer must contain in addition an explicit denial that plaintiff is a *bona fide* holder for value.[86] Allegations in the complaint which *prima facie* show that the transfer was made for value, in good faith before maturity, must be taken to be true unless appropriately controverted in the answer,[87] but immaterial allegations of a transfer for value need not be denied.[88]

(III) *Acquisition After Maturity.* If the ground of defense is that plaintiff acquired the instrument after maturity and hence subject to all the

field, 1 Phila. (Pa.) 174, 8 Leg. Int. (Pa.) 50.

Generality.— An affidavit of defense alleging procurement of the note by fraud and failure of consideration and denying ownership, is sufficient to put plaintiff to proof, although it would have been better to have been more specific. Reamer *v.* Bell, 79 Pa. St. 292.

General issue.— Where plaintiff alleges facts which *prima facie* constitute him an innocent holder, proof to show that he is not a *bona fide* holder may be introduced under the general issue. Rischa *v.* Planters' Nat. Bank, 84 Tex. 413, 19 S. W. 610.

It is sufficient to allege in effect that the circumstances of the transfer were such as to subject the instrument in the hands of the transferee to such defenses as would have been available against a purchaser for value before maturity. Wiggins *v.* Kirkpatrick, 114 N. C. 298, 19 S. E. 152, where it was averred that if the note was received at all by plaintiff, it was "received coupled with and subject to all the equities" between defendant and the payee.

Relief by cross bill.— Where a joint maker on notes filed a complaint in equity in the nature of a cross bill, alleging that he was a mere surety, and that the holder was not a *bona fide* holder, the cross bill was properly dismissed, since an adequate remedy at law existed by pleading and proving such defenses in the action at law on the notes. Hughes *v.* Pratt, 37 Oreg. 45, 60 Pac. 707.

84. Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. 484, 30 Atl. 957, 44 Am. St. Rep. 652; Gustine *v.* Cummings, 1 Wkly. Notes Cas. (Pa.) 105.

85. *Indiana.*— Hankins *v.* Shoup, 2 Ind. 342.

Iowa.— Lane *v.* Krekle, 22 Iowa 399.

Kentucky.— Early *v.* McCarl, 2 Dana (Ky.) 414.

Ohio.—Allen *v.* Johnson, 20 Ohio Cir. Ct. 8, 11 Ohio Cir. Dec. 42.

Pennsylvania.— Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 26 Atl. 201; Bitzer *v.* Muller, 1 Wkly. Notes Cas. (Pa.) 132.

United States.—Adams *v.* White, 1 Fed. Cas. No. 68, 16 Leg. Int. (Pa.) 293, 2 Pittsb. (Pa.) 21, 7 Pittsb. Leg. J. 41.

Mesne indorsement.— An affidavit of defense which alleges that the note was indorsed by the payee to plaintiff without consideration, and is held for the said payee, is sufficient, without alleging that the note was indorsed by the payee to another, who indorsed it to plaintiff. Allentown First Nat. Bank *v.* Eichelberger, 1 Woodw. Dec. (Pa.) 397.

Transfer in payment of antecedent debt.— An allegation by the maker that the payee received the note for a specific purpose but in violation of the agreement indorsed it to plaintiff for an antecedent debt states no defense. Bardsley *v.* Delp, 88 Pa. St. 420 [*reversing* 6 Wkly. Notes Cas. (Pa.) 366].

Negativing presumption of valuable consideration.— A plea that the note was transferred to plaintiff for a preëxisting debt due by the payee is insufficient without negativing the presumption that plaintiff acquired the note for value. Louisville Banking Co. *v.* Howard, 123 Ala. 197, 26 So. 207, 82 Am. St. Rep. 126.

An allegation of a belief that plaintiff gave no consideration for the note sued on is sufficient to prevent judgment on the pleadings. Thomas *v.* Witzman, 1 Wkly. Notes Cas. (Pa.) 359; Dyer *v.* Adams, 1 Wkly. Notes Cas. (Pa.) 146.

Inconsistent allegations.— An assertion in an affidavit of defense that plaintiff paid for a note seventy-five per cent of its face value is inconsistent with an allegation or inference that it was not obtained for value. Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652.

86. Forepaugh *v.* Baker, (Pa. 1888) 13 Atl. 465; Miller *v.* Ferrier, 7 U. C. Q. B. 540.

87. Allegations that the note sued on was made for defendant's accommodation and indorsed to plaintiff upon a usurious agreement, setting it forth, do not put the *bona fides* of the transaction in question. Fleischmann *v.* Stern, 90 N. Y. 110 [*affirming* 24 Hun (N. Y.) 265].

88. Guggenheim *v.* Goldberger, 7 Misc. (N. Y.) 740, 27 N. Y. Suppl. 422, 58 N. Y. St. 34.

defenses existing as between the original parties, the facts relative thereto must be appropriately alleged ;[89] but if the burden of showing good faith is on plaintiff and he fails to plead the acquisition of the instrument before maturity [90] and without notice of any existing defenses,[91] defendant is relieved of the necessity of interposing such a defense.

(IV) *TRANSFER TO AVOID DEFENSE.* The same requirements as to the necessity of alleging specific facts to question plaintiff's standing as a *bona fide* holder apply, where to defeat the action defendant relies on the fact that the transfer was made to avoid or defeat a valid defense.[92] If the answer is on belief, sufficient reasons therefor should be stated [93] and it has been held that the defense

89. *Georgia.*— Faulkner *v.* Ware, 34 Ga. 498.

Illinois.— Smith *v.* Doty, 24 Ill. 163; Ebersole *v.* Morrison First Nat. Bank, 36 Ill. App. 267.

Indiana.— Hankins *v.* Shoup, 2 Ind. 342; Weaver *v.* Zollman, 5 Ind. App. 485, 32 N. E. 592.

Iowa.— Lane *v.* Krekle, 22 Iowa 399; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Dec. 678.

Pennsylvania.— Caldwell *v.* West, 1 Phila. (Pa.) 288, 9 Leg. Int. (Pa.) 11.

The allegation must be in direct terms and not inferential. Bretton *v.* Bishop, 11 Vt. 70.

Admission of indebtedness.— In an action by the indorsee against a maker who admits an indebtedness on the note to the payee in an amount exceeding a counter-claim against the latter, an averment of a fraudulent transfer after maturity is properly stricken out. Eich *v.* Greeley, 112 Cal. 171, 44 Pac. 483.

Sufficiency.— Where the complaint on an accommodation note alleges that the paper came for value before maturity into plaintiff's possession, and the allegation is not denied, an issue is not raised by an allegation in the answer that plaintiff took the note after maturity with notice. Pryor *v.* Storke, 37 N. Y. App. Div. 364, 56 N. Y. Suppl. 94.

90. Coburne *v.* Poe, 40 Tex. 410.

91. Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 378, 1055; Campbell *v.* Patton, 113 N. C. 481, 18 S. E. 687.

92. The following allegations have been held to be sufficient in affidavits of defense: That plaintiffs were not the owners of said notes, but holding simply for the purposes of this action, and that they had been transferred to them to avoid the defense which defendant might have made in a suit by the original payees. Osmer *v.* Souder, 3 Wkly. Notes Cas. (Pa.) 155. That there was no consideration for the note and that plaintiff was a mere agent of the payee. Smith *v.* Booth, 1 Wkly. Notes Cas. (Pa.) 116. That defendant, under duress, gave the note for rent; that the lessor by failure to furnish steam as agreed in the lease caused defendant damage exceeding the value of the note; and that plaintiff is not a *bona fide* holder, but that the lessor is bringing suit in plaintiff's name to avoid the defense, although failing to set out the lease, and admitting that defendant, with knowledge of the damage, gave the note after the rent was due. Devlin *v.* Burns, 147 Pa. St. 168, 23 Atl. 375. That plaintiff is not the holder or owner for value before maturity, but that the note was handed by the payee to him for the purpose of debarring defendant from a defense to the same. Bacon *v.* Scott, 154 Pa. St. 250, 32 Wkly. Notes Cas. (Pa.) 194, 26 Atl. 422. That no consideration was paid, either by the maker or by plaintiff, to defendant, and that plaintiff is a mere transferee without value, and holds the same merely for collection for account of the maker, who is indebted to defendant "much in excess of the amount of said note." Chestnut St. Nat. Bank *v.* Ellis, 161 Pa. St. 241, 34 Wkly. Notes Cas. (Pa.) 351, 28 Atl. 1082. That the note was obtained by the original payee by fraudulent representations as to the property for which it was given; that the payee passed the note to plaintiff to avoid the defense of fraud; that plaintiff resides so far away that defendant cannot learn anything about him or the circumstances of the assignment; but that defendant believes that the note was passed to plaintiff without consideration, and that plaintiff took it merely to collect it for the original payee, and to avoid the defense of fraud. Boomer *v.* Henry, 2 Pa. Dist. 357, 13 Pa. Co. Ct. 104.

Transfer in violation of agreement.— An answer by accepters in an action against them by an indorsee setting up an agreement by the drawer that the bill should not be paid until certain goods were sold, and that until the sale the paper should not pass from his control, and also setting up in effect that the indorsement was made in pursuance of a design to deprive defendant of his defense against the drawer is sufficient. Risce *v.* Planters' Nat. Bank, 84 Tex. 413, 19 S. W. 610.

Transfer to evade statute.— An affidavit of defense stating that plaintiff obtained the note in suit after maturity and sues in his name to evade a statute prohibiting a wife from suing her husband, and further denying that defendant deserted his wife, the transferrer, or forced her to leave him, is good. Haun *v.* Trainer, 190 Pa. St. 1, 42 Atl. 367.

93. Gaskill *v.* Lynch, 4 Wkly. Notes Cas. (Pa.) 542. But see Union Trust Co. *v.* Banger, 8 Pa. Co. Ct. 99, holding that de-

attempted to be defeated by the transfer should be alleged,[94] as well as plaintiff's knowledge of the purpose of the transfer.[95]

(v) *Transfer For Collection.* Where by statute an action must be brought in the name of the real party in interest, the right to sue is put in issue by an answer that the transfer was without consideration and for the sole purpose of collection for the benefit of the real owner.[96] It is otherwise, however, where mere possession is sufficient to entitle the holder to sue,[97] and an averment that plaintiff is the agent of the payee, without a statement that he is an agent for collection, is insufficient.[98]

(vi) *Fraud.* In pleading fraud in obtaining or in the transfer of an instrument or in placing the instrument in circulation, facts from which the fraud is made apparent or can reasonably be inferred must be stated.[99]

fendant need not state the reasons for his belief.

Sufficient affidavits of defense.— An averment that defendant "verily believes and expects to prove that the note has been passed by the payee to plaintiffs to avoid making this defence, and that the plaintiffs sold the same to the use of the (payee) without consideration as between them," is sufficient against the indorsee. Reznor *v.* Supplee, 81 Pa. St. 180. An affidavit of defense, in assumpsit on a negotiable note by an indorser against the maker, which avers that the deponent "verily believes and fully expects to be able to show that the plaintiff herein is not a *bona fide* holder . . . of such note," but is being used as plaintiff to prevent a defense being established, is sufficiently precise. Penn Nat. Bank *v.* Altoona Mfg. Co., 4 Pa. Dist. 46, 15 Pa. Co. Ct. 320. An averment that defendant expected to be able to prove on the trial that plaintiff was not a *bona fide* holder, before maturity, of the note, of which defendant was an accommodation indorser, but that the same, at and after maturity, was held and owned by a third party, and that suit had been brought in the name of this plaintiff in order to shut out defendant from his defense, as against the third party was good. Union Trust Co. *v.* Banger, 8 Pa. Co. Ct. 99. An affidavit of defense is sufficient where it states that plaintiff is not a *bona fide* holder for value, that they were transferred to him to avoid a defense, and that he became the holder of them with full knowledge that there was a failure of consideration, "all of which is true to the best of deponent's knowledge and belief, and which deponent expects to be able to prove on the trial." Newbold *v.* Bernard, 15 Pa. Co. Ct. 118.

94. Fowler *v.* Willis, 4 Tex. 46.

95. Forepaugh *v.* Baker, (Pa. 1888) 13 Atl. 465.

96. Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378.

Allegation on belief.— An allegation that defendant believed and expected to prove that plaintiff held the note for collection only, for the benefit of the payee, who had given no consideration, and did not state that defendant was informed of the facts, or state any circumstance upon which to found his belief that plaintiff held for collection only is insufficient. Woolverton *v.* Smith, 4 Wkly. Notes Cas. (Pa.) 442; Gustine *v.* Cummings, 1 Wkly. Notes Cas. (Pa.) 105. But see Brown *v.* Walton, 3 Wkly. Notes Cas. (Pa.) 76, where an affidavit of defense alleging that defendant was informed, believed, and expected to be able to prove that plaintiff was merely a bolder for collection, was held good.

97. Mumford *v.* Weaver, 18 R. I. 801, 31 Atl. 1.

98. Huhler *v.* Pullen, 12 Ind. 567.

99. Tillou *v.* Britton, 9 N. J. L. 120; Adams *v.* White, 1 Fed. Cas. No. 68, 16 Leg. Int. (Pa.) 293, 7 Pittsb. (Pa.) 21, 2 Pittsb. Leg. J. 41. But an affidavit of defense setting forth that the note in suit was obtained or put into circulation by fraud or undue means is sufficient to overcome plaintiff's *prima facie* title. Lerch Hardware Co. *v.* Columbia First Nat. Bank, (Pa. 1886) 5 Atl. 778.

Fraudulent negotiation.— Allegations that defendant made the note to his own order, indorsed it, and delivered it to a broker to be discounted; that the broker told defendant he could not discount it, and would return it, when in fact he had fraudulently negotiated it, of which defendant had no knowledge until he received notice of its maturity from plaintiff; and that he had no means of knowing whether plaintiff gave value for it or not are sufficient to prevent judgment. Bruner *v.* Adams, 1 Wkly. Notes Cas. (Pa.) 390.

In fraud of bankrupt law.— An answer by the maker, alleging that the transfer was in fraud of the bankrupt law, because made to prefer creditors of the transferrer, states no defense. Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62.

Fraud of copartner.— In an action against one partner on a firm note by an indorsee thereof, an affidavit of defense that it was made without defendant's knowledge or consent by his copartner for his own private use, sufficiently alleges fraud to require plaintiff to prove that he purchased it for value before maturity. Real-Estate Invest. Co. *v.* Smith, 148 Pa. St. 496, 30 Wkly. Notes Cas. (Pa.) 80, 24 Atl. 59. An affidavit of defense, in an action on a note, by an indorsee thereof, fraudulently executed by a member of a part-

(VII) *KNOWLEDGE OF INFIRMITY.* Where *prima facie* plaintiff is a *bona fide* holder, the defense relied on must be supplemented by averments of notice to, or knowledge by, plaintiff of the infirmity complained of before the acquisition by him of the instrument in suit.[1] If such notice or knowledge is inferential or

nership for his private use, need not allege that the indorsee was not a *bona fide* holder without notice. Tradesmen's Nat. Bank *v.* Bachenheimer, 5 Pa. Dist. 218.

Necessity of alleging notice.— An affidavit of defense alleging that the note in suit was given in payment of goods sold by the payee to defendant, that thereafter a new contract was made, by which other notes were given in satisfaction of the note in suit, which was to have been returned, and that defendant made demand on the payee for its return, and had every reason to believe it to have been in his possession, and that he passed it to plaintiff in fraud of defendant's rights, is sufficient to prevent judgment, without alleging that plaintiff had notice of the fraud. Gordon *v.* Stilz, 5 Wkly. Notes Cas. (Pa.) 169. A special plea in an action by the indorser against one of two makers, setting forth that the note was fraudulently made and put in circulation, is a sufficient notice to require plaintiff to prove that he is a *bona fide* holder. Albietz *v.* Mellon, 37 Pa. St. 367.

1. *Colorado.*— Posey *v.* Denver Nat. Bank, 7 Colo. App. 108, 42 Pac. 684.

Florida.— Hancock *v.* Hale, 17 Fla. 808.

Georgia.— Faulkner *v.* Ware, 34 Ga. 498.

Illinois.— Smith *v.* Doty, 24 Ill. 163; Ebersole *v.* Morrison First Nat. Bank, 36 Ill. App. 267.

Indiana.— Shirk *v.* Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Hunter *v.* McLaughlin, 43 Ind. 38; Hall *v.* Allen, 37 Ind. 541; Hubler *v.* Pullen, 12 Ind. 567; Bradley *v.* Ward, 6 Blackf. (Ind.) 190.

Iowa.— Lane *v.* Krekle, 22 Iowa 399; Clapp *v.* Cedar County, 5 Iowa 15, 68 Am. Rep. 678; Stein *v.* Keeler, 4 Greene (Iowa) 86.

Kentucky.—Cason *v.* Grant County Deposit Bank, 97 Ky. 487, 17 Ky. L. Rep. 344, 31 S. W. 40, 53 Am. St. Rep. 418.

Maryland.— Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478.

Massachusetts.— See Goddard *v.* Lyman, 14 Pick. (Mass.) 268.

Ohio.— Wisenogle *v.* Powers, 4 Ohio Dec. (Reprint) 232, Clev. L. Rep. 141; Allen *v.* Johnson, 20 Ohio Cir. Ct. 8, 11 Ohio Cir. Dec. 42.

Pennsylvania.— Forepaugh *v.* Baker, (Pa. 1888) 13 Atl. 465; Miller *v.* Royer, 1 Wkly. Notes Cas. (Pa.) 62.

Tennessee.—Grissom *v.* Fite, 1 Head (Tenn.) 332.

But see Alabama Nat. Bank *v.* Halsey, 109 Ala. 196, 19 So. 522; Huntington First Nat. Bank *v.* Ruhl, 122 Ind. 279, 23 N. E. 766, which hold an allegation of notice of fraud to be unnecessary.

Existence of defense prior to assignment.— Under the Indiana statute to render any defense to the note available against the assignee it should be alleged that the defense existed at the time or before notice to defendant of the assignment. Rosenthal *v.* Rambo, 28 Ind. App. 265, 62 N. E. 637.

Failure of consideration.— An answer alleging in one paragraph total want of consideration, and in another a want of consideration except as to part of the amount, and each alleging notice to plaintiff at the time of the transfer, puts the *bona fides* in issue. Citizens' Bank *v.* Leonhart, 126 Ind. 206, 25 N. E. 1099.

Payment.— A plea in an action on a sealed note brought by the assignee of the payee against the maker should state that the payment was made before notice of the assignment. Helms *v.* Sisk, 8 Blackf. (Ind.) 503.

Set-off.— When the defense to an action on a promissory note given in payment for land is that the holder of the note acquired it with notice that the maker claimed a set-off for taxes on the land paid by him, and for which his vendor was liable, the answer should aver that the vendee had received, or was entitled to receive, from the vendor, a deed with covenants of general warranty. Scott *v.* Cantrell, 26 Ark. 226.

Agreement with payee.— Pleas that the note was given for stock under an agreement by the payee to take it back at defendant's request; that defendant's request was refused by the payee who was insolvent; and that plaintiff, a corporation, took the note with notice of these facts; also that the payee was insolvent; that the stocks had greatly depreciated; that defendant tendered a return of the stock and demanded a return of the note before its maturity; that the payee who was the cashier of plaintiff conspired with the latter to defraud defendant; that plaintiff was not a *bona fide* purchaser of the note, but took it after maturity with notice of defendant's equities, and that defendant purchased the stock under misrepresentations as to its value and paid more than par therefor set up a good defense in equity if not in law, in view of the insolvency of the payee. Cordell First Nat. Bank *v.* Adams, 92 Ga. 545, 17 S. E. 924.

Transferrer party to fraud.—An affidavit of defense, averring with particularity fraud in its execution, and that it was passed to plaintiffs by one who was the active agent in committing the fraud, establishes a good defense against any but a *bona fide* holder for value before maturity, and puts plaintiffs upon proof of their right as such holders. Gere *v.* Unger, 125 Pa. St. 644, 24 Wkly. Notes Cas. (Pa.) 7, 17 Atl. 511.

Transfer to one of several payees.—Where several payees of a promissory note unite in indorsing the same to one of their number, the latter acquires the interest only of his

circumstantial, facts and circumstances which will warrant a conclusion of knowledge must be detailed,[2] but notice need not be averred where by statute defenses available against an assignor may be interposed in an action by his assignee.[3]

m. Presentment, Protest, and Notice — (I) *PRESENTMENT.* To put the fact of presentment or demand in issue it must be appropriately denied.[4] It has been held, however, that an issue is made by a plea of the general issue,[5] by a defense in the form of a plea of *nil debet*,[6] and in an action on a note payable at a particular place by a person named by a denial of presentment to such person;[7] and where a note is payable at a place in another state, an averment of no demand at such place, and that by the law of such state defendant was discharged, is sufficient to raise an issue.[8] A plea of no demand is unavailable to the maker,[9] and the denial of an allegation of protest unnecessarily made does not controvert separate allegations of demand and refusal.[10]

(II) *PROTEST.* An allegation of protest for non-payment may be denied generally,[11] but a plea which fails to state dishonor before the commencement of the action[12] or the denial of an allegation unnecessarily made[13] forms no issue.

associate payees in the note and is not entitled to protection as a purchaser for value. And if in an action brought by him upon the note the answer sets up a total want of consideration for the note, in matter and manner sufficient to defeat the action, had it been brought in the name of the payees, it is not necessary to allege notice to, or knowledge in, plaintiff, of the entire worthlessness of the consideration. Saxton *v.* Dodge, 57 Barb. (N. Y.) 84.

Defense against assigned note.— A maker of a non-negotiable note setting up a defense against its purchaser must allege in his answer that the defense existed before notice to him of the assignment. Rosenthal *v.* Rambo, (Ind. App. 1902) 62 N. E. 637.

2. Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 199, 44 Am. St. Rep. 652; Stitt *v.* Garrett, 3 Whart. (Pa.) 281.

Suspicious circumstances.— An averment that plaintiff took the instrument under circumstances of suspicion sufficient to put him on inquiry is insufficient. Stitt *v.* Garrett, 3 Whart. (Pa.) 281.

Notice by officer of plaintiff.—An averment that the payee was an officer of plaintiff and "had notice of the entire transaction" without stating what the transaction was is insufficient. Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 32 Wkly. Notes Cas. (Pa.) 142, 26 Atl. 201. And an affidavit of defense alleging that, from the indorsee's position as treasurer of plaintiff, he should have known of the failure of the consideration and that affiant believed that the indorsee knew such facts, is insufficient to charge that the indorsee had actual notice. Dwight *v.* Hering, 18 Wkly. Notes Cas. (Pa.) 38.

3. Nisbett *v.* Brown, 30 Ark. 585.

4. Instances of sufficiency.— An averment that demand was not made of the maker personally or at his usual place of business is sufficient to entitle an indorser to a jury to determine whether the demand if made at all was made at a reasonable time. Ashton *v.* Dull, 31 Leg. Int. (Pa.) 61, 6 Leg. Gaz. (Pa.) 71. And an averment that plaintiff never made any demand on affiant for payment, although they had numerous business dealings together after the note fell due, in which affiant had collected sums of money from plaintiff, is sufficient. Gross *v.* Cloud, 14 Wkly. Notes Cas. (Pa.) 225.

Readiness to pay — Tender.— In Kentucky a plea of no demand at the place of payment must be accompanied by an allegation of a readiness to pay and a tender into court. Commonwealth Bank *v.* Hickey, 4 Litt. (Ky.) 225; Baker *v.* Phelps, 12 Ky. L. Rep. 387.

5. Pawcatuck Nat. Bank *v.* Barber, 22 R. I. 73, 46 Atl. 1095.

6. Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163.

7. Upper Canada Bank *v.* Sherwood, 8 U. C. Q. B. 116.

8. Although the court has personal knowledge that such is not the law. Pryor *v.* Wright, 14 Ark. 189.

9. Kirkman *v.* Allen, 17 Ind. 216, where defendant answered that plaintiff is not a resident of the state, but resides in one of the New England states, in which one he did not know; that no demand had been made before suit was brought; and that he did not know where to make payment, but was always ready to pay.

10. Brennan *v.* Lowry, 4 Daly (N. Y.) 253.

11. Decorah First Nat. Bank *v.* Day, 52 Iowa 680, 3 N. W. 728; Bartlett *v.* Jones, 4 Ohio Dec. (Reprint) 292, Clev. L. Rep. 219. *Contra*, Fidelity Ins. Co. *v.* Sarmiento, 2 Wkly. Notes Cas. (Pa.) 244, holding that in an action on a bill of exchange by the holder against the drawer, an affidavit of defense alleging that the copy filed was not such as would entitle plaintiff to judgment for want of an affidavit of defense, because it did not set forth that the bill was presented, or that it was not accepted or protested, is insufficient.

12. Wood *v.* Stevenson, 16 U. C. Q. B. 527.

13. Brennan *v.* Lowry, 4 Daly (N. Y.) 253.

(III) *Notice.* Want of notice of dishonor[14] or negligence in giving notice[15] must be affirmatively pleaded. So in an action on a foreign bill an averment of want of notice must also aver that it could have been given.[16] It is not enough to deny the receipt of notice. It must also be averred that no notice was given in fact or that due diligence was not exercised;[17] although it has been held that a denial of the receipt of due notice of non-payment or of knowledge of protest is a denial of constructive notice arising from the due sending as well as of actual notice arising from its receipt.[18] It has been held that a plea of the general issue,[19] or an allegation that notice was never sent[20] is sufficient, but a plea in the form of a negative pregnant is not.[21]

(IV) *Waiver*—(A) *Of Demand and Notice.* An allegation in the complaint of a waiver of demand and notice is met by a general denial,[22] but an answer to a complaint alleging waiver of notice of non-payment, which alleges concealment of the fact of non-payment, is insufficient unless it specially avers the facts of such alleged concealment.[23] So an answer that demand was waived after maturity is not frivolous where the complaint alleges a waiver at or about maturity.[24]

(B) *Of Protest.* Where protest fees are claimed a waiver of protest to be

14. **Information and belief.**— An averment by an indorser that he "is informed" that the protest and certificate were not actually made by a notary, without an allegation that it is believed by him, or denying actual notice, is insufficient. Cake *v.* Stidfole, 31 Leg. Int. (Pa.) 93.

An averment that notice did not arrive at defendant's place of business to the best of defendant's knowledge and belief is insufficient because it is vague and evasive. Felemeyer *v.* Ebert, 16 Wkly. Notes Cas. (Pa.) 254.

Notice at place designated in note.— Where below the maker's signature on a note was written, "Notice to 623 Walnut street," and the notary's return of protest showed that demand was made at that place, an affidavit of defense in an action thereon alleging that demand was not made at the maker's residence or place of business, although he had one in the city, is not sufficient to prevent judgment. Stone *v.* Bonsall, 1 Wkly. Notes Cas. (Pa.) 4.

Special plea and general issue.— Where the complaint on a note alleges its due protest and notice thereof to an indorser, a special plea by the latter that he was never legally notified of the protest is demurrable where he also pleads the general issue, since the allegation of notice in the complaint having been necessary the special plea was merely a repetition of the plea of the general issue. Carter *v.* Odom, 121 Ala. 162, 25 So. 774.

Traverse by maker and indorser of due notice as alleged in two counts on separate notes is good on special demurrer, being distributive. Tompkins *v.* Scott, 9 U. C. Q. B. 103.

Where an indorser wishes to defend in equity against his liability for want of due notice he must make such defense in his pleading, especially where the case has been conducted to a hearing, on the assumption of recognition of his liability being fixed on his part. He cannot for the first time raise this question under a reference, ordering a report as to the amount due to the holders of the notes. Williams *v.* Bartlett, 4 Lea (Tenn.) 620.

15. Moore *v.* Somerset, 6 Watts & S. (Pa.) 262.

16. Forchheimer *v.* Feistmann, Brightly (Pa.) 86.

17. Edgerton *v.* Smith, 3 Duer (N. Y.) 614; Tradesmen's Bank *v.* Tillyer, 12 Pa. Co. Ct. 452; Miller *v.* Vandike, 13 Wkly. Notes Cas. (Pa.) 281; Cake *v.* Stidfole, 1 Walk. (Pa.) 95.

18. Riggs *v.* Hatch, 21 Blatchf. (U. S.) 318, 16 Fed. 838.

19. Pawcatuck Nat. Bank *v.* Barber, 22 R. I. 73, 46 Atl. 1095.

General issue and special plea.— A special plea that defendant was never legally notified of the protest is a mere repetition of a prior plea of the general issue and for that reason the answer is demurrable. Carter *v.* Odom, 121 Ala. 162, 25 So. 774.

20. Wolf *v.* Jacobs, 187 Pa. St. 260, 41 Atl. 27.

An averment that defendant had never received notice of dishonor from the indorsee or his agent, although he lived only a few squares from him, is sufficient. Gross *v.* Cloud, 14 Wkly. Notes Cas. (Pa.) 225.

21. Treadwell *v.* Hoffman, 5 Daly (N. Y.) 207, where the complaint alleged that defendant had "due notice," and he denied that he had "due notice."

22. Defendant, answering by a general denial, had a right to testify whether or not the words waiving demand and notice were on the note when he indorsed it. Bay View Brewing Co. *v.* Grubb, 24 Wash. 163, 63 Pac. 1091.

23. Lowrey *v.* Steele, 27 Ind. 168.

24. Wyckoff *v.* Andrews, 50 N. Y. Super. Ct. 196.

available must be set up by a special plea,[25] which must show that protest was waived before dishonor.[26]

(v) *Exhaustion of Remedy Against Maker.* In an action by an indorsee against the indorser a denial of notice of a suit against the maker is a denial of an essential allegation.[27] The general issue is sufficient, without a plea that the action was instituted before the return of an execution against the maker;[28] but a plea that the maker was solvent at the maturity of the note is not broad enough to controvert an allegation of his insolvency at the time the action was commenced.[29]

n. Extension of Time — (i) *In General.* Extension of time for the payment of a note can only be pleaded in abatement[30] and must precede an answer in bar.[31] Hence it cannot be shown under the general issue,[32] but the nature of the contract or agreement to extend must be set out with reasonable particularity, that the court may judge of its validity.[33] It should likewise appear that the party sought to be charged executed the instrument in pursuance of the agreement to extend.[34]

(ii) *Inconvenience or Impracticability of Payment at Maturity.*

25. White *v.* Keith, 97 Ala. 668, 12 So. 611.

26. A plea to a complaint on a promissory note claiming protest fees, which avers that protest of the note was waived by the only indorser on it on the day of maturity and before protest, is insufficient, in that it fails to allege that the waiver was made before dishonor. White *v.* Keith, 97 Ala. 668, 12 So. 611.

27. Marshall *v.* Pyeatt, 13 Ind. 255.

28. Woodward *v.* Harbin, 4 Ala. 534, 37 Am. Dec. 753.

29. White *v.* Clayes, 32 Ill. 325.

30. Culver *v.* Johnson, 90 Ill. 91; Amberg *v.* Nachtway, 92 Ill. App. 608; Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316.

31. Glidden *v.* Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316.

32. Culver *v.* Johnson, 90 Ill. 91.

33. Bowman *v.* Citizens' Nat. Bank, (Ind. App. 1900) 56 N. E. 39.

Executory or executed agreement.— It should be shown whether the agreement is executed or executory. Juchter *v.* Boehm, 63 Ga. 71.

Guarantee of payee's indebtedness.—A plea that defendant agreed to guarantee the payment of plaintiff's indebtedness to third parties in consideration that the time of payment be extended until plaintiff should be discharged of the indebtedness so guaranteed and that defendant did guarantee such payment and was obliged to pay a sum larger than that incurred by him on the instrument in question is not a good plea of a covenant never to sue, operating by way of release to discharge the debt, or a plea not to sue for a definite limited time. Allen *v.* Breusing, 32 Ill. 505.

Set-off.— An answer that after execution of the note in suit plaintiff agreed that the note should not be collected until a specified time, that the amount due should be applied to pay any damages sustained by plaintiff's non-performance of the agreement, that damages were so sustained and setting off the same against the note is not an averment of an agreement to forbear until the time specified, but is a plea of set-off of such damages. Williams *v.* Taylor, 35 Conn. 592.

Remedy by special action.— In Durand *v.* Stevenson, 5 U. C. Q. B. 336, it was held that a plea that in consideration of certain notes of a third party being deposited with plaintiff as security, plaintiff agreed not to sue until the notes of the third party should become due, was not available as a plea in bar, but that defendant's remedy was by a special action for the breach of the agreement.

Sufficiency.— An answer states a good defense when it alleges that after delivery, in consideration of the deposit of collateral with plaintiff, it was agreed orally to extend the time of payment and that plaintiff retains said security and refuses to extend the time or permit a renewal of the note. Commercial Bank *v.* Hart, 10 Wash. 303, 38 Pac. 1114.

An answer claiming the privilege of an extension conferred by the note in terms and alleging that plaintiffs knew of defendant's claim at the time of instituting the action is good on general demurrer, the fact of such knowledge being determinable upon the facts. Davis *v.* Weaver, (Tex. Civ. App. 1894) 27 S. W. 902.

A plea of an agreement by a former owner to extend the time of payment and of notice to plaintiff is good on general demurrer, although it does not show that defendant was a party to the agreement, that the consideration moved from him, or that the agreement was entered into for his benefit. Paddock *v.* Jones, 40 Vt. 474.

34. A plea that plaintiff agreed by parol never to sue and that after execution of the note another agreement was made that if defendant would sign the note as surety plaintiff would never sue, but would receive the interest thereon, unless the maker should deny

Where the ground of defense is an agreement that if not convenient and practicable to pay at maturity, time for the payment should be extended, the answer must aver the inconvenience or impracticability.[35]

(III) *Consideration For Extension.* The answer must show that the agreement to extend was based on a valuable consideration.[36]

(IV) *Interest.* If the rate of interest to prevail during the extended time is not set out it will be presumed to be the same as that provided for by the note.[37]

o. Payment — (I) *Specific or General Averments.* Payment must be affirmatively pleaded and the facts relied on to establish the defense stated with reasonable fulness.[38] There are holdings, however, to the effect that an allegation of non-payment may be controverted by a general denial or an issue raised by a general averment of payment.[39]

the note; that the interest had been paid and that the note had not been denied, is bad for failing to show that the surety executed the note in pursuance of the agreement. Withrow *v.* Wiley, 3 Ind. 379.

35. Costello *v.* Wilhelm, 13 Kan. 229 (where the only allegation in this connection was that the agreement was made at a time when plaintiff and one of the defendants were settling up sundry matters between themselves and that the particular defendant at the time of making the settlement paid certain moneys to plaintiff but failed to show any connection between the settlement and and the payment of moneys on the one side and the agreement of plaintiff to extend the time of the payment of the note on the other side as would constitute one a consideration for the other); Atwood *v.* Lewis, 6 Mo. 392 (where a plea that it was agreed that if it should not be convenient for defendant to pay at maturity plaintiff would wait the convenience of defendant in consideration of which defendant agreed to pay interest, and that it was not convenient to pay, was held insufficient for the reason that if defendant sustained damage by being compelled to pay before it was convenient to him his remedy was on the agreement).

36. Bowman *v.* Citizens' Nat. Bank, (Ind. App. 1900) 56 N. E. 39; Costello *v.* Wilhelm, 13 Kan. 229; Provines *v.* Wilder, 87 Mo. App. 162.

The consideration must be stated that the court can judge for itself whether it was good and valuable. Juchter *v.* Boehm, 63 Ga. 71. *Compare* Aiken *v.* Posey, 13 Tex. Civ. App. 607, 35 S. W. 732, holding that an answer alleging that the extension of the time was based on a "valuable consideration," without more specifically stating the consideration, is not demurrable.

Deposit of collateral security.— On general demurrer a plea that the agreement was made in consideration of certain valuable securities placed in the hands of plaintiff as collateral security is sufficient. Paddock *v.* Jones, 40 Vt. 474.

37. Commercial Bank *v.* Hart, 10 Wash. 303, 38 Pac. 1114.

38. *California.*— Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Frisch *v.* Caler, 21 Cal. 71.

Indiana.— Hubler *v.* Pullen, 9 Ind. 273, 64 Am. Dec. 620.

Minnesota.— Marshall, etc., Bank *v.* Child, 76 Minn. 173, 78 N. W. 1048.

Nebraska.— Barker *v.* Wheeler, 62 Nebr. 150, 87 N. W. 20.

Pennsylvania.— Bank *v.* Muller, 2 Wkly. Notes Cas. (Pa.) 50; Fluck *v.* Hope, 1 Wkly. Notes Cas. (Pa.) 42.

Vermont.— Jewett *v.* Winship, 42 Vt. 204.

Washington.— Richards *v.* Jefferson, 20 Wash. 166, 54 Pac. 1123; Columbia Nat. Bank *v.* Western Iron, etc., Co., 14 Wash. 162, 44 Pac. 145.

Wisconsin.— Martin *v.* Pugh, 23 Wis. 184.

Failure to demur.— Failure to allege facts will not invalidate the plea if no demurrer is interposed. Reed *v.* Corry, (Tex. Civ. App. 1901) 61 S. W. 157.

An answer denying in the language of the complaint that the note had not been paid and that anything is due to plaintiff denies immaterial averments only and raises no issue. Hook *v.* White, 36 Cal. 299.

Transfer to defendant.— In an action by an administrator to recover the purchase-price of a note the allegation that plaintiff's intestate for value and before maturity transferred the note to defendant is a substantial plea of payment. Hays *v.* Dickey, 67 Ark. 169, 53 S. W. 887.

Unsettled mutual accounts.— An affidavit of defense that the notes were given as part of a running account, which had never been closed or settled, and that on opportunity given for defendant to show his payments and compare them with plaintiff's charges payment of such notes will appear is sufficient. Hubbard *v.* French, 1 Pa. Super. Ct. 218, 37 Wkly. Notes Cas. (Pa.) 556.

39. Ball *v.* Putnam, 123 Cal. 134, 55 Pac. 773; Davanay *v.* Eggenhoff, 43 Cal. 395; Chew *v.* Woolley, 7 Johns. (N. Y.) 399 (where defendant pleaded *puis darrein continuance* that he "did pay to the plaintiff the several sums of money mentioned in the plaintiff's declaration"); Jewett *v.* Winship, 42 Vt. 204.

Under the Missouri code, in a suit on a note, an answer stating that defendant made two payments, "the last of which extinguished the note," is sufficient. Joy *v.* Cooley, 19 Mo. 645.

(II) *PART PAYMENT.* A plea of part payment must definitely show whether it was made on the original debt or on the note for which it was given,[40] and a plea of part payment to the assignor before defendant had notice of the assignment and of payment of the remainder to the assignee to be sufficient must show that the remainder was accepted by the assignee in discharge of the note.[41] But failure to definitely state the amount paid in part will not vitiate the answer where the credits are unknown to defendant.[42]

(III) *TO WHOM PAYMENT MADE.* While it has been held that the answer should show to whom payment was made,[43] it has also been held that such a statement is unnecessary.[44]

(IV) *PAYMENT OR LIABILITY TO THIRD PERSON.* A plea of payment to a third person should aver that payment was actually made in pursuance of an agreement between the parties,[45] the time, mode, and items of payment,[46] by whom payment was made,[47] the authority of such third person to receive payment,[48] payment of the particular indebtedness intended,[49] and where payments to

Under the New York code of procedure an averment of payment is sufficient without further allegations. Van Giesen *v.* Van Giesen, 10 N. Y. 316 [*affirming* 12 Barb. (N. Y.) 520].

Payments not alleged in complaint.— Under a general denial and a plea alleging the circumstances, purpose, and consideration of the note, but which does not put in issue the amount alleged in the complaint to have been paid thereon and the amount remaining unpaid, proof of other payments than those alleged by plaintiff is admissible under the general denial. Ball *v.* Putnam, 123 Cal. 134, 55 Pac. 773.

An averment of payment which is qualified by a statement of facts which do not amount to a payment is insufficient. Johnson *v.* Breedlove, 72 Ind. 368.

Indorsements of payments appearing on the note may be made a part of the plea. Russell *v.* Drummond, 6 Ind. 216.

40. Vance *v.* Claiborne, 39 Tex. 398.

In an action on several notes a plea of payment and satisfaction of one is bad because a plea in bar of the whole action which sets up matter in bar of a part only. Johnson *v.* Breedlove, 72 Ind. 368.

41. Patterson *v.* Atherton, 3 McLean (U. S.) 147, 18 Fed. Cas. No. 10,822.

42. Bobb *v.* Bancroft, 13 Kan. 123.

43. Batt *v.* Gaslight Co., 13 Wkly. Notes Cas. (Pa.) 417.

44. McGrath *v.* Pitkin, 56 N. Y. Suppl. 398.

45. Allen *v.* Breusing, 32 Ill. 505, where the answer alleged that plaintiff had agreed to extend the time of payment of the note, if defendant would guarantee the payment of certain indebtedness of plaintiff to other persons; that defendant had made such a guaranty, and by reason thereof had been compelled to pay plaintiff's indebtedness.

46. Hahn *v.* Broussard, 3 Tex. Civ. App. 481, 23 S. W. 88.

47. **A plea of indorsement and delivery of the note by plaintiffs** before commencement of the action and payment to the indorsee is bad because of the failure to aver by whom the note was paid, since it was competent for plaintiffs themselves to have paid it, taken it up, erased the indorsement, and sued in their own name. Hawkins *v.* Fellowes, 6 Dana (Ky.) 128.

Acknowledgment of debt.— A plea of payment without stating by whom is not an acknowledgment of the debt by defendant, since it might have been paid by someone else who was liable. Blum *v.* Bidwell, 20 La. Ann. 43.

48. Maynard *v.* Black, 41 Ind. 310.

As against an assignee a plea of payment to the assignor should aver that the payment was made before the assignment or before the note matured. It is not enough to aver payment to the assignor before defendant had notice of the assignment. Patterson *v.* Atherton, 3 McLean (U. S.) 147, 18 Fed. Cas. No. 10,822.

Authority as to kind of payment.— Where defendant pleads payment to plaintiff's attorney, who held the note for collection, it is unnecessary to allege that plaintiff had authorized his attorney to receive other payment than money. Hewett *v.* Thomas, 37 Tex. 520.

Ambiguity.— In an action by an executor an answer alleging the death of the payee, leaving property less than the amount allowed by law to the widow, and that she had paid expenses of funeral and last sickness; that before his death decedent, owing no debts, gave the notes to his wife; and that defendant, believing her to be the owner, paid the amount due to her, and that she surrendered the notes — is either ambiguous, as based on two distinct theories, or must be construed as based on a gift *inter vivos*, and as such is insufficient, alleging no delivery. Bingham *v.* Stage, 123 Ind. 281, 23 N. E. 756.

49. A plea asserting that the note sued on was indorsed to plaintiff by the payee for the sole purpose of discharging a particular note made by him to a third party, and that the payee, after the maturity, directed the maker to pay the money to the third party, which was done, is bad, without averring that the payment was made to the third party in discharge of the particular note which it

plaintiff and to others on his behalf are relied on the payments respectively made to each should be stated.[50] Where defendant defends on the ground that he ought to pay another than plaintiff, he must show that he is defending in privity with such other and with his assent.[51]

(v) *Payment by Other Party to Instrument.* After an indorser has pleaded he cannot by a plea *puis darrien* avail himself of a subsequent payment by the maker.[52]

(vi) *Offer to Pay, Readiness, and Tender.* The plea of an offer to pay in property as permitted by the terms of the instrument must state the offer and when it was made or that an instrument sufficient to pass title was tendered.[53] So a plea alleging readiness and willingness to pay as agreed must also allege a readiness to pay ever since and up to the time of the action, and follow it by a tender into court.[54]

(vii) *Change of Place of Payment.* The time and consideration of an agreement to change the place of payment in consideration of a part payment before maturity should be definitely pleaded.[55]

(viii) *Joinder of Pleas.* The joinder of a plea of set-off, with a plea of payment from collateral security is not obnoxious,[56] nor is an answer setting up the acceptance of a new note under a composition agreement, and the pendency of bankruptcy proceedings, within the scope of the rule against double pleading.[57] But an answer alleging plaintiff's indorsement prior to that of defendant and before delivery and that plaintiff negotiated and paid the note in suit and released defendant is bad for duplicity.[58]

(ix) *Payment Otherwise Than by Terms of Instrument* — (a) *In General.* Not only must an agreement to satisfy the debt otherwise than as provided for in the instrument be alleged, but also performance of the agreement or a tender in accordance with its terms.[59]

(b) *Receipt of Money or Property.* A general statement of the receipt of money or property or the proceeds thereof sufficient to pay the indebtedness on the instrument is insufficient,[60] without an averment that it was received as pay-

was the object of the indorsement to discharge. Alsobrook *v.* Deshler, 10 Ala. 698.

50. Eastham *v.* Patty, (Tex. Civ. App. 1902) 69 S. W. 224.

51. Canadian Bank of Commerce *v.* Ross, 22 U. C. C. P. 497.

52. Commercial Bank *v.* Love, 19 Wend. (N. Y.) 98.

53. Parker *v.* Morton, 29 Ind. 89.

54. Greeley *v.* Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286; Perdew *v.* Tillma, 62 Nebr. 865, 88 N. W. 123.

An allegation of payment to plaintiff's intestate of the main part of the note and a tender of judgment for the remainder is sufficient. Schackerman *v.* Vollrath, 1 Wkly. Notes Cas. (Pa.) 149.

55. Colter *v.* Greenhagen, 3 Minn. 126.

56. Babcock *v.* Callender, 17 Conn. 34.

57. Deford *v.* Hewlett, 49 Md. 51.

58. Wilson *v.* Johnson, (N. J. 1894) 29 Atl. 419.

59. Beazley *v.* Gignilliat, 61 Ga. 187; Parker *v.* Morton, 29 Ind. 89; Perdew *v.* Tillma, 62 Nebr. 865, 88 N. W. 123; Rising *v.* Patterson, 5 Whart. (Pa.) 316.

Collection by third party.— A plea that by agreement a third party was to collect moneys for the maker and apply them to payment of the note, and that a sufficient sum has been collected to pay the same is sufficient. Merrill *v.* Randell, 22 Ill. 227.

60. Greenwood First Nat. Bank *v.* Wilbern, (Nebr. 1902) 90 N. W. 1126.

Sales by defendant to plaintiff.— That defendant, after the note was given, sold logs to plaintiff at a stipulated price exceeding the amount of such note, and that plaintiff agreed to apply such amount in payment of the note when it should become due, and pay defendant the balance, does not show a payment of the note, although the facts are available by way of counter-claim. Dudley *v.* Stiles, 32 Wis. 371.

Instructions to coobligor.— An allegation of delivery of property to plaintiff by defendant's coöbligor with instructions to apply the proceeds in payment of the note in suit is not a plea of payment or satisfaction. Hook *v.* White, 36 Cal. 229.

Collection of security.— Allegations "that the drafts and bills of exchange on which suit is brought in this case are renewals of other drafts and bills of exchange, of like amounts, payment of all of which was secured to said plaintiff by a certain mortgage," and that "the amount of said mortgage and judg-

ment in whole or in part,[61] or that the proceeds of the property were received,[62] under an agreement that it should be so applied.[63]

(c) *Acceptance of Substitute For Payment.* An answer of payment by the substitution of another note for that sued on,[64] by the guaranty of plaintiff's debt to a third person,[65] or by the giving of an order on a third person,[66] must allege an acceptance thereof in discharge of defendant's liability. In the last case the answer should also allege that the order was of value or was honored.[67]

(x) *Discharge or Release*—(a) *In General.* Where the defense interposed is the release or discharge of defendant by agreement of the parties or by operation of law, all the facts necessary to constitute the defense must be explicitly averred.[68]

ment thereon is sufficient to fully cover the entire amount of all notes, acceptances and indebtedness held" by plaintiff against defendant, and "that the said plaintiff has in the manner aforesaid received payment in full of the notes, drafts and bills of exchange upon which this action is founded" are not open to the objection that it was a mere statement of defendant's conclusions from facts not disclosed. Warren Nat. Bank *v.* Seneca Oil Works, 175 Pa. St. 580, 38 Wkly. Notes Cas. (Pa.) 281, 34 Atl. 859.

Failure to enforce security.— A plea that defendant pledged collateral which plaintiff failed to collect must further aver that the collateral became uncollectable through plaintiff's negligence. Hawley Bros. Hardware Co. *v.* Brownstone, 123 Cal. 643, 56 Pac. 468.

61. Homas *v.* McConnell, 3 McLean (U. S.) 381, 12 Fed. Cas. No. 6,656.

Collection of insurance moneys.— A plea that, in pursuance of an agreement between defendant, plaintiff, and the mortgagee in possession of property mortgaged to secure the payment of a note in suit, plaintiff and the mortgagee collected insurance moneys paid for a loss sustained on the mortgaged property and that the note was fully paid therefrom is a sufficient plea of payment. Hailey First Nat. Bank *v.* Bews, 2 Ida. 1175, 31 Pac. 816.

Assignment for creditors by other party to note.— A plea by the payee of a bill of exchange that the drawer had assigned his property for the benefit of another creditor first, and then for plaintiff's benefit, is insufficient, if it does not aver that there was sufficient property to pay the preferred creditor. McCarthy *v.* Roots, 21 How. (U. S.) 432, 16 L. ed. 162.

62. Homas *v.* McConnell, 3 McLean (U. S.) 381, 12 Fed. Cas. No. 6,656.

63. In a suit by an indorser an answer that plaintiff had been fully paid by moneys received by him from the estate of a deceased maker and from other sources is bad for want of averments that plaintiff received such moneys under circumstances which made him indebted to the estate therefor, and that it had been agreed that such indebtedness should operate *pro tanto* as a payment of the money sued for. Johnson *v.* Breedlove, 72 Ind. 368.

64. Witz *v.* Fite, 91 Va. 446, 22 S. E. 171.

Retention of renewal note.—An affidavit of defense, which sets up that defendants mailed plaintiffs a renewal note for the amount sued for and a check for the balance, including interest for the renewal note, and that the check was retained and applied on account by plaintiffs, is sufficient to prevent judgment on the note. Wolff *v.* Jolly, 31 Pittsb. Leg. J. N. S. 194..

65. Allen *v.* Breusing, 32 Ill. 505.

66. Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567.

Damages for non-payment.—A plea setting out an accord and satisfaction as to part of the debt, by the acceptance of an order made long after the maturity of the note, and alleging a set-off as to the residue is bad for failing to answer a claim for damages for non-payment from the time the note was due until the time the order was given. Playter *v.* Turner, 5 U. C. Q. B. 555.

67. Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567.

An allegation that defendant "indorsed" a check which should have been applied to the note is insufficient for failing to state an indorsement to plaintiff or for his benefit, or that the check was paid. Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567.

68. Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830; Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120; Nill *v.* Comparet, 15 Ind. 243; Larimore *v.* Wells, 29 Ohio St. 13; Roche *v.* Kempt, 33 U. C. Q. B. 387.

Bankruptcy.— In an action on a firm note a plea that some of the copartners had been adjudicated bankrupts is insufficient. Pastor *v.* Hicks, 3 Wkly. Notes Cas. (Pa.) 63.

Parol agreement.— An agreement not required to be in writing need not be averred to be in that form. Carpenter *v.* McClure, 37 Vt. 127.

Alteration.— A plea by an indorser that, since the execution of the note and delivery thereof to plaintiff, she has, without the knowledge and consent of defendant, an indorser, erased and changed the same for the purpose of releasing another indorser whereby he was released is defective, because too general and indefinite. Scharf *v.* Moore, 102 Ala. 468, 14 So. 879.

Cancellation of instrument.— An allegation that plaintiff agreed to cancel and deliver up a note on return of the consideration

(B) *Consideration For Release.* An answer setting up as a defense a release from liability must aver a sufficient consideration therefor.[69]

(C) *Performance of Conditions.* Where the alleged release was by agreement, the answer should aver a performance of all the conditions necessary to effect a discharge according to its terms,[70] and if it appears that the agreement has been fully executed, satisfaction and discharge are sufficiently alleged.[71]

(D) *Foreign Laws.* A plea of a discharge by the laws of a foreign state should specify such laws and set out the facts which operated to extinguish the liability.[72]

p. Set-Off, Counter-Claim, and Cross Complaint — (I) *Set-Off and Counter-Claim* — (A) *Mode of Pleading.* Statements of fact in an answer to a complaint on commercial paper, which if properly pleaded would entitle defendant to affirmative relief are not available by way of set-off or counter-claim unless pleaded as such.[73] If the allegations are sufficient either as a defense or counter-

therefor is not an allegation that the instrument was canceled or destroyed. Diven *v.* Spicer, 1 Kan. 103.

Rescission of contract on which note is based.— A plea averring the rescission of the contract for which the note sued on was given must show that by the rescission the note was to be surrendered. Childers *v.* Smith, 10 B. Mon. (Ky.) 235.

Judgment on original debt.—A mere recital in the answer, in an action against the indorser of a note, that plaintiff, in a former action against the maker of the note, recovered a judgment against him on the original debt, does not present the defense that plaintiff had elected to retain the debt and surrender the note. Carter *v.* Howard, 17 Misc. (N. Y.) 381, 39 N. Y. Suppl. 1060.

Participation of plaintiff.— An answer in an action on an individual note that it was given for a joint debt and secured by a joint mortgage to plaintiff, who intrusted it to the joint debtor as custodian, and that the latter transferred it to defendant for his personal indebtedness, fails to connect the plaintiff with the transaction. Johnson *v.* Tabor, 4 Colo. App. 183, 35 Pac. 199.

Submission to arbitration.— A plea that all matters in controversy was submitted to arbitrators three days before the execution of the note sued upon, but which does not aver that the consideration of the note was among the matters submitted, is not sufficient. Armstrong *v.* Webster, 30 Ill. 333.

Inconsistency.—Where the answer contains a general denial and also pleads payment, a demurrer to a plea in bar that plaintiff had released the cause of action sued on for a valuable consideration is properly sustained. Whiteley Malleable Castings Co. *v.* Bevington, 25 Ind. App. 391, 58 N. E. 268.

69. Scharf *v.* Moore, 102 Ala. 468, 14 So. 879; Maness *v.* Henry, 96 Ala. 454, 11 So. 410, Gibson *v.* Weir, 1 J. J. Marsh (Ky.) 446.

Insufficient averments.— A plea that, "after the plaintiff informed defendant of his discharge as endorser on the draft in said plaintiff's declaration mentioned, the said defendant, in consideration of the said discharge, paid and discharged other pretended demands held by the said plaintiff against the said defendant, which the said defendant did not consider and believe he was legally bound to pay," does not set up a legal or equitable consideration for a discharge, but only an alleged reason for paying other claims held by plaintiff. Fridenberg *v.* Robinson, 14 Fla. 130.

70. Parks *v.* Zeek, 53 Ind. 221; Childers *v.* Smith, 10 B. Mon. (Ky.) 235.

71. Jaffray *v.* Hunter, 15 N. Y. App. Div. 115, 44 N. Y. Suppl. 639, where the answer alleged that defendant being indebted to plaintiffs transferred his property in trust for them; that they agreed to deduct five thousand dollars from defendant's debt, if he would take charge of and dispose of the property so transferred, that he did dispose of it and paid the proceeds to plaintiffs who, without allowing the five thousand dollars, applied all the proceeds to the original debt, that plaintiffs never denied the right to the credit but promised to allow it in the future, that defendant continued to deal with plaintiffs, and that afterward he became indebted to plaintiffs, for which indebtedness he gave two notes for two thousand five hundred dollars each, but did not claim the credit because in fear that it would prevent him from obtaining an extension on other commercial paper.

72. Ticknor *v.* Voorhies, 46 Mo. 110.

Amendments.— A plea of a discharge under a specified insolvent law of another state, "and the acts amending the same," is fatally defective if it fails to state the amendments. Hempstead *v.* Reed, 6 Conn. 480.

73. Allen *v.* Breusing, 32 Ill. 505; Bates *v.* Rosekrans, 37 N. Y. 409, 4 Transcr. App. (N. Y.) 332, 4 Abb. Pr. N. S. (N. Y.) 276 [*affirming* 23 How. Pr. (N. Y.) 98]; Pratt *v.* American Pneumatic Tool Co., 50 N. Y. App. Div. 369, 63 N. Y. Suppl. 1062; Prentiss *v.* Graves, 33 Barb. (N. Y.) 621; Commercial Bank *v.* Toklas, 21 Wash. 36, 56 Pac. 927; Schmitz *v.* Schmitz, 19 Wis. 207, 88 Am. Dec. 681.

In Massachusetts another note on which plaintiff is indebted (Sargent *v.* Southgate, 5

claim, but do not purport to set up the latter they will be treated as presenting a defense.[74]

(B) *Subject-Matter.* The rules of pleading relative to counter-claim and set-off apply to actions on bills and notes or like instruments, so that a cause of action to be available to defendant by way of affirmative relief must have arisen out of the contract or transaction on which the action is brought or be connected with the subject of the action,[75] or it may be any other cause arising on contract[76] and existing at the commencement of the action,[77] but not a claim or demand arising out of or sounding in tort.[78] Defendant is not precluded from setting up a counter-claim, for the reason that the court would have no jurisdiction of an original action based on the subject-matter of the claim.[79]

Pick. (Mass.) 312, 16 Am. Dec. 409) or an account against him must be filed by way of set-off (Clark *v.* Leach, 10 Mass. 51).

If the pleading shows that it is intended as a counter-claim against the payee it cannot at the same time be considered as an answer to plaintiff's cause of action. Gabe *v.* McGinnis, 55 Ind. 372.

There should be a prayer of set-off.— Allen *v.* Breusing, 32 Ill. 505; Bates *v.* Rosekrans, 37 N. Y. 409, 4 Transcr. App. (N. Y.) 332, 4 Abb. Pr. N. S. (N. Y.) 276 [*affirming* 23 How. Pr. (N. Y.) 98].

74. Burrall *v.* De Groot, 5 Duer (N. Y.) 379; McConihe *v.* Hollister, 10 Wis. 269.

75. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Hughes *v.* Snure, 22 U. C. Q. B. 597.

Principal and agent.— In an action on a note given for plaintiff's services, an answer that plaintiff agreed to obtain a loan for defendant, that they paid the full commissions thereon, but that he failed to procure the full amount and refused to return the commission received by him on that part which defendants did not receive states a good counter-claim. Slade *v.* Montgomery, 53 N. Y. App. Div. 343, 65 N. Y. Suppl. 709.

Master and servant.— That plaintiff while in defendant's employ defaulted in his accounts and charged himself with the deficits is a proper subject of counter-claim in an action by him on a note given for his salary. Slade *v.* Montgomery, 53 N. Y. App. Div. 343, 65 N. Y. Suppl. 709.

Landlord and tenant.— Failure of the landlord to make promised repairs and damages to the tenant in consequence of such failure constitute a good counter-claim in an action on a note given by the latter to the former for rent. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

Breach of contract for which note given.— Defendant may counter-claim a cause of action for damages sustained by a breach of the contract between plaintiff and defendant, which was the consideration of the note. Hurst *v.* Combs, 17 Ky. L. Rep. 84, 30 S. W. 416; Burns *v.* Jordan, 43 Minn. 25, 44 N. W. 523; Heebner *v.* Shephard, 5 N. D. 56, 63 N. W. 892.

Overcharges for goods for which the note was given in an amount exceeding the sum due on the note are a proper subject of counter-claim. Briggs *v.* Freedman, 9 N. Y. Civ. Proc. 73.

Tender.— In an action on a note payable at a bank in another state, a plea by way of set-off that pending a suit within the state defendant offered payment of the debt and costs in the bills of the bank and in pursuance of the laws of the foreign state is sufficient. Vermont State Bank *v.* Porter, 5 Day (Conn.) 316, 5 Am. Dec. 157.

Where mutual accounts are settled by the giving of a note the maker cannot set off an account thus settled. Bower *v.* Douglass, 25 Ga. 714.

Partial failure of consideration as ground of counter-claim see *supra*, XIV, D, 2, f.

How question of availability raised.— Whether a counter-claim is one that could be interposed in the action is a question that can only be raised by demurrer and cannot be raised at the trial by motion. Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

76. Wakefield *v.* Spencer, 8 Minn. 376.

Breach of independent contract.— Damages sustained by the maker by breach of an independent contract, which by agreement between the parties might be offset against the note. Williams *v.* Taylor, 35 Conn. 592.

A counter-claim based on the payment of a prior note which had been fraudulently altered is insufficient if it fails to aver that the note was paid or given without consideration. Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Replevin for property mortgaged to secure note.— Under a general denial in replevin for property mortgaged to secure the payment of a note held by plaintiff defendant may set up an indebtedness of plaintiff to defendant existing at the commencement of the suit in an amount equal to the amount due on the note. Davis *v.* Culver, 58 Nebr. 265, 78 N. W. 504.

77. Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697, 70 N. Y. St. 432; Russ *v.* Sadler, 197 Pa. St. 51, 46 Atl. 903; Harris *v.* Snider, 9 Humphr. (Tenn.) 743.

78. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Slade *v.* Montgomery, 53 N. Y. App. Div. 243, 65 N. Y. Suppl. 709. See also Central Ohio R. Co. *v.* Thompson, 2 Bond (U. S.) 296, 5 Fed. Cas. No. 2,550.

79. Vail *v.* Jones, 31 Ind. 467.

(c) *Privity of Parties.* As a rule privity of the parties is a prerequisite to the right to set-off or counter-claim.[80] However by statute in one jurisdiction, at least in an action against several defendants, any one of whom is principal and the other sureties, a claim in favor of the principal defendant and against the plaintiff or any former holder of the note or other contract may be pleaded as a set-off by the principal or any other defendant,[81] and although the contrary has been held,[82] the better view seems to be that in an action on behalf of an insolvent bank against an accommodation maker alone a plea that the indorser had money on deposit in the bank is insufficient to entitle defendant to set off such deposit.[83] Where by statute a claim may be set off against a usee in like manner as if he were plaintiff, in the absence of an averment to that effect in the complaint defendant may aver that the action is for the use of the party against whom the claim is asserted.[84]

(d) *Claims Against Prior Holders.* A counter-claim against a payee is not available against an indorsee for value before maturity,[85] especially where there is no allegation that the claim arose before the assignment of the note to plaintiff or before defendant had notice thereof,[86] and where by statute a counter-claim can only be set up against an assignor of a note transferred after maturity, assignment after maturity must be averred.[87]

(e) *Several Claims.* Several distinct claims or demands may be pleaded[88] in

80. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Durbon *v.* Kelley, 22 Ind. 183; Russ *v.* Sadler, 197 Pa. St. 51, 46 Atl. 903; Earle *v.* Miller, 102 Fed. 600.

Interest of stranger.— A joint demand in favor of defendant, his coöbligor, and a stranger to the note in suit, which fails to show an acquisition of the stranger's interest in the demand, is not the subject of a valid counter-claim. Hook *v.* White, 36 Cal. 299.

Property of another affected.— Defendant in avoidance of his liability cannot assert a claim for tortious acts affecting the property of another. Central Ohio R. Co. *v.* Thompson, 2 Bond (U. S.) 296, 5 Fed. Cas. No. 2,550.

In an action on partnership notes, individual matters cannot be set off. Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642.

In an action by an individual the demand against the firm of which plaintiff is a member may be set off, where it is alleged that the causes of action sued on were those of the firm and not of plaintiff alone. Griffin *v.* Kemp, 46 Ind. 172.

Claim against prior holder.— In an action by the transferees of a note for value after dishonor and after the sale of collateral by a prior holder, an answer setting up that the sale was without authority and for an insufficient price, and attempting to set off a claim against such prior holder, is not a counter-claim against plaintiff, although it may constitute a defense. Canadian Securities Co. *v.* Prentice, 9 Ont. Pr. 324. To same effect see Torrance *v.* Livingstone, 10 Ont. Pr. 29.

81. Indebtedness to drawee and indorsee.— An indebtedness of plaintiff may be set off by defendants in an action on a bill of exchange drawn upon them in favor of a third party which was indorsed to them by such third party and by them indorsed to plaintiff. Larrimore *v.* Heron, 16 Ind. 350.

Where one of several makers files a set-off in his favor he must allege that he is principal and that the other makers are only sureties. Dodge *v.* Dunham, 41 Ind. 186; Durbon *v.* Kelley, 22 Ind. 183.

82. Shackamaxon Bank *v.* Kinsler, 16 Wkly. Notes Cas. (Pa.) 509.

83. Earle *v.* Miller, 102 Fed. 600, where it appeared that the note was discounted by the bank in due course of business in ignorance of defendant's relation to the indorser and the answer failed to show that the indorser still owned the deposit or that he desired to have the same used by the maker as a set-off.

84. Forkner *v.* Dinwiddie, 3 Ind. 34.

85. Benham *v.* Connor, 113 Cal. 168, 45 Pac. 258; McGrath *v.* Pitkin, 56 N. Y. Suppl. 398; Smith *v.* Nicholson, 19 U. C. Q. B. 27.

86. Benham *v.* Connor, 113 Cal. 168, 45 Pac. 258.

Sufficient averment of existing indebtedness.— An allegation that at the time of the indorsement by the payee to plaintiff the former was indebted, etc., sufficiently avers an existing indebtedness before notice of the transfer. Jenkinson *v.* Bowen, 22 Ind. 344.

Assignment of claim after assignment of note.— An answer is bad if it shows that the claim offered as a set-off was assigned to defendant after assignment to plaintiff of the note sued on. It should aver an assignment to defendant before notice of the transfer to plaintiff. Sayres *v.* Linkhart, 25 Ind. 145.

87. Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697, 70 N. Y. St. 435.

88. In Indiana a defendant may set up as many grounds of counter-claim and set-off as he may have. Vail *v.* Jones, 31 Ind. 467.

separate counts, even when the pleas are different in their nature and require different trials before different tribunals.[89]

(F) *Necessity of Pleading Facts* — (1) IN GENERAL. The facts relied on must be pleaded so as to show a good cause of action and they must be set out with the same particularity as would be required if relief were sought by an independent action.[90]

(2) AMOUNT OF DAMAGE. Defendant must allege that, by reason of the cause of action alleged by way of counter-claim or set-off, he has sustained damage and must specify the amount of damage for which he seeks affirmative relief.[91]

89. Burton *v.* Brush, 4 Vt. 467, assumpsit on a note where defendant pleaded set-off in two counts, one in assumpsit on simple contract and the other in debt on a judgment.

90. *Alabama.*— Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59.

California.— Belleau *v.* Thompson, 33 Cal. 495.

Indiana.— Blacker *v.* Dunbar, 108 Ind. 217, 9 N. E. 104; Whiteley Malleable Castings Co. *v.* Bevington, 25 Ind. App. 391, 58 N. E. 268.

Kentucky.— Farquhar *v.* Collins, 3 A. K. Marsh. (Ky.) 31.

Mississippi.— Phipps *v.* Shegogg, 30 Miss. 241.

New York.— Rice *v.* Grange, 131 N. Y. 149, 30 N. E. 46, 42 N. Y. St. 748; Pratt *v.* American Pneumatic Tool Co., 50 N. Y. App. Div. 369, 63 N. Y. Suppl. 1062 [*affirmed* in 166 N. Y. 588, 59 N. E. 1129]; Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697, 70 N. Y. St. 432.

Oregon.— Haines *v.* Caldwell, 40 Oreg. 229, 66 Pac. 910.

Pennsylvania.— Cake *v.* Northumberland County Nat. Bank, 6 Wkly. Notes Cas. (Pa.) 88.

Tennessee.— Harris *v.* Snider, 9 Humphr. (Tenn.) 743.

Texas.— Henderson *v.* Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35.

United States.— Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

Excessive payment for plaintiff.— An answer is sufficient which states an agreement to pay plaintiff's note on his representation that it did not provide for interest, that in fact the note did bear interest which defendant paid with the principal, and as to that the sums so paid be set off. Brown *v.* Freed, 31 Ind. 387.

Special or money count.— In Massachusetts, one who has indorsed a note for the accommodation of plaintiff and who has been compelled to pay it may file a declaration in set-off, stating the particulars in a special count, and need not declare in a count for money paid. Parker *v.* Sanborn, 7 Gray (Mass.) 191.

Sufficiency.— Averments that "said plaintiff is justly and truly indebted to me in the sum of one hundred dollars for professional services rendered to him by me as an attorney at law, in and about his business, within six years last past" (Lawrence *v.* Smedley, 6 Wkly. Notes Cas. (Pa.) 42) and that plaintiff was performing certain work for defendant, and that a part of the purchase-money remained due plaintiff; that, about the time the work was completed, plaintiff obtained from defendant the two notes, with the agreement that an account should be furnished, that, if the full amount of the two notes was not due plaintiff, he (plaintiff) should provide payment *pro tanto*, or for the whole sum, as the case might be, when the notes reached maturity, and that there had been overcharges, so that at the time the note was given there was nothing due on the contract (Corr *v.* Kelly, 1 Wkly. Notes Cas. (Pa.) 387) are sufficient.

91. *Indiana.*— Rawson *v.* Pratt, 91 Ind. 9; Billingsley *v.* Stratton, 11 Ind. 396.

New York.— Eldridge *v.* Crow, 7 Misc. (N. Y.) 150, 27 N. Y. Suppl. 362, 57 N. Y. St. 498 [*affirming* 5 Misc. (N. Y.) 591, 25 N. Y. Suppl. 797, 56 N. Y. St. 900]; Palmer *v.* Smedley, 18 How. Pr. (N. Y.) 321.

Ohio.— Davis *v.* Gray, 17 Ohio St. 330.

Pennsylvania.— Dovell *v.* Zulich, 1 Wkly. Notes Cas. (Pa.) 264; Callahan *v.* Mann, 1 Wkly. Notes Cas. (Pa.) 104.

United States.— Adams *v.* White, 1 Fed. Cas. No. 68, 16 Leg. Int. (Pa.) 293, 2 Pittsb. (Pa.) 21, 7 Pittsb. Leg. J. (Pa.) 41.

Sale of stock.— A plea that plaintiff had sold certain shares of stock belonging to defendant "for the use of defendant, and converted to its use" is a ratification of the sale and a claim of the purchase-price of the stock and not its actual value. Terry *v.* Birmingham Nat. Bank, 99 Ala. 566, 13 So. 149.

Payment of firm debts.— An answer pleading that the indorsement by the payee to plaintiff was without consideration and that by an agreement between the payee and defendant the latter paid the debts of a firm — the note being given for the purchase of a one-half interest therein — that under the agreement one half of such debts was to be repaid to defendant by the payee, and that a sum specified had been paid before maturity of the note in question, is not defective because failing to allege the payment of all the debts of the copartnership. Allentown First Nat. Bank *v.* Eichelberger, 1 Woodw. Dec. (Pa.) 397.

(G) *Effect of Confession of Plea.* The confession of a set-off pleaded by the maker precludes a recovery of the indorser who is also a defendant.[92]

(H) *Bill of Particulars.* If an unsettled transaction or open account is sought to be set up a bill of particulars or itemized statement is necessary.[93]

(I) *Cross Complaint.* A cross complaint, bringing in all parties necessary to an adjudication of the controversy, is appropriate where it is sought to rescind the instrument for fraud,[94] or to cancel an indorsement alleged to have been made by mistake and without consideration.[95]

q. Verification—(I) *In General.* In many of the states, by legislative enactment or by rules of practice, certain defenses are rendered unavailable, unless the plea thereof is verified or an affidavit of its truth is presented.[96]

(II) *Denial of Execution or Signature*—(A) *In General.* The effect of these provisions is that the execution of the instrument on which a recovery is sought is not put in issue unless such execution or the genuineness of the signature of the person sought to be charged or who purports to have signed it is denied under oath, or if not so denied plaintiff need only produce or read the instrument.[97] But statutes of this character do not apply to writings which do

92. Robertson *v.* Moore, 6 U. C. Q. B. O. S. 646.

93. Graham *v.* Chub, 39 Mich. 417; Phipps *v.* Shegogg, 30 Miss. 241.

Exhibition of note interposed as counter-claim.— An answer setting up a note by way of counter-claim must be accompanied by the instrument or a copy thereof, or assign some reason for its absence. Hamrick *v.* Craven, 39 Ind. 241.

94. Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850.

95. Hardison *v.* Davis, 131 Cal. 635, 63 Pac. 1005, also holding it to be unnecessary to aver that the mistake was due to the negligence of the indorsee.

96. **In Georgia,** where no pleas on oath or affirmation are filed, the court may render judgment without the verdict of a jury. Brewster *v.* Hamilton, 87 Ga. 547, 13 S. E. 660.

In Massachusetts, under an early statute, in an action by the indorsee against the promisor, defendant was not permitted to verify a plea of usury by his own oath, because the statute contemplated only cases where the original contracting parties were also parties to the suit. Binney *v.* Merchant, 6 Mass. 190.

Special and money counts.— A statute applicable where the whole action is on a written instrument does not render wholly defective for want of verification a plea of the general issue interposed to a declaration containing a special count and the money counts, in the absence of notice that the note is the sole cause of action. Carr *v.* Richardson, 1 Hill (N. Y.) 372.

97. *Alabama.*— Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Walker *v.* Bentley, 64 Ala. 92; Sorelle *v.* Elmes, 6 Ala. 706; McWhorter *v.* Lewis, 4 Ala. 198; Lazarus *v.* Shearer, 2 Ala. 718.

Arkansas.— Richardson *v.* Comstock, 21 Ark. 69; State Bank *v.* Kerby, 9 Ark. 345; Trowbridge *v.* Pitcher, 4 Ark. 157.

California.—San Louis Obispo County Bank *v.* Greenberg, 127 Cal. 26, 59 Pac. 139; Ward *v.* Clay, 82 Cal. 502, 23 Dec. 50, 227; Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280; Corcoran *v.* Doll, 32 Cal. 82; Hastings *v.* Dollarhide, 18 Cal. 390; Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Delaware.— Pusey *v.* Pyle, 4 Houst. (Del.) 98.

Georgia.— Lowe Bros. Cracker Co. *v.* Ginn, 94 Ga. 408, 20 S. E. 106.

Illinois.— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Gaddy *v.* McCleave, 59 Ill. 182; Lincoln *v.* Hinzey, 51 Ill. 435; Hunt *v.* Weir, 29 Ill. 83; Lockridge *v.* Nuckolls, 25 Ill. 178; Adams *v.* King, 16 Ill. 169, 61 Am. Dec. 64; Frye *v.* Menkins, 15 Ill. 339; Dwight *v.* Newell, 15 Ill. 333; Linn *v.* Buckingham, 2 Ill. 451; Judd *v.* Cralle, 37 Ill. App. 149; Donnell *v.* McDonald, 37 Ill. App. 144.

Indiana.— Woolen *v.* Wise, 73 Ind. 212; Woolen *v.* Whitacre, 73 Ind. 198; Wallace *v.* Reed, 70 Ind. 263; Belton *v.* Smith, 45 Ind. 291; Lucas *v.* Smith, 42 Ind. 103; Coen *v.* Funk, 18 Ind. 345; Moorman *v.* Barton, 16 Ind. 206; Wade *v.* Mussleman, 14 Ind. 362; Hauser *v.* Hays, 11 Ind. 368; Hoefgan *v.* Harrison, 7 Ind. 594; Abernathy *v.* Reeves, 7 Ind. 306; White *v.* Rogers, 6 Blackf. (Ind.) 436; Wilson *v.* Merkle, 6 Blackf. (Ind.) 118; Parry *v.* Henderson, 6 Blackf. (Ind.) 72; McDonald *v.* Hare, 28 Ind. App. 227, 62 N. E. 501.

Iowa.— Dickey *v.* Baker, 76 Iowa 303, 41 N. W. 24.

Kansas.— Hutchinson *v.* Myers, 52 Kan. 290, 34 Pac. 742; Eggan *v.* Briggs, 23 Kan. 710; Payne *v.* Kansas City Nat. Bank, 16 Kan. 147; Reed *v.* Arnold, 10 Kan. 102.

Kentucky.— Gill *v.* Johnson, 1 Metc. (Ky.) 649; Black *v.* Crouch, 3 Litt. (Ky.) 226; Crenshaw *v.* Carrico, 4 Bibb (Ky.) 456; Spencer *v.* Shakers Soc., 23 Ky. L. Rep. 854, 64 S. W. 468; Harrison *v.* Rees, 19 Ky. L. Rep. 658, 41 S. W. 431.

not of themselves form the basis of the action [98] or preclude a showing of a want of capacity to execute [99] or the introduction of a defense that does not contradict execution.[1] Nor are they applicable where no opportunity has been afforded defendant to deny the execution.[2] There are, however, decisions to the effect that where a general denial is interposed, although not sworn to, execution of the instrument is not admitted,[3] or the production of the instrument dispensed with,[4] and that such interposition will prevent a judgment *nil dicit*.[5] In some

Michigan.— Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 543, 65 N. W. 759; McCormick Mach. Harvesting Co. *v.* McKee, 51 Mich. 426, 16 N. W. 796; Lobdell *v.* Merchants' & Manufacturers' Bank, 33 Mich. 408; Hoard *v.* Little, 7 Mich. 468.

Minnesota.— McCormick Harvesting Mach. Co. *v.* Doucette, 61 Minn. 40, 63 N. W. 95.

Mississippi.— Thornton *v.* Alliston, 12 Sm. & M. (Miss.) 124.

Missouri.— Jervis *v.* Unnerstall, 29 Mo. App. 474; Smith Middlings Purifier Co. *v.* Rembaugh, 21 Mo. App. 390.

Ohio.— Somers *v.* Harris, 16 Ohio 262; Ring *v.* Foster, 6 Ohio 279.

Pennsylvania.— Miller *v.* Weeks, 22 Pa. St. 89.

Tennessee.—Barrett *v.* Hambright, 4 Sneed (Tenn.) 586; Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Texas.— San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556; Johnston *v.* Jefferson, 31 Tex. 332; Kinnard *v.* Herlock, 20 Tex. 48; Matossy *v.* Frosh, 9 Tex. 610; Ramsay *v.* McCauley, 2 Tex. 189.

Virginia.— Clason *v.* Parrish, 93 Va. 24, 24 S. E. 471.

Wisconsin.—Neilson *v.* Schuckman, 53 Wis. 638, 11 N. W. 44; Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26; Ela *v.* Sprague, 3 Pinn. (Wis.) 323, 4 Chandl. (Wis.) 52.

The federal courts follow the state statutes in this respect. Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160; Pratt *v.* Willard, 6 McLean (U. S.) 27, 19 Fed. Cas. No. 11,378; McClintick *v.* Cummins, 2 McLean (U. S.) 98, 15 Fed. Cas. No. 8,698.

Although the note does not purport to have been executed by defendant, yet if its execution by him is averred he cannot deny it, whether it was by mark, initial, or other designation, except by a sworn plea. Wimberly *v.* Dallas, 52 Ala. 196 [*overruling* Flowers *v.* Bitting, 45 Ala. 448].

Where acceptance by an agent is alleged in the petition, neither the acceptance nor the authority of the agent is controverted unless denied on oath. San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556.

Forgery.— Evidence that the note in suit is a forgery is inadmissible. Woolen *v.* Wise, 73 Ind. 212; Woolen *v.* Whitacre, 73 Ind. 198.

A denial verified on information and belief is insufficient. McCormick Harvesting Mach. Co. *v.* Doucette, 61 Minn. 40, 63 N. W. 95.

Under the Mississippi act of 1824, the general issue when verified has the qualities of the plea *non est factum*, and it will be sufficient to prove that the signature of the name was in the handwriting of defendant, or made by his authority. Sumpter *v.* Geron, 4 How. (Miss.) 263.

Non est factum, non assumpsit, or a plea of the general issue properly verified is sufficient. Walter *v.* School Trustees, 12 Ill. 63; Hinton *v.* Husbands, 4 Ill. 187; Williams *v.* Miami Powder Co., 36 Ill. App. 107; Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642; Bates *v.* Hunt, 1 Blackf. (Ind.) 67; Gray *v.* Tunstall, 1 Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730.

Sealed note.— *Non est factum* may be pleaded to debt on a sealed note without verifying the plea by affidavit. Russell *v.* Hamilton, 3 Ill. 56.

A verified notice given under the general issue does not satisfy a statute requiring a verified plea. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

The filing of an affidavit of merits will not dispense with the necessity of verifying the plea. Hansen *v.* Hale, 44 Ill. App. 474.

An answer verified by attorney is not sufficient. Johnston Harvesting Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252.

98. Crenshaw *v.* Carrico, 4 Bibb (Ky.) 456.

99. Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88.

1. Freeman *v.* Ellison, 37 Mich. 459.

Fraud in procuring the signature may be shown, although execution is not denied on oath. Nielson *v.* Schuckman, 53 Wis. 638, 11 N. W. 44.

2. As in an action begun before a justice by declaring on the common counts only, and on being appealed to the circuit a new declaration was filed with a copy of the note attached, but without giving defendant an opportunity to plead anew. McMillen *v.* Beach, 38 Mich. 397.

3. Fannon *v.* Robinson, 10 Iowa 272.

4. Woolen *v.* Whitacre, 73 Ind. 198; Potter *v.* Earnest, 51 Ind. 384; Lucas *v.* Smith, 42 Ind. 103; Lebeaume *v.* Lebeaume, 1 Mo. 487; San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556; Davis *v.* Marshall, 25 Tex. 372; Robinson *v.* Brinson, 20 Tex. 438; Kinnard *v.* Herlock, 20 Tex. 48; Bond *v.* Mallow, 17 Tex. 636; Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518; Matossy *v.* Frosh, 9 Tex. 610; Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160. But see Payne *v.* Kansas City Nat. Bank, 16 Kan. 147; Reed *v.* Arnold, 10 Kan. 102.

5. Hurt *v.* Blackburn, 20 Tex. 601; Robinson *v.* Brinson, 20 Tex. 438; Kinnard *v.* Herlock, 20 Tex. 48.

jurisdictions where no sworn denial is interposed the effect of such statutes is merely to dispense with proof of execution on the part of plaintiff, to shift the burden of proof to defendant, and to permit the latter to disprove his signature.[6]

(B) *Several Defendants.* Where there are several defendants plaintiff need prove execution only as to those who have denied the same under oath,[7] and proof of non-execution by the others is inadmissible.[8]

(C) *Parties Sued or Answering Jointly.* Although it has been held that a sworn denial by one joint maker is sufficient for all,[9] it has also been held that where the maker and the indorser[10] or several indorsers[11] answer jointly, their pleading must be verified by or on behalf of each.

(D) *Copartners.* Execution by a copartnership must be denied by the sworn plea of all the members thereof,[12] and an unverified answer by one partner of execution by the other for a personal debt[13] is insufficient to put plaintiff to proof of firm execution or a joint liability.[14] On the other hand a denial of execution by one partner under oath has been held sufficient.[15] In some states the failure to deny execution by a firm will dispense with the necessity of proving the partnership or that defendants are members thereof.[16]

(E) *Corporations.* The rule requiring the denial of execution under oath is as well applicable to notes and bills purporting to be made by corporations as to those made by a natural person, and unless so denied the instrument will be proof of the authority of the officers of the corporation to execute it on its behalf.[17]

6. Brayley *v.* Hedges, 52 Iowa 623, 3 N. W. 652; Sankey *v.* Trump, 35 Iowa 267; Terhune *v.* Henry, 13 Iowa 99; Sheldon *v.* Middleton, 10 Iowa 17; Seachrist *v.* Griffith, 6 Iowa 390; Lyon *v.* Bunn, 6 Iowa 48; Palmer *v.* Yarrington, 1 Ohio St. 253 [*overruling* Taylor *v.* Colvin, Wright (Ohio) 449].

7. Ferguson *v.* State Bank, 8 Ark. 416; Feeney *v.* Mazelin, 87 Ind. 226; Taylor *v.* Gay, C Blackf. (Ind.) 150.

Plea of discharge by one defendant.— In an action against two defendants as makers, if defendants do not deny the execution under oath, but one sets forth as a defense that he was only a surety for his co-defendant, and that by subsequent transactions between plaintiff and his co-defendant he was discharged from liability, the execution of the note is admitted. Payne *v.* Kansas City Nat. Bank, 16 Kan. 147.

8. Massey *v.* Farmers' Nat. Bank, 113 Ill. 334.

9. Wren *v.* McLaren, 48 Mich. 197, 12 N. W. 41.

10. Andrews *v.* Storms, 5 Sandf. (N. Y.) 609.

11. Alfred *v.* Watkins, Code Rep. N. S. (N. Y.) 343.

12. Davis *v.* Scarritt, 17 Ill. 202; Warren *v.* Chambers, 12 Ill. 124; Stevenson *v.* Farnsworth, 7 Ill. 715; Bailey *v.* Valley Bank, 21 Ill. App. 642; Mills *v.* Bunce, 29 Mich. 364.

13. Talbott *v.* Kennedy, 76 Ind. 282.

14. Zuel *v.* Bowen, 78 Ill. 234. See also Towle *v.* Dunham, 76 Mich. 251, 42 N. W. 1117, holding that while failure to deny the execution of the notes on oath admitted the firm signature and the partner's authority, it did not admit that the firm received the consideration or preclude defendants from showing that the notes had been fraudulently used, with plaintiffs' knowledge, for other than partnership purposes.

15. Haight *v.* Arnold, 48 Mich. 512, 12 N. W. 680 (where defendant alleged that "he did not sign the same," neither did he authorize any person to sign it for him); Hogg *v.* Orgill, 34 Pa. St. 344 (where defendant alleged that the note sued on was not made or given by him and that he knew nothing of it); Reiter *v.* Fruh, 150 Pa. St. 623, 30 Wkly. Notes Cas. (Pa.) 231, 24 Atl. 347 (where one defendant denied that he made the note, that he authorized or ratified the making of it, or that he was or had been a member of the firm); Johl *v.* Fernberger, 10 Heisk. (Tenn.) 37 (a plea by one defendant that the note was not executed by him, or by any one authorized to bind him in the premises).

16. Litchfield *v.* Daniels, 1 Colo. 268; Lobdell *v.* Merchants' & Manufacturers' Bank, 33 Mich. 408. *Contra*, Shepherd *v.* Fry, 3 Gratt. (Va.) 422.

17. *Alabama.*— Montgomery, etc., R. Co. *v.* Trebles, 44 Ala. 255.

Georgia.— Union Dray Co. *v.* Reid, 26 Ga. 107.

Illinois.— Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269.

Michigan.— Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063.

Minnesota.— Freeport First Nat. Bank *v.* Composition Bd. Mfg. Co., 61 Minn. 274, 63 N. W. 731.

A note signed by parties assuming to represent a company is sufficient evidence to entitle the holder to judgment in an action thereon, unless a plea verified by affidavit puts in issue the authority of the parties signing the note to bind the other members of the company. Dwight *v.* Newell, 15 Ill. 333.

Under the Iowa code the answers of a cor-

(F) *Denial of Execution by Decedents.* The decisions as to the applicability of such statutes in actions against the personal representatives of a deceased maker are not in accord, and while in some states these provisions have been held not to apply,[18] in others no distinction is made between such actions and those in which the actual party is defendant.[19]

(G) *Authority of Agents.* Although it is held that notwithstanding the failure to support the truth of the plea by affidavit, the agency must be proved before the note can be read in evidence,[20] it seems to be the rule that in an action against the principal upon a note made by an agent, it is not necessary to prove the authority of the agent, unless the denial of the execution of the note is verified by affidavit.[21]

(H) *Alteration.* In some jurisdictions verification of the plea is necessary where defendant seeks to prove that the instrument in suit is not the one executed by him because of alteration therein,[22] although the rule has been held to be inapplicable where the denial of the signature[23] or the denial of the obligation of the instrument so far as it depends on the voluntary and valid signature and execution of it by defendant[24] is not on oath.

(I) *Sufficiency.* The denial under oath must be unequivocal[25] and substantially comply with the terms of the statute.[26] If the authenticity of the signature is sought to be put in issue its genuineness must be attacked directly[27] by specific and positive statements.[28] An affidavit of the non-execution of a note

poration to an interrogatory of a verified answer to the effect that the signer had no authority was a good denial of the signature under the statute, the denial being as specific as the circumstances would permit. Marshall Field Co. *v.* Oren Ruff-Corn Co., (Iowa 1902) 90 N. W. 618.

Who may verify.— In an action on a note purporting to be that of a corporation, by its president, a verification by its secretary of an answer denying the genuineness of the signature is sufficient. Marshall Field Co. *v.* Oren Ruff-Corn Co., (Iowa 1902) 90 N. W. 618, where it is said that in such a case it is probable that the officer should show knowledge of the facts in order to enable him to deny the signature.

18. Wells *v.* Wells, 71 Ind. 509; Mahon *v.* Sawyer, 18 Ind. 73; Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Ashworth *v.* Grubbs, 47 Iowa 353.

19. Martin *v.* Dortch, 1 Stew. (Ala.) 479; Ellis *v.* Planters' Bank, 7 How. (Miss.) 235.

A denial on information and belief is sufficient. Martin *v.* Dortch, 1 Stew. (Ala.) 479.

The authority of an agent to sign the name of the intestate must be denied by the administrator on oath. Ellis *v.* Planters' Bank, 7 How. (Miss.) 235.

In Texas if the administrator is unwilling to verify the plea the widow of the intestate may intervene and make the necessary affidavit. Solomon *v.* Huey, 1 Tex. Unrep. Cas. 265.

20. Pope *v.* Risley, 23 Mo. 185; Wahrendorff *v.* Whittaker, 1 Mo. 205.

21. Delahay *v.* Clement, 3 Ill. 575; Thompson *v.* Abbott, 11 Iowa 193; Ellis *v.* Planters' Bank, 7 How. (Miss.) 235. See also Sorrelle *v.* Elmes, 6 Ala. 706, holding that a plea that defendant authorized his agent by writing to sign a note in the name of his principal, to be binding on him if the payee gave notice thereof to the principal in thirty days, and alleging that no notice was given, is equivalent to a plea denying the execution of the note, and must be verified.

22. Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273; Moorman *v.* Barton, 16 Ind. 206; Polhemus *v.* Ann Arbor Sav. Bank, 27 Mich. 44.

23. Lake *v.* Cruikshank, 31 Iowa 395.

24. Vandergrift *v.* Hollis, 6 Houst. (Del.) 90, which in effect overruled Hollis *v.* Vandergrift, 5 Houst. (Del.) 597, and reaffirms Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

25. Ela *v.* Sprague, 3 Pinn. (Wis.) 323, 4 Chandl. (Wis.) 52, where the denial would apply as well to a note altered with defendant's assent, or so as not to affect its legal force and effect as to a case where the signature was forged.

A verified plea is insufficient, if it merely denies that any note of the description and amount claimed in plaintiff's petition was for value assigned and indorsed to plaintiff by defendant, or by any other person with his knowledge and consent at the time, etc., set forth in plaintiff's petition. Carle *v.* Cornell, 11 Iowa 374.

26. Truesdell *v.* Hunter, 28 Ill. App. 292.

27. An affidavit denying execution alone is not sufficient. Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

28. Douglass *v.* Matheny, 35 Iowa 112, where an allegation that the signature "was obtained, if defendant signed the same, and of which fact he has no sufficient knowledge, information, or advice to form a belief, by false and fraudulenet representations" was held to be insufficient.

sued upon should not be construed technically, but will be sufficient if evidently intended in good faith to meet plaintiff's case,[29] and the truth of the plea can be inferred from the facts stated.[30]

(III) *PLEA OF WANT OR FAILURE OF CONSIDERATION.* Unless so required a plea of the want or failure of consideration need not be supported by oath,[31] but if a sworn denial is necessary a defense based on such want or failure is unavailable unless presented by a verified answer or an affidavit in support thereof.[32]

(IV) *PLEA OF PAYMENT.* In the absence of any requirement that a plea of payment must be verified no verification of such plea is necessary.[33]

(V) *TRANSFER OF OWNERSHIP*— (A) *In General.* In many jurisdictions the transfer of ownership of the instrument sued on is only put in issue by a verified plea or answer, and such requirements must be substantially complied with.[34] A

29. Haight *v.* Arnold, 48 Mich. 512, 12 N. W. 680; Anderson *v.* Walter, 34 Mich. 113.

An affidavit by an attorney of the truth of a plea stating that "defendant, for answer to the complaint, saith that he did not sign the note sued on" is sufficient. McCoy *v.* Harrell, 40 Ala. 232.

30. Tindal *v.* Bright, Minor (Ala.) 103.

31. Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240; McCarthy *v.* Barthe, 6 L. C. Jur. 130. See also Arnold *v.* Trundle, 7 J. J. Marsh. (Ky.) 115 (holding that a plea to a suit on a note under seal, admitting a valid consideration if the representations of the obligee had been true, but alleging the note to have been procured by false representations, need not be verified by the oath of the party); Davis *v.* Young, 3 T. B. Mon. (Ky.) 381 (holding that in actions on notes above £5, and not exceeding fifty dollars, pleas impeaching the consideration need not be verified).

A plea impeaching the consideration of a note under seal need not be verified by affidavit. Lemmon *v.* Hanley, 28 Tex. 219; Harris *v.* Cato, 26 Tex. 338; Davidson *v.* Gibson, 2 Tex. Unrep. Cas. 331. But see *contra*, the earlier cases of Muckleroy *v.* Bethany, 23 Tex. 163; Conner *v.* Autrey, 18 Tex. 427; Clopton *v.* Pridgen, 8 Tex. 308.

Illegality.— A plea that a note was given for money with which to play cards (Burton *v.* Emerine, 3 A. K. Marsh. (Ky.) 499) or was executed on a gaming consideration (Chambers *v.* Simpson, 1 T. B. Mon. (Ky.) 112) need not be verified.

32. Miller *v.* McIntyre, 9 Ala. 638; Parkman *v.* Ely, 5 Ala. 346 [But see the later decision in Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240]; Williams *v.* Williams, 13 Ark. 421; Kelly *v.* Matthews, 5 Ark. 223; White *v.* Camp, 1 Fla. 94; Muckleroy *v.* Bethany, 23 Tex. 163; Conner *v.* Autrey, 18 Tex. 427; Clopton *v.* Pridgen, 8 Tex. 308.

Form of affidavit.— The affidavit of a failure of consideration should be drawn in issuable terms and confined to a single allegation, and should not be in the alternative or double; it should be so constructed as to apprise plaintiff of the facts he will be required to prove on the trial. White *v.* Camp, 1 Fla. 94.

33. O'Bryan *v.* Standiford, 47 Kan. 24, 27 Pac. 129.

34. *Alabama.*— Hanna *v.* Ingram, 93 Ala. 482, 9 So. 621; Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; Price *v.* Lavender, 38 Ala. 389; Smith *v.* Harrison, 33 Ala. 706; Nesbitt *v.* Pearson, 33 Ala. 668; Savage *v.* Walshe, 26 Ala. 619; Agee *v.* Medlock, 25 Ala. 281; Bancroft *v.* Paine, 15 Ala. 834; Bragg *v.* Nall, 14 Ala. 619; Frazer *v.* Brownrigg, 10 Ala. 817; Tarver *v.* Nance, 5 Ala. 512; Deshler *v.* Guy, 5 Ala. 186; McWhorter *v.* Lewis, 4 Ala. 198; Lazarus *v.* Shearer, 2 Ala. 718; Fowlkes *v.* Baldwin, 2 Ala. 705; Jennings *v.* Cummings, 9 Port. (Ala.) 309; Beal *v.* Snedicor, 8 Port. (Ala.) 523. But see Birch *v.* Tillotson, 16 Ala. 387.

Arkansas.— Sumpter *v.* Tucker, 14 Ark. 185.

Delaware.— Pusey *v.* Pyle, 4 Houst. (Del.) 98.

Illinois.— Grier *v.* Gibson, 36 Ill. 521; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Frye *v.* Menkins, 15 Ill. 339; Hudson *v.* Dickinson, 12 Ill. 407; Hayden *v.* Olinger, 5 Ill. App. 632.

Indiana.— Wallace *v.* Reed, 70 Ind. 263; Crawford *v.* Redway, 62 Ind. 573; Lawson *v.* Sherra, 21 Ind. 363; Groves *v.* Train, 11 Ind. 198; Thomas *v.* Register, 3 Ind. 369; Berger *v.* Henderson, 5 Blackf. (Ind.) 545.

Iowa.— Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440; Robinson *v.* Lair, 31 Iowa 9; Sands *v.* Wood, 1 Iowa 263; Steinhelber *v.* Edwards, 2 Greene (Iowa) 366.

Kansas.— Eggan *v.* Briggs, 23 Kan. 710. See Stout *v.* Judd, (Kan. App. 1900) 63 Pac. 662.

Kentucky.— Burks *v.* Howard, 2 B. Mon. (Ky.) 66; Black *v.* Crouch, 3 Litt. (Ky.) 226; Frazier *v.* Harvie, 2 Litt. (Ky.) 180; McGee *v.* Donaphan, 2 Litt. (Ky.) 139; Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610.

Michigan.—Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 543, 65 N. W. 759; Lobdell *v.* Merchants', etc., Bank, 33 Mich. 408.

Mississippi.— Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

statute dispensing with proof of execution unless it is denied under oath is not applicable to indorsement or assignment[35] where the indorsement purports to be by an agent.[36] Nor is the requirement of a sworn denial of indorsement applicable to an action by the indorsee against the maker[37] or to a note transferred without indorsement.[38] So a requirement of a sworn plea of belief that an assignment is forged does not apply to an indorsed note.[39] The interest of plaintiff is not admitted by failure to deny under oath an indorsement by way of guaranty,[40] and a statute dispensing with proof of handwriting unless denied by affidavit does not require an allegation of sale and transfer after maturity to be so controverted.[41]

(B) *Authority of Agent.* Proof need not be made of the authority of an agent to assign[42] or indorse,[43] or of the authority to indorse the name of a corporation,[44] unless by plea verified by statute.

South Carolina.— Madden *v.* Burris, 1 Brev. (S. C.) 387.

Tennessee.— Knott *v.* Planters' Bank, 2 Humphr. (Tenn.) 493; Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519; Smith *v.* Wallace, 4 Yerg. (Tenn.) 572.

Under the Arkansas statute, the time of the assignment can be put in issue only by a sworn plea. Sanger *v.* Sumner, 13 Ark. 280, where the assignment was without date.

Claim against decedent's estate.— Prior to the code of 1881 an indorsee who presented a note as a claim against the maker's estate was not required to prove the indorsement unless it was put in issue by a pleading under oath. Jennings *v.* McFadden, 80 Ind. 531.

Inability to deny on oath.— A rule of court that the genuineness of indorsements of notes shall be taken to be admitted unless denied by affidavit was not intended to fix on a party the admission of a fact which he does not remember, and therefore asks shall be proved, although he acknowledges its existence to be possible. Owosso Sav. Bank *v.* Walsh, 65 Fed. 783.

Denying plaintiff's interest.— After *non assumpsit*, not verified, although the maker cannot deny the execution or the indorser the indorsement, yet they may urge that upon plaintiff's declaration he has no interest in the note sufficient to maintain a suit. Eakir *v.* Burger, 1 Sneed (Tenn.) 417.

A plea of non-assignavit need not be sworn to. Klyce *v.* Black, 7 Baxt. (Tenn.) 277.

The signature of a guarantor need not be proved unless denied on oath. Partridge *v.* Patterson, 6 Iowa 514.

Under the California practice act a party was not required to deny the genuineness of an indorsement under oath. Youngs *v.* Bell, 4 Cal. 201; Grogan *v.* Ruckle, 1 Cal. 193.

Sufficiency.— A general denial sworn to in general terms (Vestal *v.* Burditt, 6 Blackf. (Ind.) 555), or an affidavit that the signature to the assignment is not in the handwriting of the payee (Davis *v.* Cleghorn, 25 Ill. 212) is insufficient.

Necessity of charging forgery.— It is not necessary that an affidavit to a plea denying an assignment should in terms charge that the assignment was forged. Any plea substantially denying the assignment is all that is required. Burks *v.* Howard, 2 B. Mon. (Ky.) 66.

If the affidavit to the plea is defective a demurrer to the replication should be visited on the plea. Bancroft *v.* Paine, 15 Ala. 834.

Variance.— If defendant does not deny, by a sworn plea, an allegation that plaintiff is the payee, he cannot avail himself of a variance between the petition and the note sued on in the payee's name. Farley *v.* Harvey, 14 Ind. 377.

35. Sinclair *v.* Gray, 9 Fla. 71. See also Stroud *v.* Harrington, Hempst. (U. S.) 117, 23 Fed. Cas. No. 13,546*a* [*followed* in Clark *v.* Cropper, Hempst. (U. S.) 213, 5 Fed. Cas. No. 2,817*a*], holding that a statute requiring the execution of a writing to be denied on oath does not comprehend an indorsement unless the action is on the indorsement against the indorser.

An indorsement is not a written instrument within a statute providing that where the complaint sets out a copy of the instrument sued on its genuineness and due execution will be deemed admitted unless the answer denying the same is verified. Mahr *v.* Reynolds, 38 Cal. 560.

36. Spicer *v.* Smith, 23 Mich. 96.

37. Sheldon *v.* Bahner, 4 Pa. Co. Ct. 16; Richardson *v.* Cato, 9 Humphr. (Tenn.) 464.

38. Southern Kansas Farm Loan, etc., Co. *v.* Barnes, 63 Kan. 548, 66 Pac. 638; Hutchinson *v.* Myers, 52 Kan. 290, 34 Pac. 742; Pattie *v.* Wilson, 25 Kan. 326; Washington *v.* Hobart, 17 Kan. 275; Morris *v.* Case, 4 Kan. App. 691, 46 Pac. 54.

Although an indorsement is alleged, but a copy of the note attached to the petition shows no indorsement, an unverified denial puts in issue the title and ownership of the note. Farm Land Mortgage, etc., Co. *v.* Elsbree, 55 Kan. 562, 40 Pac. 906.

39. Cass *v.* Northrup, 1 Stew. & P. (Ala.) 89.

40. Eggan *v.* Briggs, 23 Kan. 710.

41. Clason *v.* Parrish, 93 Va. 24, 24 S. E. 471.

42. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; Nimmon *v.* Worthington, 1 Ind. 376, Smith (Ind.) 226.

43. Habersham *v.* Lehman, 63 Ga. 380.

44. Walker *v.* Krebaum, 67 Ill. 252.

(VI) *DENIAL OF NOTICE OF PROTEST.* The sufficiency of a notice of protest will not be considered if the fact of notice is not denied on oath as required by statute,[45] and the omission of a sworn denial of receipt of the notice will permit the introduction in evidence of the notarial certificate of protest.[46] So if the affidavit is insufficient to satisfy the statute.[47]

(VII) *TIME OF VERIFICATION.* Unless by special leave of the court the affidavit must be interposed before the commencement of the trial,[48] or before the instrument is offered in evidence.[49]

(VIII) *EFFECT OF VERIFICATION.* The only effect of verification is to place the burden of proving the transfer on plaintiff, who is relieved of such proof only when no sworn plea is interposed.[50] So the fact of assignment only is raised by a sworn plea, and the time of assignment may be put in issue without verification.[51]

(IX) *OBJECTIONS — WAIVER.* The omission or interposition of a defective affidavit or verified plea is waived by going to trial on the merits,[52] by an agreement that all matters of defense may be given in evidence under the answer interposed,[53] or by the failure to object until after verdict.[54] The want of a verification cannot be reached by a general demurrer,[55] or by a demurrer for want of facts,[56] but must be specially excepted to.[57]

3. REPLICATION — a. In General — (I) *WHEN NECESSARY.* No replication is necessary where the plea merely serves to complete the issue[58] or sets forth matter irrelevant or immaterial to plaintiff's cause of action,[59] where the matter pleaded is defensive merely and does not amount to a counter-claim,[60] or where

45. Negaunee First Nat. Bank *v.* Freeman, 47 Mich. 408, 11 N. W. 219.

46. Gawtry *v.* Doane, 48 Barb. (N. Y.) 148 [*affirmed* in 51 N. Y. 84].

47. Pierson *v.* Boyd, 2 Duer (N. Y.) 33, where the indorser admitted that he had received notice of protest of the note, but denied "having any knowledge or information sufficient to form a belief whether or not he received due notice of said protest." See also Barker *v.* Cassidy, 16 Barb. (N. Y.) 177, where a denial by the indorser according to his "knowledge, information, recollection and belief" of receipt of notice was held sufficient to destroy the presumption arising from the notarial certificate of the fact.

48. Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26.

49. Somers *v.* Harris, 16 Ohio 262.

50. Jarell *v.* Lillie, 40 Ala. 271; Lockbridge *v.* Nuckolls, 25 Ill. 178.

Evidence to rebut assignment.— A verified plea is not necessary to render admissible evidence to rebut the assignment after its introduction by plaintiff. Lockbridge *v.* Nuckolls, 25 Ill. 178.

What is admitted.— By failing to file an affidavit no more is admitted than the making of the indorsement. Eggan *v.* Briggs, 23 Kan. 710.

51. Hayden *v.* Olinger, 5 Ill. App. 632; Rich *v.* Sovacool, 11 Ind. 148.

52. Hagar *v.* Mounts, 3 Blackf. (Ind.) 57, 261; State Ins. Co. *v.* Cranmer, (Kan. 1901) 65 Pac. 661.

53. Allison *v.* Hubbell, 17 Ind. 559.

54. State Ins. Co. *v.* Cranmer, (Kan. 1901) 65 Pac. 661; Myers *v.* Douglass, 99 Ky. 267, 35 S. W. 917.

55. Steagall *v.* Levy, 3 Tex. App. Civ. Cas. § 469.

56. J. I. Case Threshing Mach. Co. *v.* Millikan, 28 Ind. App. 686, 63 N. E. 777.

57. Steagall *v.* Levy, 3 Tex. App. Civ. Cas. § 469.

58. Brown *v.* Ready, 14 Ky. L. Rep. 583, 20 S. W. 1036 [*distinguishing* Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234, and holding that a plea of *non est factum* to an averment of execution and delivery simply completed the issue and required no replication]; Anderson *v.* Perkins, 10 Mont. 154, 25 Pac. 92. And see Williams *v.* Little, 11 N. H. 66.

59. Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235; Robinson *v.* Bohn Mfg. Co., 71 Miss. 95, 14 So. 460.

60. Defensive matter and counter-claim distinguished.— An answer setting up that the note in suit was given in consideration of a machine which was warranted, that there was a breach of the warranty, and in conclusion praying damages was held to constitute a counter-claim and necessitate a replication under the North Dakota practice (Heebner *v.* Shephard, 5 N. D. 56, 63 N. W. 892); but on the other hand an answer setting up that the goods for which the note was given were not of the quality warranted and claiming damages for the breach of such warranty was held not to constitute a counter-claim and require a replication under the practice of New York (Nichols *v.* Boerum, 6 Abb. Pr. (N. Y.) 290). Nor, under the statutes of Minnesota, does a defense in an action by the transferee of an overdue note that the original payee owed defendant a debt due prior to such transfer constitute a counter-claim. Linn *v.*

the answer does not set up new matter.[61] But if plaintiff would avoid an answer by showing that the *lex loci contractus* is different from the law of the forum he must set out such law in his reply,[62] and a reply has been held necessary where the answer sets up that plaintiff is not a *bona fide* holder for value before maturity.[63] In some jurisdictions replication must be made to a plea of failure of consideration,[64] but as a rule this is not considered new matter, requiring a reply.[65] So too a plea of payment is not new matter and requires no replication,[66] and a failure to reply to a plea of want of consideration[67] or of *non assumpsit*[68] is waived by going to trial.

(II) *SUFFICIENCY*—(A) *In General.*[69] The replication, in an action on a note,[70] should traverse the material[71] averments of the new matter set forth in the answer or confess and avoid it,[72] by averments of facts,[73] and a replication to a part only of the averments in the answer is insufficient,[74] unless by virtue of the matter pleaded in the replication a part of the averments of the plea become immaterial,[75] and any scandalous matter should be stricken out.[76] But the general rules relating to pleading govern, with regard to the sufficiency, and a replication not involving duplicity, uncertainty, or other objectionable matter, but containing a substantial denial of the answer, will be held sufficient;[77] and it has been

Rugg, 19 Minn. 181. See also Prentiss *v.* Graves, 33 Barb. (N. Y.) 621; Ravicz *v.* Nickells, 9 N. D. 536, 84 N. W. 353.

61. See Goddard *v.* Fulton, 21 Cal. 430.

62. Hope *v.* Caldwell, 21 U. C. C. P. 241.

63. Chambers *v.* Allen, 73 N. Y. Suppl. 334.

64. Stebbens *v.* Lenfesty, 14 Ind. 4. See also Babcock *v.* Farmers, etc., Bank, 46 Kan. 548, 26 Pac. 1037.

65. Alden *v.* Carpenter, 7 Colo. 87, 1 Pac. 904; Gafford *v.* American Mortg., etc., Co., 77 Iowa 736, 42 N. W. 550; Ballou *v.* Wells, 12 Allen (Mass.) 485; Carpenter *v.* Meyers, 32 Mo. 213.

66. Powesheik County *v.* Mickel, 10 Iowa 76; Stacy *v.* Stichton, 9 Iowa 399; True *v.* Triplett, 4 Metc. (Ky.) 57; Van Gieson *v.* Van Gieson, 10 N. Y. 316 [*affirming* 12 Barb. (N. Y.) 520]; Giesson *v.* Giesson, Code Rep. N. S. (N. Y.) 414. See also Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. *Compare* Fewster *v.* Goddard, 25 Ohio St. 276.

67. Kaestner *v.* Chicago First Nat. Bank, 170 Ill. 322, 48 N. E. 998.

68. Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166 [*affirming* 55 Ill. App. 124].

69. For form of reply see Esseltyn *v.* Weeks, 2 Abb. Pr. (N. Y.) 272.

70. Where the word "note" is used in a replication without further words of identification it will be understood to mean the note mentioned in the previous pleadings. Grover *v.* Gaunt, 6 Sm. & M. (Miss.) 317.

71. A traverse of immaterial matter contained in the answer will not operate to make the replication bad for duplicity. Hereford *v.* Crow, 4 Ill. 423; Elminger *v.* Drew, 4 McLean (U. S.) 388, 8 Fed. Cas. No. 4,416.

72. Say *v.* Dascomb, 1 Hill (N. Y.) 552; Chillicothe Bank *v.* Swayne, 8 Ohio 257, 32 Am. Dec. 707. And see Martin *v.* Garrett, 7 Harr. & J. (Md.) 272.

73. Facts distinguished from conclusions. — Where the defense was that the consideration for which the note in suit was given had failed, in that it had been given in consideration of the surrender and cancellation of a prior note, the surrender and cancellation of which had been refused, a replication that the prior note was at the time of such settlement canceled and satisfied, was not an existing liability, and had not existed or continued after the date of settlement, was the statement of a mere conclusion and not a proper statement of facts. McClellan *v.* Perry, 37 Ill. App. 157.

74. Smythe *v.* Scott, 124 Ind. 183, 24 N. E. 685; Marquis *v.* Rogers, 8 Blackf. (Ind.) 118; Howk *v.* Pollard, 6 Blackf. (Ind.) 108; Allen *v.* Skead, 9 U. C. Q. B. 217; Brown *v.* Wheeler, 6 U. C. Q. B. 393; Gilmore *v.* Edmunds, 2 U. C. Q. B. 419. See also Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658. *Compare* McClintick *v.* Johnston, 1 McLean (U. S.) 414, 15 Fed. Cas. No. 8,700; Campbell *v.* McCrea, 11 U. C. Q. B. 93.

75. As where for instance the answer avers that the note was given for lands the title to which had failed and the replication denies that this was the consideration. In such case the replication is not open to the objection that it replies to only a part of the answer, inasmuch as plaintiff's title to the land is immaterial if such land is not the consideration involved. Spears *v.* Featheringill, 14 Ind. 402.

76. An allegation that the maker was a mere tool in the indorser's hands, that the maker had been indicted for perjury for swearing to an answer in another action, or that the sister of the maker had brought an action to have him removed as her trustee and the court in doing so had found him to be a dissolute man is scandalous and should be stricken out. Stokes *v.* Leary, 66 N. Y. Suppl. 822.

77. Conard *v.* Dowling, 7 Blackf. (Ind.) 481; Deut *v.* Coleman, 10 Sm. & M. (Miss.) 83. See also Kinzie *v.* Farmers', etc., Bank,

held that a replication setting up an estoppel *in pais* against a married woman need not aver that she had knowledge of the defenses when she made the statements constituting such estoppel.[78]

(B) *To Special Pleas*—(1) DENIAL OF PLAINTIFF'S TITLE. A replication to an answer denying plaintiff' title and alleging that another party was the legal holder should deny title in such party at the time the action was instituted[79] and aver title in plaintiff,[80] although it is held that a replication that the suit is prosecuted for the benefit and use of the legal owner would be sufficient,[81] and a replication averring that plaintiff has an interest in the note will be understood to mean an interest sufficient to enable him to maintain a suit at law.[82]

(2) FAILURE OF CONSIDERATION. Where a replication to the plea of failure of consideration is made it is sufficient to reply generally that the consideration was adequate and did not fail in the manner and form alleged, or to specially set forth the consideration;[83] but a replication that plaintiff had not refused to deliver the consideration is not a suffieient answer to an allegation that the consideration had not been delivered,[84] and a general replication not specially denying that the note was given for the specific consideration alleged in the answer or that the consideration had failed in the manner and form set forth therein is insufficient.[85]

(3) NON EST FACTUM. While as a rule the plea of *non est factum* closes the issue and requires no reply,[86] a reply of estoppel may be pleaded thereto,[87] and where the facts pleaded by defendant show that the note is not binding on him a general replication would be but a deduction of law and insufficient.[88]

(4) PAYMENT OR SET-OFF. A replication denying payment in the language of the answer alleging such payment is sufficient,[89] and an admission of partial payment with an averment that no more was paid is a sufficient replication to a plea of payment in full.[90] Where defendant pleads a set-off a reply that he owes a sum in excess of the amount claimed as set-off is sufficient.[91] So too where plaintiff has both a note and an account against defendant he may sue upon the former and set up the latter in replication to a plea of set-off by defendant.[92]

(III) *VERIFICATION.* In some jurisdictions the reply need not be verified,[93] while in others a verification is essential.[94]

2 Dougl. (Mich.) 105; Woolley *v.* Hunton, 33 U. C. Q. B. 152.

78. Stephenson *v.* Clayton, 14 Ind. App. 76, 42 N. E. 491.

79. Brunskill *v.* McGuire, 3 U. C. C. P. 408; Dickenson *v.* Clemow, 7 U. C. Q. B. 421; Bank of British North America *v.* Ainly, 7 U. C. Q. B. 33; Morton *v.* Thompson, 1 U. C. Q. B. 178. See also McIntyre *v.* Skead, 8 U. C. Q. B. 300.

80. Doty *v.* Sturdevant, 1 Pa. St. 399.

81. Trezevant *v.* McNeal, 2 Humphr. (Tenn.) 352.

82. Anderson *v.* Patrick, 7 How. (Miss.) 347. See also Neale *v.* Neale, 18 Ky. L. Rep. 343, 36 S. W. 526.

83. Gregory *v.* Logan, 7 Blackf. (Ind.) 112; Holeman *v.* Lamme, 6 Blackf. (Ind.) 222; Thomas *v.* Quick, 5 Blackf. (Ind.) 334; Farmer *v.* Fairman, 5 Blackf. (Ind.) 257; Congleton *v.* Garrard, 22 Ky. L. Rep. 819, 58 S. W. 791; Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489. See also Phelps *v.* Jenkins, 5 Ill. 48; Graveley *v.* Jones, 8 U. C. Q. B. 606.

84. Bourland *v.* Gibson, 26 Ill. App. 416.

85. Kernodle *v* Hunt, 4 Blackf. (Ind.) 57 [*approved* in Clark *v.* Harrison, 5 Blackf. (Ind.) 302].

86. Lewis *v.* Hodapp, 14 Ind. App. 111, 42 N. E. 649, 56 Am. St. Rep. 295.

87. Brickley *v.* Edwards, 131 Ind. 3, 30 N. E. 708.

88. Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685.

If the answer alleges that defendant was intoxicated and not in possession of his faculties at the time that the note was executed, a replication that said defendant ratified the execution of the note when sober is but a conclusion of law and insufficient, it being necessary to allege the acts amounting to ratification. Copenrath *v.* Kienby, 83 Ind. 18.

89. Fannon *v.* Robinson, 10 Iowa 272.

90. Lillie *v.* Trentman, 130 Ind. 16, 29 N. E. 405.

91. Meeker *v.* Shanks, 112 Ind. 207, 13 N. E. 712. See also Bourne *v.* Wooldridge, 10 B. Mon. (Ky.) 492.

92. Blount *v.* Rick, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108.

93. McNeer *v.* Dipboy, 13 Ind. 542; Russell *v.* Drummond, 6 Ind. 216.

94. Young *v.* Mumma, 3 Iowa 140; Case *v.* Edson, 40 Kan. 161, 19 Pac. 635 (holding, however, that where an unverified replication

b. Departure From Complaint. A replication to a plea setting forth facts foreign to the theory of plaintiff's recovery as set forth in the material allegations[95] in his petition is a departure and not allowable.[96] Thus a replication setting forth a right of action in favor of a ward of plaintiff where the complaint set forth the cause of action in favor of plaintiff in his own right,[97] a reliance upon the provisions of the statutes of a state other than that relied upon in the complaint,[98] or a reliance upon the provisions of a statute when the complaint relies upon the law merchant,[99] would be a departure; but matter tending to avoid the allegations in the plea and merely explanatory of the complaint and supporting and fortifying it is not a departure.[1] Thus where a plea puts in issue the ownership of the note, a replication setting forth the nature of plaintiff's ownership is not a departure, although the source of his title be differently averred in the complaint.[2]

4. Rejoinder. If after an answer alleging a want of consideration plaintiff has replied by showing *prima facie* a good consideration it is incumbent upon defendant to file a rejoinder if he would prove such want,[3] and where the answer alleges a failure of consideration, a rejoinder to a replication setting forth the consideration, which alleges but a partial failure, would be a departure.[4] By taking issue on the allegation of a rejoinder plaintiff admits that the same if true avoids his replication; and if this were made in confession and avoidance of defendant's answer such answer would then stand as confessed by plaintiff and a verdict should be rendered against him.[5]

5. Amendment — a. Of Declaration, Complaint, or Petition. The allowance of amendments to the declaration, petition, or complaint, in an action on a bill or note, rests largely in the discretion of the trial court.[6] Amendments will generally be permitted[7] in the furtherance of justice, provided a new and distinct

was filed to an answer and plaintiff afterward with leave of the court withdrew the replication and refiled it, duly verified, and the court with knowledge of all the parties treated and considered it as duly verified, the irregularity in the proceedings was immaterial); Hendricks *v.* Cameron, 2 Tex. App. Civ. Cas. § 351.

95. A departure from an immaterial allegation is not fatal. Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408.

96. See Bolling *v.* McKenzie, 89 Ala. 470, 7 So. 658; Shank *v.* Fleming, 9 Ind. 189; Wilson *v.* Johnson, (N. J. 1894) 29 Atl. 419; Lillienthal *v.* Hotaling Co., 15 Oreg. 371, 15 Pac. 630.

97. Bearss *v.* Montgomery, 46 Ind. 544.

98. Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240.

99. Will *v.* Whitney, 15 Ind. 194; Midland Steele Co. *v.* Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211.

1. Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Shirts *v.* Irons, 47 Ind. 445. See also Culberson *v.* American Trust, etc., Co., 107 Ala. 457, 19 So. 34; Cooper *v.* Blood, 2 Wis. 62.

2. Berney *v.* Steiner, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144. See also Bishop *v.* Travis, 51 Minn. 183, 53 N. W. 461.

Departure in declaring on witnessed note. — In declaring on a note of this nature, the fact that the note was witnessed need not be alleged in the complaint, and if defendant pleads the statute of limitations of six years a replication that the note was witnessed and the action brought within fourteen years would not be a departure from the declaration. Carpenter *v.* McClure, 38 Vt. 375.

3. Boone *v.* Boone, 58 Miss. 820.

4. Kilgore *v.* Powers, 5 Blackf. (Ind.) 22.

5. Brown *v.* Bamberger, 110 Ala. 342, 20 So. 114.

6. Mattingly *v.* Bank of Commerce, 21 Ky. L. Rep. 1029, 53 S. W. 1043; Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272; Green *v.* Jackson, 15 Me. 136.

7. *Alabama.*— Tapscott *v.* Gibson, 129 Ala. 503, 30 So. 23; Dowling *v.* Blackman, 70 Ala. 303; Ricketts *v.* Weeden, 64 Ala. 548; Long *v.* Patterson, 51 Ala. 414; Robinson *v.* Darden, 50 Ala. 71; Burch *v.* Taylor, 32 Ala. 26; Reed *v.* Scott, 30 Ala. 640; *Ex p.* Ryan, 9 Ala. 89; Davis *v.* Chester, Minor (Ala.) 385.

California.— Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40.

Delaware.— Dehaven *v.* Tweed, 4 Houst. (Del.) 234.

Georgia.— Ford *v.* Scruggs, 97 Ga. 228, 22 S. E. 590; Wingate *v.* Atlanta Nat. Bank, 95 Ga. 1, 22 S. E. 37; Bright *v.* Central City St. R. Co., 88 Ga. 535, 15 S. E. 12; Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680; Lewis *v.* Harper, 73 Ga. 564; Tift *v.* Carlton, 73 Ga. 145; Ross *v.* Jordan, 62 Ga. 298.

Indiana.— McDonald *v.* Yeager, 42 Ind. 388. See also Sayers *v.* Crawfordsville First

cause of action is not introduced.[8] Thus a mistake in the date or time of payment,[9] a mistake in the date of notice of dishonor,[10] or a mistake in the amount of the note[11] may be cured by amendment.

Nat. Bank, 89 Ind. 230; McKinlay *v.* Shank, 24 Ind. 258.

Iowa.— McCarn *v.* Rivers, 7 Iowa 404.

Kentucky.— Mattingly *v.* Bank of Commerce, 21 Ky. L. Rep. 1029, 53 S. W. 1043.

Maine.— Jenness *v.* Barron, 95 Me. 531, 50 Atl. 712; Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272; Starbird *v.* Henderson, 64 Me. 570; Strang *v.* Hirst, 61 Me. 9; Green *v.* Jackson, 15 Me. 136; Barrett *v.* Barrett, 8 Me. 353.

Maryland.— Gisriel *v.* Burrows, 72 Md. 366, 20 Atl. 240.

Massachusetts.— Hayward *v.* French, 12 Gray (Mass.) 453; Lohdell *v.* Baker, 3 Metc. (Mass.) 469; Barker *v.* Burgess, 3 Metc. (Mass.) 273; Tenney *v.* Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

Michigan.— Warder *v.* Gibbs, 92 Mich. 29, 52 N. W. 73; Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66. See also Stofflet *v.* Strome, 101 Mich. 197, 59 N. W. 411.

Minnesota.—Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Missouri.— Harkness *v.* Julian, 53 Mo. 238.

New Hampshire.— Lane *v.* Barron, 64 N. H. 277, 9 Atl. 544; Libbey *v.* Pierce, 47 N. H. 309; Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227; Burnham *v.* Spooner, 10 N. H. 165.

New York.— Van Duzer *v.* Howe, 21 N. Y. 531; Vibbard *v.* Roderick, 51 Barb. (N. Y.) 616; Sturges *v.* Newcombe, 12 Misc. (N. Y.) 371, 33 N. Y. Suppl. 558, 67 N. Y. St. 301; Cohn *v.* Husson, 67 How. Pr. (N. Y.) 461.

Oregon.—Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190.

Pennsylvania.— De Barry *v.* Withers, 44 Pa. St. 356; Schoneman *v.* Fegley, 7 Pa. St. 433; Wilson *v.* Jamieson, 7 Pa. St. 126.

South Carolina.— Jacobs *v.* Gilreath, 41 S. C. 143, 19 S. E. 308, 310; Moore *v.* Christian, 31 S. C. 337, 9 S. E. 981; Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314; Bischoff *v.* Blease, 20 S. C. 460.

Texas.— Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395; Arnold *v.* Willis, 68 Tex. 268, 4 S. W. 485.

Vermont.— Vaughn *v.* Rugg, 52 Vt. 235; Stephens *v.* Thompson, 28 Vt. 77.

Virginia.— Tidball *v.* Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. 318.

United States.— Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31; Drake *v.* Found Treasure Min. Co., 53 Fed. 474.

Canada.— See Martin *v.* Wilber, 9 U. C. C. P. 75.

See 7 Cent. Dig. tit. "Bills and Notes," § 1575 *et seq.*

8. *Alabama.*— Mahan *v.* Smitherman, 71 Ala. 563; Dowling *v.* Blackman, 70 Ala. 303.

Georgia.— Norris *v.* Pollard, 75 Ga. 358; Fokes *v.* De Vaughn, 66 Ga. 735; Broach *v.* Kelly, 66 Ga. 148; Long *v.* Bullard, 59 Ga. 355; Mississippi Cent. R. Co. *v.* Plant, 58 Ga. 167.

New York.—Wattson *v.* Thibou, 17 Abb. Pr. (N. Y.) 184.

Pennsylvania.— Farmers', etc., Bank *v.* Israel, 6 Serg. & R. (Pa.) 293; Dull *v.* Amies, 2 Miles (Pa.) 144.

South Carolina.— Crane *v.* Lipscomb, 24 S. C. 430.

See 7 Cent. Dig. tit. "Bills and Notes," § 1575.

Form of liability.— A complaint charging defendants as guarantors of a note cannot be amended so as to charge them as indorsers. Peters *v.* Chamberlain, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 457, 36 N. Y. St. 1000.

New promise.— An amendment setting up a new promise by defendant to pay the note sued on states a new cause of action. Erskine *v.* Wilson, 27 Tex. 117.

9. *Iowa.*— Avery *v.* Wilson, 26 Iowa 573.

Kansas.— Wilson *v.* Phillips, 8 Kan. 211.

Louisiana.— Bussey *v.* Rothschild, 27 La. Ann. 316.

Maine.— Dodge *v.* Haskell, 69 Me. 429.

Minnesota.— Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

United States.— Drake *v.* Found Treasure Min. Co., 53 Fed. 474.

See 7 Cent. Dig. tit. "Bills and Notes," § 1577.

Failure to allege time of maturity.—Where a complaint fails to allege the time when a note sued on is payable, but the note itself is overdue, and the maker knows it to be the identical note which he will be called upon to defend, an amendment whereby the time of payment is inserted in no way changes the character of the action so as to affect the substantial rights of the parties, and is therefore allowable. Tribune Pub. Co. *v.* Hamill, 2 Colo. App. 237, 30 Pac. 137. See also Brisbois *v.* Lewis, 9 Colo. 494, 13 Pac. 179; Hardee *v.* Lovett, 83 Ga. 203, 9 S. E. 680.

Variance between complaint and copy of note.— Where there is a variance between the date of the note sued upon as described in the complaint and the copy filed therewith the copy, being correct, supplies the defect in the complaint, and it is not error to permit an amendment of the defect after the finding. Wells *v.* Dickey, 15 Ind. 361. See also Carver *v.* Carver, 53 Ind. 241.

10. Loose *v.* Loose, 36 Pa. St. 538.

Failure to allege notice.— In a suit against the drawer of a bill of exchange an amendment is allowance supplying the omission of the declaration to allege presentment, refusal to pay, dishonor, and notice. Jones *v.* Warren, 60 Ga. 359.

11. Nimmon *v.* Worthington, 1 Ind. 376; Green *v.* Jackson, 15 Me. 136; Drake *v.* Found

b. Of Plea or Answer. The plea or answer may be amended[12] in the discretion of the trial court,[13] provided the amendment does not operate to surprise plaintiff[14] or set up an entirely new defense.[15]

6. Issues, Proof, and Variance — a. Evidence Admissible — (i) *Under Declaration, Complaint, or Petition* — (a) *In General.* A payee declaring on a draft may show that he paid the draft after notice of its dishonor;[16] but evidence to show the character of plaintiff's liability and that no demand was made of the maker is inadmissible in an action to recover money paid on a note by mistake, where no allegations to that effect are made,[17] and misrepresentations as to the circumstances of the maker made by an assignor to an assignee cannot be proved when not pleaded by the latter in suing the former.[18]

(b) *Execution.* Ratification of the filling of a note signed in blank may be shown, although not pleaded;[19] but where the sole issue of non-execution is found for defendant, it is error for the court without amendment to the pleadings to hear evidence and find defendant to be estopped from denying his signature or liability.[20]

(c) *Consideration.* A note reissued for a new consideration should be so declared on and not in its original form,[21] and where defendant relies on the

Treasure Min. Co., 53 Fed. 474. See also Wrigley *v.* Bibb Real Estate, etc., Co., 97 Ga. 331, 22 S. E. 917, holding that where the declaration on a note containing a stipulation for attorney's fees contained no allegation for the recovery of such fees, it was proper to permit an amendment so as to entitle plaintiff to recover the same. To same effect is Baxley Banking Co. *v.* Carter, 112 Ga. 529, 37 S. E. 728.

12. *California.*— McPherson *v.* Weston, 85 Cal. 90, 24 Pac. 733.

Illinois.— Wilson *v.* King, 83 Ill. 232.

Louisiana.— St. Mark *v.* Delarne, 2 Mart. (La.) 101.

Massachusetts.—Ham *v.* Kerwin, 146 Mass. 378, 15 N. E. 657.

Mississippi.— Bingham *v.* Sessions, 6 Sm. & M. (Miss.) 13.

Missouri.— Turner *v.* Thomas, 10 Mo. App. 338.

Nebraska.— Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.

Wisconsin.— Gregory *v.* Hart, 7 Wis. 532.

See 7 Cent. Dig. tit. "Bills and Notes," § 1582.

Amendment of counter-claim.— A motion for leave to amend a counter-claim may be granted or denied in the discretion of the trial court. Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287. See also Rawlings *v.* Fisher, 110 Mich. 19, 67 N. W. 977.

Permitting plea to be verified.— In an action on a promissory note it is not error for the court after the trial has commenced to allow the verification of a plea denying the execution of the indorsement on the note. Ennor *v.* Hodson, 28 Ill. App. 445. See also Edgefield Bank *v.* Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 U. S. App. 282, 2 C. C. A. 637, 18 L. R. A. 201; Loving *v.* Fairchild, 1 McLean (U. S.) 333, 15 Fed. Cas. No. 8,556.

13. *Alabama.*— Anniston Pipe Works *v.* Mary Pratt Furnace Co., 94 Ala. 606, 10 So. 259.

California.— Buffalo Cycle Co. *v.* Todd, 133 Cal. 292, 65 Pac. 573; Clarkson *v.* Hoyt, (Cal. 1894) 36 Pac. 382; McPherson *v.* Weston, 85 Cal. 90, 24 Pac. 733; Page *v.* Williams, 54 Cal. 562.

Kansas.— Sanders *v.* Wakefield, 41 Kan. 11, 20 Pac. 518; Foote *v.* Sprague, 13 Kan. 155. See also Dunham *v.* Brown, (Kan. App. 1899) 58 Pac. 232.

Massachusetts.—Ham *v.* Kerwin, 146 Mass. 378, 15 N. E. 657.

Nebraska.— Central City Bank *v.* Rice, 44 Nebr. 594, 63 N. W. 60.

See 7 Cent. Dig. tit. "Bills and Notes," § 1582.

14. McPherson *v.* Weston, 85 Cal. 90, 24 Pac. 733.

15. Crompton, etc., Loom Works *v.* Brown, 27 Misc. (N. Y.) 319, 57 N. Y. Suppl. 823; Hong-Kong, etc., Banking Corp. *v.* Emanuel, 17 N. Y. Suppl. 790, 44 N. Y. St. 454. See also Cuthbert *v.* Brown, 49 S. C. 513, 27 S. E. 485, holding that a motion to amend an answer by withdrawing an admission of a material fact and substituting a denial thereof, thereby changing the nature of the defense, comes too late after trial gone into and motion of nonsuit refused. And see Avegno *v.* Fosdick, 28 La. Ann. 109, holding that after plea of the general issue, in an action on a promissory note, a supplemental answer setting up want of consideration changes the issue and is not allowable.

16. McDonough *v.* Heyman, 38 Mich. 334.

17. Case *v.* Case, 49 Hun (N. Y.) 83, 1 N. Y. Suppl. 714, 17 N. Y. St. 313.

18. McKinney *v.* McConnel, 1 Bibb (Ky.) 239.

19. Bremner *v.* Fields, (Tex. Civ. App. 1896) 34 S. W. 447.

20. Newby *v.* Myers, 44 Kan. 477, 27 Pac. 971.

21. Koons *v.* McWhinney, 30 Ind. 74.

defense of want of consideration for an acceptance the real consideration may be shown, although not pleaded.[22]

(D) *Amount Due.* In rebutting a defense of payment plaintiff may show a mistake in computation at the time of the alleged payment,[23] and under an allegation that a certain amount was due to the drawer of an order the amount due by the drawer when the order was accepted may be shown.[24] The date of a credit may be proved under an allegation stating the amount of, but not the time of, the credit.[25] In the absence of an allegation of disparity between specie and paper currency evidence relative thereto is inadmissible,[26] and, under an averment of the legal rate of interest in a foreign state where the note was made, proof is admissible that the note bore such interest by the laws of such state.[27]

(E) *Transfer.* Evidence of indorsement to plaintiff is admissible under an allegation of sale, assignment, and delivery,[28] and evidence of indorsement by a partner for his firm is admissible, although it is not alleged that he had authority or that the firm is a commercial one.[29] Under an allegation of transfer by indorsement, evidence is admissible of an indorsement pursuant to the resolution of a board of directors.[30] A retransfer to plaintiff by a subsequent indorser may be shown without an allegation to that effect.[31] Intermediate indorsements may be proved, although not alleged, to overcome matters of defense set up by defendant after plaintiff has made out a *prima facie* case.[32] Under an allegation of indorsement as a condition of a loan to the maker evidence of the indorser's privity to the negotiations is admissible.[33] Proof of assignment is admissible under an allegation of indorsement and lawful holding.[34]

(F) *Ownership and Possession.* Under an allegation that plaintiff is the assignee evidence is admissible that he is entitled to all the rights of a *bona fide* purchaser for value,[35] and he may prove defendant's possession of the note sued on, although he does not allege it.[36]

(G) *Demand and Notice.* An allegation of demand[37] or that a note was duly protested[38] authorizes proof of due presentment at the place designated in the instrument. Under an allegation of presentment at maturity plaintiff may show that by the law where the demand was made the instrument was not entitled to grace,[39] and under allegations of demand and notice the protest and certificate thereof are admissible,[40] but facts excusing notice must be averred.[41]

(H) *Collateral Agreements.* Under a declaration on an agreement signed by defendant and indorsed on a note to which he was not a party, plaintiff cannot produce the note signed on the back by defendant and prove an agreement by parol.[42] So under an obligation of an agreement that the indorser and not the maker should be liable evidence that defendant indorsed as a surety is admissible.[43]

(I) *New Promise.* Evidence of a new promise is admissible, although not

22. Gafford *v.* American Mortg., etc., Co., 77 Iowa 736, 42 N. W. 550.
23. Easton *v.* Strother, 57 Iowa 506, 10 N. W. 877.
24. Capron *v.* Anness, 136 Mass. 271.
25. Scarborough *v.* Bowyer, (Tex. Civ. App. 1896) 36 S. W. 141.
26. Shaw *v.* Trunsler, 30 Tex. 390.
27. Tryon *v.* Rankin, 9 Tex. 595.
28. Red River Valley Invest. Co. *v.* Cole, 62 Minn. 457, 64 N. W. 1149.
29. Hodge *v.* Eastin, 5 Mart. N. S. (La.) 57.
30. Nelson *v.* Eaton, 15 How. Pr. (N. Y.) 305 [*affirmed* in 26 N. Y. 410].
31. Hyde *v.* Groce, 7 Mart. N. S. (La.) 572; Dicks *v.* Cash, 7 Mart. N. S. (La.) 362.
32. Preston *v.* Mann, 25 Conn. 118.
33. Meyer *v.* Hibsher, 47 N. Y. 265.
34. Brown *v.* Richardson, 20 N. Y. 472 [*reversing* 1 Bosw. (N. Y.) 492].
35. Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694.
36. McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512.
37. Parker *v.* Bernard, 9 Rob. (La.) 18.
38. Voisin *v.* Jewell, 9 La. 112.
39. Garland *v.* West, 9 Baxt. (Tenn.) 315.
40. Kentucky Bank *v.* Goodale, 20 La. Ann. 50.
41. Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665.
42. Crozer *v.* Chambers, 20 N. J. L. 256.
43. McPhillips *v.* Jones, 73 Hun (N. Y.) 516, 26 N. Y. Suppl. 101, 56 N. Y. St. 164.

alleged,[44] and evidence of a promise of the drawer to pay after the drawee's refusal is admissible, although not alleged, where priorly the drawer has notice that he would be charged.[45]

(J) *Attorney's Fees.* The value of an attorney's services may be shown, although employment of an attorney is not specifically averred.[46]

(II) *Under Plea or Answer* — (A) *In General.* The evidence offered under the plea or answer must correspond with the allegations thereof.[47]

(B) *Under General Issue* — (1) In General. Defendant may under the general issue introduce evidence to show that the action is prematurely brought[48] or that he did not execute or deliver the note.[49]

(2) Denial of Ownership. Evidence that plaintiff, in an action on a note, is not the owner of the note may be given under the general issue.[50]

(3) Failure, Illegality, or Want of Consideration. Unless required by

44. Cook *v.* Shearman, 103 Mass. 21.

45. Ives *v.* Eastin, 6 La. 13.

46. Lindley *v.* Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; Harvey *v.* Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222; Starnes *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480.

47. *Alabama.*— King *v.* Griffin, 6 Ala. 387.

California.— Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491.

Indiana.— Crawford *v.* Redway, 62 Ind. 573; Corbin *v.* Flack, 19 Ind. 459.

Iowa.— Richmond Second Nat. Bank *v.* Martin, 82 Iowa 442, 48 N. W. 735; Dunning *v.* Rumbaugh, 36 Iowa 566; Allen *v.* Newberry, 8 Iowa 65.

Michigan.— Alpena Nat. Bank *v.* Greenbaum, 80 Mich. 1, 44 N. W. 1123.

Minnesota.— Lebanon Sav. Bank *v.* Penney, 44 Minn. 214, 46 N. W. 331.

New York.— Dalrymple *v.* Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438; Wheeler *v.* Ruckman, 7 Rob. (N. Y.) 447, 35 How. Pr. (N. Y.) 350; Scott *v.* Johnson, 5 Bosw. (N. Y.) 213; Taylor *v.* Jackson, 5 Daly (N. Y.) 497; Gates *v.* Dundon, 19 N. Y. Suppl. 390, 19 N. Y. St. 757; Wimpfheimer *v.* Ludwig, 1 N. Y. Suppl. 432; Smedberg *v.* Whittlesey, 3 Sandf. Ch. (N. Y.) 320.

Pennsylvania.— Ballentine *v.* McGeagh, 4 Brewst. (Pa.) 95.

South Carolina.— McGrath *v.* Barnes, 18 S. C. 606.

Texas.— Lemmon *v.* Hanley, 28 Tex. 219.

Wisconsin.— Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

See 7 Cent. Dig. tit. "Bills and Notes," § 1590.

Illustrations.— Evidence of an extension of time for payment (Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Newell *v.* Salmons, 22 Barb. (N. Y.) 647), that a person other than defendant signed the note (Matthews *v.* Bates, 93 Ga. 317, 20 S. E. 320), or that plaintiff has collateral security (Flint *v.* Nelson, 10 Utah 261, 37 Pac. 479) is not competent unless pleaded.

48. Munro *v.* King, 3 Colo. 238. See also Heaton *v.* Myers, 4 Colo. 59, holding that a subsequent written agreement, supported by a valid consideration showing a contingency upon which the payment of a promissory note is to depend, is admissible in evidence under the general issue, in an action on the note by an assignee after maturity against the maker. But see Culver *v.* Johnson, 90 Ill. 91, holding that an agreement after maturity of a note to extend the time of payment beyond time of bringing suit cannot be shown under the general issue.

49. Carrier *v.* Hague, 9 S. C. 454.

Signing as guarantor.— In assumpsit on a promissory note the defense that defendant signed the note as guarantor and not as joint maker may be proved under the general issue. Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880.

50. *Alabama.*— Birch *v.* Tillotson, 16 Ala. 387; Evans *v.* Gordon, 8 Port. (Ala.) 142. But see Agee *v.* Medlock, 25 Ala. 281, holding that in assumpsit by the indorsee of a promissory note the fact that plaintiff is not the owner of the note is not a good defense under the general issue.

Illinois.— Ingraham *v.* Luther, 65 Ill. 446; Simons *v.* Waterman, 17 Ill. 371.

Indiana.— Bates *v.* Hunt, 1 Blackf. (Ind.) 67. *Compare* Mastin *v.* Crosby, 6 Blackf. (Ind.) 296.

Maine.— See Stearns *v.* Burnham, 5 Me. 261, 17 Am. Dec. 228.

Michigan.— Reynolds *v.* Kent, 38 Mich. 246.

Mississippi.— Anderson *v.* Patrick, 7 How. (Miss.) 347; Netterville *v.* Stevens, 2 How. (Miss.) 642.

New York.— Hull *v.* Wheeler, 7 Abb. Pr. (N. Y.) 411.

See 7 Cent. Dig. tit. "Bills and Notes," § 1606.

Under Tex. Rev. Stat. art. 271, providing that in an action by an assignee or indorsee of a written instrument the assignment or indorsement "shall be regarded as fully proved unless the defendant shall deny in his plea that the same is genuine," and shall also file an affidavit that he believes it is forged a general denial only will not authorize evidence attacking the validity of the assignment. Grounds *v.* Sloan, 73 Tex. 662, 11 S. W. 898.

statute to be specially pleaded,[51] failure,[52] partial failure,[53] illegality,[54] or want[55] of consideration may be shown under the general issue.

(4) Fraud. Facts tending to establish fraud may be given in evidence under the general issue,[56] unless required by statute to be specially pleaded.[57]

(5) Good Faith of Purchaser. In an action by an indorsee against the maker, where the declaration alleges that the note passed into plaintiff's hands before maturity, defendant may show under the general issue that the note did not pass into plaintiff's hands until after its maturity.[58]

51. *California.*— Sharon *v.* Sharon, 68 Cal. 29, 8 Pac. 614.

Colorado.— Munro *v.* King, 3 Colo. 238; Roop *v.* Delahaye, 2 Colo. 307; Patterson *v.* Gile, 1 Colo. 200.

Georgia.— Johnson *v.* Ballingall, 1 Ga. 68.

Illinois.— Wilson *v.* King, 83 Ill. 232; Leggat *v.* Sands' Ale Brewing Co., 60 Ill. 158; Keith *v.* Mafit, 38 Ill. 303; Rose *v.* Mortimer, 17 Ill. 475.

Indiana.—Casad *v.* Holdridge, 50 Ind. 529; Johns *v.* Harrison, 20 Ind. 317; Frybarger *v.* Cockefair, 17 Ind. 404.

Massachusetts.— Bradford *v.* Tinkham, 6 Gray (Mass.) 494.

Nebraska.— Dillon *v.* Darst, 48 Nebr. 803, 67 N. W. 783; Sharpless *v.* Giffen, 47 Nebr. 146, 66 N. W. 285.

New Hampshire.— Jones *v.* Houghton, 61 N. H. 51.

New York.— Boswell *v.* Welshoefer, 9 Daly (N. Y.) 196.

Tennessee.— Simpson *v.* Moore, 6 Baxt. (Tenn.) 371.

Texas.— Moore *v.* Alston, (Tex. App. 1891) 17 S. W. 1117.

Wisconsin.— Gregory *v.* Hart, 7 Wis. 532; Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

See 7 Cent. Dig. tit. "Bills and Notes," § 1604.

52. *Indiana.*—Catlett *v.* McDowell, 4 Blackf. (Ind.) 556; Tucker *v.* Tipton, 4 Blackf. (Ind.) 529.

Mississippi.—Ferguson *v.* Oliver, 8 Sm. & M. (Miss.) 332; Brewer *v.* Harris, 2 Sm. & M. (Miss.) 84, 41 Am. Dec. 587.

New York.— Meakin *v.* Anderson, 11 Barb. (N. Y.) 215; Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Jones *v.* Swan, 6 Wend. (N. Y.) 589.

Ohio.— Loffland *v.* Russell, Wright (Ohio) 438.

South Carolina.— Farrow *v.* Mays, 1 Nott & M. (S. C.) 312.

Vermont.— Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693.

See 7 Cent. Dig. tit. "Bills and Notes," § 1604.

53. Catlett *v.* McDowell, 4 Blackf. (Ind.) 556; Brewer *v.* Harris, 2 Sm. & M. (Miss.) 84, 41 Am. Dec. 587; Staab *v.* Ortiz, 3 N. M. 53, 1 Pac. 857. *Contra*, Payne *v.* Cutler, 13 Wend. (N. Y.) 605; Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693.

54. Hill *v.* Callaghan, 31 Mich. 424. See also Robinson *v.* Howard, 7 Cush. (Mass.) 611 note.

Usury.— Under a plea of *non assumpsit* in an action by an indorsee against an indorser on a bill of exchange, the defense of usury is admissible. Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61. See also Gaillard *v.* Le Seigreur, 1 McMull. (S. C.) 225.

55. *Indiana.*—Catlett *v.* McDowell, 4 Blackf. (Ind.) 556; Tucker *v.* Tipton, 4 Blackf. (Ind.) 529.

Michigan.— Colbath *v.* Jones, 28 Mich. 280.

Mississippi.— Ferguson *v.* Oliver, 8 Sm. & M. (Miss.) 332.

Missouri.— Block *v.* Elliott, 1 Mo. 275.

New York.— Evans *v.* Williams, 60 Barb. (N. Y.) 346; Meakim *v.* Anderson, 11 Barb. (N. Y.) 215; Payne *v.* Cutler, 13 Wend. (N. Y.) 605.

Ohio.— Loffland *v.* Russell, Wright (Ohio) 438.

South Carolina.—Talbert *v.* Cason, 1 Brev. (S. C.) 298.

Vermont.— Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693; Parrot *v.* Farnsworth, Brayt. (Vt.) 174; Hawley *v.* Beeman, 2 Tyler (Vt.) 238.

United States.— Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880.

See 7 Cent. Dig. tit. "Bills and Notes," § 1604.

56. *Indiana.*— Cohee *v.* Cooper, 8 Blackf. (Ind.) 115; Hagar *v.* Mounts, 3 Blackf. (Ind.) 57.

Michigan.— Soper *v.* Peck, 51 Mich. 563, 17 N. W. 57.

Mississippi.— Brewer *v.* Harris, 2 Sm. & M. (Miss.) 84, 41 Am. Dec. 587.

Missouri.— Block *v.* Elliott, 1 Mo. 275.

New York.—Sill *v.* Rood, 15 Johns. (N. Y.) 230; Many *v.* Disbrow, 2 N. Y. Leg. Obs. 88.

Ohio.— Loffland *v.* Russell, Wright (Ohio) 438.

South Carolina.— Shelton *v.* Garry, 1 McCord (S. C.) 470.

Vermont.—Hawley *v.* Beeman, 2 Tyler (Vt.) 238.

See, generally, Fraud; and 7 Cent. Dig. tit. "Bills and Notes," § 1605.

57. Arthur *v.* Gard, 3 Colo. App. 133, 32 Pac. 343; Anderson *v.* Jacobson, 66 Ill. 522; Johns *v.* Harrison, 20 Ind. 317; Gregory *v.* Hart, 7 Wis. 532. *Compare* Kirchoff *v.* Goezlin, 30 Ill. App. 190.

58. Herrick *v.* Swomley, 56 Md. 439. See also Robinson *v.* Howard, 7 Cush. (Mass.) 611 note; Fant *v.* Miller, 17 Gratt. (Va.) 47. But see Sturdivant *v.* Memphis Nat. Bank, 60 Fed. 730, 9 C. C. A. 256, holding that

(6) PAYMENT. In an action on a note evidence of payment is competent under the general issue,[59] unless required by statute to be specially pleaded.[60]

(7) PROTEST AND NOTICE. The defense of want of due notice to an indorser of a note must be specially pleaded to be available.[61]

(c) *Under Special Plea* — (1) OF FRAUD. Under a plea of fraud the evidence must be confined to the fraud alleged in the plea.[62]

(2) OF LIMITATIONS. In an action by the indorsee against the maker, the maker cannot, under an answer setting up the statute of limitations, introduce in aid of such plea evidence of a want of consideration for the note.[63]

(3) OF NON EST FACTUM. The plea of *non est factum* puts in issue only the execution of the note[64] and confines defendant in his proof to the issue thus made.[65] Accordingly fraud,[66] illegality of consideration,[67] want of consideration,[68]

in an action upon a note by an indorsee plaintiff's *bona fides* cannot be questioned under a plea of the general issue.

59. *Illinois.*— Mines *v.* Moore, 41 Ill. 273; Rush *v.* Fister, 23 Ill. App. 348.

Indiana.—Page *v.* Prentice, 7 Blackf. (Ind.) 322.

New York.—Clark *v.* Yale, 12 Wend. (N. Y.) 470; Losee *v.* Dunkin, 7 Johns. (N. Y.) 70, 5 Am. Dec. 245.

Pennsylvania.—Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649.

Vermont.— Jewett *v.* Winship, 42 Vt. 204; Gilson *v.* Gilson, 16 Vt. 464; Pierce *v.* Clark, 1 Tyler (Vt.) 140.

United States.— Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880.

See 7 Cent. Dig. tit. "Bills and Notes," § 1609.

Payment after suit brought.—In assumpsit on a note, payment of the note after the commencement of a suit thereon cannot he given in evidence under the general issue, except to reduce the damages. Pemigewasset Bank *v.* Brackett, 4 N. H. 557. See also Dana *v.* Sessions, 46 N. H. 509.

60. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Hyde *v.* Hazel, 43 Mo. App. 668; Martin *v.* Pugh, 23 Wis. 184; Gregory *v.* Hart, 7 Wis. 532.

61. Williams *v.* Bartlett, 4 Lea (Tenn.) 620. See also White *v.* Keith, 97 Ala. 668, 4 So. 611, holding that in an action on a note for the costs of protest and notice evidence of waiver of protest and notice before maturity is not admissible under a general denial.

62. Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393, holding that in an action on a note, under a general plea of fraud in procuring the note in suit, evidence of fraud in procuring a note of which the one in suit is a renewal is not admissible. See also Taylor *v.* Moore, 23 Ark. 408 (holding that upon a plea that the note was given in part consideration of a wharf-boat which plaintiff on the sale falsely and fraudulently represented to be sound and adapted to use, the main issue is whether such representations were made, and until that fact is shown evidence as to the soundness is inadmissible); Corbin *v.* Flack, 19 Ind. 459.

Conspiracy to defraud.— Where an action on a note is brought by the second indorsee and the answer alleges that the payee and the first indorsee conspired together to defraud defendant, the latter may prove statements made to him by the payee at and before the time the note was executed, and statements made by the first indorsee at a time when he held the note, tending to show in connection with other testimony that plaintiff had notice of the conspiracy. Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301.

Duress.— In an action on a note given in settlement of an unliquidated claim for salvage, where the defense set up is merely that the note was given under duress to relieve the maker's vessel from a fraudulent claim, it is not proper to show the exorbitance of the claim, but the only inquiry is as to the duress. Hyland *v.* Anderson, 1 Misc. (N. Y.) 337, 20 N. Y. Suppl. 707, 48 N. Y. St. 665.

63. Davidson *v.* Delano, 11 Allen (Mass.) 523.

64. *Iowa.*—Dunning *v.* Rumbaugh, 36 Iowa 566; Chambers *v.* Games, 2 Greene (Iowa) 320.

Kentucky.— Woolson *v.* Shirley, 6 Dana (Ky.) 308.

Ohio.— Young *v.* Wilson, Tapp. (Ohio) 179.

Pennsylvania.— Brobst *v.* Welker, 8 Pa. St. 467.

Texas.— Parr *v.* Johnston, 15 Tex. 294.

See 7 Cent. Dig. tit. "Bills and Notes," § 1597.

65. Dunning *v.* Rumbaugh, 36 Iowa 566.

66. Thomas *v.* Ruddell, 66 Ind. 326; Maxwell *v.* Morehart, 66 Ind. 301; Chambers *v.* Games, 2 Greene (Iowa) 320; Edwards *v.* Brown, 1 Cr. & J. 307, 9 L. J. Exch. O. S. 84, 1 Tyrw. 182, 3 Y. & J. 423. But see Woolson *v.* Shirley, 6 Dana (Ky.) 308, holding that fraud in the execution, but not in the consideration, may be shown under the plea of *non est factum.* See also Van Valkenburg *v.* Rouk, 12 Johns. (N. Y.) 337; Stacy *v.* Ross, 27 Tex. 3, 84 Am. Dec. 604, which hold that if a note is misread or misexpounded to an unlettered man this may be shown under a plea of *non est factum.*

67. Chambers *v.* Games, 2 Greene (Iowa) 320.

68. Woolson *v.* Shirley, 6 Dana (Ky.) 308; Rittenhouse *v.* Crevling, 14 N. Y. Suppl. 85, 38 N. Y. St. 280; Parr *v.* Johnston, 15 Tex. 294.

or payment[69] cannot be proved under it; but evidence of want of delivery[70] or alteration after execution[71] is competent under a plea denying the execution of the note sued on.

(4) Of Payment. Under the plea of payment any matters may be given in evidence which tend to show payment[72] or which amount in law to a satisfaction of the note;[73] but failure of consideration,[74] want of consideration,[75] execution in a representative capacity,[76] or mistake,[77] cannot be shown under such plea.

(5) Of Want, Failure, or Illegality of Consideration. The evidence offered under a plea of want, failure, or illegality of consideration must correspond with the allegations of the plea.[78] Thus under a plea of want of consideration a conditional delivery,[79] an illegal consideration,[80] or fraud in execution[81] cannot be shown. In like manner where the only defense pleaded is failure of consideration defendant will not be allowed to prove that plaintiff is not the owner of the note.[82] On the other hand under the plea of total failure of consideration defendant may obtain an abatement in the sum agreed to be paid, if the evidence shows a partial failure.[83] So under an answer alleging that the note

69. Young *v.* Wilson, Tapp. (Ohio) 179. See also Bailey *v.* Cowles, 86 Ill. 333, holding that in an action on a note defendant cannot show under a plea of *non est factum* that he had executed to plaintiff a release and quitclaim of an equity in certain lands, and that such release and quitclaim were accepted by plaintiff in satisfaction of the debt. And see Edelen *v.* Gough, 5 Gill (Md.) 103.

70. Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Owings *v.* Grubbs, 6 J. J. Marsh. (Ky.) 31; Sawyer *v.* Warner, 15 Barb. (N. Y.) 282.

71. Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Conner *v.* Sharpe, 27 Ind. 41; Boomer *v.* Koon, 6 Hun (N. Y.) 645.

72. Ross *v.* Pitts, 39 Ala. 606; Cohen *v.* State Bank, 29 Fla. 655, 11 So. 44; Ruggles *v.* Gatton, 50 Ill. 412; English *v.* Steele, 1 Hun (N. Y.) 716. See also Shriner *v.* Lamborn, 12 Md. 170.

Evidence of an agreement as to the mode of payment, which agreement does not vary in any manner the terms of the contract as embodied by the note, is admissible under the defense of payment. Jones *v.* Snow, 64 Cal. 456, 2 Pac. 28.

Loss of note after possession by payer.— The subsequent possession by the payer of bills of exchange alleged to have been paid, and their destruction by burning, may be shown on the issue of payment. Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360.

Payment to third person.— In an action to recover a balance alleged to be due and unpaid on a note, evidence of a partial payment by defendant to a third person, at plaintiff's request, is admissible under a plea of payment in full by defendant to plaintiff. Ballard *v.* Turner, 58 Ind. 127. See also Griswold *v.* Ward, 7 N. J. L. 95.

73. Branner *v.* Piper, 25 Iowa 400; Farmers', etc., Bank *v.* Sherman, 33 N. Y. 69 [*affirming* 6 Bosw. (N. Y.) 181]. But see Omaha First Nat. Bank *v.* Chilson, 45 Nebr. 257, 63 N. W. 362, holding that in a suit on a note by a pledgee thereof, evidence that the pledgee had taken other security and agreed to release the note is inadmissible under an answer pleading payment of the debt for which the note was pledged.

74. Lewis *v.* Reeder, 9 Serg. & R. (Pa.) 193.

75. Lowry *v.* Shane, 34 Ind. 495.

Usury.— A creditor held two notes against a debtor, one usurious and the other not, and the debtor made a payment greater than the amount of the usurious note, without applying it to either, and the creditor applied it to discharge the usurious note, and the residue to the other. It was held in an action on the latter that defendant could not, under a plea of payment, set up in defense the amount of usury paid on the other note. Rackley *v.* Pearce, 1 Ga. 241.

76. Rand *v.* Hale, 3 W. Va. 495, 100 Am. Dec. 761.

77. Lowry *v.* Shane, 34 Ind. 495.

78. Norris *v.* Tiffany, 6 Misc. (N. Y.) 380, 26 N. Y. Suppl. 750, 56 N. Y. St. 406.

79. Norris *v.* Tiffany, 6 Misc. (N. Y.) 380, 26 N. Y. Suppl. 750, 56 N. Y. St. 406.

80. Durham Fertilizer Co. *v.* Pagett, 39 S. C. 69, 17 S. E. 563; Lyts *v.* Keevey, 5 Wash. 606, 32 Pac. 534.

81. Hawkins *v.* Nation, 39 Ind. 50. See also Wentworth *v.* Dows, 117 Mass. 14, holding that in an action by the payee against the maker of a note given for the price of goods, where the only defense set up is want of consideration, the maker cannot prove, in reduction of damages, either a breach of warranty or a fraudulent representation in the sale of the goods. But see Porter *v.* Gunnison, 2 Grant (Pa.) 297, holding that in an action on a note, under a notice to plaintiff to prove consideration, etc., defendant may give in evidence that the note has been stolen or lost, obtained by duress, or procured or put in circulation by fraud.

82. Russell *v.* Gregg, 49 Kan. 89, 30 Pac. 185.

83. Morgan *v.* Printup, 72 Ga. 66.

In Illinois the statutory defense of a partial failure of consideration is not admissible under a plea of total failure. Swain *v.* Cawood,

was given for an illegal consideration defendant may show that it was made in renewal of a note so given.[84]

b. Matters Which Need Not Be Proved — (I) *Matters Admitted* — (A) *In General.* Since the rule is elementary that no proof is required as to matters not in issue, where the answer to a declaration or complaint on a negotiable instrument admits its execution, it is unnecessary to produce further proof thereof or to introduce the instrument in evidence.[85] Since, however, a note is not executed until it is signed and delivered, it has been held that an admission in an answer that the maker of the note signed it will not dispense with proof of delivery and payment of the consideration therefor.[86]

(B) *By Failure to Deny.* The rule is well settled that every material allegation of the declaration or complaint not controverted by the answer or other pleadings shall, for the purposes of the action, be taken as true.[87] This rule is

3 Ill. 505; Belden *v.* Church, 23 Ill. App. 473. But under a plea of partial failure of consideration, it is competent for defendant to show by parol proof that a note was given in part for real estate, and in part for improvements which were to be made thereon by the vendor, but which were not made; and their value is the extent of the failure of consideration. Jones *v.* Buffum, 50 Ill. 277. So in an action by one partner against his copartner on a note given on settlement of partnership affairs, items accidentally omitted from the settlement are admissible only under a plea of failure of consideration. Johnson *v.* Wilson, 54 Ill. 419.

Failure and want of consideration.— Under pleas of failure and want of consideration, it may be proved that a note sued on, although absolute in its terms, was given as an indemnity to plaintiff against loss as surety. Laroque *v.* Russell, 7 Ala. 798. See also Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225, holding that where defendant by way of defense to a note pleads in general terms that it is wholly without consideration and void, and plaintiff, without requiring a statement of the facts on which the defense is based, joins issue, any evidence is admissible on the trial which tends to impeach or sustain the consideration. And see Westbrook *v.* Howell, 34 Ill. App. 571, holding that in an action on a due-bill defendant can show, under a plea of want of consideration, that the indebtedness for which it had been given had been paid before the due-bill was made.

84. Chenery *v.* Barker, 12 Gray (Mass.) 345. But see Rice *v.* Grange, 131 N. Y. 149, 30 N. E. 46, 42 N. Y. St. 748, holding that in an action against the maker of a promissory note, an answer of failure of consideration will not enable him to set off a worthless note, for which the note sued on was exchanged, in the absence of allegations amounting to a counter-claim.

85. *California.*— Sheehy *v.* Chalmers, (Cal. 1894) 36 Pac. 514.

Illinois.— Cothran *v.* Ellis, 125 Ill. 496, 16 N. E. 646; Lowman *v.* Aubery, 72 Ill. 619.

Indiana.— Audleur *v.* Kuffel, 71 Ind. 543; Strough *v.* Gear, 48 Ind. 100; Zehner *v.* Kepler, 16 Ind. 290; Messmore *v.* Vanpelt, 15 Ind. 138.

Kansas.— Williams *v.* Norton, 3 Kan. 295. See also Missouri River, etc., R. Co. *v.* Wilson, 10 Kan. 105.

Kentucky.— See Bartlett *v.* Marshall, 2 Bibb (Ky.) 467.

Louisiana.— Spears *v.* Spears, 27 La. Ann. 537.

Maryland.— Keplinger *v.* Griffith, 2 Gill & J. (Md.) 296.

Missouri.— See Arthur *v.* Pendleton, 7 Mo. 519.

North Carolina.— Carrington *v.* Allen, 87 N. C. 354.

South Carolina.— Daniel *v.* Ray, 1 Hill (S. C.) 32.

Upon the plea of payment it is not necessary for plaintiff to produce in evidence the bill declared on, as the plea admits its execution and that it is such an instrument as is averred in the declaration or appears on oyer. Turner *v.* White, 4 Cranch C. C. (U. S.) 465, 24 Fed. Cas. No. 14,264.

Where denial is not filed.— In Indiana, in a suit upon a promissory note in the hands of an indorsee, where the execution of the note is denied but the denial is not filed, proof of the delivery of the note to the payee by the maker is not required. Miller *v.* Voss, 40 Ind. 307.

Admission of assignment.— Where in a suit against the drawer, accepter, and indorsers of a bill of exchange, it was averred that the last indorser assigned the bill without indorsement in writing and the answer of such indorser admitted the making of the assignment, it was held that no further proof thereof was needed. Crawford *v.* Dunham, 16 Ind. 380.

As to what amounts to an admission of the validity of an indorsement see Trego *v.* Lowrey, 8 Nebr. 238.

86. Hepp *v.* Huefner, 61 Wis. 148, 20 N. W. 923.

87. *California.*— Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201.

Kentucky.— Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120.

Missouri.— Cummings *v.* Gutridge, 17 Mo. 469; Simms *v.* Lawrence, 9 Mo. 665.

equally applicable to the allegation of execution,[88] indorsements,[89] and demand of payment.[90]

(II) *Surplusage.* Any part of the declaration or complaint which may be stricken out without destroying plaintiff's right of action may be treated as surplusage and need not be proved.[91]

c. Variance — (I) *Allegations in Declaration, Complaint, or Petition* — (A) *Description of Instrument* — (1) In General. The general rule is that the allegations and proof must correspond, and a material variance between the description of a bill or note in the declaration or complaint and the one produced in evidence is fatal.[92]

New York.— Hopkins *v.* Ward, 67 Barb. (N. Y.) 452.

Pennsylvania.— Smith *v.* Hiester, 11 Wkly. Notes Cas. (Pa.) 353.

Tennessee.— Blackwell *v.* Fitzpatrick, 9 Baxt. (Tenn.) 218.

88. *California.*— Rauer *v.* Broder, 107 Cal. 282, 40 Pac. 430.

Georgia.— Hays *v.* Hamilton, 68 Ga. 833.

Iowa.—Morton *v.* Coffin, 29 Iowa 235; Mann *v.* Howe, 9 Iowa 546.

Maine.— Willis *v.* Cresey, 17 Me. 9, where the instrument declared on was lost.

Nebraska.— See Dinsmore *v.* Stimbert, 12 Nebr. 433, 11 N. W. 872.

New Hampshire.—Williams *v.* Gilchrist, 11 N. H. 535.

Withdrawal of plea.— Where the instrument sued on is incorporated as a part of the declaration or complaint and defendant's answer is withdrawn, the withdrawal amounts to a judgment *nil dicit,* and no proof of the instrument is necessary. Graves *v.* Cameron, 77 Tex. 273, 14 S. W. 59; Carlon *v.* Ruffner, 12 W. Va. 297.

89. Manning *v.* Perkins, 16 Iowa 71; Union Nat. Bank *v.* Lee, 33 La. Ann. 301; Thierry *v.* Laffon, 4 La. Ann. 347; Nicholas *v.* Oliver, 36 N. H. 218. See also Maxwell *v.* Kennedy, 10 La. Ann. 798 (where plaintiff offered in evidence "the drafts and protests filed with the petition." No objection being made to the introduction of these documents, it was held that this was itself sufficient proof of the indorsement of the draft sued on); Simms *v.* Lawrence, 9 Mo. 665.

In Florida it has been held that the provision of the statute (Thompson Dig. Fla. 348) which dispenses with proof of execution of bonds, notes, etc., unless the same be denied by the plea of the defendant under oath, does not apply to the indorsement or assignment of such instruments. Sinclair *v.* Gray, 9 Fla. 71.

90. Marshall *v.* Mefford, 8 B. Mon. (Ky.) 375; Stevens *v.* Adams, 45 Me. 611.

91. *Indiana.*— Reagan *v.* Maze, 4 Blackf. (Ind.) 344.

Massachusetts.— See Munroe *v.* Cooper, 5 Pick. (Mass.) 412.

Minnesota.— Birdsall *v.* Fischer, 17 Minn. 100. See also Jaeger *v.* Hartman, 13 Minn. 55.

New York.— Bedell *v.* Carll, 33 N. Y. 581, holding that since the holder of a negotiable instrument indorsed in blank need give no other evidence of title, unless his possession be impeached by proof of *mala fides,* in an action on such instrument an allegation in the complaint that plaintiff acquired title by gift from the payee is immaterial and need not be proved.

United States.— Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386; Drake *v.* Fisher, 2 McLean (U. S.) 69, 7 Fed. Cas. No. 4,061.

England.— See Houriet *v.* Morris, 3 Campb. 303.

Where, in the commencement of a declaration or complaint, plaintiff is described in a representative capacity and a cause of action is set forth in his favor without reference to such representative character, the action will be regarded as his private action and such designation of his representative capacity as mere *descriptio personæ* and surplusage. Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill (N. Y.) 240; Hunt *v.* Van Alstyne, 25 Wend. (N. Y.) 605; Trammell *v.* Swan, 25 Tex. 473. See also Gould *v.* Glass, 19 Barb. (N. Y.) 179; Delafield *v.* Kinney, 24 Wend. (N. Y.) 345.

92. *Alabama.*—May *v.* Miller, 27 Ala. 515; Dew *v.* Garner, 7 Port. (Ala.) 503; Davis *v.* Campbell, 3 Stew. (Ala.) 319.

California.— Farmer *v.* Cram, 7 Cal. 135.

Georgia.— Hardee *v.* Griner, 80 Ga. 559, 7 S. E. 102.

Illinois.— Ingraham *v.* Luther, 65 Ill. 466; Connolly *v.* Cottle, 1 Ill. 364; Taylor *v.* Kennedy, 1 Ill. 91. See also Spangler *v.* Pugh, 21 Ill. 85, 36, 74 Am. Dec. 77, where the court said: "No allegation, descriptive of the identity of that, which is legally essential to the claim, can ever be rejected. And of this character are names, sums, magnitudes, dates, durations and terms, which being essential to the i[n]dentity of the writing set forth, must in general, be precisely proved."

Missouri.— Perry *v.* Barret, 18 Mo. 140; Bremen Bank *v.* Umrath, 42 Mo. App. 525.

New Jersey.—Addis *v.* Van Buskirk, 24 N. J. L. 218, where the declaration described the note as drawn payable "without defalcation or discount," and the note when put in evidence proved to be drawn payable "without defalcation."

Pennsylvania.— January *v.* Goodman, 1 Dall. (Pa.) 208, 1 L. ed. 103.

(2) Pleading According to Legal Effect of Instrument — (a) In General. In declaring upon a written instrument it is not necessary to set out its very words, but it may be pleaded according to its legal effect, and only its obligatory parts need be stated.[93] If, however, the instrument be declared on according to its legal effect, that effect must be truly stated, and if there be a failure in either mode an exception may be taken for the variance and the instrument cannot be given in evidence.[94]

(b) Immaterial Variance. A party is not bound to prove matters which are merely surplusage or immaterial averments, and if the proof does not correspond with such matters and averments the variance is immaterial and will be disregarded where the paper is described in effect.[95]

Texas.— Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

United States.— Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386; Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 3 L. ed. 317.

Where plaintiff alleges the separate and exclusive right in himself and the proof produced discloses an equal right in another, an allegation by plaintiff that the discrepancy is the result of error must be clearly proven or his claim is discharged by conflict with itself. McMicken *v.* Webb, 6 How. (U. S.) 292, 12 L. ed. 443.

93. *Alabama.*— Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523.

Arkansas.— Hawkins *v.* Dean, 24 Ark. 189; Matlock *v.* Purefoy, 18 Ark. 492; Bingham *v.* Calvert, 13 Ark. 399.

Illinois.— Tipton *v.* Utley, 59 Ill. 25; Archer *v.* Claflin, 31 Ill. 306; Crittenden *v.* French, 21 Ill. 598.

Kentucky.— Hartman *v.* Welz, 1 B. Mon. (Ky.) 242.

Maine.— Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683, where the declaration failed to mention a memorandum on the note stating that it was held as collateral security and it was held that this did not amount to a variance.

Maryland.— Rich *v.* Boyce, 39 Md. 314 (where the note sued on contained a recital that it was secured by three hundred shares of stock in a certain company and in the narr. it was described by its obligatory parts with no reference to this recital and the court held that the note was admissible); Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 503.

Massachusetts.— Clary *v.* Thomas, 103 Mass. 44.

Texas.— Mason *v.* Kleberg, 4 Tex. 85.

Vermont.— Bates *v.* Leclair, 49 Vt. 229; Wead *v.* Marsh, 14 Vt. 80.

A due-bill may be declared on as a promissory note. Johnson *v.* Johnson, Minor (Ala.) 263.

94. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117; Childs *v.* Laflin, 55 Ill. 156; Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77; Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 3 L. ed. 317.

Where the complaint describes a promissory note, and the instrument offered in evidence at the trial is under seal, there is such a variance as to warrant the rejection of the instrument. Phillips *v.* Americus Guano Co., 110 Ala. 521, 18 So. 104; McCrummen *v.* Campbell, 82 Ala. 566, 2 So. 482; Reed *v.* Scott, 30 Ala. 640; Hooker *v.* Gallagher, 6 Fla. 351; Pierce *v.* Lacy, 23 Miss. 193. *Compare* Irwin *v.* Brown, 2 Cranch C. C. (U. S.) 314, 13 Fed. Cas. No. 7,080, where it was held that the words, "Witness my hand and seal. W. Dulany (L. S.)," added to an inland bill of exchange, might be rejected as surplus, and the declaration made in the usual form, as upon the custom of merchants. Conversely, where an unsealed note was declared upon under a special count in a declaration of debt as a writing obligatory the variance was held to be fatal. Stull *v.* Wilcox, 2 Ohio St. 569; Scott *v.* Horn, 9 Pa. St. 407.

95. *Alabama.*— Leigh *v.* Lightfoot, 11 Ala. 935.

California.— Corcoran *v.* Doll, 32 Cal. 82, holding, where a copy of a note in the complaint contained the word "Administrator" and the rates of interest in words as well as figures, and the original note had "Adm'r" and the rates of interest in figures, that the variance was immaterial.

Illinois.— Teeter *v.* Poe, 48 Ill. App. 158.

Massachusetts.— Little *v.* Blunt, 16 Pick. (Mass.) 359.

Missouri.— Brooks *v.* Ancell, 51 Mo. 178. See also Beach *v.* Curle, 15 Mo. 107, holding that since all negotiable notes are promissory, where the petition describes a certain writing as a promissory note and it turns out in proof that it is also negotiable, there is no variance.

South Carolina.— White *v.* Fassitt, 10 Humphr. (Tenn.) 191.

Texas.— Thomas *v.* Young, 5 Tex. 253, where a note was described in the declaration as payable to "A. Whiting" and the note offered in evidence was payable to "Mr. A. Whiting," and it was held that there was no variance.

United States.— Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087.

Where words are wrongly spelled in the original instrument it is not a material variance for the pleader in his petition and summons, in setting out a copy of the note sued

(c) Instrument in Foreign Language. Where the declaration or complaint describes the instrument sued on according to its tenor and effect, if it be in a foreign language, it may nevertheless be stated as if it were in English without noticing the foreign language.[96]

(3) Where Instrument Is Made Part of Declaration or Complaint. The general rule seems to be that when the instrument sued on is annexed to, and made part of, the declaration or complaint, there can be no variance between the *allegata* and *probata*, since the instrument will control the averments.[97]

(4) Words of Negotiability. In an action upon a promissory note, if it be declared upon as payable to plaintiff directly, when in fact it is payable to his order,[98] or if it is described as payable to his order, when in fact it is payable to him directly,[99] there is no variance.

(5) Place of Execution. A contract evidenced by a promissory note is transitory, and it is not necessary, in an action on such instrument dated at a particular place, to state the place of its date in the declaration;[1] and where the declaration alleges that an instrument was executed at a specified place, and the instrument produced in evidence is silent as to the place of execution, there is no material variance, and the allegation as to the place of execution may be treated

on, to write such words correctly. Dent *v.* Miles, 4 Mo. 419.

96. *Illinois.*— Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387.

Indiana.— Lambert *v.* Blackman, 1 Blackf. (Ind.) 59.

Kentucky.— Hartman *v.* Welz, 1 B. Mon. (Ky.) 242.

New York.—Nourny *v.* Dubosty, 12 Abb. Pr. (N. Y.) 128.

Ohio.— See Meigs *v.* Guiraud, 3 Ohio Dec. (Reprint) 328, where the note incorporated in the petition was in French, and the court refused to enter judgment until the petition was amended by furnishing a copy of the note sued on in the English language.

England.— Atty.-General *v.* Valabreque, Wightw. 9.

97. *Indiana.*— Cassaday *v.* American Ins. Co., 72 Ind. 95; Carper *v.* Gaar, 70 Ind. 212; Crandall *v.* Auburn First Nat. Bank, 61 Ind. 349; Stafford *v.* Davidson, 47 Ind. 319; Mercer *v.* Herbert, 41 Ind. 459; Kunkler *v.* Turnting, 10 Ind. 418; Grover *v.* Bruce, 10 Ind. 418.

Louisiana.—Tenney *v.* Russell, 1 Rob. (La.) 449; Rio *v.* Gordon, 14 La. 418; Weyman *v.* Cater, 13 La. 492; Ditto *v.* Barton, 6 Mart. N. S. (La.) 127; Krumbhaar *v.* Ludeling, 3 Mart. (La.) 640.

Mississippi.— Hughes *v.* Grand Gulf Bank, 2 Sm. & M. (Miss.) 115, a case of variance between the note sued on and the bill of particulars filed with the declaration.

Ohio.— Brainard *v.* Rittberger, 4 Ohio Dec. (Reprint) 432, Clev. L. Rep. 154.

Texas.— Mast *v.* Nacogdoches County, 71 Tex. 380, 9 S. W. 267; Dewees *v.* Lockhart, 1 Tex. 535; Pryon *v.* Grinder, 25 Tex. Suppl. 159; Morrison *v.* Keese, 25 Tex. Suppl. 154. See also Sherwood *v.* La Salle County, (Tex. 1894) 26 S. W. 650.

Exhibit.— Where there is an inconsistency between the allegations of the pleading and the contents of the exhibit properly filed therewith the latter controls and the variance cannot be taken advantage of. Glenn *v.* Porter, 72 Ind. 525.

98. Crittenden *v.* French, 21 Ill. 598; Sappington *v.* Pullram, 4 Ill. 385; Fay *v.* Goulding, 10 Pick. (Mass.) 122; Whitney *v.* Whitney, Quincy (Mass.) 117 (in which cases the action was brought by the payee, and the court in both cases held that if the action had been brought by an indorsee the omission of the words "or order" in the declaration would have been fatal); Barrows *v.* Million, 43 Mo. App. 79 (where the petition alleged that the note was payable to plaintiff or order, and the evidence showed that it was payable to plaintiff or bearer); Mason *v.* Kleberg, 4 Tex. 85.

99. Harrison *v.* Weaver, 2 Port. (Ala.) 542; Thackaray *v.* Hanson, 1 Colo. 365; Pleasant Hill Bank *v.* Wills, 79 Mo. 275 (where the complaint alleged that the note was negotiable, whereas in fact it was not). *Contra*, Carrington *v.* Ford, 4 Cranch C. C. (U. S.) 231, 5 Fed. Cas. No. 2,449.

1. *Arkansas.*— Matlock *v.* Purefoy, 18 Ark. 492 (where the court, however, added that if the note had been made in a foreign country and plaintiff sought to recover interest or damages different from that allowed by the law of the forum, then the place ought to be alleged, being in that case a matter of substance); Semon *v.* Hill, 7 Ark. 70.

California.— Brown *v.* Weldon, 71 Cal. 393, 12 Pac. 280.

Indiana.— Reagan *v.* Maze, 4 Blackf. (Ind.) 344.

New York.—Alder *v.* Griner, 13 Johns. (N. Y.) 449.

Texas.— Wexel *v.* Cameron, 31 Tex. 614.

England.— Houriet *v.* Morris, 3 Campb. 303. See, however, Armani *v.* Castrique, 2 D. & L. 432, where it was held that a declaration against the drawer or indorser of a foreign bill of exchange must allege that the bill was made in parts beyond the sea.

as surplusage.[2] So according to the better doctrine where an instrument has been declared on as executed at a certain place, and the instrument itself, when produced in evidence, shows that it was executed at a different place the variance has been held to be immaterial.[3]

(6) TIME OF EXECUTION. In some jurisdictions where, in an action on a negotiable instrument, the declaration states that it was given at a particular time, this is not descriptive of such instrument, and a variance between it and the date of the instrument is not material.[4] In other jurisdictions, however, the time laid in the declaration is material, and where the action is brought on the instrument itself, it must be proved as laid, unless laid under a *videlicet*.[5]

(7) DESCRIPTION OF PARTIES — (a) MAKER OR DRAWER — aa. *General Rule.* Where the description of the maker or drawer of the instrument declared on, as set forth in the declaration or complaint, differs materially from the instrument itself the variance is fatal.[6]

2. Anderson *v.* Hamilton, 6 Blackf. (Ind.) 94; Anderson *v.* Brown, Morr. (Iowa) 158; Fairfield *v.* Adams, 16 Pick. (Mass.) 381. See also Sheppard *v.* Graves, 14 How. (U. S.) 505, 14 L. ed. 518.

3. Swinney *v.* Burnside, 17 Ark. 38; Crowley *v.* Barry, 4 Gill (Md.) 194. *Contra,* Carter *v.* Preston, 51 Miss. 423.

4. *Alabama.*— Lawson *v.* Townes, 2 Ala. 373.

Illinois.—Archer *v.* Claflin, 31 Ill. 317, where the declaration upon a promissory note described the instrument sued upon as bearing a particular date, corresponding with the date of the original note offered in evidence, and there was held to be no variance, although the paper filed with the declaration as a copy of said note purported to be of a different date. See also Cutting *v.* Conklin, 28 Ill. 506, where the note was dated "Feb'y," and the declaration set out the date "February," and the court held that the variance was immaterial.

Indiana.— Estep *v.* Estep, 23 Ind. 114.

Iowa.— Rife *v.* Pierson, 2 Greene (Iowa) 129.

Kentucky.— Totten *v.* Cooke, 2 Metc. (Ky.) 275.

Missouri.— See Hamilton *v.* Stewart, 5 Mo. 266.

New York.— Dresser *v.* Smith, 1 How. Pr. (N. Y.) 172; Field *v.* Field, 9 Wend. (N. Y.) 394 (where a note was dated "4 Mo. 1st," and it was held to be no variance in declaring upon the note as having been made on the first day of April).

Texas.— Cooper Grocery Co. *v.* Moore, 19 Tex. Civ. App. 283, 46 S. W. 665.

Utah.— Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

England.— Coxon *v.* Lyon, 2 Campb. 307 note; Giles *v.* Bourne, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646.

Note incorrectly dated.— Where a declaration correctly sets out the date of a note, no variance is created by proof that the note was in fact made on a day different from its date. Marshall *v.* Russell, 44 N. H. 509.

Omission of year.— It was held in Salisbury *v.* Wilson, Tapp. (Ohio) 198, that there is no variance between an allegation that the note was made on a particular date and a note without date as to the year.

5. *Arkansas.*— Hanly *v.* Real Estate Bank, 4 Ark. 598.

Colorado.— Manning *v.* Haas, 5 Colo. 37.

Delaware.— Wilmington, etc., Bank *v.* Simmons, 1 Harr. (Del.) 331.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155; Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77. See also Walker *v.* Welch, 13 Ill. 674.

Indiana.— Reid *v.* Cox, 5 Blackf. (Ind.) 312. See also Randles *v.* Randles, 39 Ind. 555.

Kentucky.—Banks *v.* Coyle, 2 A. K. Marsh. (Ky.) 564.

Minnesota.—Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Missouri.— Grant *v.* Winn, 7 Mo. 188.

New Hampshire.— See Drown *v.* Smith, 3 N. H. 299.

Ohio.— Fallis *v.* Griffith, Wright (Ohio) 303.

Pennsylvania.— Church *v.* Feterow, 2 Penr. & W. (Pa.) 301; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; Dunbar *v.* Jumper, 2 Yeates (Pa.) 74.

Vermont.— Manchester Bank *v.* Allen, 11 Vt. 302. See also Robinson *v.* Grandy, 50 Vt. 122.

West Virginia.— Damarin *v.* Young, 27 W. Va. 436.

United States.—Cooke *v.* Graham, 3 Cranch (U. S.) 229, 2 L. ed. 240.

England.— See Coxon *v.* Lyon, 2 Campb. 207 note; Smith *v.* Lord, 2 D. & L. 759, 9 Jur. 450, 14 L. J. Q. B. 112.

Undated note.— It was held in Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252, that it was a fatal variance if the note declared on as of a particular date proved not to have any date. See also Savage *v.* Aills, 2 T. B. Mon. (Ky.) 93.

6. *Arkansas.*—Boren *v.* State Bank, 8 Ark. 500 (where plaintiff declared on a note signed by A, B, and C, and offered in evidence a note signed by A and B, but not by C); State Bank *v.* Hubbard, 4 Ark. 419 (where the declaration stated that defendant executed the note as principal, and the note, produced on

bb. *Idem Sonans.* The courts, however, do not treat as fatal any slight and trivial variance, such as the omission or transposition of a letter, but the variance must be a substantial and material one, such as would render the instrument offered in evidence a different and distinct instrument from the one described in the declaration or complaint, to authorize the court to exclude it from the jury on the ground of variance.[7]

cc. *Abbreviations or Contractions.* The generally accepted rule is that where the drawer, maker, or payee of a negotiable instrument is described by his full name in the declaration or complaint, and abbreviations, contractions, or initials have been used in designating him in the instrument itself, there is no material variance, provided there is no attempt in the declaration or complaint to set out the instrument *in hæc verba.*[8]

oyer, proved to have been executed by another person as principal and by defendant as surety).

California.— Cotes *v.* Campbell, 3 Cal. 191, where the declaration described a note made by "one McKinley and one Campbell," and the note sought to be introduced as evidence was signed by "H. B. McKinley and C. Campbell & Co."

Connecticut.— Rossiter *v.* Marsh, 4 Conn. 196.

Illinois.— Desmond *v.* St. Louis, etc., R. Co., 77 Ill. 631, where the maker of the note was described in the declaration as the "St. Louis, Alton and Terre Haute Railroad Company," and the notes sought to be admitted in evidence were made by the "Terre Haute, Alton and St. Louis Railroad Company." Unless there be an averment in the declaration explaining the apparent inconsistency between the names and the averment be sustained by proof. Becker *v.* German Mut. F. Ins. Co., 68 Ill. 412, where the declaration stated the name of the maker of the note as "William Becker," and the note offered in evidence was signed "Wilhelm Becker" in the German language, and the court held that the two names were different in both orthography and sound, and that the note was not admissible in evidence on account of the variance.

Iowa.— Hall *v.* Bennett, 2 Greene (Iowa) 466, where the makers of the note were described as "S. Hall" and "B. F. Jesse," and the payee as "B. Bennett," and the note offered in evidence was signed by "Townsend Hall" and "Benjamin F. Jesse" and made payable to "Benjamin Bennett."

Missouri.— King *v.* Clark, 7 Mo. 269, where the declaration described the bill as being drawn by "George A. Cook" under the name of "G. A. Cook," and the bill offered in evidence was drawn by "G. W. Cook."

South Carolina.—Flant *v.* Gadberry, 5 Rich. (S. C.) 10.

United States.— Craig *v.* Brown, Pet. C. C. (U. S.) 139, 6 Fed. Cas. No. 3,326, where the variance between "Elisha" and "Elijah" was held to be fatal.

Illegible signature.— In an action against defendant as maker of a promissory note to which the signature is illegible, and it is not attempted to be described in the declaration, there is not such a variance between the note and declaration as to operate to defeat the action. It is analogous to a signature evidenced by a mark. Dew *v.* Garner, 7 Port. (Ala.) 503.

7. *Alabama.*— Coster *v.* Thomason, 19 Ala. 717, where the variance was between "Hearn" and "Hearne."

Arkansas.— Power *v.* Woolley, 21 Ark. 462, where the variance was between "Wolley" and "Woolley."

Illinois.—Belton *v.* Fisher, 44 Ill. 32 (where the variance was between "Belton" and "Beton"); Morton *v.* McClure, 22 Ill. 257 (where the variance was between "Japheth" and "Japhath"); Stevens *v.* Stebbins, 4 Ill. 25 (where the variance was between "Steven" and "Stevens"). See also Graham *v.* Eiszner, 28 Ill. App. 269.

Indiana.—Alvord *v.* Moffatt, 10 Ind. 366 (where the variance was between "Charleston" and "Charlestown"); Moore *v.* Anderson, 8 Ind. 18 (where the variance was between "Corn" and "Conn"). See also Gaskin *v.* Wells, 15 Ind. 253.

Kentucky.— Schooler *v.* Asherst, 1 Litt. (Ky.) 216, 13 Am. Dec. 232, where the variance was between "Josiah" and "Josier."

Louisiana.—Anselm *v.* Braud, 6 La. 140, where a note signed by Charles "Braud," and made part of the petition which charged the maker by the name of Charles "Breux" or "Brand," was held under general issue admissible on proper proof.

Maryland.— Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519, where the variance was between "Penryn" and "Pennyrine."

Michigan.— Buhl *v.* Trowbridge, 42 Mich. 44, 3 N. W. 245, where the variance was between "Trobridge" and "Trowbridge."

Missouri.—Cato *v.* Hutson, 7 Mo. 142, where the variance was between "Hudson" and "Hutson."

8. *Alabama.*— Cantly *v.* Hopkins, 5 Stew. & P. (Ala.) 58. See also Chandler *v.* Hudson, 8 Ala. 366.

Arkansas.— State Bank *v.* Peel, 11 Ark. 750.

Connecticut.— See Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

Illinois.— Ross *v.* Clawson, 47 Ill. 402; Lee *v.* Mendel, 40 Ill. 359; Hunter *v.* Bryden, 21

dd. *Principal or Agent.* Where a negotiable instrument is executed by a person as agent or in a fiduciary capacity, the fact that the principal is described in the declaration or complaint as the drawer or maker of the instrument will create no variance, the pleader having the right to declare according to the operation of law on the contract.[9] On the other hand where a negotiable instrument is executed by a party individually, and is declared on as executed for and in behalf of a designated principal by such party, the variance is fatal.[10] So where a negotiable instrument is executed by a party as agent or in a fiduciary capacity, and is declared on as executed by such party in his individual capacity, it is a fatal variance.[1]

ee. *Joint or Several Promisors.* It is no variance to declare on a joint and several note as a joint note, or to aver that the makers promised to pay the money, this being its legal effect.[12] Conversely, where a note is described in the declaration as executed by defendant, and the note produced in evidence is shown to have been executed by defendant and another, there is no variance, the note being still that of defendant, although executed by another with him.[13]

(b) PAYEE. The name of the original payee of a negotiable instrument is an essential part of the description, and a misrecital is fatal. Thus where such instrument is declared on as payable to plaintiff, and the instrument introduced in evidence is payable to a third party, the variance is material, and the instrument

Ill. 591; Pickering *v.* Pulsifer, 9 Ill. 79; Greathouse *v.* Kipp, 4 Ill. 371; Linn *v.* Buckingham, 2 Ill. 451. See also Wilson *v.* Turner, 81 Ill. 402. But see Curtis *v.* Marrs, 29 Ill. 508; Rives *v.* Marrs, 25 Ill. 315.

Indiana.— West *v.* Hayes, 104 Ind. 30, 3 N. E. 610; Rightsell *v.* Kellum, 48 Ind. 252; Farley *v.* Harvey, 14 Ind. 377; Doron *v.* Cosby, 13 Ind. 497, 12 Ind. 634; Hunt *v.* Raymond, 11 Ind. 215; Muirhead *v.* Snyder, 4 Ind. 486; Ramsay *v.* Herndon, 5 Blackf. (Ind.) 345; Lasselle *v.* Hewson, 5 Blackf. (Ind.) 161; Taylor *v.* Coquillard, 5 Blackf. (Ind.) 158. But see Loudon *v.* Walpole, 1 Smith (Ind.) 121, where the maker of a note was described in the declaration as "Andrew A. Loudon," and the note produced was signed "A. A. Loudon," the court holding that while the note was admissible in evidence, its mere production, without further proof to identify it as the note sued upon, was not sufficient to authorize a judgment in favor of plaintiff.

Mississippi.— Robertson *v.* Banks, 1 Sm. & M. (Miss.) 666.

Missouri.— Weaver *v.* McElhenon, 13 Mo. 89.

New York.— Wood *v.* Bulkley, 13 Johns. (N. Y.) 486. See also Claflin *v.* Griffin, 8 Bosw. (N. Y.) 689.

Vermont.— Mellendy *v.* New England Protective Union Div. No. 172, 36 Vt. 31.

See 7 Cent. Dig. tit. "Bills and Notes," § 1622.

9. *Alabama.*— Baldwin *v.* Stebbins, Minor (Ala.) 180.

Connecticut.— Phelps *v.* Riley, 3 Conn. 266.

Missouri.— Slevin *v.* Reppy, 46 Mo. 606.

New Mexico.— Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

New York.— See Mack *v.* Spencer, 4 Wend. (N. Y.) 411.

10. Rossiter *v.* Marsh, 4 Conn. 196.

11. Lawton *v.* Swihart, 10 Ind. 562; Atkins *v.* Brown, 59 Me. 90; Leach *v.* Blow, 8 Sm. & M. (Miss.) 221. See, however, McMartin *v.* Adams, 16 Mo. 268.

12. Knott *v.* Swannell, 91 Ill. 25 (where a promissory note which read, "I promise to pay," etc., and was signed by two persons, was described in the declaration as having been made jointly by defendants, and it was held that the note was joint and several and therefore there was no material variance between the count and the note); Pogue *v.* Clark, 25 Ill. 333. So where parties are declared against as joint makers of a promissory note, the production of a note signed at the foot by one, the name of the other appearing in blank on the back of the note, will *prima facie* support the declaration (Lincoln *v.* Hinzey, 51 Ill. 435); but where a declaration is on a joint note and the evidence shows a note by one party, the variance is fatal to a recovery (Hopkins *v.* Farwell, 32 N. H. 425).

13. *Illinois.*— Rock Valley Paper Co. *v.* Nixon, 84 Ill. 11; Pogue *v.* Clark, 25 Ill. 333. See also Connolly *v.* Cottle, 1 Ill. 364, where it was held that in an action on a note, a several promise is not proved by evidence of a joint one.

Indiana.— Anderson *v.* Hamilton, 6 Blackf. (Ind.) 94.

Maine.— Hapgood *v.* Watson, 65 Me. 510, where the court held it to be well settled that the joint promise of several may be declared on as the individual promise of each.

Maryland.— Brown *v.* Warram, 3 Harr. & J. (Md.) 572.

Minnesota.— Nichols, etc., Co. *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110.

England.— Mountstephen *v.* Brooke, 1 B. & Ald. 224; Cocks *v.* Brewer, 11 M. & W. 51.

may properly be excluded;[14] but it is not necessary for the declaration or complaint to describe the payee otherwise than as he is described in the instrument itself.[15] The failure of the declaration to aver the capacity in which the payee is to receive the money, or the purpose for which he is to apply it, where both are set forth in the body of the instrument sued on, does not amount to a material variance.[16]

(8) AMOUNT. In an action upon a negotiable instrument, the amount declared upon in the declaration or complaint should correspond with the amount stated in the instrument produced in evidence, and even the slightest variance in this respect has been held to be fatal.[17]

(9) INTEREST. Where the declaration or complaint makes no mention of interest and the note introduced in evidence bears interest the variance has been held fatal.[18] Conversely, where the declaration or complaint describes the note declared on as for a certain sum with interest and the instrument offered in evidence is silent as to the interest the variance is fatal.[19]

14. *Arkansas.*— Murphree *v.* State Bank, 4 Ark. 448.

California.— Farmer *v.* Cram, 7 Cal. 135.

Illinois.— Ingraham *v.* Luther, 65 Ill. 446. But see Chicago First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, 26 L. R. A. 289, where it was held that it is not necessary in a declaration to state the parties to a bill of exchange unless such parties are plaintiff or defendant.

Indiana.— McKinney *v.* Harter, 6 Blackf. (Ind.) 320.

Louisiana.— Flogny *v.* Adams, 11 Mart. (La.) 547.

New York.— White *v.* Joy, 13 N. Y. 83.

South Carolina.— Harden *v.* Harden, 1 Strobh. (S. C.) 56; Cherry *v.* Fergeson, 2 McMull. (S. C.) 15.

Note payable to blank.— Where a complaint alleged that defendant made, executed, and delivered his promissory note to the Portland Savings Bank, it was held that a note payable to —— could not be received in evidence under such allegation. Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

Immaterial variance.— Where one of the payees of a note was described in the declaration as "James M. Fassitt," and in the note offered in evidence his name appeared as "James W. Fassitt," it was held that the variance was immaterial. White *v.* Fassitt & Co., 10 Humphr. (Tenn.) 191.

15. Reynolds *v.* Roth, 61 Ark. 317, 33 S. W. 105; Root *v.* Henry, 6 Mass. 504 (where the declaration was held sufficient without any allegation of the christian names of the payees); Edmundson *v.* Yates, 25 Tex. 373; Montpelier Bank *v.* Russell, 27 Vt. 719.

16. Bowie *v.* Foster, Minor (Ala.) 264; Graham *v.* Fahnestock, 5 Gill (Md.) 215.

17. *Alabama.*— Fournier *v.* Black, 32 Ala. 41.

Connecticut.— Norwich Bank *v.* Hyde, 13 Conn. 279.

Illinois.— Spangler *v.* Pugh, 21 Ill. 85, 74 Am. Dec. 77, where the difference of one-half cent between the amount declared on in the declaration and that stated in the instrument offered in evidence was held to be a fatal variance.

Louisiana.—White *v.* Noland, 3 Mart. N. S. (La.) 636; Pilie *v.* Mollere, 2 Mart. N. S. (La.) 666.

New York.— Bissel *v.* Drake, 19 Johns. (N. Y.) 66.

There was held to be no material variance where the note declared upon was stated in the declaration to be for "four hundred and two and 50-100 dollars," and the note produced in evidence read "four hund and two and 50-100 dollars" (Glenn *v.* Porter, 72 Ind. 525), and where the complaint described the note declared on to be for four hundred and eighty dollars, and a copy of the note set out with the complaint showed an indorsement by which it was stipulated that if the note was paid in town lots the sum should be five hundred and fifty dollars (Parker *v.* Morton, 29 Ind. 89).

Omission of word "dollars."—Where a note was declared on for four hundred and forty-seven dollars and sixty-six cents, and the instrument offered in evidence corresponded therewith, except that the word "dollars" was omitted, it was held that there was no variance and that the word must be supplied by construction. Stevens *v.* Smith, 15 N. C. 292. See also Salisbury *v.* Wilson, Tapp. (Ohio) 199.

18. Sawyer *v.* Patterson, 11 Ala. 523; Gragg *v.* Frye, 32 Me. 283; Blue *v.* Russell, 3 Cranch C. C. (U. S.) 102, 3 Fed. Cas. No. 1,568; Coyle *v.* Gozzler, 2 Cranch C. C. (U. S.) 625, 6 Fed. Cas. No. 3,312. *Contra*, Wilson *v.* King, Morr. (Iowa) 106; Beach *v.* Curle, 15 Mo. 107.

19. Cooper *v.* Guy, Tapp. (Ohio) 148.

There was no variance where the declaration described the note as bearing interest at the rate of ten per cent per annum from the date thereof until paid, and the note introduced in evidence provided for interest at ten per cent, since the declaration simply described the instrument according to its legal effect. Crittenden *v.* French, 21 Ill. 598.

(10) PLACE OF PAYMENT. In some jurisdictions the rule has been laid down that a negotiable instrument made payable at a particular place will not support a declaration or complaint upon an instrument described as payable generally.[20] In others, however, it has been held that a variance in the description of place of payment is not material, where defendant is not misled thereby, since a variance in description must be both material and misleading.[21]

(11) TIME OF PAYMENT. In many cases it has been held that the declaration or complaint must state accurately the time of payment of the instrument, and that even a slight variance in this respect between the declaration or complaint and the instrument itself is fatal.[22] In others, however, the rule is laid down that a variance between an allegation in a pleading and proof is not material unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits, and that a slight variance between the declaration or complaint and the instrument declared on as to the time of payment is not fatal.[23]

20. *Arkansas.*—Walker *v.* Walker, 5 Ark. 643; Caruthers *v.* Real Estate Bank, 4 Ark. 447; Dickinson *v.* Tunstall, 4 Ark. 170; Sumner *v.* Ford, 3 Ark. 389.

Delaware.— Thornton *v.* Herring, 5 Houst. (Del.) 154.

Illinois.— Childs *v.* Laflin, 55 Ill. 156; Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742.

Indiana.— Alden *v.* Barbour, 3 Ind. 414.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327. *Compare* State Bank *v.* Vaughan, 36 Mo. 90.

New Mexico.— Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

United States.— Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160.

21. *Alabama.*— Morris *v.* Poillon, 50 Ala. 403; Clark *v.* Moses, 50 Ala. 326. *Contra,* before the adoption of the present code. Clancy *v.* Hilliard, 39 Ala. 713; Puckett *v.* King, 2 Ala. 570.

Connecticut.— See Comstock *v.* Savage, 27 Conn. 184, holding, in an action on a note which was declared on as payable at the Farmers' & Mechanics' bank, and which when produced in evidence was payable on its face at the F. & Mechanics' bank, that there was no necessary variance between the allegation and proof.

Mississippi.— Walker *v.* Tunstall, 3 How. (Miss.) 259.

Pennsylvania.—Collins *v.* Naylor, 10 Phila. (Pa.) 437, 32 Leg. Int. (Pa.) 248.

Texas.— Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087. See also Andrews *v.* Hoxie, 5 Tex. 171.

22. *Alabama.*— Caller *v.* Boykin, Minor (Ala.) 206.

District of Columbia.— Johnston *v.* Randall, 2 Mackey (D. C.) 81.

Massachusetts.— Stanwood *v.* Scovel, 4 Pick. (Mass.) 422.

Mississippi.— See Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

South Carolina.— Morris *v.* Fort, 2 McCord (S. C.) 397.

Tennessee.— Blakemore *v.* Wood, 3 Sneed (Tenn.) 470.

Vermont.— Woodstock Bank *v.* Downer, 27 Vt. 482, 65 Am. Dec. 210.

West Virginia.— Scott *v.* Baker, 3 W. Va. 285, where the declaration described a note as payable "two months after the date thereof," and the note produced in evidence was made payable "sixty days after date."

United States.— Page *v.* Alexandria Bank, 7 Wheat. (U. S.) 35, 5 L. ed. 390 (where a note payable fifty-four days after date was declared on as one payable on demand); Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208 3 L. ed. 317; Kikinbal *v.* Mitchell, 2 McLean (U. S.) 402, 14 Fed. Cas. No. 7, 763.

See 7 Cent. Dig. tit. "Bills and Notes," 1632.

Omission of the word "date."— Where the declaration set out a note payable "one day after date," and the note offered in evidence read "one day after," the word "date" being omitted, it was held that the variance was immaterial and that the omission would be supplied by intendment. White *v.* Word, 22 Ala. 442.

Note payable on contingency.— It has been held that a count on a note payable on the occurrence of a particular event, or in a reasonable time, is not supported by a note introduced in evidence payable only on the occurrence of such event, even where it is shown that the contingency was rendered impossible by the misconduct of defendant, the court holding that facts should have been alleged tending to deprive defendant of any excuse for not paying the money. Hilt *v.* Campbell, 6 Me. 109.

23. Tipton *v.* Utley, 59 Ill. 25; Morton *v.* Tenny, 16 Ill. 404; Hamilton *v.* Pumphrey, 20 Ind. 396 (where a note dated the 15th of February, 1862, was described in the complaint as payable on the 16th of February, 1862, the note produced in evidence read "payable one day after date," and there was held to be no variance); Hoover *v.* Johnson, 6 Blackf. (Ind.) 473; Vandevender *v.* Pittsford, 6 Blackf. (Ind.) 197; Chapman *v.* Carolin, 3 Bosw. (N. Y.) 456 (where this rule

(12) Mode and Form of Payment. As a general rule allegations as to the mode and form of payment of negotiable instruments should correspond with the proof and a material variance in this respect is fatal.[24] Where, however, the stipulation in a note as to the manner of payment is for the benefit of the maker, the rule is that if the maker in such case neglects to avail himself of the privilege inserted for his benefit, the note, according to its terms, becomes an absolute promise to pay money, and a complaint which so describes it conforms to its legal effect and is sufficient.[25]

(13) Consideration. The omission from the declaration or complaint of the words "for value received," where they occur in the instrument sued on, or the failure to allege the specific consideration stated in such instrument does not constitute a variance.[26] Conversely, an allegation in the declaration or complaint that the instrument was given for value received, where the phrase does not occur in the instrument itself, will not constitute a variance.[27]

(14) Presentment, Protest, and Notice — (a) Waiver or Excuse. In an action on a negotiable instrument, where there is an allegation of demand, protest, and notice, and the proof shows a waiver thereof[28] or excuse for not giving,[29] there is no variance. In some cases, however, the doctrine has been laid

was carried to the extent of holding that failure to state the time of payment in the declaration was immaterial); Bates *v.* Leclair, 49 Vt. 229; Passumpsit Bank *v.* Goss, 31 Vt. 315.

Omission of words "after date."—Where the declaration described the note as payable on demand and the note produced in evidence read "on demand after date," it was held that the omission from the declaration of the words "after date" did not constitute a material variance. Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617.

Where no date of payment is specified in the instrument it is not a material variance, in declaring upon such instrument, to describe it as payable on request; particularly where the pleader does not profess to set it out *in hæc verba*. Dickens *v.* Howell, 24 Ark. 230.

24. Carlisle *v.* Davis, 7 Ala. 42 (where the note read for the payment of a sum of money "in the common currency of Alabama," and the declaration described it as a promissory note for the payment of a sum *in numero*); Brewster *v.* Dana, 1 Root (Conn.) 266; Phillips *v.* Dodge, 8 Ga. 51. See also Hardin *v.* Titus, Dall. (Tex.) 622. But see Morrison *v.* Tate, 1 Metc. (Ky.) 569.

A note payable in woolen fulled cloth will support a declaration describing it as payable in fulled cloth. Wead *v.* Marsh, 14 Vt. 80.

25. Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Nesbitt *v.* Pearson, 33 Ala. 668; Love *v.* Simmons, 10 Ala. 113; Plowman *v.* Riddle, 7 Ala. 775; McRae *v.* Raser, 9 Port. (Ala.) 122; Sexton *v.* Wood, 17 Pick. (Mass.) 110. See also Parker *v.* Morton, 29 Ind. 89.

Condition inserted for benefit of payee.—Where the note contained a positive undertaking to pay the money therein mentioned at maturity, with a condition inserted for the benefit of the payee, but which condition imposed no obligation upon the maker to pay in that manner unless the payee should so direct, it was held that the omission of the recital of such condition in the declaration created no variance. Owen *v.* Barnum, 7 Ill. 461.

26. McRae *v.* Raser, 9 Port. (Ala.) 122; Hawkins *v.* Dean, 24 Ark. 189; Matlock *v.* Purefoy, 18 Ark. 492; White *v.* Molyneux, 2 Ga. 124 (where the declaration on a note given for rent was held to be supported by a note given for rent of a storehouse). *Contra*, Rosetter *v.* Marsh, 4 Conn. 196.

27. McRae *v.* Raser, 9 Port. (Ala.) 122; Bingham *v.* Calvert, 13 Ark. 399. See also McWilliams *v.* Smith, 1 Call (Va.) 123. *Contra*, Saxton *v.* Johnson, 10 Johns. (N. Y.) 418; Treadway *v.* Nicks, 3 McCord (S. C.) 195.

28. *Connecticut.*— Windham Bank *v.* Norton, 22 Conn. 213, 56 Am. Dec. 397; Camp *v.* Bates, 11 Conn. 487.

Iowa.— Knight *v.* Fox, Morr. (Iowa) 305. *Contra*, Peck *v.* Schick, 50 Iowa 281; Lumbert *v.* Palmer, 29 Iowa 104.

Massachusetts.— Armstrong *v.* Chadwick, 127 Mass. 156; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327.

New Hampshire.— Hibbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

Vermont.— Farmers', etc., Bank *v.* Day, 13 Vt. 36.

See 7 Cent. Dig. tit. "Bills and Notes," § 1639.

29. *Alabama.*— Kennon *v.* McRea, 7 Port. (Ala.) 175; Taylor *v.* Branch, 1 Stew. & P. (Ala.) 249, 23 Am. Dec. 293.

Arkansas.— Peters *v.* Hobbs, 25 Ark. 67, 91 Am. Dec. 526.

Connecticut.— Windham Bank *v.* Norton,

down that in an action against an indorser a general allegation of notice to such indorser is not supported by proof of matters excusing actual notice.[30]

(b) Subsequent Promise to Pay. An allegation of demand and notice is sustained by proof of a promise to pay made by the indorser after maturity.[31]

(c) Constructive Demand. Proof of constructive demand and notice will support a declaration alleging actual demand and notice.[32]

(d) Time and Place of. As a general rule plaintiff is not held to strict proof

22 Conn. 213, 56 Am. Dec. 397; Hinsdale *v.* Miles, 5 Conn. 331; Norton *v.* Lewis, 2 Conn. 478.

Florida.— Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Maine.— Saco Nat. Bank *v.* Sanborn, 63 Me. 340, 18 Am. Rep. 224, where evidence of reasonable diligence in giving notice was held sufficient to support an allegation of notice, since legal notice is not necessarily actual notice.

Massachusetts.— City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Shed *v.* Blett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Jones *v.* Fales, 4 Mass. 245.

Mississippi.— Goodloe *v.* Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 150.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327.

New York.— Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Williams *v.* Matthews, 3 Cow. (N. Y.) 252; Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222; Cummings *v.* Fisher, Anth. N. P. (N. Y.) 1.

England.— Greenway *v.* Hindley, 4 Campb. 52; Hodge *v.* Fillis, 3 Campb. 463; Patience *v.* Townley, 2 Smith K. B. 223, 8 Rev. Rep. 711. See also Firth *v.* Thrush, 8 B. & C. 387, 6 L. J. K. B. O. S. 355, 2 M. & R. 359, 15 E. C. L. 193, where the declaration averred that defendant had notice of dishonor, and it was held that this allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary to state in the declaration the special circumstances which rendered valid notice given at a later period than in ordinary cases would be sufficient.

See 7 Cent. Dig. tit. "Bills and Notes," § 1639.

Special custom.— It was held in Coyle *v.* Gozzler, 2 Cranch (U. S.) 625, 6 Fed. Cas. No. 3,312, that a special custom of the banks and merchants of the county of Washington to demand payment on the day after the last day of grace might be given in evidence without being averred in the declaration.

Place of demand.—Where the petition alleges that due demand was made "at the proper place," the note being annexed to the petition as part of it, proof of demand at the place indicated in the note is admissible. Laferriere *v.* Bynum, 12 La. 587.

Party making demand.—Where the complaint alleged the protest of a note and referred to a notary's certificate attached, and the evidence showed that demand was made and notice given by another person, it was held that the reference to the notary's certificate might be rejected as surplusage and that the variance was immaterial. Smedberg *v.* Whittlesey, 3 Sandf. Ch. (N. Y.) 320.

30. *Arkansas.*—Anderson *v.* Yell, 15 Ark. 9.

Georgia.— Hall *v.* Davis, 41 Ga. 614.

Indiana.— Curtis *v.* State Bank, 6 Blackf. (Ind.) 312, 38 Am. Dec. 143.

Iowa.— Lumbert *v.* Palmer, 29 Iowa 104.

Maine.— Hill *v.* Varrell, 3 Me. 233.

Massachusetts.— See Blakely *v.* Grant, 6 Mass. 386.

Missouri.— Pier *v.* Heinrichoffen, 52 Mo. 333.

New Hampshire.— Child *v.* Moore, 6 N. H. 33.

New York.— Clift *v.* Rodger, 25 Hun (N. Y.) 39; Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665; Schulz *v.* Dupuy, 3 Abb. Pr. (N. Y.) 252.

Tennessee.— Gilroy *v.* Brinkley, 12 Heisk. (Tenn.) 392; Harwood *v.* Jarvis, 5 Sneed (Tenn.) 375.

England.— Harris *v.* Richardson, 4 C. & P. 522, 19 E. C. L. 631.

31. *Alabama.*— Shirley *v.* Fellows, 9 Port. (Ala.) 302.

Mississippi.— Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310.

New York.—Clark *v.* Tryon, 4 Misc. (N. Y.) 63, 23 N. Y. Suppl. 780, 53 N. Y. St. 123 [*reversing* 2 Misc. (N. Y.) 457, 21 N. Y. Suppl. 1075, 51 N. Y. St. 146].

Ohio.— Myers *v.* Standart, 11 Ohio St. 29.

Tennessee.— People's Nat. Bank *v.* Dibrell, 91 Tenn. 301, 18 S. W. 626. See also Bogart *v.* McClumb, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737.

United States.— Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595; Martin *v.* Winslow, 2 Mason (U. S.) 241, 16 Fed. Cas. No. 9,172.

England.— Campbell *v.* Webster, 2 C. B. 258, 9 Jur. 992, 15 L. J. C. P. 4, 52 E. C. L. 258.

32. Saco Nat. Bank *v.* Sanborn, 63 Me. 340, 18 Am. Rep. 224; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Jones *v.* Fales, 4 Mass. 245; Baumgardner *v.* Reeves, 35 Pa. St. 250.

Reason of rule.— In North Bank *v.* Abbott, 13 Pick. (Mass.) 465, 470, 25 Am. Dec. 334, the court said: "The principle of allowing some latitude in the mode of proof, where a presentment and demand are averred in the declaration, seems to be this; the plaintiff does not give in evidence matters strictly in excuse, but a qualified presentment and demand, or acts which in their legal effect and by the custom of merchants, are deemed equivalent to a demand."

of time and place of presentment when laid under a *videlicet*, and he is authorized to make his proof conform to the legal effect of the declaration.[33]

(B) *Indorsement or Transfer* — (1) IN GENERAL. While it has been held that in an action on a note by the payee, indorsements may be disregarded in describing the note,[34] yet where the declaration or complaint sets out an indorsement, and the instrument declared on does not correspond with the allegation, the variance is fatal.[35] In some jurisdictions, however, the transferee is allowed to fill up the blank indorsement to himself and to aver in his petition that it was made in that form, without making a material variance.[36]

(2) DESCRIPTION OF PARTIES. Where the declaration avers an indorsement to the indorsee by certain designation or name, a variance between such description and the instrument produced in evidence has been held to be fatal;[37] but a variance between the name of the indorser as set out in the complaint and that shown by the instrument offered in evidence is immaterial when the instrument set out in the exhibit corresponds with the latter,[38] and where the declaration or complaint only sets out the indorsement in substance and there is no attempt to describe accurately by what name or designation the order to pay plaintiff was made, there is no variance.[39]

33. *Alabama.*— Smith *v.* Robinson, 11 Ala. 270; Crawford *v.* Canfield, 6 Ala. 153; Quigley *v.* Primrose, 8 Port. (Ala.) 247.

Mississippi.— Wells *v.* Woodley, 5 How. (Miss.) 484.

Tennessee.—Frank *v.* Townsend, 9 Humphr. (Tenn.) 724.

Virginia.— Jackson *v.* Henderson, 3 Leigh (Va.) 196.

England.— Bynner *v.* Russell, 1 Bing. 23, 7 Moore C. P. 267, 8 E. C. L. 383.

34. *Illinois.*— Rozet *v.* Harvey, 26 Ill. App. 558.

Louisiana.— Hill *v.* Buddington, 8 Rob. (La.) 119; Gaines *v.* Morris, 6 Rob. (La.) 4.

Maryland.— Woodruff *v.* Munroe, 33 Md. 146.

Texas.— San Antonio, etc., R. Co. *v.* Cockvill, 72 Tex. 613, 10 S. W. 702.

England.—Waynam *v.* Bend, 1 Campb. 175; Duncan *v.* Scott, 1 Campb. 100; Smith *v.* Chester, 1 T. R. 654, 1 Rev. Rep. 345.

35. *Alabama.*—Alabama Coal Mining Co. *v.* Brainard, 35 Ala. 476; Strader *v.* Alexander, 9 Port. (Ala.) 441.

Illinois.— Dunkar *v.* Schlotfeldt, 49 Ill. App. 652.

Indiana.— Smelser *v.* Wayne, etc., Straight Line Turnpike Co., 82 Ind. 417; Morgan *v.* Smith American Organ Co., 73 Ind. 179; Wallace *v.* Reed, 70 Ind. 263; Jackson Tp. *v.* Barnes, 55 Ind. 136; Stowe *v.* Weir, 15 Ind. 341.

Kentucky.—Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610.

Louisiana.— Taylor *v.* Normand, 12 Rob. (La.) 240.

36. *California.*— See Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90.

Indiana.— Moore *v.* Pendleton, 16 Ind. 481; Bowers *v.* Traver, 5 Blackf. (Ind.) 24.

Iowa.— Skinner *v.* Church, 36 Iowa 91.

Massachusetts.— See State Trust Co. *v.* Owen Paper Co., 162 Mass. 156, 38 N. E. 438.

New York.— Norris *v.* Badger, 6 Cow. (N. Y.) 449.

Pennsylvania.— Dilworth *v.* Hirst, 1 Phila. (Pa.) 111, 8 Leg. Int. (Pa.) 206.

Allegation of ownership.—Where plaintiff alleged in his complaint that he was the owner and holder of the note declared on, while the evidence showed that he held said note only as collateral security for money paid and advanced on the strength and credit of the same, it was held that he was the owner of the instrument to the amount for which the paper had been pledged to him, and that there was no variance. Curtis *v.* Mohr, 18 Wis. 615. See also Hilton *v.* Waring, 7 Wis. 492.

Striking out indorsements.— The owner of a negotiable instrument having the right to strike out all subsequent indorsements made merely for the purpose of collection may, in setting out the instrument in his declaration, omit altogether those indorsements which have been stricken out. Tennessee Bank *v.* Smith, 9 B. Mon. (Ky.) 609.

Admission by defendant in his answer that plaintiff acquired the note sued upon by the indorsement in blank of the payee is sufficient proof of the signature of the indorser. Moore *v.* Polk, 24 La. Ann. 216.

37. Jordan *v.* Ford, 7 Ark. 416 (where it was held that a note indorsed to "Joseph B. Myers" was not admissible in evidence under a count describing the note as indorsed to "Joseph B. Mason"); Hyer *v.* Smith, 3 Cranch C. C. (U. S.) 437, 12 Fed. Cas. No. 6,979 (where the declaration alleged the indorsement to be to Hyer & Burdett, "survivors of Bremner," when in fact the draft was indorsed to the order of "Messrs. Hyers, Bremner, and Burdett").

38. Glenn *v.* Porter, 72 Ind. 525.

39. Lee *v.* Mendel, 40 Ill. 359; Speer *v.* Craig, 22 Ill. 433; Carpenter *v.* Sheldon, 22 Ind. 259; Farmington Sav. Bank *v.* Fall, 71 Me. 49; Dennistoun *v.* Stewart, 17 How.

(3) TIME OF. In an action by an indorsee upon a negotiable instrument, if the declaration or complaint avers that the indorsement was made before the instrument became due, and it appears in evidence to have been made after maturity, this is not a material variance.[40]

(4) IN ACTION AGAINST INDORSER. In an action against an indorser a special indorsement, which qualifies the contract or goes in discharge of the liability of the indorser, must be stated by way of averment in order to avoid a variance.[41]

(II) *ALLEGATIONS IN PLEA OR ANSWER* — (A) *Non-Execution.* A plea of *non est factum* is supported by proof that the note sued on when executed was for a smaller amount,[42] but a plea denying corporate execution is not sustained by a note signed by officers of the corporation who, by statute, are vested with authority to manage its affairs.[43]

(B) *Want of Consideration.* A plea of want of consideration is not sustained where there is evidence of any consideration, however inadequate,[44] or by proof that a consideration fraudulently represented to be good was really of no value;[45] but such a plea is sustained by proof that the note was given for a valueless article.[46]

(C) *Failure of Consideration.* A plea of total failure of consideration requires proof of the consideration as alleged,[47] and is sustained by proof that the subject-matter for which the instrument was given had no value[48] or by proof of the infirmity of the title of a third party to land for which the note in suit was given in payment and which plaintiff had procured to be transferred to defendant;[49] but not by proof of a partial failure.[50]

(D) *Partial Failure.* Partial failure of consideration must be proved to the extent to which it is pleaded.[51]

(E) *Illegality of Consideration.* A plea admitting a consideration but denying its validity is not proved by showing that there was no consideration for the instrument or that it failed.[52]

(F) *Payment.* Where defendant pleads an agreement by the payee to apply so much of his indebtedness to the former toward payment of the note as should be necessary for that purpose he may prove a debt of any amount;[53] but a plea of an agreement to accept in payment a note made by a third party to

(U. S.) 606, 15 L. ed. 228. See also Lautermilch *v.* Kneagy, 3 Serg. & R. (Pa.) 202; Forman *v.* Jacob, 1 Stark. 46, 2 E. C. L. 28.

40. *Maryland.*— Canfield *v.* McIlwaine, 32 Md. 94; Penn *v.* Flack, 3 Gill & J. (Md.) 369.

Massachusetts.— Little *v.* Blunt, 16 Pick. (Mass.) 359.

New York.— Parsons *v.* Parsons, 5 Cow. (N. Y.) 476.

Virginia.—Davis *v.* Miller, 14 Gratt. (Va.) 1.

England.—Young *v.* Wright, 1 Campb. 139. See also Russel *v.* Langstaffe, Dougl. 496.

41. Davis *v.* Campbell, 3 Stew. (Ala.) 319. See also Clancy *v.* Hilliard, 39 Ala. 713; Newell *v.* Williams, 5 Sneed (Tenn.) 208 (where, to an indorsement in blank, was superadded an unconditional promise to pay the debt, and the declaration charged the indorser as upon the mere liability implied by law as indorser in blank, and the court held that the variance was fatal).

Where the allegation was that payment was guaranteed in the words "payment guarantee," and the note offered in evidence contained the phrase "payment guaranteed," it was held that this description was not such as tended to mislead or surprise the adverse party, and hence that it was properly disregarded by the court. Washington *v.* Denton First Nat. Bank, 64 Tex. 4.

42. Stephens *v.* Anderson, (Tex. Civ. App. 1896) 36 S. W. 1000.

43. Hartford City Bank *v.* Press Co., 56 Fed. 260.

44. Cheney *v.* Higginbotham, 10 Ark. 273.

45. Davis *v.* Young, 3 T. B. Mon. (Ky.) 381.

46. Mooklar *v.* Lewis, 40 Ind. 1.

47. Wheat *v.* Summers, 13 Ill. App. 444, where it is also held that if the evidence shows that the plea does not set out the whole consideration, but that some element enters into it which is not alleged, the defense under that plea is not sustained.

48. Mooklar *v.* Lewis, 40 Ind. 1.

49. Ball *v.* Ballenseifen, 28 Ill. App. 221.

50. Burnap *v.* Cook, 32 Ill. 168; Whitacre *v.* Culver, 9 Minn. 295; Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

51. Hall *v.* Marks, 56 Ill. 125.

52. Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472.

53. Babcock *v.* Callendar, 17 Conn. 34.

defendant is not supported by proof of an offer to deliver the note to plaintiff unindorsed.[54]

E. Evidence — 1. Presumptions and Burden of Proof — a. Execution and Delivery — (I) *Execution* — (A) *In General.* At common law a plaintiff suing upon a promissory note was bound to prove its execution by defendant or by some one acting by defendant's authority. Statutes have very generally changed this rule, however, so that when an action at law or a suit in chancery is founded on a promissory note or other written instrument the burden of proving its execution is not cast on plaintiff,[55] unless its execution is denied by proper plea.[56] In some jurisdictions where defendant pleads the general issue and verifies his plea by his affidavit, the burden is thrown on plaintiff of proving the due execution of the instrument.[57] In other jurisdictions, however, it is provided by statute

54. Eichholtz *v.* Taylor, 88 Ind. 38.

55. Garrett *v.* Garrett, 64 Ala. 263.

The statue applies only when the written instrument is the foundation of a suit and is without application when it is proposed to use it collaterally to establish an indebtedness. Then its execution must be proved by the party relying on it. Garrett *v.* Garrett, 64 Ala. 263.

56. *Alabama.*—Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Garrett *v.* Garrett, 64 Ala. 263; Wimberly *v.* Dallas, 52 Ala. 196.

Arkansas.— Richardson *v.* Comstock, 21 Ark. 69; State Bank *v.* Kerby, 9 Ark. 345; Trowbridge *v.* Pitcher, 4 Ark. 157.

California.— Corcoran *v.* Doll, 32 Cal. 82; Hastings *v.* Dollarhide, 18 Cal. 390; Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Colorado.— Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195.

Delaware.—Pusey *v.* Pyle, 4 Houst. (Del.) 98.

Georgia.— Lowe Bros. Cracker Co. *v.* Ginn, 94 Ga. 408, 20 S. E. 106.

Illinois.— Dean *v.* Ford, 180 Ill. 309, 54 N. E. 417; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 S. E. 695; Walter *v.* School Trustees, 12 Ill. 63; Hinton *v.* Husbands, 4 Ill. 187; Chicago Electric Light Renting Co. *v.* Hutchinson, 25 Ill. App. 476. See also Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99.

Indiana.— Woollen *v.* Wire, 110 Ind. 251, 11 N. E. 236; Stair *v.* Richardson, 108 Ind. 429, 9 N. E. 300; Pate *v.* Aurora First Nat. Bank, 63 Ind. 254; Brooks *v.* Allen, 62 Ind. 401; Potter *v.* Earnest, 51 Ind. 384; Hunter *v.* Probst, 47 Ind. 359; Gaskin *v.* Wells, 15 Ind. 253.

Iowa.— Carthage Nat. Bank *v.* Butterbaugh, 116 Iowa 657, 88 N. W. 954; Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440; Miller *v.* House, 67 Iowa 737, 25 N. W. 899; Sankey *v.* Trump, 35 Iowa 267; Clinton Nat. Bank *v.* Torry, 30 Iowa 85; Terhune *v.* Henry, 13 Iowa 99; Carle *v.* Cornell, 11 Iowa 374.

Kansas.— Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470; St. Louis State Sav. Assoc. *v.* Barber, 35 Kan. 488, 11 Pac. 330; Eggan *v.* Briggs, 23 Kan. 710; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147; Holmes *v.* Riley, 14 Kan. 131.

Kentucky.— Gill *v.* Johnson, 1 Metc. (Ky.) 649; Black *v.* Crouch, 3 Litt. (Ky.) 226.

Michigan.— Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063; McRobert *v.* Crane, 49 Mich. 483, 13 N. W. 826; Anderson *v.* Walter, 34 Mich. 113; Mills *v.* Bunce, 29 Mich. 364; Hoard *v.* Little, 7 Mich. 468.

Mississippi.— Wanita Woolen Mills *v.* Rollins, 7 Miss. 253, 22 So. 819; Thornton *v.* Alliston, 12 Sm. & M. (Miss.) 124; Banghan *v.* Graham, 1 How. (Miss.) 220.

Missouri.— Foster *v.* Nowlin, 4 Mo. 18; Labeaume *v.* Labeaume, 1 Mo. 487; Edmonston *v.* Henry, 45 Mo. App. 346; Zervis *v.* Unnerstall, 29 Mo. App. 474.

Ohio.— Somers *v.* Harris, 16 Ohio 262; Taylor *v.* Colvin, Wright (Ohio) 449.

Tennessee.— Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Texas.— Brashear *v.* Martin, 25 Tex. 202; Kinnard *v.* Herlock, 20 Tex. 48; Matossy *v.* Frosh, 9 Tex. 610; Ramsay *v.* McCanley, 2 Tex. 189; Harvey *v.* Harvey, (Tex. Civ. App. 1897) 40 S. W. 185.

Wisconsin.— Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26.

United States.— Gray *v.* Tunstall, Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730.

See 7 Cent. Dig. tit. "Bills and Notes," § 1651.

57. *Illinois.*— Chicago Electric Light Renting Co. *v.* Hutchinson, 25 Ill. App. 476. See also Vance *v.* Funk, 3 Ill. 263.

Indiana.— Bates *v.* Hunt, 1 Blackf. (Ind.) 67, where it was held that in an action in assumpsit by the indorsee against the maker, it is incumbent on plaintiff to prove on the general issue both the execution of the note and the assignment.

Missouri.—Worrell *v.* Roberts, 58 Mo. App. 197. See also Cavitt *v.* Tharp, 30 Mo. App. 131.

Nebraska.— Donovan *v.* Fowler, 17 Nebr. 247, 22 N. W. 424.

United States.— Gray *v.* Tunstall, Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730. See also Sebree *v.* Dorr, 9 Wheat. (U. S.) 558, 6 L. ed. 160.

England.— Duncan *v.* Scott, 1 Campb. 100, where it was held that in an action against the maker by the indorsee, under the plea of *non assumpsit*, it is necessary for plaintiff to prove the indorsement of the payee.

that the denial of due execution must be specific in order to make proof thereof necessary at the trial.[58]

(B) *Place of Execution.* The place at which a promissory note bears date is held to be *prima facie* the place where the note was made[59] and this place is also presumed to be the place of the maker's residence.[60] Where the contrary is not shown it will be presumed that a note sued on in a state was executed in the state.[61]

(C) *Time of Execution.* If there be no date the instrument will be considered as dated at the time it was made.[62] If dated the date will be *prima facie*[63]

It is not incumbent on plaintiff to show the capacity in which defendant executed the instrument, where it does not appear from the instrument itself that it was signed by defendant in any other than his personal capacity (Williams *v.* Miami Paper Co., 36 Ill. App. 107), that defendant was a guarantor as alleged in the complaint (Boynton *v.* Pierce, 79 Ill. 145), or the christian names of plaintiffs or that they were partners (Salisbury *v.* Gillett, 3 Ill. 290).

A plea of non est factum to an action on a negotiable instrument imposes upon plaintiff the burden of proving its execution as well as the necessity of producing the instrument in evidence.

Georgia.— Stanton *v.* Burge, 34 Ga. 435.

Indiana.— Collins *v.* Maghee, 32 Ind. 268. See also King *v.* Conn, 25 Ind. 425.

Missouri.— Smith *v.* Roach, 59 Mo. App. 115.

South Carolina.— Ison *v.* Ison, 6 Rich. (S. C.) 380, where it was held that this plea does not put the assignment in issue.

Texas.— Barnett *v.* Logue, 29 Tex. 282 (where it was held that such a plea does not put in issue the assignment or indorsement of the instrument); Parr *v.* Johnston, 15 Tex. 294.

58. *Iowa.*— Morton *v.* Coffin, 29 Iowa 235; Mann *v.* Howe, 9 Iowa 546.

Louisiana.— Lewis *v.* Fairbanks, 26 La. Ann. 536; Miller *v.* Whitfield, 16 La. Ann. 10; Austin *v.* Latham, 19 La. 88; Beach *v.* Wagner, 19 La. 86; Vairin *v.* Palmer, 14 La. 361; Hyde *v.* Brown, 5 La. 33; Bennett *v.* Allison, 2 La. 419; Miller *v.* Cohea, 1 La. 486; Hughes *v.* Harrison, 8 Mart. N. S. (La.) 297.

Massachusetts.— True *v.* Dillon, 138 Mass. 347.

Minnesota.— Cowing *v.* Peterson, 36 Minn. 130, 30 N. W. 461; Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252.

Ohio.— Somers *v.* Harris, 16 Ohio 262.

Tennessee.— Jewett *v.* Graham, 3 Baxt. (Tenn.) 16, where it was held that while the plea of *nil debet* to an action on a promissory note does not put in issue the execution of the note it does put in issue the existence of the debt.

Virginia.— Phaup *v.* Stratton, 9 Gratt. (Va.) 615; Shepherd *v.* Fry, 3 Gratt. (Va.) 442.

59. *Alabama.*—Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Dundee Mortg., etc., Inv. Co. *v.* Nixon, 95 Ala. 318, 10 So. 311.

Delaware.—Parks *v.* Evans, 5 Houst. (Del.) 576.

Illinois.—Bronte *v.* Leslie, 30 Ill. App. 288.

Indiana.— Hall *v.* Harris, 16 Ind. 180.

New Jersey.—Hoppins *v.* Miller, 17 N. J. L. 185.

Where a bill does not designate the place where it was drawn, but it appears that the drawer resides in one state and the drawee in another, the presumption is that it was drawn at the drawer's residence. Harmon *v.* Wilson, 1 Duv. (Ky.) 322.

60. *Alabama.*— Decatur Branch Bank *v.* Peirce, 3 Ala. 321; Robinson *v.* Hamilton, 4 Stew. & P. (Ala.) 91.

Kentucky.— See Hyatt *v.* James, 2 Bush (Ky.) 463, 92 Am. Dec. 505.

Maryland.— Sasscer *v.* Whitely, 10 Md. 98, 69 Am. Dec. 126; Nailor *v.* Bowie, 3 Md. 251.

Minnesota.— Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Missouri.— Plahto *v.* Patchin, 26 Mo. 389.

Nebraska.— Nicholson *v.* Barnes, 11 Nebr. 452, 9 N. W. 652, 38 Am. Rep. 373.

New York.— Taylor *v.* Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Lowery *v.* Scott, 24 Wend. (N. Y.) 358, 35 Am. Dec. 627; Chapman *v.* Lipscombe, 1 Johns. (N. Y.) 294; Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222.

Pennsylvania.— Duncan *v.* McCullough, 4 Serg. & R. (Pa.) 480.

United States.— Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917 [*reversing* 11 Fed. 191].

See also *supra*, I, D, 2, a, (II), (A), (1) [7 Cyc. 636].

61. Clark *v.* Carey, 63 Ind. 105; Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639; Farhni *v.* Ramsee, 19 Ind. 400.

62. Aldridge *v.* Decatur Branch Bank, 17 Ala. 45; Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244; Seldonridge *v.* Connable, 32 Ind. 375.

63. *Alabama.*—Aldridge *v.* Decatur Branch Bank, 17 Ala. 45.

California.—Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois.— Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626; Knisely *v.* Sampson, 100 Ill. 573; Baldwin *v.* Freydendall, 10 Ill. App. 106.

Maine.— Emery *v.* Vinall, 26 Me. 295.

Minnesota.— Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70.

evidence of the time when it was made, but such evidence is only *prima facie* and is not conclusive.[64]

(D) *Execution by Agent.* Where commercial paper has been executed by an agent, it is, as a general rule,[65] incumbent upon the holder to prove the agent's authority in order to render the principal liable, and the burden of making such proof is upon such holder.[66] If the holder of a note executed by an agent relies on its ratification by the principal, he must show its execution by the agent and the

See 7 Cent. Dig. tit. "Bills and Notes," § 282.

Bank-notes which are frequently reissued are an exception to this rule. Wright *v.* Douglass, 3 Barb. (N. Y.) 554; Long *v.* Yanceyville Bank, 81 N. C. 41; Farmers', etc., Bank *v.* White, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772; Greer *v.* Perkins, 5 Humphr. (Tenn.) 588.

Note dated on Sunday.— The date being *prima facie* the time of execution a note dated on Sunday is *prima facie* void (Sayre *v.* Wheeler, 31 Iowa 112. *Contra,* Dohoney *v.* Dohoney, 7 Bush (Ky.) 217), but where the legal Sunday ends by statute at sunset it has been held that the date of a note on Sunday is no evidence of its execution before sunset and that it is therefore *prima facie* valid (Nason *v.* Dinsmore, 34 Me. 391), the time of delivery in such case being a question for the jury to determine (Hill *v.* Dunham, 7 Gray (Mass.) 543). Where a bill is dated and drawn on Sunday and the acceptance is not dated it will not be presumed to have been accepted on Sunday (Begbie *v.* Levi, 1 Cr. & J. 180, 9 L. J. Exch. O. S. 51, 1 Tyrw. 130), and where a note was shown to have been signed on Sunday, but not in the presence of plaintiffs, and it bore date on a different day, the burden was held not to be on plaintiffs to show that it was not delivered on Sunday (Flanagan *v.* Meyer, 41 Ala. 132).

64. *Alabama.*—Aldridge *v.* Decatur Branch Bank, 17 Ala. 45.

California.— Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244; Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260.

Illinois.— Baldwin *v.* Freydendall, 10 Ill. App. 106.

Maine.— Cumberland Bank *v.* Mayberry, 48 Me. 198; Drake *v.* Rogers, 32 Me. 524; Emery *v.* Vinall, 26 Me. 295.

Massachusetts.— Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57.

Minnesota.— Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Mississippi.— Dean *v.* De Lezardi, 24 Miss. 424.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556]; Germania Bank *v.* Distler, 4 Hun (N. Y.) 633, 67 Barb. (N. Y.) 333 [*affirmed* in 64 N. Y. 642]; Breck *v.* Cole, 4 Sandf. (N. Y.) 79.

See 7 Cent. Dig. tit. "Bills and Notes," § 282.

65. By statute in some states the holder of a note purporting to be executed by an agent need not prove the execution or the authority of the agent, unless they are expressly denied in the pleadings (Moore *v.* Holmes, 68 Minn. 108, 70 N. W. 872; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466; Brashear *v.* Martin, 25 Tex. 202), and in England the rule of the text is changed as to bank drafts by 16 & 17 Vict. c. 59, § 19 (Charles *v.* Blackwell, 2 C. P. D. 151, 46 L. J. C. P. 368, 36 L. T. Rep. N. S. 195, 25 Wkly. Rep. 772, 1 C. P. Div. 548).

Where the agent is an officer of an incorporated company, his authority as agent is sometimes to be presumed from his office. Thus the cashier of a bank will be presumed to have authority to transfer its negotiable securities by indorsement (Wild *v.* Passamaquoddy Bank, 3 Mason (U. S.) 505, 29 Fed. Cas. No. 17,646), but where the charter of the company provides that its affairs shall be conducted by a board of directors, it will not be presumed that the president and secretary have authority by virtue of their office to make notes for the company (McCullough *v.* Moss, 5 Den. (N. Y.) 567).

66. *Illinois.*— Wallace *v.* Wallace, 8 Ill. App. 69.

Iowa.— Miller *v.* House, 67 Iowa 737, 25 N. W. 899.

Louisiana.— Barriere *v.* Fortier, 23 La. Ann. 274.

Massachusetts.— Northampton Bank *v.* Pepoon, 11 Mass. 288.

Michigan.— New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344, 6 N. W. 823; Spicer *v.* Smith, 23 Mich. 96.

Missouri.— Cravens *v.* Gillilan, 63 Mo. 28; Swearingen *v.* Knox, 10 Mo. 31; State Bank *v.* Scott, 1 Mo. 744.

New Jersey.— Flax, etc., Mfg. Co. *v.* Ballentine, 16 N. J. L. 454.

New York.— Knight *v.* Lang, 2 Abb. Pr. (N. Y.) 227.

See, generally, PRINCIPAL AND AGENT; and 7 Cent. Dig. tit. "Bills and Notes," § 1649.

If a note be given by the trustees of a school district their authority must be shown. Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

If a note be made by the selectmen of a town the holder must show their authority to bind the town in such manner. Rich *v.* Errol, 51 N. H. 350; Great Falls Bank *v.* Farmington, 41 N. H. 32; Andover *v.* Grafton, 7 N. H. 298.

If the agent who sells a note for his principal gives an express warranty of its genuineness his authority so to do must be shown by the holder of the paper. Wilder *v.* Cowles, 100 Mass. 487.

subsequent adoption by the principal of the unauthorized signature as his own.[67]

(E) *Execution by Partner.* A note made by an individual partner in the firm-name is *prima facie* the act of the firm done in the course of its partnership business;[68] but a note executed in the individual names of all the partners is not *prima facie* a partnership note or evidence of a partnership debt[69] and if the name of an individual partner is the same as that of the firm, the paper executed in such name is presumptively that of the individual and not of the firm.[70]

(II) *DELIVERY*—(A) *In General.* Delivery is in general presumed from possession of the bill or note,[71] but this presumption that a promissory note

67. Cravens *v.* Gillilan, 63 Mo. 28.

68. *Indiana.*— Ensminger *v.* Marvin, 5 Blackf. (Ind.) 210.

Kansas.— Adams *v.* Ruggles, 17 Kan. 237.

Kentucky.— Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

Maryland.— Manning *v.* Hays, 6 Md. 5; Thurston *v.* Lloyd, 4 Md. 283.

Michigan.— Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192.

Minnesota.— Wilson *v.* Richards, 28 Minn. 337, 9 N. W. 872.

Missouri.— Feurt *v.* Brown, 23 Mo. App. 332.

New York.— National Union Bank *v.* Landon, 66 Barb. (N. Y.) 193; Whitaker *v.* Brown, 16 Wend. (N. Y.) 505.

See, generally, PARTNERSHIP.

Indorsement by partner.— Where the payees are a firm, the indorsement by one of the firm is *prima facie* on partnership account. McConeghy *v.* Kirk, 68 Pa. St. 200.

69. Trowbridge *v.* Cushman, 24 Pick. (Mass.) 310; Dunnica *v.* Clinkscales, 73 Mo. 500; Gay *v.* Johnson, 45 N. H. 587; Richardson *v.* Huggins, 23 N. H. 106; Buffum *v.* Seaver, 16 N. H. 160; Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. 180.

70. *Maine.*— Mercantile Bank *v.* Cox, 38 Me. 500.

Massachusetts.—Manufacturers', etc., Bank *v.* Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369.

New York.— Chemung Nat. Bank *v.* Ingraham, 58 Barb. (N. Y.) 290; Rochester Bank *v.* Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

United States.— U. S. Bank *v.* Binney, 5 Mason (U. S.) 176, 28 Fed. Cas. No. 16,791.

England.— Furze *v.* Sharwood, 2 Q. B. 388, 2 G. & D. 116, 6 Jur. 554, 11 L. J. Q. B. 119, 42 E. C. L. 726; Wintle *v.* Crowther, 1 Cr. & J. 316, 9 L. J. Exch. O. S. 65, 1 Tyrw. 210.

A contrary presumption has been made in the case of a loan to one who carried on his partnership and private business in the same individual name and gave his check in payment. Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165. *Compare* Burroughs' Appeal, 26 Pa. St. 264.

71. *Arkansas.*— Williams *v.* Williams, 13 Ark. 421; Mitchell *v.* Conley, 13 Ark. 414.

California.— Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Shain *v.* Sullivan, 106 Cal. 208, 39 Pac. 606.

Connecticut.—McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.

Florida.— State *v.* Suwanee County, 21 Fla. 1.

Georgia.— Cox *v.* Adams, 2 Ga. 158, holding that even where a note originally payable to "B, or bearer" is in the possession of C indorsed by B, delivery to B will be presumed from C's possession.

Illinois.— Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626.

Indiana.— Brooks *v.* Allen, 62 Ind. 401; Napier *v.* Mayhew, 35 Ind. 276; Mahon *v.* Sawyer, 18 Ind. 73; Garrigus *v.* Home Frontier, etc., Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262.

Kansas.— Schallehn *v.* Hibbard, 64 Kan. 601, 68 Pac. 61.

Louisiana.— See Weems *v.* Ventress, 14 La. Ann. 267.

Maryland.— Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965.

Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Missouri.— Hurt *v.* Ford, (Mo. 1896) 36 S. W. 671.

New York.— Kidder *v.* Horrobin, 72 N. Y. 159; Bellows *v.* Folsom, 4 Rob. (N. Y.) 43; Beaman *v.* Lyon, 27 N. Y. Wkly. Dig. 168.

North Carolina.— Pate *v.* Brown, 85 N. C. 166.

Vermont.— Woodford *v.* Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

But see Lloyd *v.* Sandilands, Gow 13, 5 E. C. L. 850, where possession of a check by the payee was held not to be evidence of its delivery to him by the maker.

See 7 Cent. Dig. tit. "Bills and Notes," § 1649.

Presumption of acceptance by payee on delivery by agent.— Where delivery is made to a payee's agent, his acceptance may be presumed and the delivery is complete. Gordon *v.* Adams, 127 Ill. 223, 19 N. E. 557 [*citing* Bodley *v.* Higgins, 73 Ill. 375; Thompson *v.* Candor, 60 Ill. 244].

Where a note is found among the papers of a deceased payee its proper delivery is to be presumed (Holliday *v.* Lewis, 14 Hun (N. Y.) 478), but a note payable "to Aurilla Ballou, . . . if she called for it before she deceased, if not, to be paid to Daniel M. Blanchard by her order" has been held to be Blanchard's property, and recoverable as such from Ballou's executor, although found among the

or bill of exchange was delivered, arising from possession of the instrument by the payee, may be rebutted.[72]

(B) *Place of Delivery.* In the absence of place of date and of other evidence of place of delivery the maker's residence is *prima facie* the place of delivery.[73]

(C) *Time of Delivery.* In the absence of evidence to the contrary it is presumed that a bill or note was delivered at the time it bears date.[74]

b. Drawing and Acceptance of Bill — (I) *Drawing of Bill.* The law merchant presumes that a bill of exchange is drawn against funds provided to meet it.[75] If, however, a bill is drawn without funds provided to meet it, the law will presume that the drawer had no expectation that it would be paid and consequently that he was not injured by want of presentment and notice, and such presentment and notice are therefore unnecessary as to him.[76]

latter's papers at her death (Blanchard *v.* Sheldon, 43 Vt. 512). So if found among papers of a deceased person who is a stranger to it, and whose representative makes no claim to it, no delivery to the payee will be presumed, and delivery, actual or constructive, must be shown (Mahon *v.* Sawyer, 18 Ind. 73), and a note intended for a gift, and found among waste papers of the maker after her death, is not presumed to have been delivered (Blanchard *v.* Williamson, 70 Ill. 647).

72. Hurt *v.* Ford, (Mo. 1896) 36 S. W. 671.

73. Harmon *v.* Wilson, 1 Duv. (Ky). 322.

74. *Illinois.*— Knisely *v.* Sampson, 100 Ill. 573; Baldwin *v.* Freydendall, 10 Ill. App. 106.

Iowa.— Sayre *v.* Wheeler, 31 Iowa 112.

Kentucky.— Dohoney *v.* Dohoney, 7 Bush (Ky.) 217.

Maine.— Emery *v.* Vinall, 26 Me. 295.

Mississippi.— Morgan *v.* Burrow, (Miss. 1894) 16 So. 432.

New York.— Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70 [*reversing* 5 Hun (N. Y.) 556]; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

Pennsylvania.— Lerch *v.* Bard, 162 Pa. St. 307, 29 Atl. 890; Claridge *v.* Klett, 15 Pa. St. 255.

Vermont.— Woodford *v.* Dorwin, 3 Vt. 82, 81 Am. Dec. 573.

England.— Anderson *v.* Weston, 6 Bing. N. Cas. 296, 4 Jur. 105, 9 L. J. C. P. 194, 37 E. C. L. 631; Hague *v.* French, 3 B. & P. 173; Roberts *v.* Bethell, 12 C. B. 778, 16 Jur. 1087, 22 L. J. C. P. 69, 1 Wkly. Rep. 80, 74 E. C. L. 778; Giles *v.* Bourne, 2 Chit. 300, 6 M. & S. 73, 18 E. C. L. 646; Obbard *v.* Betham, 8 L. J. K. B. O. S. 254, M. & M. 483, 22 E. C. L. 569; Smith *v.* Battens, 1 M. & Rob. 341; De la Courtier *v.* Bellamy, 2 Show. 422; Taylor *r.* Kinloch, 1 Stark. 175, 2 E. C. L. 74.

This presumption will not be made in favor of a receipt indorsed on a bond taking it out of the operation of the statute of limitations, where the writer had an interest in falsifying the date. *In re* Cremer, 5 Watts & S. (Pa.) 331.

75. *Connecticut.*— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Missouri.— Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115.

New York.— Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

Tennessee.— Golladay *v.* Union Bank, 2 Head (Tenn.) 57, although the drawer may have waived notice, and although acceptance of the bill may have been refused.

Texas.— Cole *v.* Wintercost, 12 Tex. 118.

England.— Nickolson *v.* Gouthit, 2 H. Bl. 609, 3 Rev. Rep. 527; Meggadon *v.* Holt, 12 Mod. 15, 1 Show. 317; Tatlock *v.* Harris, 3 T. R. 174; Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242.

76. *Arkansas.*— Sullivan *v.* Deadman, 23 Ark. 14.

Illinois.— Brower *v.* Rupert, 24 Ill. 182.

Kentucky.— Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374.

Maryland.— Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 468.

Mississippi.—Carson *v.* Alexander, 34 Miss. 528.

Missouri.— Merchants' Bank *v.* Easley, 44 Mo. 286, 100 Am. Dec. 287.

New York.— Franklin *v.* Vanderpool, 1 Hall (N. Y.) 78; Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139.

United States.— Read *v.* Wilkinson, 2 Wash. (U. S.) 514, 20 Fed. Cas. No. 11,611; Baker *v.* Gallagher, 1 Wash. (U. S.) 461, 2 Fed. Cas. No. 768.

England.— Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242; *Ex p.* Heath, 2 Ves. & B. 240.

This rule applies also to presentment for acceptance and notice of non-acceptance (Tarver *v.* Nance, 5 Ala. 712), and to foreign, as well as to inland, bills (Legge *v.* Thorpe, 2 Campb. 310, 12 East 171; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605; Bickerdike *v.* Bollman, 1 T. R. 405, 1 Rev. Rep. 242), and it is not necessary for the holder to prove in such case that the drawer was not injured by the want of presentment or notice (Fitzgerald *v.* Williams, 6 Bing. N. Cas. 68, 9 L. J. C. P. 41, 8 Scott 271, 37 E. C. L. 512).

The want of funds is only presumptive evidence that the drawer had no reasonable expectation of its being paid and the burden of proof is on the holder to show that there was no reasonable expectation (Hopkirk *v.* Page, 2 Brock. (U. S.) 20, 12 Fed. Cas. No. 6,697) and that the drawer was not injured by the

(II) *Acceptance of Bill* — (A) *In General.* Every acceptance raises the presumption of funds in the drawee's hands applicable to the payment of the bill,[77] especially if the bill request the drawee to pay "if in funds."[78] As between the accepter and the drawer, indorser, or other holder, for whose accommodation the acceptance was given, this presumption may be rebutted, and the true relation of the parties to each other shown.[79]

(B) *Conditional Acceptance.* Where an acceptance is upon a condition, the burden of proving that the condition has been performed is on the holder of the bill.[80]

delay (Hamlin *v.* Simpson, 105 Iowa 125, 74 N. W. 906, 44 L. R. A. 397).

77. *Alabama.*— Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Capital City Ins. Co. *v.* Quinn, 73 Ala. 558.

Arkansas.— Byrd *v.* Bertrand, 7 Ark. 321.

Connecticut.— Jarvis *v.* Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Georgia.— Flournoy *v.* Jeffersonville First Nat. Bank, 78 Ga. 222, 2 S. E. 547.

Illinois.— Gillilan *v.* Myers, 31 Ill. 525; Parks *v.* Nichols, 20 Ill. App. 143.

Indiana.— Pilkington *v.* Woods, 10 Ind. 432.

Kentucky.— Turner *v.* Browder, 5 Bush (Ky.) 216; Bryne *v.* Schwing, 6 B. Mon. (Ky.) 199.

Louisiana.— Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Eastin *v.* Osborn, 26 La. Ann. 153.

Maine.— Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

Missouri.—Adams *v.* Darby, 28 Mo. 162, 75 Am. Dec. 115; Klopfer *v.* Levi, 33 Mo. App. 322.

Nebraska.— Trego *v.* Lowrey, 8 Nebr. 238.

New York.— Heuertematte *v.* Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657; Belmont *v.* Coleman, 21 N. Y. 96; Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409; Healy *v.* Gilman, 1 Bosw. (N. Y.) 235; Atlantic F. & M. Ins. Co. *v.* Boies, 6 Duer (N. Y.) 583. See also Doyle *v.* Unglish, 143 N. Y. 556, 38 N. E. 711, 62 N. Y. St. 807; Mechanics' Bank *v.* Livingston, 33 Barb. (N. Y.) 458; Mottram *v.* Mills, 2 Sandf. (N. Y.) 189.

North Carolina.— Jordan *v.* Tarkington, 15 N. C. 357; State Bank *v.* Clark, 8 N. C. 36.

Pennsylvania.— Coursin *v.* Ledlie, 31 Pa. St. 506.

Tennessee.— Bradley *v.* McClellan, 3 Yerg. (Tenn.) 301.

Texas.— Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 703.

United States.— Hortsman *v.* Henshaw, 11 How. (U. S.) 177, 13 L. ed. 653; Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 4 L. ed. 268; Kemble *v.* Lull, 3 McLean (U. S.) 272, 14 Fed. Cas. No. 7,683; Benjamin *v.* Tillman, 2 McLean (U. S.) 213, 3 Fed. Cas. No. 1,304.

England.— Vere *v.* Lewis, 3 T. R. 182.

See 7 Cent. Dig. tit. "Bills and Notes," § 129.

Letter of request.— The presumption applies only in the case of a mercantile bill and not to a mere letter of request. Gillilan *v.* Myers, 31 Ill. 525.

It is also presumptive evidence that the drawer had a reasonable expectation that it would be paid; but the burden of proving such expectation is on the drawer himself, where it appears that he had no funds in the drawee's hands at the time the bill became due. Richie *v.* McCoy, 13 Sm. & M. (Miss.) 541.

If a bill is drawn against merchandise in the accepter's hands, notwithstanding the presumption of funds made against the accepter in favor of a holder for value, there is an implied contract on the drawer's part to indemnify the accepter, upon which he will be liable to the accepter if the goods received prove insufficient to cover the bill. Hidden *v.* Waldo, 55 N. Y. 294; Blackmar *v.* Thomas, 28 N. Y. 67. But to recover against the accommodated drawer he must first prove the insufficiency of the goods sold, that being his primary fund for reimbursement. Gihon *v.* Stanton, 9 N. Y. 476.

78. Kemble *v.* Lull, 3 McLean (U. S.) 272, 14 Fed. Cas. No. 7,683.

79. Parks *v.* Nichols, 20 Ill. App. 143; Trego *v.* Lowrey, 8 Nebr. 238; Hidden *v.* Waldo, 55 N. Y. 294.

This presumption is rebutted if the drawing and acceptance are both for the payee's accommodation, under an agreement that the accepter shall look to the payee for indemnity (Thurman *v.* Van Brunt, 19 Barb. (N. Y.) 409), and if a bill is drawn upon a letter of credit to enable the drawer to buy goods, this will overcome the presumption, and the accepter, knowing this fact, cannot hold a joint drawer who has signed the bill for the accommodation of his co-drawer (Turner *v.* Browder, 5 Bush (Ky.) 216).

80. *Alabama.*—Andrews *v.* Baggs, Minor (Ala.) 173, 12 Am. Dec. 47.

Arkansas.— Owen *v.* Lavine, 14 Ark. 389; Henry *v.* Hazen, 5 Ark. 401.

California.— Nagle *v.* Homer, 8 Cal. 353.

Georgia.— Marshall *v.* Clary, 44 Ga. 511.

Illinois.— Cummings *v.* Hummer, 61 Ill. App. 393.

Kansas.— Liggett *v.* Weed, 7 Kan. 273.

Maine.— Head *v.* Sleeper, 20 Me. 314.

Mississippi.— Shackelford *v.* Hooker, 54 Miss. 716; Van Vacter *v.* Flack, 1 Sm. & M. (Miss.) 393, 40 Am. Dec. 100.

Missouri.— Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174.

Nebraska.— Palmer *v.* Rice, 36 Nebr. 844, 55 N. W. 256.

(c) *Place of Acceptance.* In the absence of any proof as to the place of acceptance it will be presumed that a bill of exchange was accepted where dated.[81]

(d) *Time of Acceptance.* The date of an acceptance is presumptively the time when it was made.[82]

c. Consideration — (i) *In General.* Unlike other contracts[83] the law presumes a consideration in case of commercial paper, and this presumption applies to all negotiable bills of exchange, notes, or checks,[84] to indorsements

New Jersey.— Rice *v.* Porter, 16 N. J. L. 440.

New York.— Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Pennsylvania.— Mason *v.* Graff, 35 Pa. St. 448.

Texas.— Carlisle *v.* Hooks, 58 Tex. 420.

United States.— Lacon First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609; Read *v.* Wilkinson, 2 Wash. (U. S.) 514, 20 Fed. Cas. No. 11,611.

England.— Gammon *v.* Schmoll, 1 Marsh. 80, 5 Taunt. 344, 1 E. C. L. 182.

See 7 Cent. Dig. tit. "Bills and Notes," § 1664.

Condition not on bill.— Where an acceptance is upon a condition not written on the bill itself the burden of proving the condition is upon the accepter. Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Mason *v.* Hunt, Dougl. 284; Clarke *v.* Cock, 4 East 57; Kaines *v.* Knightly, Skin. 54; Bowerbank *v.* Monteiro, 4 Taunt. 844, 14 Rev. Rep. 679.

81. Blossman *v.* Mather, 5 La. Ann. 335.

82. Glossop *v.* Jacob, 4 Campb. 227, 1 Stark. 69, 2 E. C. L. 36; Roberts *v.* Bethell, 12 C. B. 778, 16 Jur. 1087, 22 L. J. C. P. 69, 1 Wkly. Rep. 80, 74 E. C. L. 778.

If there be no express date to the acceptance the date of the bill must be presumed to have been the date of the acceptance, or at least it will be presumed to have been accepted before its maturity. Smith *v.* Edgeworth, 3 Allen (Mass.) 233; Roberts *v.* Bethell, 12 C. B. 778, 16 Jur. 1087, 22 L. J. C. P. 69, 1 Wkly. Rep. 80, 74 E. C. L. 778; Begbie *v.* Levi, 1 Cr. & J. 180, 9 L. J. Exch. O. S. 51, 1 Tyrw. 130.

83. See, generally, CONTRACTS.

In the case of a sealed note a consideration is of course presumed.

Maryland.— Snyder *v.* Jones, 38 Md. 542.

New Jersey.— Magie *v.* Union County Tp., 40 N. J. L. 453; Aller *v.* Aller, 40 N. J. L. 446.

New York.— Conway *v.* Williams, 2 Hun (N. Y.) 642.

North Carolina.— Wester *v.* Bailey, 118 N. C. 193, 24 S. E. 9; Angier *v.* Howard, 94 N. C. 27.

Pennsylvania.— Mack's Appeal, 68 Pa. St. 231.

See 7 Cent. Dig. tit. "Bills and Notes," § 1655.

Under a statute abolishing the distinction between simple contracts and those made under seal the consideration of a sealed note may be inquired into, although executed in another state, where the seal conclusively imports a consideration. Williams *v.* Haines, 27 Iowa 251, 1 Am. Rep. 268.

84. *Alabama.*— Martin *v.* Foster, 83 Ala. 213, 3 So. 422; Bird *v.* Wooley, 23 Ala. 717; Thompson *v.* Hall, 16 Ala. 204; Thompson *v.* Armstrong, 5 Ala. 383; Jones *v.* Rives, 3 Ala. 11.

Arkansas.— Ware *v.* Kelly, 22 Ark. 441; Cheney *v.* Higginbotham, 10 Ark. 273; Greer *v.* George, 8 Ark. 131; Gage *v.* Melton, 1 Ark. 224.

California.— Younglove *v.* Cunningham, (Cal. 1896) 43 Pac. 755; Poirier *v.* Gravel, 88 Cal. 79, 25 Pac. 962; Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

Colorado.— Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Cowan *v.* Hallack, 9 Colo. 572, 13 Pac. 700.

Connecticut.— Bristol *v.* Warner, 19 Conn. 7; Camp *v.* Tompkins, 9 Conn. 545; Edgerton *v.* Edgerton, 8 Conn. 6.

Delaware.— Kennedy *v.* Murdock, 5 Harr. (Del.) 263.

District of Columbia.— Johnson *v.* Wright, 2 App. Cas. (D. C.) 216.

Florida.—McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Lines *v.* Smith, 4 Fla. 47.

Georgia.— Gallagher *v.* Kiley, 115 Ga. 420, 41 S. E. 613; Rowland *v.* Harris, 55 Ga. 141; Brewer *v.* Brewer, 7 Ga. 584; Daniel *v.* Andrews, Dudley (Ga.) 157.

Hawaii.— Macfarlane *v.* Lowell, 9 Hawaii 438; Lathrop *v.* Kamakakehau, 1 Hawaii 160.

Illinois.— McMickey *v.* Safford, 197 Ill. 540, 64 N. E. 540; Nickerson *v.* Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Hulme *v.* Renwick, 16 Ill. 371; Mason *v.* Buckmaster, 1 Ill. 27; Safford *v.* Graves, 56 Ill. App. 499.

Indiana.— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245; Keesling *v.* Watson, 91 Ind. 578; Du Pont *v.* Beck, 81 Ind. 271; Durland *v.* Pitcairn, 51 Ind. 426; Beeson *v.* Howard, 44 Ind. 413; Nichols *v.* Woodruff, 8 Blackf. (Ind.) 493; Pritchett *v.* Sheridan, (Ind. App. 1902) 63 N. E. 865.

Iowa.— Wolf *v.* Wolf, 97 Iowa 279, 66 N. W. 170; McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499; Thompson *v.* Maugh, 3 Greene (Iowa) 342.

Kansas.—Sollenberger *v.* Stephens, 46 Kan. 386, 26 Pac. 690.

Kentucky.— Cotton *v.* Graham, 84 Ky. 672, 8 Ky. L. Rep. 658, 2 S. W. 647; Henderson, etc., R. Co. *v.* Moss, 2 Duv. (Ky.) 242; Early *v.* McCart, 2 Dana (Ky.) 414; Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599; Powell *v.* Flan-

of such paper, inuring to the benefit of the holder in an action against the indor-

ary, 22 Ky. L. Rep. 908, 59 S. W. 5; James *v.* Hayden, 10 Ky. L. Rep. 534.

Louisiana.— Mahier *v.* Henrie, 28 La. Ann. 246; Union Bank *v.* Ross, 21 La. Ann. 513; Byrne *v.* Grayson, 15 La. Ann. 457; Martin *v.* Donovan, 15 La. Ann. 41; Harrison *v.* Poole, 4 Rob. (La.) 193; Davidson *v.* Keyes, 2 Rob. (La.) 254, 38 Am. Dec. 209.

Maine.— Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410; Bourne *v.* Ward, 51 Me. 191; Foster *v.* Paulk, 41 Me. 425; Smith *v.* Poor, 37 Me. 462; Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Maryland.— Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322.

Massachusetts.— Huntington *v.* Shute, 180 Mass. 371, 62 N. E. 380; Whitney *v.* Clary, 145 Mass. 156, 13 N. E. 393; Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726; Estabrook *v.* Boyle, 1 Allen (Mass.) 412; Morris *v.* Bowman, 12 Gray (Mass.) 467.

Michigan.— Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Matteson *v.* Morris, 40 Mich. 52.

Minnesota.— Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286; Nichols, etc., Co. *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110; Adams *v.* Adams, 25 Minn. 72; Pinney *v.* King, 21 Minn. 514; Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228.

Mississippi.— Moore *v.* Mickell, Walk. (Miss.) 231.

Missouri.— Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; Glasscock *v.* Glasscock, 66 Mo. 627; Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215; Caples *v.* Branham, 20 Mo. 244, 64 Am. Dec. 183; Muldrow *v.* Caldwell, 7 Mo. 563; Rector *v.* Fornier, 1 Mo. 204; Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39; Wood *v.* Flanery, 89 Mo. App. 632.

Nebraska.— Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

New Hampshire.— Shaw *v.* Shaw, 60 N. H. 565; Chesley *v.* Chesley, 37 N. H. 229; Coburn *v.* Odell, 30 N. H. 540; Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376; Cross *v.* Rowe, 22 N. H. 77.

New York.— Hegeman *v.* Moon, 131 N. Y. 462, 30 N. E. 487, 43 N. Y. St. 662; Langley *v.* Wadsworth, 99 N. Y. 61, 1 N. E. 106; Raubitschek *v.* Bank, 80 N. Y. 478; Bringman *v.* Von Glahn, 71 N. Y. App. Div. 537, 75 N. Y. Suppl. 845; Mortimer *v.* Chambers, 63 Hun (N. Y.) 335, 17 N. Y. Suppl. 874, 43 N. Y. St. 365; Hale *v.* Shannon, 57 Hun (N. Y.) 466, 11 N. Y. Suppl. 129, 32 N. Y. St. 1079; James *v.* Chalmers, 5 Sandf. (N. Y.) 52 (in favor of a purchaser after maturity); Olsen *v.* Ensign, 7 Misc. (N. Y.) 682, 28 N. Y. Suppl. 38, 58 N. Y. St. 378; White *v.* Davis, 17 N. Y. Suppl. 548, 42 N. Y. St. 901; Troy Bank *v.* Topping, 13 Wend. (N. Y.) 557.

North Carolina.— Campbell *v.* McCormac, 90 N. C. 491; McArthur *v.* McLeod, 51 N. C. 475; Harwood *v.* Crowell, 3 N. C. 396.

Ohio.— Sterling *v.* Kious, 7 Ohio, Pt. II, 237; Ring *v.* Foster, 6 Ohio 279; Richmond *v.* Patterson, 3 Ohio 368; Mors *v.* McCloud, 2 Ohio 5; Murphy *v.* Hagerman, Wright (Ohio) 293.

Oregon.— Flint *v.* Phipps, 16 Oreg. 437, 19 Pac. 543.

Pennsylvania.— Conmey *v.* Macfarlane, 97 Pa. St. 361; Hartman *v.* Shaffer, 71 Pa. St. 312; Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607; Knight *v.* Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99.

South Carolina.—Charleston Bank *v.* Chambers, 11 Rich. (S. C.) 657; Chappell *v.* Proctor, Harp. (S. C.) 49.

South Dakota.— Niblack *v.* Champeny, 12 S. D. 165, 72 N. W. 402; Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074.

Tennessee.— Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804.

Texas.— Newton *v.* Newton, 77 Tex. 508, 14 S. W. 157; Harris *v.* Cato, 26 Tex. 338.

Utah.— Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont.— Willard *v.* Pinard, 65 Vt. 160, 26 Atl. 67; Hathaway *v.* Hagan, 59 Vt. 75, 8 Atl. 678; Arnold *v.* Sprague, 34 Vt. 402; Middlebury *v.* Case, 6 Vt. 165.

Virginia.— Terry *v.* Ragsdale, 33 Gratt. (Va.) 342; Blair *v.* Wilson, 28 Gratt. (Va.) 165; Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

Washington.— Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

West Virginia.— McClain *v.* Lowther, 35 W. Va. 297, 13 S. E. 1003.

United States.— Lipsmeier *v.* Vehslage, 29 Fed. 175; Halsted *v.* Lyon, 2 McLean (U. S.) 226, 11 Fed. Cas. No. 5,968; McClintick *v.* Johnston, 1 McLean (U. S.) 414, 15 Fed. Cas. No. 8,700; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204; Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

England.— Holliday *v.* Atkinson, 5 B. & C. 501, 8 D. & R. 168, 29 Rev. Rep. 299, 11 E. C. L. 558.

Canada.— Larraway *v.* Harvey, 14 Quebec Super. Ct. 97; Mair *v.* McLean, 1 U. C. Q. B. 455; Sutherland *v.* Patterson, (Mich. T.) 6 Vict.

See also *supra*, I, C, 1, i, (I), (A) [7 Cyc. 609]; and 7 Cent. Dig. tit. "Bills and Notes," § 1653.

In the case of a bank check it is presumed that the drawer was, at the time of giving the check, indebted in the amount named to the payee. Matter of Humfreville, 6 N. Y. App. Div. 535, 39 N. Y. Suppl. 550; Mills *v.* McMullen, 4 N. Y. App. Div. 27, 38 N. Y. Suppl. 705, 74 N. Y. St. 165; Poucher *v.* Scott, 33 Hun (N. Y.) 223; Koehler *v.* Adler,

ser,[85] and to acceptances.[86] In some jurisdictions even a non-negotiable note imports a consideration;[87] but this is not so in others[88] and was not so at common law.[89] On the other hand this presumption is not to be extended to the signature of a co-maker who signs a note after its delivery[90] and may be rebutted by any competent evidence.[91]

47 N. Y. Super. Ct. 518; Terry *v.* Ragsdale, 33 Gratt. (Va.) 342.

In the case of a bill of exchange the natural and usual presumption is of a debt due from the drawee to the drawer. Byrd *v.* Bertrand, 7 Ark. 321; Doyle *v.* Unglish, 143 N. Y. 556, 38 N. E. 711, 62 N. Y. St. 801.

In the case of a note it is presumed that it is given in settlement of the maker's debt to the payee, and that it has settled all such indebtedness up to its date.

Alabama.— Copeland *v.* Clark, 2 Ala. 388.

District of Columbia.— Tyler *v.* Busey, 3 MacArthur (D. C.) 344.

Georgia.— Piper *v.* Wade, 57 Ga. 223; Broughton *v.* Thornton, 50 Ga. 568.

Indiana.— Bishop *v.* Welch, 35 Ind. 521.

Iowa.— Grimmell *v.* Warner, 21 Iowa 11.

New York.— De Freest *v.* Bloomingdale, 5 Den. (N. Y.) 304.

West Virginia.— Mahnke *v.* Neale, 23 W. Va. 57.

85. *Alabama.*— Connerly *v.* Planters', etc., Ins. Co., 66 Ala. 432.

California.— Scribner *v.* Hanke, 116 Cal. 613, 48 Pac. 714; Luning *v.* Wise, 64 Cal. 410, 1 Pac. 495, 874.

Illinois.— Wightman *v.* Hart, 37 Ill. 123.

Indiana.— Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Johnston *v.* Dickson, 1 Blackf. (Ind.) 256.

Louisiana.— New Orleans Canal, etc., Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385.

Missouri.— Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 4 Mo. App. 276.

Ohio.— Dumont *v.* Williamson, 18 Ohio St. 515, 98 Am. Dec. 186.

Pennsylvania.— Long *v.* Spencer, 78 Pa. St. 303.

United States.— McClintick *v.* Johnston, 1 McLean (U. S.) 414, 15 Fed. Cas. No. 8,700.

But if the discount is procured by the maker, the indorsement is *prima facie* for his accommodation.

California.— See Hendrie *v.* Berkowitz, 37 Cal. 113, 99 Am. Dec. 251.

Kentucky.— See Muhling *v.* Sattler, 3 Metc. (Ky.) 285, 77 Am. Dec. 172.

Louisiana.— Satterfield *v.* Compton, 6 Rob. (La.) 120.

Mississippi.— Bloom *v.* Helm, 53 Miss. 21.

New York.— Jennings *v.* Kosmak, 20 Misc. (N. Y.) 300, 45 N. Y. Suppl. 802. See also Stall *v.* Catskill Bank, 18 Wend. (N. Y.) 466.

Ohio.— Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613.

Pennsylvania.— See Bowman *v.* Cecil Bank, 3 Grant (Pa.) 33.

Tennessee.— Overton *v.* Hardin, 6 Coldw. (Tenn.) 375.

United States.— Lemoine *v.* Bank of North America, 3 Dill. (U. S.) 44, 15 Fed. Cas. No. 8,240. 1 Centr. L. J. 529, 7 Chic. Leg. N. 18, 20 Int. Rev. Rec. 153, 22 Pittsb. Leg. J. 47. See 7 Cent. Dig. tit. "Bills and Notes," § 1665.

86. Spurgeon *v.* Swain, 13 Ind. App. 188, 41 N. E. 397 (parol acceptance); Kendall *v.* Galvin, 15 Me. 131, 32 Am. Dec. 141.

87. *California.*— Rogers *v.* Schulenburg, 111 Cal. 281, 43 Pac. 899; Stewart *v.* Street, 10 Cal. 372.

Indiana.— Louisville, etc., R. Co. *v.* Caldwell, 98 Ind. 245. See also Rogers *v.* Maxwell, 4 Ind. 243.

Missouri.— Taylor *v.* Newman, 77 Mo. 257; Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39.

New York.— Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. 835, 38 N. Y. St. 56, 24 Am. St. Rep. 424, 12 L. R. A. 845 [*affirming* 57 Hun (N. Y.) 518, 11 N. Y. Suppl. 278, 33 N. Y. St. 98]; Mortimer *v.* Chambers, 63 Hun (N. Y.) 335, 17 N. Y. Suppl. 874, 43 N. Y. St. 365; Paine *v.* Noelke, 53 How. Pr. (N. Y.) 273 [*affirmed* in 54 How. Pr. (N. Y.) 333].

Ohio.— Langhorst *v.* Dolle, 8 Ohio Dec. (Reprint) 140, 5 Cinc. L. Bul. 933.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402. See 7 Cent. Dig. tit. "Bills and Notes," § 1653.

88. *Connecticut.*— Bristol *v.* Warner, 19 Conn. 7; Edgerton *v.* Edgerton, 8 Conn. 6.

Illinois.— Wickersham *v.* Beers, 20 Ill. App. 243.

Maine.— Bourne *v.* Ward, 51 Me. 191.

Massachusetts.— Courtney *v.* Doyle, 10 Allen (Mass.) 122.

North Carolina.— Stronach *v.* Bledsoe, 85 N. C. 473; Harwood *v.* Crowell, 3 N. C. 396.

Pennsylvania.— Sidle *v.* Anderson, 45 Pa. St. 464; Bircleback *v.* Wilkins, 22 Pa. St. 26.

Virginia.— Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

89. Wingo *v.* McDowell, 8 Rich. (S. C.) 446.

90. Parkhurst *v.* Vail, 73 Ill. 343; Courtney *v.* Doyle, 10 Allen (Mass.) 122; Clopton *v.* Hall, 51 Miss. 482.

91. *Alabama.*— Litchfield *v.* Falconer, 2 Ala. 280.

Georgia.— Boynton *v.* Twitty, 53 Ga. 214.

Massachusetts.— Barker *v.* Prentiss, 6 Mass. 430.

Mississippi.— Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489.

Nebraska.— Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

Nevada.— Travis *v.* Epstein, 1 Nev. 116.

England.— Abbott *v.* Hendricks, 10 L. J.

(II) "*For Value Received.*" The recital "for value received" in a note imports, or is *prima facie* evidence of, consideration,[92] whether the note is negotiable or not,[93] and the same is true of words of equivalent import.[94]

(III) *Want, Failure, or Illegality of Consideration.*[95] The defendant who sets up any of the foregoing defenses has the burden of proving the want,[96]

C. P. 51, 1 M. & G. 791, 2 Scott N. R. 183, 39 E. C. L. 1029.

See also *infra*, XIV, E, 2, d, (I); and 7 Cent. Dig. tit. "Bills and Notes," § 1738.

If the presumption is rebutted, the burden then falls on plaintiff. Huntington *v.* Shute, 180 Mass. 371, 62 N. E. 380; Campbell *v.* McCormac, 90 N. C. 491; Conmey *v.* Macfarlane, 97 Pa. St. 361.

92. *Alabama.*— Thompson *v.* Armstrong, 5 Ala. 383.

Arkansas.— Richardson *v.* Comstock, 21 Ark. 69.

Colorado.— Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Connecticut.— Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

Hawaii.— Macfarlane *v.* Lowell, 9 Hawaii 438.

Illinois.— Hoyt *v.* Jaffray, 29 Ill. 104; Hill *v.* Todd, 29 Ill. 101.

Kentucky.— Cotton *v.* Graham, 84 Ky. 672, 8 Ky. L. Rep. 658, 2 S. W. 647, for value received, and for love and affection.

Louisiana.— Friedmann *v.* Houghton, 21 La. Ann. 200; North *v.* Troxler, 3 La. Ann. 136; Carrol *v.* Peters, McGloin (La.) 88.

Maine.— Noyes *v.* Smith, (Me. 1886) 5 Atl. 529; Bourne *v.* Ward, 51 Me. 191; Sawyer *v.* Vaughan, 25 Me. 337; Stevens *v.* McIntire, 14 Me. 14.

Massachusetts.— Huntington *v.* Shute, 180 Mass. 371, 62 N. E. 371; Gamwell *v.* Mosely, 11 Gray (Mass.) 173; Black River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387; Noxon *v.* De Wolf, 10 Gray (Mass.) 343; Burnham *v.* Allen, 1 Gray (Mass.) 496; Delano *v.* Bartlett, 6 Cush. (Mass.) 364; Parish *v.* Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

Michigan.— Parsons *v.* Frost, 55 Mich. 230, 21 N. W. 303.

Minnesota.— Frank *v.* Irgins, 27 Minn. 43, 6 N. W. 380; Priedman *v.* Johnson, 21 Minn. 12.

Missouri.— Taylor *v.* Newman, 77 Mo. 257.

New Hampshire.— Child *v.* Moore, 6 N. H. 33.

New York.— Bruyn *v.* Russell, 60 Hun (N. Y.) 280, 14 N. Y. Suppl. 591, 38 N. Y. St. 50; Howell *v.* Wright, 41 Hun (N. Y.) 167; Holliday *v.* Lewis, 14 Hun (N. Y.) 478; Sawyer *v.* McLouth, 46 Barb. (N. Y.) 350; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Benson *v.* Couchman, 1 Code Rep. (N. Y.) 119.

North Carolina.— Stronach *v.* Bledsoe, 85 N. C. 473; Cox *v.* Slade, 13 N. C. 8.

Ohio.— Leonard *v.* Sweetzer, 16 Ohio 1; Dugan *v.* Campbell, 1 Ohio 115.

Pennsylvania.— Messmore *v.* Morrison, 172 Pa. St. 300, 34 Atl. 45.

Texas.— Williams *v.* Edwards, 15 Tex. 41; Bybee *v.* Wadlington, 2 Tex. Unrep. Cas. 464.

Vermont.— Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230; Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

West Virginia.— Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Cook *v.* Gray, Hempst. (U. S.) 84, 6 Fed. Cas. No. 3,156*a*.

England.— Holliday *v.* Atkinson, 5 B. & C. 501, 8 D. & R. 168, 29 Rev. Rep. 295, 11 E. C. L. 558.

See 7 Cent. Dig. tit. "Bills and Notes," § 1653.

In an indorsement such words indicate a consideration adequate to the face of the note (Waldrip *v.* Black, 74 Cal. 409, 15 Pac. 226), but they are not evidence against the assignor of a non-negotiable certificate in an action brought by him against a pledgee of his assignee (Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173).

93. *Maine.*— Bourne *v.* Ward, 51 Me. 191.

Michigan.— Conrad Seipp Brewing Co. *v.* McKittrick, 86 Mich. 191, 48 N. W. 1086.

North Carolina.— Stronach *v.* Bledsoe, 85 N. C. 473.

Ohio.— Leonard *v.* Sweetzer, 16 Ohio 1; Dugan *v.* Campbell, 1 Ohio 115.

Virginia.— Averett *v.* Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

See 7 Cent. Dig. tit. "Bills and Notes," § 1653.

94. Rowland *v.* Harris, 55 Ga. 141 ("for value"); Horn *v.* Fuller, 6 N. H. 511 ("agreeably to my father's last will, I promise"); Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428 (a stub annexed to a note given for services containing the words, "to make the amount the same as Chas. W. Cornell").

95. See also *infra*, XIV, E, 1, e, (II), (C),

96. *Alabama.*— Martin *v.* Foster, 83 Ala. 213, 3 So. 422; Douglass *v.* Eason, 36 Ala. 687.

Arkansas.— Martin *v.* Tucker, 35 Ark. 279; Richardson *v.* Comstock, 21 Ark. 69; Cheney *v.* Higginbotham, 10 Ark. 273; Gage *v.* Melton, 1 Ark. 224.

California.— Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441.

Colorado.— Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Connecticut.— Ross *v.* Webster, 63 Conn. 64, 26 Atl. 476.

Georgia.— Rowland *v.* Harris, 55 Ga. 141.

Hawaii.— Macfarlane *v.* Lowell, 9 Hawaii 438.

failure,[97] or illegality[98] of consideration. The presumption of a valid consider-

Illinois.— Topper *v.* Snow, 20 Ill. 434; McCartney *v.* Washburn, 52 Ill. App. 540; Hardy *v.* Ross, 4 Ill. App. 501.

Indiana.— Beeson *v.* Howard, 44 Ind. 413; Cook *v.* Nohle, 4 Ind. 221; Thomas *v.* Quick, 5 Blackf. (Ind.) 334; Towsey *v.* Shook, 3 Blackf. (Ind.) 267, 25 Am. Dec. 108.

Iowa.— Smith *v.* Griswold, 95 Iowa 684, 64 N. W. 624; McCormick Harvesting Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499; Iowa College *v.* Hill, 12 Iowa 462.

Kansas.— Sollenberger *v.* Stephens, 46 Kan. 386, 26 Pac. 690; Stout *v.* Judd, (Kan. App. 1900) 63 Pac. 662.

Kentucky.— James *v.* Hayden, 10 Ky. L. Rep. 534.

Louisiana.— Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177; Berwin *v.* Gauger, 23 La. Ann. 647; Hawkins *v.* Wiel, 22 La. Ann. 579; Robinson *v.* Doherty, 20 La. Ann. 209; Henderson *v.* Giraudeau, 15 La. Ann. 382; Nevins *v.* Chapman, 15 La. Ann. 353; North *v.* Troxler, 3 La. Ann. 136; Bradford *v.* Cooper, 1 La. Ann. 325.

Maine.— Sawyer *v.* Vaughan, 25 Me. 337.

Massachusetts.— Jennison *v.* Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; Parish *v.* Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378.

Missouri.— Wood *v.* Flanery, 89 Mo. App. 632; Hammett *v.* Barnum, 30 Mo. App. 289; Ewing *v.* Clarke, 8 Mo. App. 570.

Nebraska.— Dinsmore *v.* Stimbert, 12 Nehr. 433, 11 N. W. 872.

New Hampshire.— Coburn *v.* Odell, 30 N. H. 540.

New Jersey.— Duncan *v.* Gilbert, 29 N. J. L. 521.

New York.— Rauhitschek *v.* Blank, 80 N. Y. 478; James *v.* Chalmers, 6 N. Y. 209; Howell *v.* Wright, 41 Hun (N. Y.) 167; Sawyer *v.* McLouth, 46 Barb. (N. Y.) 350; New York Exch. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593; Fitch *v.* Redding, 4 Sandf. (N. Y.) 130; Bottum *v.* Scott, 11 N. Y. St. 514; Orleans Bank *v.* Barry, 1 Den. (N. Y.) 116.

North Carolina.— McArthur *v.* McLeod, 51 N. C. 475.

Oregon.— Flint *v.* Phipps, 16 Oreg. 437, 19 Pac. 543.

Pennsylvania.— Conmey *v.* Macfarlane, 97 Pa. St. 361; Knight *v.* Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99.

South Carolina.— Pryor *v.* Coulter, 1 Bailey (S. C.) 517.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Newton *v.* Newton, 77 Tex. 508, 14 S. W. 157.

Utah.— Nephi First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Washington.— McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

United States.— McClintick *v.* Johnston, 1 McLean (U. S.) 414, 15 Fed. Cas. No. 8,700; Packwood *v.* Clark, 2 Sawy. (U. S.) 546, 18 Fed. Cas. No. 10,656.

England.— Robins *v.* Maidstone, 4 Q. B. 811, Dav. & M. 30, 7 Jur. 694, 12 L. J. Q. B. 321, 45 E. C. L. 811; Bingham *v.* Stanley, 2 Q. B. 117, 1 G. & D. 237, 6 Jur. 381, 10 L. J. Q. B. 319, 42 E. C. L. 598; Whitaker *v.* Edmunds, 1 A. & E. 638, 1 M. & Rob. 366, 28 E. C. L. 301; Collins *v.* Martin, 1 B. & P. 648, 2 Esp. 250, 4 Rev. Rep. 752; Smith *v.* Martin, C. & M. 58, 1 Dowl. N. S. 418, 11 L. J. Exch. 129, 9 M. & W. 304, 41 E. C. L. 37; Percival *v.* Frampton, 2 C. M. & R. 180, 3 Dowl. P. C. 748, 4 L. J. Exch. 139, 5 Tyrw. 579; Mills *v.* Barber, 5 Dowl. P. C. 77, 2 Gale 5, 5 L. J. Exch. 204, 1 M. & W. 425; Fearn *v.* Filica, 14 L. J. C. P. 15, 7 M. & G. 513, 8 Scott N. R. 241, 49 E. C. L. 513.

Canada.— Downie *v.* Francis, 30 L. C. Jur. 22; Coté *v.* Bergeron, 3 Quebec 476; Alexander *v.* Taylor, (Quebec Consol. Dig. 205) C. R. 1880; Sutherland *v.* Patterson, (Mich. T.) 6 Vict.

See 7 Cent. Dig. tit. "Bills and Notes," § 1654.

97. *Alabama.*— Green *v.* Casey, 70 Ala. 417; Douglass *v.* Eason, 36 Ala. 687.

Arkansas.— Richardson *v.* Comstock, 21 Ark. 69; Dickson *v.* Burks, 11 Ark. 307; Cheney *v.* Higginbotham, 10 Ark. 273; Greer *v.* George, 8 Ark. 131; Rankin *v.* Badgett, 5 Ark. 345; Gage *v.* Melton, 1 Ark. 224.

Illinois.— Topper *v.* Snow, 20 Ill. 434.

Louisiana.—Stephens *v.* Lanier, 20 La. Ann. 347; Muggah *v.* Tucker, 10 La. Ann. 683.

Minnesota.— Or partial failure. Bisbee *v.* Torinus, 26 Minn. 165, 12 N. W. 168.

Mississippi.— Gunning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350; Boone *v.* Boone, 58 Miss. 820.

Nebraska.— Crosby *v.* Ritchey, 56 Nehr. 336, 76 N. W. 898.

Pennsylvania.— Conmey *v.* Macfarlane, 97 Pa. St. 361.

South Carolina.— Miller *v.* Deal, 9 Rich. (S. C.) 75.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

Washington.— McKenzie *v.* Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748.

See 7 Cent. Dig. tit. "Bills and Notes," § 1654.

98. *Connecticut.*— Terry *v.* Olcott, 4 Conn. 442.

Georgia.— Hudson *v.* Equitable Mortg. Co., 100 Ga. 83, 26 S. E. 75.

Illinois.— Pixley *v.* Boynton, 79 Ill. 351; Hone *v.* Ammons, 14 Ill. 29; Stanton *v.* Strong, 94 Ill. App. 486; Benson *v.* Morgan, 26 Ill. App. 22.

Indiana.—Pritchett *v.* Sheridan, (Ind. App. 1902) 63 N. E. 865.

Iowa.— Shaulis *v.* Buxton, 115 Iowa 425, 88 N. W. 968; Waterman *v.* Baldwin, 68 Iowa 255, 26 N. W. 435.

Louisiana.— Babcock *v.* Watson, 24 La. Ann. 238; McGuigin *v.* Ochiglevich, 18 La. Ann. 92; Powell *v.* Graves, 14 La. Ann. 860.

Maine.— Hapgood *v.* Needham, 59 Me. 442; Emery *v.* Estes, 31 Me. 155.

ation must be met by proof, and mere denial by averment in the answer is in general not sufficient to rebut the presumption.[99]

d. Transfer and Ownership — (I) *Ownership.* As between the holder and maker possession of a negotiable note is *prima facie* evidence of ownership by the holder.[1] So where one holds a note payable to bearer his title to it will be

Massachusetts.—Pratt *v.* Langdon, 97 Mass. 97, 93 Am. Dec. 61; Wyman *v.* Fiske, 3 Allen (Mass.) 238, 80 Am. Dec. 66; Brigham *v.* Potter, 14 Gray (Mass.) 522.

Michigan.— American Ins. Co. *v.* Cutler, 36 Mich. 261.

Missouri.— American Ins. Co. *v.* Smith, 73 Mo. 368.

New Hampshire.— Doe *v.* Burnham, 31 N. H. 426; Gassett *v.* Godfrey, 26 N. H. 415.

New Jersey.— Allerton *v.* Grundy, 67 N. J. L. 55, 50 Atl. 352.

New York.— White *v.* Benjamin, 138 N. Y. 623, 33 N. E. 1037, 52 N. Y. St. 151; Cuyler *v.* Sanford, 8 Barb. (N. Y.) 225.

North Carolina.—Brown *v.* Kinsey, 81 N. C. 245.

South Carolina.—Pryor *v.* Coulter, 1 Bailey (S. C.) 517.

Tennessee.— Keith *v.* Clarke, 4 Lea (Tenn.) 718.

Texas.— Cundeff *v.* Campbell, 40 Tex. 142.

England.— Edmunds *v.* Groves, 5 Dowl. P. C. 775, 1 Jur. 592, 6 L. J. Exch. 203, M. & H. 211, 2 M. & W. 642; Wyatt *v.* Bulmer, 2 Esp. 538.

See 7 Cent. Dig. tit. "Bills and Notes," § 1656.

That a note for "futures" is for a gaming consideration will not be presumed. Williams *v.* Connor, 14 S. C. 621.

99. Greer *v.* George, 8 Ark. 131; Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234; Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774. But see Goodenough *v.* Huff, 53 Vt. 482, holding that the general issue puts in issue the consideration as well as the execution, and that it is incumbent on plaintiff in such a case to prove the consideration.

By statute in some states the denial of a valid consideration by plea or answer puts the consideration in issue, and throws on plaintiff the burden of proving it. McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Smith *v.* Le Vesque, 25 Fla. 464, 6 So. 263; Reddick *v.* Mickler, 23 Fla. 335, 2 So. 698; Prescott *v.* Johnson, 8 Fla. 391; White *v.* Camp, 1 Fla. 94; Poole *v.* Vanlandingham, 1 Ill. 47; Martin *v.* Donovan, 15 La. Ann. 41; Tissott *v.* Bowles, 18 La. 29; Davis *v.* Travis, 98 Mass. 222; Estabrook *v.* Boyle, 1 Allen (Mass.) 412.

1. *Alabama.*— Jarrell *v.* Lillie, 40 Ala. 271; Broadhead *v.* Jones, 39 Ala. 96; Bird *v.* Wooley, 23 Ala. 717.

Arkansas.— Winship *v.* Merchants' Nat. Bank, 42 Ark. 22.

California.— McCann *v.* Lewis, 9 Cal. 246.

Colorado.—Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523, 44 Pac. 764.

Delaware.— Freeman *v.* Sutton, 3 Houst. (Del.) 264, but holding that the presumption did not arise when the note was payable to the maker's own order and was sent to the holder to enable him to procure its discount for the maker's benefit.

Illinois.— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560; Garvin *v.* Wiswell, 83 Ill. 215; Palmer *v.* Gardiner, 77 Ill. 143; Ransom *v.* Jones, 2 Ill. 291; Ryan *v.* Illinois Trust, etc., Bank, 100 Ill. App. 251; Metcalf *v.* Draper, 98 Ill. App. 399; Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437; Whiteley *v.* Clark, 29 Ill. App. 36; Chapin *v.* Thompson, 7 Ill. App. 288.

Indiana.— Paulman *v.* Claycomb, 75 Ind. 64; Brown *v.* Street, 60 Ind. 8; Tam *v.* Shaw, 10 Ind. 469; Grimes *v.* McAninch, 9 Ind. 278; Bush *v.* Seaton, 4 Ind. 522.

Iowa.— Dickerson *v.* Cass County Bank, (Iowa 1902) 89 N. W. 15; Tolerton, etc., Co. *v.* Anglo-California Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777; Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442; King *v.* Gottschalk, 21 Iowa 512.

Kansas.— O'Keeffe *v.* Frankfort First Nat. Bank, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370; Eggan *v.* Briggs, 23 Kan. 710; Parker *v.* Gilmore, 10 Kan. App. 527, 63 Pac. 20.

Kentucky.—Crosthwait *v.* Misener, 13 Bush (Ky.) 543.

Louisiana.—New Orleans Canal, etc., Co. *v.* Bailey, 18 La. Ann. 676.

Maine.— Southard *v.* Wilson, 29 Me. 56; Scott *v.* Williamson, 24 Me. 343; Lord *v.* Appleton, 15 Me. 270.

Maryland.— Long *v.* Crawford, 19 Md. 220; Ellicott *v.* Martin, 6 Md. 509, 61 Am. Dec. 327; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Massachusetts.— Chaffee *v.* Taylor, 3 Allen (Mass.) 598.

Michigan.— Hogan *v.* Dreifus, 121 Mich. 453, 80 N. W. 254; Barnes *v.* Peet, 77 Mich. 391, 43 N. W. 1025.

Minnesota.— Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117; Tarbox *v.* Gorman, 31 Minn. 62, 16 N. W. 466.

Mississippi.— Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385; Smith *v.* Prestidge, 6 Sm. & M. (Miss.) 478.

Missouri.— Priest *v.* Way, 87 Mo. 16; Fitzgerald *v.* Barker, 85 Mo. 13.

Montana.—Meadowcroft *v.* Walsh, 15 Mont. 544, 39 Pac. 914.

Nebraska.— Ryan *v.* West, 63 Nebr. 894, 89 N. W. 416; Menzie *v.* Smith, 63 Nebr. 666,

presumed from his possession of it,[2] even though the note has been specially

88 N. W. 855; Sanford *v.* Litchenberger, 62 Nebr. 501, 87 N. W. 305.

New Hampshire.— Blodgett *v.* Jackson, 40 N. H. 21; Southwick *v.* Ely, 15 N. H. 541.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617.

New York.— Scoville *v.* Landon, 50 N. Y. 686; Morss *v.* Gleason, 2 Hun (N. Y.) 31; Smith *v.* Schanck, 18 Barb. (N. Y.) 344; Seeley *v.* Engell, 17 Barb. (N. Y.) 530; James *v.* Chalmers, 5 Sandf. (N. Y.) 52 [*affirmed* in 6 N. Y. 209].

North Carolina.— Triplett *v.* Foster, 115 N. C. 335, 20 S. E. 475; Holly *v.* Holly, 94 N. C. 670; Robertson *v.* Dunn, 87 N. C. 191; Pugh *v.* Grant, 86 N. C. 39; Jackson *v.* Love, 82 N. C. 405, 33 Am. Rep. 685.

Oregon.— Sturgis *v.* Baker, 39 Oreg. 541, 65 Pac. 810.

Pennsylvania.— Porter *v.* Gunnison, 2 Grant (Pa.) 297.

South Carolina.— Cone *v.* Brown, 15 Rich. (S. C.) 262.

Tennessee.— Sawyer *v.* Moran, 3 Tenn. Ch. 35.

Texas.— Johnson *v.* Mitchell, 50 Tex. 212, 32 Am. Rep. 602; Willis *v.* Stamps, 36 Tex. 48; Garrett *v.* Findlater, 21 Tex. Civ. App. 635, 53 S. W. 839.

Vermont.— Sanford *v.* Norton, 17 Vt. 285.

Washington.— See Brooks *v.* James, 16 Wash. 335, 47 Pac. 751.

Wisconsin.— Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

United States.— Cheney *v.* Stone, 29 Fed. 885; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

Canada.— Black *v.* Strickland, 3 Ont. 217. See 7 Cent. Dig. tit. "Bills and Notes," § 1826.

2. *Colorado.*— Solomon *v.* Brodie, 10 Colo. App. 353, 50 Pac. 1045.

Georgia.— Greer *v.* Woolfolk, 60 Ga. 623; Cox *v.* Adams, 2 Ga. 158.

Illinois.—Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Garvin *v.* Wiswell, 83 Ill. 215; Jewett *v.* Cook, 81 Ill. 260; Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105; Gilmore *v.* German Sav. Bank, 89 Ill. App. 442; Gale *v.* Rector, 5 Ill. App. 481.

Indiana.— Hall *v.* Allen, 37 Ind. 541; Tam *v.* Shaw, 10 Ind. 469.

Iowa.— Gaskell *v.* Patton, 58 Iowa 163, 12 N. W. 140; Stoddard *v.* Burton, 41 Iowa 582; Breckbill *v.* Stutyman, 3 Greene (Iowa) 572. See also Dawson *v.* Jewett, 4 Greene (Iowa) 157.

Kentucky.—Crosthwait *v.* Misener, 13 Bush (Ky.) 543.

Louisiana.— Booty *v.* Cooper, 18 La. Ann. 565; Bacon *v.* Smith, 2 La. Ann. 441, 46 Am. Dec. 549; Banks *v.* Eastin, 3 Mart. N. S. (La.) 291.

Maryland.— Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Massachusetts.— Holcomb *v.* Beach, 112 Mass. 450; Rider *v.* Taintor, 4 Allen (Mass.) 356; Pettee *v.* Prout, 3 Gray (Mass.) 502, 63 Am. Dec. 778; Beekman *v.* Wilson, 9 Metc. (Mass.) 434; Dole *v.* Weeks, 4 Mass. 451.

Minnesota.— Robinson *v.* Smith, 62 Minn. 62, 64 N. W. 90.

Mississippi.— Smith *v.* Prestidge, 6 Sm. & M. (Miss.) 478.

Missouri.— Fitzgerald *v.* Barker, 85 Mo. 13; Spears *v.* Bond, 79 Mo. 467; Dora *v.* Parsons, 56 Mo. 601; McDonald *v.* Harrison, 12 Mo. 447; Lachance *v.* Loeblein, 15 Mo. App. 460.

Nebraska.— Hastings City Nat. Bank *v.* Thomas, 46 Nebr. 861, 65 N. W. 895; McDonald *v.* Aufdengarten, 41 Nebr. 40, 59 N. W. 762.

New Hampshire.— Hopkins *v.* Farwell, 32 N. H. 425.

New York.— Farmers', etc., Bank *v.* Wadsworth, 24 N. Y. 547; James *v.* Chalmers, 6 N. Y. 209; Smith *v.* Schanck, 18 Barb. (N. Y.) 344 [*overruling* Brisbane *v.* Pratt, 4 Den. (N. Y.) 63]; Ogilby *v.* Wallace, 2 Hall (N. Y.) 553; Townsend *v.* Billinge, 1 Hilt. (N. Y.) 353; Morton *v.* Rogers, 14 Wend. (N. Y.) 575; Robinson *v.* Crandall, 9 Wend. (N. Y.) 425; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 2 Am. Dec. 126.

North Carolina.— Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601; Jackson *v.* Love, 82 N. C. 405, 33 Am. Rep. 685.

North Dakota.— Shepard *v.* Hanson, 9 N. D. 249, 83 N. W. 20.

Ohio.— Sterling *v.* Kious, 7 Ohio, Pt. II, 237.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195.

Rhode Island.— See Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

South Carolina.— Cone *v.* Brown, 15 Rich. (S. C.) 262; Jackson *v.* Heath, 1 Bailey (S. C.) 355; Jones *v.* Westcott, 2 Brev. (S. C.) 166, 3 Am. Dec. 704. But see Richardson *v.* Gower, 10 Rich. (S. C.) 109.

Tennessee.— Wells *v.* Schoonover, 9 Heisk. (Tenn.) 805; Smyth *v.* Carden, 1 Swan (Tenn.) 28.

Texas.— Texas Banking, etc., Co. *v.* Turnley, 61 Tex. 365; Rider *v.* Duval, 28 Tex. 622; Molin *v.* Manning, 2 Tex. 351; Thompson *v.* Wheeler, 2 Tex. 260.

Vermont.— Potter *v.* Bartlett, 6 Vt. 248.

West Virginia.—Spencer Bank *v.* Simmons, 43 W. Va. 79, 27 S. E. 299.

Wisconsin.— Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

United States.— Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170; Washington First Nat. Bank *v.* Texas, 20 Wall. (U. S.) 72, 22 L. ed. 295; Edwards *v.* Bates County, 99 Fed. 905, 40 C. C. A. 161.

England.— McLean *v.* Clydesdale Banking Co., 9 App. Cas. 95, 50 L. T. Rep. N. S. 457.

indorsed, and not further indorsed by the special indorsee to the holder.[3] The same is true of one in possession of a note payable to a particular person "or bearer"[4] or of a note indorsed in blank.[5] In like manner possession by the

See 7 Cent. Dig. tit. "Bills and Notes," § 1829.

3. Rider *v.* Taintor, 4 Allen (Mass.) 356. See also Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131, holding that where bills of exchange were specially indorsed, the indorsements still continued uncanceled, and there were no reindorsements or other evidence of any subsequent assignment, possession by the original indorser is *prima facie* evidence that he is the owner of them. But see Hart *v.* Windle, 15 La. 265; Veitch *v.* Basye, 2 Cranch C. C. (U. S.) 6, 28 Fed. Cas. No. 16,909, which hold that where plaintiff has by special indorsement parted with his interest in the note in suit to another it is necessary to a recovery that he show his title by a retransfer.

4. Cox *v.* Adams, 2 Ga. 158; Chinberg *v.* Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462; Pettee *v.* Prout, 3 Gray (Mass.) 502, 63 Am. Dec. 778; Truesdell *v.* Thompson, 12 Metc. (Mass.) 565 (irrespective of the addition, "said note to be kept in the hands of" the particular person, the actual holder and plaintiff); Johnson *v.* Mitchell, 50 Tex. 212, 32 Am. Rep. 602.

5. *Alabama.*— Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444; Beeson *v.* Lippman, 52 Ala. 276; Alabama, etc., R. Co. *v.* Sanford, 36 Ala. 703; Henley *v.* Busch, 33 Ala. 636.

California.— State Bank *v.* J. L. Mott Iron Works, 113 Cal. 409, 45 Pac. 674.

Connecticut.— Hoyt *v.* Seeley, 18 Conn. 353.

Delaware.— Fairthorne *v.* Garden, 1 Houst. (Del.) 197; Hartwell *v.* McBeth, 1 Harr. (Del.) 363.

Florida.— McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Gregory *v.* McNealy, 12 Fla. 578.

Georgia.— Paris *v.* Moe, 60 Ga. 90.

Illinois.— Lohman *v.* Cass County Bank, 87 Ill. 616; Palmer *v.* Nassau Bank, 78 Ill. 380; Palmer *v.* Gardiner, 77 Ill. 143; Curtiss *v.* Martin, 20 Ill. 557; Roberts *v.* Haskell, 20 Ill. 59; Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224; Metcalf *v.* Draper, 98 Ill. App. 399; Surine *v.* Winterbotham, 96 Ill. App. 123.

Indiana.— Pilkington *v.* Woods, 10 Ind. 432.

Iowa.— Rubey *v.* Culbertson, 35 Iowa 264; Fletcher *v.* Anderson, 11 Iowa 228; Hickok *v.* Labussier, Morr. (Iowa) 115.

Kansas.— O'Keeffe *v.* Frankfort First Nat. Bank, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370; State Sav. Assoc. *v.* Barber, 35 Kan. 488, 11 Pac. 330; Eggan *v.* Briggs, 23 Kan. 710.

Kentucky.— Cope *v.* Daniel, 9 Dana (Ky.) 415.

Louisiana.— New Orleans Canal, etc., Co. *v.* Bailey, 18 La. Ann. 676; Gordon *v.* Nelson, 16 La. 321; Cotton *v.* Union Bank, 15 La. 369; Abat *v.* Wiltz, 14 La. 448; McKinney *v.* Beeson, 14 La. 254; Burns *v.* Haynes, 13 La. 12; Griffon *v.* Jacobs, 2 La. 192; Allard *v.* Gannshau, 4 Mart. (La.) 662.

Maine.— Metcalf *v.* Yeaton, 51 Me. 198. See also Sturtevant *v.* Randall, 53 Me. 149.

Maryland.—Elliott *v.* Chesnut, 30 Md. 562; Kunkel *v.* Spooner, 9 Md. 462, 66 Am. Dec. 332; Whiteford *v.* Burckmeyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Massachusetts.— Whitten *v.* Hayden, 9 Allen (Mass.) 408; Way *v.* Richardson, 3 Gray (Mass.) 412, 63 Am. Dec. 760; Truesdell *v.* Thompson, 12 Metc. (Mass.) 565; Peaslee *v.* Robbins, 3 Metc. (Mass.) 164; Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Little *v.* Obrien, 9 Mass. 423.

Michigan.— Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760; Hogan *v.* Dreifus, 121 Mich. 453, 80 N. W. 254; Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122.

Minnesota.—Ames, etc., Co. *v.* Smith, 65 Minn. 304, 67 N. W. 999.

Mississippi.— Kendrick *v.* Kyle, 78 Miss. 278, 28 So. 951.

Missouri.— Dorn *v.* Parsons, 56 Mo. 601; Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39; Lachance *v.* Loeblein, 15 Mo. App. 460; Rubelman *v.* McNichol, 13 Mo. App. 584.

New Hampshire.— Newmarket Sav. Bank *v.* Hanson, 67 N. H. 501, 32 Atl. 774; Blodgett *v.* Jackson, 40 N. H. 21; Hopkins *v.* Farwell, 32 N. H. 425.

New Mexico.— Leitensdorfer *v.* Webb, 1 N. M. 34.

New York.— Bedell *v.* Carll, 33 N. Y. 581; Wood *v.* Wellington, 30 N. Y. 218; Zimmer *v.* Chew, 34 N. Y. App. Div. 504, 54 N. Y. Suppl. 685; Hays *v.* Southgate, 10 Hun (N. Y.) 511; Morton *v.* Rogers, 14 Wend. (N. Y.) 575; Dean *v.* Hewitt, 5 Wend. (N. Y.) 257.

North Carolina.— Coffin *v.* Smith, 128 N. C. 252, 38 S. E. 864; Davis *v.* Morgan, 64 N. C. 570; Fuller *v.* Smith, 58 N. C. 192.

North Dakota.—Shepard *v.* Hanson, 9 N. D. 249, 83 N. W. 20.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; McCoy *v.* Hornbrook, 7 Ohio Dec. (Reprint) 143, 1 Cinc. L. Bul. 170.

Oklahoma.— Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

Pennsylvania.— Porter *v.* Gunnison, 2 Grant (Pa.) 297; Bacon *v.* Sanders, 4 Whart. (Pa.) 148; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

Tennessee.— Neely *v.* Morris, 2 Head (Tenn.) 595, 75 Am. Dec. 753; Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

Texas.— Whithed *v.* McAdams, 18 Tex. 551; Merlin *v.* Manning, 2 Tex. 351; Hans-

indorsee under a special indorsement is presumptive evidence of his title.[6] So if a note is held by the payee, with his own indorsement upon it, he will still be presumed to be the owner,[7] and this is true of any other holder whose indorsement appears on a bill or note held by himself,[8] whether the indorsement be con-

borough *v.* Towns, 1 Tex. 58; Grant *v.* Ennis, 5 Tex. Civ. App. 44, 23 S. W. 998.

Vermont.— Hyde *v.* Lawrence, 49 Vt. 361.

West Virginia.— Spencer Bank *v.* Simmons, 43 W. Va. 79, 27 S. E. 299.

United States.— Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170; Dawson Town, etc., Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464; Dennison *v.* Larned, 6 McLean (U. S.) 496, 7 Fed. Cas. No. 3,798.

See 7 Cent. Dig. tit. "Bills and Notes," § 1829.

6. *Indiana.*— Mendenhall *v.* Banks, 16 Ind. 284; Lemon *v.* Temple, 7 Ind. 556.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Michigan.— Wilson Sewing Mach. Co. *v.* Spears, 50 Mich. 534, 15 N. W. 894.

Mississippi.— Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385.

New York.— Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132.

See 7 Cent. Dig. tit. "Bills and Notes," § 1827.

If a note payable to a partnership and indorsed with its name is found among the papers of a deceased partner, this will be sufficient possession to raise the presumption of delivery to, and title in, him. Birkey *v.* McMakin, 64 Pa. St. 343. And see Turnley *v.* Black, 44 Ala. 159 (where a note found among the papers of a deceased person without the indorsement of the payee, who was also dead, was presumed to be the property of the person among whose papers it was found); Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Bobb *v.* Letcher, 30 Mo. App. 43.

7. *Alabama.*— Beeson *v.* Lippman, 52 Ala. 276; Price *v.* Lavender, 38 Ala. 389; Pitts *v.* Keyser, 1 Stew. (Ala.) 154.

Colorado.— Spencer *v.* Carstarphen, 15 Colo. 445, 24 Pac. 882.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412.

Georgia.— Daniel *v.* Royce, 96 Ga. 566, 23 S. E. 493; Leitner *v.* Miller, 49 Ga. 486; May *v.* Dorsett, 30 Ga. 116.

Illinois.— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560; Palmer *v.* Gardiner, 77 Ill. 143; Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Humphreyville *v.* Culver, 73 Ill. 485; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Porter *v.* Cushman, 19 Ill. 572.

Indiana.— Williams *v.* Dyer, 5 Blackf. (Ind.) 160; Harris *v.* Smith, 4 Blackf. (Ind.) 550; Hanna *v.* Pegg, 1 Blackf. (Ind.) 181.

Iowa.— Pilmer *v.* Des Moines Branch State Bank, 19 Iowa 112.

Louisiana.— Cooper *v.* Cooper, 14 La. Ann. 665.

Maine.—Abbott *v.* Joy, 47 Me. 177.

Massachusetts.— Chaffee *v.* Taylor, 3 Allen (Mass.) 598.

Minnesota.— Ames, etc., Co. *v.* Smith, 65 Minn. 304, 67 N. W. 999; Kells *v.* Northwestern Live Stock Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541.

Missouri.— Williams *v.* Smith, 21 Mo. 419; Page *v.* Lathrop, 20 Mo. 589.

Nevada.— Todman *v.* Purdy, 5 Nev. 238.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617.

New York.— Mottram *v.* Mills, 1 Sandf. (N. Y.) 37; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Chautauque County Bank *v.* Davis, 21 Wend. (N. Y.) 584.

Oregon.— Spreckels, etc., Co. *v.* Bender, 30 Oreg. 577, 48 Pac. 418.

Tennessee.— Ross *v.* Meek, 93 Tenn. 666, 28 S. W. 20.

Texas.— Hays *v.* Cage, 2 Tex. 501.

Vermont.— Hamblet *v.* Bliss, 55 Vt. 535.

Wisconsin.— Hungerford *v.* Perkins, 8 Wis. 267.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131; Lonsdale *v.* Brown, 3 Wash. (U. S.) 404, 15 Fed. Cas. No. 8,492.

England.— Callow *v.* Lawrence, 3 M. & S. 95, 15 Rev. Rep. 423.

Canada.— Black *v.* Strickland, 3 Ont. 217.

See 7 Cent. Dig. tit. "Bills and Notes," § 1827.

Erasure of indorsement.— The payee's possession of a bill or note is *prima facie* evidence of title in him, notwithstanding his own indorsement is erased. Richards *v.* Darst, 51 Ill. 140; Williams *v.* Potter, 72 Ind. 354; Pilmer *v.* Des Moines Branch State Bank, 19 Iowa 112; Goddard *v.* Cunningham, 6 Iowa 400; Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617.

8. *Georgia.*— Leitner *v.* Miller, 49 Ga. 486.

Illinois.— Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. 560; Best *v.* Nokomis Nat. Bank, 76 Ill. 608.

Indiana.— Mendenhall *v.* Banks, 16 Ind. 284.

Louisiana.— Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583.

Missouri.— Wickersham *v.* Jarvis, 2 Mo. App. 279.

Tennessee.— Brady *v.* White, 4 Baxt. (Tenn.) 382.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Hunter *v.* Kibbe, 5 McLean (U. S.) 279, 12 Fed. Cas. No. 6,907; Lonsdale *v.* Brown, 3 Wash. (U. S.) 404, 15 Fed. Cas. No. 8,492.

Canada.— Black *v.* Strickland, 3 Ont. 217.

See 7 Cent. Dig. tit. "Bills and Notes," § 1827.

ditional or absolute.[9] On the other hand possession of a non-negotiable note does not raise a presumption of title[10] if there is neither indorsement nor assignment,[11] and the possession of a note payable to order and not indorsed by the payee is not evidence of title in the holder,[12] even though the payee is dead and the possession derived from his executors.[13] In any event possession is only presumptive evidence of title and may be rebutted.[14]

(II) *Transfer or Indorsement* — (A) *Order of Indorsements.* The presumption is that indorsers are liable in the order in which they signed their names.[15]

9. Abbott *v.* Joy, 47 Me. 177.

Special indorsement not struck out.— Possession in the indorser is presumptive evidence of title, although his special indorsement on the paper has not been struck out.

Alabama.— Pitts *v.* Keyser, 1 Stew. (Ala.) 154.

Illinois.— Brinkley *v.* Going, 1 Ill. 366.

Indiana.— Mendenhall *v.* Banks, 16 Ind. 284.

Louisiana.— Wood *v.* Tyson, 13 La. Ann. 104; Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 599; Hart *v.* Windle, 15 La. 265.

Missouri.— Page *v.* Lathrop, 20 Mo. 589.

New York.— Norris *v.* Badger, 6 Cow. (N. Y.) 449.

United States.— Dugan *v.* U. S., 3 Wheat. (U. S.) 172, 4 L. ed. 362; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478, 19 Fed. Cas. No. 11,131.

10. Blackwood *v.* Brown, 32 Mich. 104; Barrick *v.* Austin, 21 Barb. (N. Y.) 241; Birclebaek *v.* Wilkins, 22 Pa. St. 26; Ball *v.* Hill, 38 Tex. 237; Merrill *v.* Smith, 22 Tex. 53; Merlin *v.* Manning, 2 Tex. 351; Robinson *v.* Texas Pine Land Assoc., (Tex. Civ. App. 1897) 40 S. W. 620.

11. Taylor *v.* Acre, 8 Ala. 491; Dalton City Co. *v.* Johnson, 57 Ga. 398. And see Pier *v.* Bultis, 48 Wis. 429, 4 N. W. 381, where it appeared that the payee of a non-negotiable note assigned the same to another as collateral security by an indorsement of absolute sale, and afterward, having the note in his possession for a temporary purpose, sold it to a third person. It was held that the possession by such third person with the first indorsement remaining thereon did not import ownership.

12. *Arkansas.*— Caldwell *v.* Meshew, 44 Ark. 564.

District of Columbia.— *In re* Wagner, MacArthur & M. (D. C.) 395.

Illinois.— Porter *v.* Cushman, 19 Ill. 572.

Iowa.— Tuttle *v.* Becker, 47 Iowa 486.

Kansas.— O'Keeffe *v.* Frankfort First Nat. Bank, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370; Durein *v.* Moeser, 36 Kan. 441, 13 Pac. 797; Rumsey *v.* Schmitz, 14 Kan. 542.

Kentucky.— Gano *v.* McCarthy, 79 Ky. 409.

Michigan.— Redmond *v.* Stansbury, 24 Mich. 445.

Minnesota.— Red River Valley Inv. Co. *v.* Cole, 62 Minn. 457, 64 N. W. 1149; Van Eman *v.* Stanchfield, 13 Minn. 75.

Missouri.— Dorn *v.* Parsons, 56 Mo. 601; Vastine *v.* Wilding, 45 Mo. 89, 100 Am. Dec. 347; Cavitt *v.* Tharp, 30 Mo. App. 131.

New Jersey.— Crisman *v.* Swisher, 28 N. J. L. 149.

New York.— Price *v.* Brown, 98 N. Y. 388.

North Carolina.— Holly *v.* Holly, 94 N. C. 670; Robertson *v.* Dunn, 87 N. C. 191.

North Dakota.— Stewart *v.* Gregory, etc., Co., 9 N. D. 618, 84 N. W. 553; Shepard *v.* Hanson, 9 N. D. 249, 83 N. W. 20.

Texas.— Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327.

See 7 Cent. Dig. tit. "Bills and Notes," § 1673.

In Indiana the possession of a note without the payee's indorsement is presumed to show authority on his part to collect it. Paulman *v.* Claycomb, 75 Ind. 64.

13. Taylor *v.* Surget, 14 Hun (N. Y.) 116. But see *contra*, King *v.* Gottschalk, 21 Iowa 512 (where the persons in possession purported to be the payee's heirs); Scoville *v.* Landon, 50 N. Y. 686 (where the holder was the payee's executor).

14. Netterville *v.* Stevens, 2 How. (Mass.) 642; Hays *v.* Hathorn, 74 N. Y. 486 [*reversing* 10 Hun (N. Y.) 511]. See also Hesser *v.* Doran, 41 Iowa 468; Herrick *v.* Swomley, 56 Md. 439; Lockwood *v.* Underwood, 16 Hun (N. Y.) 592.

Defendant may show that plaintiff acquired title after suit brought (Hovey *v.* Sebring, 24 Mich. 232, 9 Am. Rep. 122) and evidence of fraud in making the note or transferring it will throw upon plaintiff the burden of proving his title (Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271).

15. *Alabama.*— Price *v.* Lavender, 38 Ala. 389.

Illinois.— Givens *v.* Merchants' Nat. Bank, 85 Ill. 442.

Maine.— Cummings *v.* Herrick, 43 Me. 203.

Michigan.— Freeman *v.* Ellison, 37 Mich. 459.

New York.— Palmer *v.* Field, 76 Hun (N. Y.) 229, 27 N. Y. Suppl. 736, 59 N. Y. St. 123.

Rhode Island.— Crompton *v.* Spencer, 20 R. I. 330, 38 Atl. 1002.

Wisconsin.— Hale *v.* Danforth, 46 Wis. 554, 1 N. W. 284.

Successive liability of indorsers see *supra*, VI, G, 1, a, (II), (A) [7 Cyc. 828].

Where there is only one indorser on a note, the legal presumption is that he is the immediate indorser of the holder. Lawrence *v.* Miller, 16 N. Y. 235.

(B) *Place of Indorsement.* The indorser's residence is presumed to be the place of an undated indorsement.[16]

(C) *Time of Indorsement.* The date of an indorsement, like that of a note, is *prima facie* evidence of the time of making it, but circumstances may throw the burden of proof on the holder.[17] If the indorsement is not dated the presumption is that it was made at the time of the execution of the note,[18] or at least before maturity and dishonor.[19] An indorsement in blank by one who is

16. Simpson *v.* White, 40 N. H. 540.

State of date.— An indorsed note is presumed to be indorsed in the state in which it is dated, in the absence of evidence to the contrary. Belford *v.* Bangs, 15 Ill. App. 76.

17. Smith *v.* Ferry, 69 Mo. 142; Baker *v.* Arnold, 3 Cai. (N. Y.) 279.

18. *Illinois.*— Dodd *v.* Doty, 98 Ill. 393; Smith *v.* Nevlin, 89 Ill. 193; White *v.* Weaver, 41 Ill. 409; Stewart *v.* Smith, 28 Ill. 397; Grier *v.* Cable, 45 Ill. App. 405.

Indiana.— Patterson *v.* Carrell, 60 Ind. 128; Snyder *v.* Oatman, 16 Ind. 265; Bates *v.* Prickett, 5 Ind. 22, 61 Am. Dec. 73; Rosenthal *v.* Rambo, 28 Ind. App. 265, 62 N. E. 637.

Iowa.— Leland *v.* Parriott, 35 Iowa 454; Hayward *v.* Munger, 14 Iowa 516.

Louisiana.— New Orleans Canal, etc., Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385.

Maine.—Gray *v.* Brown, 49 Me. 544; Parker *v.* Tuttle, 41 Me. 349; Lowell *v.* Gage, 38 Me. 35; Walker *v.* Davis, 33 Me. 516; Burnham *v.* Webster, 19 Me. 232.

Massachusetts.— National Pemberton Bank *v.* Longee, 108 Mass. 371, 11 Am. Rep. 367; Noxon *v.* De Wolf, 10 Gray (Mass.) 343; Benthall *v.* Judkins, 13 Metc. (Mass.) 265.

Michigan.—Higgins *v.* Watson, 1 Mich. 428.

Missouri.— Smith *v.* Ferry, 69 Mo. 142.

New Hampshire.— Burnham *v.* Wood, 8 N. H. 334.

New York.— Pinckerton *v.* Bailey, 8 Wend. (N. Y.) 600.

North Carolina.— Meadows *v.* Cozart, 76 N. C. 450.

Pennsylvania.—Amsbaugh *v.* Gearhart, 11 Pa. St. 482.

Texas.— Watson *v.* Flanagan, 14 Tex. 354.

Vermont.— Washburn *v.* Ramsdell, 17 Vt. 299.

Wisconsin.— Mason *v.* Noonan, 7 Wis. 609.

United States.— Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170.

See 7 Cent. Dig. tit. "Bills and Notes," § 1678.

19. *California.*— Sperry *v.* Spaulding, 45 Cal. 544.

Georgia.— Hogan *v.* Moore, 48 Ga. 156; Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590; Dickerson *v.* Burke, 25 Ga. 225.

Hawaii.— Coney *v.* Mitamura, 10 Hawaii 64.

Illinois.— Cook *v.* Norwood, 106 Ill. 558; Cisne *v.* Chidester, 85 Ill. 523; Richards *v.* Betzer, 53 Ill. 466; Depuy *v.* Schuyler, 45 Ill. 306; Mobley *v.* Ryan, 14 Ill. 51, 56 Am. Dec. 488; Mann *v.* Merchants' L. & T. Co., 100 Ill. App. 224.

Iowa.— Rea *v.* Owens, 37 Iowa 262; Fletcher *v.* Anderson, 11 Iowa 228; Wilkinson *v.* Sargent, 9 Iowa 521.

Kansas.— Ft. Scott First Nat. Bank *v.* Elliott, 46 Kan. 32, 26 Pac. 487; Lyon *v.* Martin, 31 Kan. 411, 2 Pac. 790; Ecton *v.* Harlan, 20 Kan. 452; Rahm *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 530; Challiss *v.* Woodburn, 2 Kan. App. 652, 43 Pac. 792.

Kentucky.— Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534.

Louisiana.— Miller *v.* Wisner, 22 La. Ann. 457.

Maine.— Webster *v.* Calden, 56 Me. 204; Huston *v.* Young, 33 Me. 85.

Maryland.— Hopkins *v.* Kent, 17 Md. 113; McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Massachusetts.— Balch *v.* Onion, 4 Cush. (Mass.) 559; Ranger *v.* Cary, 1 Metc. (Mass.) 369.

Missouri.— Crawford *v.* Johnson, 87 Mo. App. 478.

New Hampshire.— Burnham *v.* Wood, 8 N. H. 334.

New Jersey.— Seyfert *v.* Edison, 45 N. J. L. 393.

New York.— Andrews *v.* Chadbourne, 19 Barb. (N. Y.) 147; Pinkerton *v.* Bailey, 8 Wend. (N. Y.) 600; Hendricks *v.* Judah, 1 Johns. (N. Y.) 319.

North Carolina.— Tredwell *v.* Blount, 86 N. C. 33.

Pennsylvania.— Snyder *v.* Riley, 6 Pa. St. 164, 47 Am. Dec. 452.

Tennessee.—Bearden *v.* Moses, 7 Lea (Tenn.) 459.

Texas.— Johnston *v.* Josey, 34 Tex. 533; Smith *v.* Turney, 32 Tex. 143; Rhode *v.* Alley, 27 Tex. 443; Smith *v.* Clopton, 4 Tex. 109.

Vermont.—Leland *v.* Farnham, 25 Vt. 553; Washburn *v.* Ramsdell, 17 Vt. 299.

West Virginia.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin.— Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774; Mason *v.* Noonan, 7 Wis. 609.

United States.— New Orleans Canal, etc., Co. *v.* Montgomery, 95 U. S. 16, 24 L. ed. 346; Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170; Bank of British North America *v.* Ellis, 6 Sawy. (U. S.) 96, 2 Fed. Cas. No. 859, 8 Am. L. Rec. 460, 9 Reporter 204.

England.— Lewis *v.* Parker, 4 A. & E. 838,

not the payee will also be presumed to have been made at the time when the note was made,[20] at least where such indorsement appears above that of the payee,[21] and the presumption of indorsement before maturity is not refuted by evidence merely of the payee's declarations to the contrary.[22] Where one who was not known as the holder until after the maturity of the paper, holds without any indorsement, and the paper at its maturity was in other hands, the presumption is that the transfer was made after maturity.[23]

e. Good Faith and Payment of Value — (I) *In General.* The transferee or holder of a bill or note is presumed by the law merchant to have obtained it in good faith, before maturity, and for value.[24] Accordingly one who seeks to

31 E. C. L. 368; Parkin *v.* Moon, 7 C. & P. 408, 32 E. C. L. 680.

See 7 Cent. Dig. tit. "Bills and Notes," § 1678.

20. *Delaware.*— Gilpin *v.* Marley, 4 Houst. (Del.) 284.

Illinois.— Parkhurst *v.* Vail, 73 Ill. 343; White *v.* Weaver, 41 Ill. 409; Webster *v.* Cobb, 17 Ill. 459; Klein *v.* Currier, 14 Ill. 237; Grier *v.* Cable, 45 Ill. App. 405.

Indiana.— Snyder *v.* Oatman, 16 Ind. 265; Cecil *v.* Mix, 6 Ind. 478; Bates *v.* Pricket, 5 Ind. 22, 61 Am. Dec. 73; Ewing *v.* Sils, 1 Ind. 125.

Maine.— Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461; Childs *v.* Wyman, 44 Me. 433, 69 Am. Dec. 111; Lowell *v.* Gage, 38 Me. 35; Colburn *v.* Averill, 30 Me. 310, 50 Am. Dec. 630; Burnham *v.* Webster, 19 Me. 232.

Maryland.— Sullivan *v.* Violett, 6 Gill (Md.) 181.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; National Pemberton Bank *v.* Lougee, 108 Mass. 371, 11 Am. Rep. 367; Benthall *v.* Judkins, 13 Metc. (Mass.) 265; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

Michigan.— See Freeman *v.* Ellison, 37 Mich. 459; Higgins *v.* Watson, 1 Mich. 428.

Missouri.— Powell *v.* Thomas, 7 Mo. 440, 38 Am. Dec. 465.

New Hampshire.—Martin *v.* Boyd, 11 N. H. 385, 35 Am. Dec. 501.

North Carolina.— Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237.

Pennsylvania.— Amsbaugh *v.* Gearhart, 11 Pa. St. 482.

Texas.— Carr *v.* Rowland, 14 Tex. 275; Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

Contra, Johnston *v.* McDonald, 41 S. C. 81, 19 S. E. 65.

See 7 Cent. Dig. tit. "Bills and Notes," § 1665½.

21. Arnold *v.* Bryant, 8 Bush (Ky.) 668; Union Bank *v.* Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541.

22. Hearson *v.* Graudine, 87 Ill. 115.

23. Allison *v.* Hubbell, 17 Ind. 559.

If a note is not put into suit for five years after its maturity the indorsement will be presumed to have been made after maturity. Bounsall *v.* Harrison, 2 Gale 113, 1 M. & W. 611, Tyrw. & G. 925. So where a note is payable one day after date and was made without consideration, the burden has been held not to be on the maker to show that it was transferred after maturity. Beall *v.* Leverett, 32 Ga. 105, 79 Am. Dec. 298.

24. *Alabama.*— Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Minell *v.* Reed, 26 Ala. 730.

California.— Beer *v.* Clifton, 111 Cal. 51, 43 Pac. 411; Sperry *v.* Spaulding, 45 Cal. 544; Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451; Palmer *v.* Goodwin, 5 Cal. 458.

Colorado.— Wyman *v.* Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; King *v.* Mecklenburg, (Colo. App. 1902) 68 Pac. 984; McKinley *v.* Beggs, (Colo. App. 1901) 67 Pac. 1019; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523, 44 Pac. 764; Pendleton *v.* Smissaert, 1 Colo. App. 508, 29 Pac. 521.

Delaware.— Martin *v.* Hamilton, 5 Harr. (Del.) 314.

Florida.— Hancock *v.* Hale, 17 Fla. 808.

Georgia.— Parr *v.* Erickson, 115 Ga. 873, 42 S. E. 240; Stewart County Bank *v.* Adams, 96 Ga. 529, 23 S. E. 496; Rhodes *v.* Beall, 73 Ga. 641; Faulkner *v.* Ware, 34 Ga. 498.

Idaho.— Yates *v.* Spofford, (Ida. 1901) 65 Pac. 501.

Illinois.—Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546; Cisne *v.* Chidester, 85 Ill. 523; Shreeves *v.* Allen, 79 Ill. 553; Clarke *v.* Johnson, 54 Ill. 296; Merritt *v.* Boyden, 93 Ill. App. 613.

Indiana.— Tescher *v.* Merea, 118 Ind. 586, 21 N. E. 316; Riley *v.* Schawacker, 50 Ind. 592; Hall *v.* Allen, 37 Ind. 541; Pilkington *v.* Woods, 10 Ind. 432.

Iowa.— Mahaska County State Bank *v.* Crist, 87 Iowa 415, 54 N. W. 450; Rea *v.* Owens, 37 Iowa 262; Lathrop *v.* Donaldson, 22 Iowa 234; Shelton *v.* Sherfey, 3 Greene (Iowa) 108.

Kansas.— Topeka Bank *v.* Nelson, 58 Kan. 815, 49 Pac. 155; Cobleskill First Nat. Bank *v.* Emmitt, 52 Kan. 603, 35 Pac. 213; Ft. Scott First Nat. Bank *v.* Elliott, 46 Kan. 32, 26 Pac. 487; Gafford *v.* Hall, 39 Kan. 166, 17 Pac. 851; Parker *v.* Gilmore, 10 Kan. App. 527, 63 Pac. 20.

Kentucky.— Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534; Hargis *v.* Louisville Trust Co., 17 Ky. L. Rep. 218, 30 S. W. 877.

Louisiana.— Citizens' Bank *v.* Strauss, 26 La. Ann. 736; Wheeler *v.* Maillot, 20 La.

impeach the good faith of the holder of a bill or note has the burden cast upon him of proving it.[25] The presumption of the law merchant as to the good faith

Ann. 75; Judson *v.* Holmes, 9 La. Ann. 20; Nicholson *v.* Patton, 13 La. 213.

Maine.— Wing *v.* Martel, 95 Me. 535, 50 Atl. 705; Webster *v.* Calden, 56 Me. 204; Walker *v.* Davis, 33 Me. 516; Huston *v.* Young, 33 Me. 85; Marr *v.* Plummer, 3 Me. 73.

Maryland.— Farmers' Bank *v.* Brooke, 40 Md. 249; Canfield *v.* McIlwaine, 32 Md. 94; Miller *v.* Farmers', etc., Bank, 30 Md. 392; Hopkins *v.* Kent, 17 Md. 113.

Massachusetts.— National Bank of North America *v.* Kirby, 108 Mass. 497; Balch *v.* Onion, 4 Cush. (Mass.) 559; McGee *v.* Prouty, 9 Metc. (Mass.) 547, 43 Am. Dec. 409; Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40.

Michigan.— Little *v.* Mills, 98 Mich. 423, 57 N. W. 266; Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Chicago, etc., R. Co. *v.* Edson, 41 Mich. 673, 3 N. W. 176; Wright *v.* Irwin, 33 Mich. 32.

Minnesota.— Cummings *v.* Thompson, 18 Minn. 246.

Mississippi.—Dibrell *v.* Dandridge, 51 Miss. 55; Harrison *v.* Pike, 48 Miss. 46; Winstead *v.* Davis, 40 Miss. 785; Emanuel *v.* White, 34 Miss. 56, 69 Am. Dec. 385.

Missouri.—Borgess Invest. Co. *v.* Vetts, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Famous Shoe, etc., Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. Rep. 424, 26 L. R. A. 568; Johnson *v.* McMurray, 72 Mo. 278; Clark *v.* Schneider, 17 Mo. 295; Crawford *v.* Johnson, 87 Mo. App. 478.

Montana.— Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

Nebraska.— Dubuque First Nat. Bank *v.* McKibben, 50 Nebr. 513, 70 N. W. 38; Kelman *v.* Calhoun, 43 Nebr. 157, 61 N. W. 615; McDonald *v.* Aufdengarten, 41 Nebr. 40, 59 N. W. 762.

New Hampshire.— Perkins *v.* Prout, 47 N. H. 387, 93 Am. Dec. 449.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617; Duncan *v.* Gilbert, 29 N. J. L. 521.

New Mexico.— City Nat. Bank *v.* Hickox, 5 N. M. 22, 16 Pac. 912.

New York.— Nickerson *v.* Ruger, 76 N. Y. 279; Harger *v.* Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Mechanics', etc., Nat. Bank *v.* Crow, 60 N. Y. 85; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Strickland *v.* Henry, 66 N. Y. App. Div. 23, 73 N. Y. Suppl. 12.

North Carolina.— Pugh *v.* Grant, 86 N. C. 39; Tredwell *v.* Blount, 86 N. C. 33; Meadows *v.* Cozart, 76 N. C. 450.

North Dakota.— Ravicz *v.* Nickells, 9 N. D. 536, 84 N. W. 353.

Ohio.— Johnson *v.* Way, 27 Ohio St. 374; Davis *v.* Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375; Sterling *v.* Kious, 7 Ohio, Pt. II, 237.

Oregon.— Owens *v.* Snell, 29 Oreg. 483, 44 Pac. 827.

Pennsylvania.— Lamb *v.* Burke, 132 Pa. St. 413, 20 Atl. 685; Battles *v.* Laudenslager, 84 Pa. St. 446; Dingman *v.* Amsink, 77 Pa. St. 114; Kuhns *v.* Gettysburg Nat. Bank, 68 Pa. St. 445.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

South Carolina.— Rock Island First Nat. Bank *v.* Anderson, 28 S. C. 143, 5 S. E. 343; Schaub *v.* Clark, 1 Strobh. (S. C.) 299, 47 Am. Dec. 554; Jones *v.* Westcott, 2 Brev. (S. C.) 166, 3 Am. Dec. 704.

Texas.— Liddell *v.* Crain, 53 Tex. 549; Blum *v.* Loggins, 53 Tex. 121; Johnston *v.* Josey, 34 Tex. 533; Smith *v.* Clopton, 4 Tex. 109.

Utah.— Voorhees *v.* Fisher, 9 Utah 303, 34 Pac. 64.

Vermont.— Blaney *v.* Pelton, 60 Vt. 275, 13 Atl. 564; Quinn *v.* Hard, 43 Vt. 375, 5 Am. Rep. 284; Washburn *v.* Ramsdell, 17 Vt. 299; Sanford *v.* Norton, 17 Vt. 285.

Virginia.— Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

West Virginia.— Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin.— Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819; Gutwilling *v.* Stumes, 47 Wis. 428, 2 N. W. 774; Cook *v.* Helms, 5 Wis. 107.

United States.— Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Swift *v.* Smith, 102 U. S. 442, 26 L. ed. 193; Brown *v.* Spofford, 95 U. S. 474, 24 L. ed. 508; Press Co. *v.* Hartford City Bank, 58 Fed. 321, 7 C. C. A. 248.

England.— King *v.* Milsom, 2 Campb. 5; Solomons *v.* Bank of England, 13 East 135, note *b*; Middleton *v.* Barned, 4 Exch. 241.

Canada.— Mair *v.* McLean, 1 U. C. Q. B. 455.

See 7 Cent. Dig. tit. "Bills and Notes," § 1675.

If payable in words or effect to bearer mere possession is *prima facie* evidence of the holder's good faith (Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567; Sperry *v.* Spaulding, 45 Cal. 544; Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170), and the presumption applies to any holder taking the paper before maturity (Roswell Mfg. Co. *v.* Hudson, 72 Ga. 24; Woodworth *v.* Huntoon, 40 Ill. 131, 89 Am. Dec. 340).

25. *Alabama.*— Montgomery First Nat. Bank *v.* Dawson, 78 Ala. 67; Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

California.— Sperry *v.* Spaulding, 45 Cal. 544; Palmer *v.* Goodwin, 5 Cal. 458.

Georgia.— Griffin *v.* Evans, 23 Ga. 438.

Idaho.— Yates *v.* Spofford, (Ida. 1901) 65 Pac. 501.

Illinois.— Depuy *v.* Schuyler, 45 Ill. 306; Merritt *v.* Boyden, 93 Ill. App. 613; Bemis *v.* Horner, 62 Ill. App. 38; Muhlke *v.* Hegerness, 56 Ill. App. 322.

Indiana.— Rogers *v.* Worth, 4 Blackf. (Ind.) 186.

of the holder of a bill or note has been extended to the holder of negotiable coupon bonds[26] and to securities held as collateral to bills and notes,[27] but the holder of half a bank-note, presenting it for payment, is not entitled to such presumption.[28] On the other hand the fact that a note was purchased from an agent who exceeded his authority[29] or that it was offered for discount with blanks not filled up[30] will not destroy the presumption of good faith.

(II) *Rebuttal of Presumption*—(A) *In General.* The presumption of good faith may be rebutted like other presumptions.[31] Thus the presumption of good faith includes the presumption that the holder took the bill in the ordinary course of business,[32] but the burden of proving good faith is shifted to the indorsee by proof that he paid for the paper much less than its face.[33] So evi-

Iowa.— Earhart *v.* Gant, 32 Iowa, 481.

Kansas.— State Sav. Assoc. *v.* Barber, 35 Kan. 488, 11 Pac. 330; Mann *v.* Springfield Second Nat. Bank, 34 Kan. 746, 10 Pac. 150.

Louisiana.— New Orleans Canal, etc., Co. *v.* Templeton, 20 La. Ann. 141, 96 Am. Dec. 385; Wheeler *v.* Maillot, 20 La. Ann. 75.

Maryland.— Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.— McGee *v.* Prouty, 9 Metc. (Mass.) 547, 43 Am. Dec. 409.

Missouri.— Clark *v.* Schneider, 17 Mo. 295; Third Nat. Bank *v.* Tinsley, 11 Mo. App. 498.

Montana.— Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

New York.— Hill *v.* Northrup, 1 Hun (N. Y.) 612, 4 Thomps. & C. (N. Y.) 120; Potter *v.* Chadsey, 16 Abb. Pr. (N. Y.) 146; Nelson *v.* Cowing, 6 Hill (N. Y.) 336; Pratt *v.* Adams, 7 Paige (N. Y.) 615.

North Carolina.— McArthur *v.* McLeod, 51 N. C. 475.

North Dakota.— Ravicz *v.* Nickells, 9 N. D. 536, 84 N. W. 353.

Pennsylvania.— Lerch Hardware Co. *v.* Columbia First Nat. Bank, (Pa. 1886) 5 Atl. 778; Battles *v.* Laudenslager, 84 Pa. St. 446; Gray *v.* Kentucky Bank, 29 Pa. St. 365; Eckert *v.* Conrad, 1 Wkly. Notes Cas. (Pa.) 414.

Texas.— Willis *v.* Stamps, 36 Tex. 48; Wright *v.* Hardie, (Tex. Civ. App. 1895) 30 S. W. 675; Faulkner *v.* Warren, 1 Tex. App. Civ. Cas. § 658.

Wisconsin.— Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819; Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774; Reeve *v.* Liverpool, etc., Ins. Co., 39 Wis. 520.

United States.— Collins *v.* Gilbert, 94 U. S. 753, 24 L. ed. 170; Goodman *v.* Simonds, 20 How. (U. S.) 343, 5 L. ed. 934.

See 7 Cent. Dig. tit. "Bills and Notes," § 1676.

26. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Robinson *v.* Hodgson, 73 Pa. St. 202; Walker *v.* State, 12 S. C. 200.

27. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; Carpenter *v.* Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313.

28. Bullet *v.* Pennsylvania Bank, 2 Wash. (U. S.) 172, 4 Fed. Cas. No. 2,125.

29. Chicopee Bank *v.* Chapin, 8 Metc. (Mass.) 40.

30. Chemung Canal Bank *v.* Bradner, 44 N. Y. 680.

31. *Illinois.*— Kaley *v.* Musgrave, 26 Ill. App. 509.

Kansas.— French *v.* Gordon, 10 Kan. 370.

Kentucky.— Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534.

Maine.— Norton *v.* Heywood, 20 Me. 359; Hutchinson *v.* Moody, 18 Me. 393.

Maryland.— Lucas *v.* Byrne, 35 Md. 485.

Rhode Island.— Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.

Virginia.— Duerson *v.* Alsop, 27 Gratt. (Va.) 229.

Wisconsin.— Cook *v.* Helms, 5 Wis. 107.

See 7 Cent. Dig. tit. "Bills and Notes," § 1687.

To rebut the presumption that an indorsee before maturity is a *bona fide* holder for value, and shift the burden of proof to him, there must be circumstances antecedent to or attendant on the act of transfer, amounting either to actual notice of fraud, illegality, or failure of consideration, or to such a combination of suspicious circumstances as would in legal contemplation afford ground for the presumption that he was aware at the time of its acquisition of some equity between the original parties thereto which should have prevented its purchase by him. Bennett *v.* Torlina, 56 Mo. 309; Greer *v.* Yosti, 56 Mo. 307; Corby *v.* Butler, 55 Mo. 398; Horton *v.* Bayne, 52 Mo. 531. Evidence which merely throws a suspicion on such good faith is not sufficient. Lyon *v.* Martin, 31 Kan. 411, 2 Pac. 790.

32. *Illinois.*— Woodworth *v.* Huntoon, 40 Ill. 131, 89 Am. Dec. 340.

Iowa.— Shelton *v.* Sherfey, 3 Greene (Iowa) 108.

Kansas.— Parker *v.* Gilmore, 10 Kan. App. 527, 63 Pac. 20.

Kentucky.— Alexander *v.* Springfield Bank, 2 Metc. (Ky.) 534.

Maine.— Walker *v.* Davis, 33 Me. 516.

New York.— Andrews *v.* Chadbourne, 19 Barb. (N. Y.) 147; Orleans Bank *v.* Barry, 1 Den. (N. Y.) 116.

Pennsylvania.— Snyder *v.* Riley, 6 Pa. St. 164, 47 Am. Dec. 452.

33. Richmond *v.* Diefendorf, 51 Hun (N. Y.) 537, 4 N. Y. Suppl. 375, 21 N. Y. St. 696.

dence that the bill was lost[34] or stolen[35] shifts the burden of proving good faith, and throws it on the holder; but it has been held that he is in such case entitled to notice before trial that such proof will be required.[36]

(B) *Fraud or Illegality.* Evidence of illegality or fraud in the origin or transfer of the paper throws on the holder the burden of proving his good faith,[37]

34. Merchants', etc., Nat. Bank *v.* Masonic Hall, 62 Ga. 271; Matthews *v.* Poythress, 4 Ga. 287; Nicholson *v.* Patton, 13 La. 213; Worcester County Bank *v.* Dorchester, etc., Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; Cummings *v.* Thompson, 18 Minn. 246.

35. *Massachusetts.*— Wyer *v.* Dorchester, etc., Bank, 11 Cush. (Mass.) 51, 59 Am. Dec. 137.

Minnesota.— Cummings *v.* Thompson, 18 Minn. 246.

Missouri.— Devlin *v.* Clark, 31 Mo. 22.

New York.— Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Dutchess County Ins. Co. *v.* Hachfield, 1 Hun (N. Y.) 675; Porter *v.* Knapp, 6 Lans. (N. Y.) 125.

Pennsylvania.— Robinson *v.* Hodgson, 73 Pa. St. 202; Kuhns *v.* Gettysburg Nat. Bank, 68 Pa. St. 445.

England.— Paterson *v.* Hardacre, 4 Taunt. 114.

See 7 Cent. Dig. tit. "Bills and Notes," § 1684.

36. Paterson *v.* Hardacre, 4 Taunt. 114.

37. *Alabama.*— Reid *v.* Mobile Bank, 70 Ala. 199; Chambers *v.* Falkner, 65 Ala. 448; Ross *v.* Drinkard, 35 Ala. 434; Boyd *v.* McIvor, 11 Ala. 822; Thompson *v.* Armstrong, 7 Ala. 256; Marston *v.* Forward, 5 Ala. 347.

Arkansas.— Tabor *v.* Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; Bertrand *v.* Barkman, 13 Ark. 150.

California.— Eames *v.* Crosier, 101 Cal. 260, 35 Pac. 873; Jordan *v.* Grover, 99 Cal. 194, 33 Pac. 889; Sperry *v.* Spaulding, 45 Cal. 544.

Colorado.— Harrington *v.* Johnson, 7 Colo. App. 483, 44 Pac. 368.

District of Columbia.— Washington Second Nat. Bank *v.* Hume, 4 Mackey (D. C.) 90.

Georgia.— See Robenson *v.* Vason, 37 Ga. 66.

Illinois.— Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971; Wright *v.* Brosseau, 73 Ill. 381; Bemis *v.* Horner, 44 Ill. App. 317.

Indiana.— Huntington First Nat. Bank *v.* Ruhl, 122 Ind. 279, 23 N. E. 766; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Giberson *v.* Jolley, 120 Ind. 301, 22 N. E. 306; Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Mitchell *v.* Tomlinson, 91 Ind. 167; Harbison *v.* State Bank, 28 Ind. 133, 92 Am. Dec. 308.

Iowa.— Warder, etc., Co. *v.* Cuthbert, 99 Iowa 681, 68 N. W. 917; Skinner *v.* Raynor, 95 Iowa, 536, 64 N. W. 601; Galbraith *v.* McLaughlin, 91 Iowa 399, 59 N. W. 338; U. S. National Bank *v.* Crosley, 86 Iowa 633, 53 N. W. 352; Frank *v.* Blake, 58 Iowa 750, 13 N. W. 50; Woodward *v.* Rogers, 31 Iowa 342.

Kansas.— Brook *v.* Teague, 52 Kan. 119, 34 Pac. 347.

Kentucky.— David *v.* Merchants' Nat. Bank, 103 Ky. 586, 20 Ky. L. Rep. 263, 45 S. W. 878; Breckinridge *v.* Moore, 3 B. Mon. (Ky.) 629; Early *v.* McCart, 2 Dana (Ky.) 414.

Louisiana.— Union Bank *v.* Ryan, 21 La. Ann. 551; Morgan *v.* Yarborough, 13 La. 74, 33 Am. Dec. 553.

Maine.— Market, etc., Nat. Bank *v.* Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; Kellogg *v.* Curtis, 69 Me. 212, 31 Am. Rep. 273; Roberts *v.* Lane, 64 Me. 108, 18 Am. Rep. 242; Aldrich *v.* Warren, 16 Me. 465.

Maryland.— McCosker *v.* Banks, 84 Md. 292, 35 Atl. 935; Cover *v.* Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394; Rhinehart *v.* Schall, 69 Md. 352, 16 Atl. 126; Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Crampton *v.* Perkins, 65 Md. 22, 3 Atl. 300; Totten *v.* Bucy, 57 Md. 446.

Massachusetts.— Conant *v.* Johnston, 165 Mass. 450, 43 N. E. 192; National Revere Bank *v.* Morse, 163 Mass. 383, 40 N. E. 180; Bill *v.* Stewart, 156 Mass. 508, 31 N. E. 386; Sullivan *v.* Langley, 120 Mass. 437; Tucker *v.* Morrill, 1 Allen (Mass.) 528; Sistermans *v.* Field, 9 Gray (Mass.) 331.

Michigan.— Drovers' Nat. Bank *v.* Blue, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. Rep. 327; French *v.* Talbot Paving Co., 100 Mich. 443, 59 N. W. 166; Horrigan *v.* Wyman, 90 Mich. 121, 51 N. W. 187; Mace *v.* Kennedy, 68 Mich. 389, 36 N. W. 187; Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192; Paton *v.* Coit, 5 Mich. 505, 72 Am. Dec. 58.

Minnesota.— Decorah First Nat. Bank *v.* Holan, 63 Minn. 525, 65 N. W. 952; Montreal Bank *v.* Richter, 55 Minn. 362, 57 N. W. 61; MacLaren *v.* Cochran, 44 Minn. 255, 46 N. W. 408; Merchants' Exch. Bank *v.* Luckow, 37 Minn. 542, 35 N. W. 434; Cummings *v.* Thompson, 18 Minn. 246.

Missouri.— Campbell *v.* Hoff, 129 Mo. 317, 31 S. W. 603; Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Johnson *v.* McMurry, 72 Mo. 278; Cass Co. *v.* Green, 66 Mo. 498; Jones *v.* Burden, 56 Mo. App. 199; Cannon *v.* Moore, 17 Mo. App. 92.

Montana.— Harrington *v.* Butte, etc., Min. Co., 27 Mont. 1, 69 Pac. 102; Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560; Thamling *v.* Duffey, 14 Mont. 567, 37 Pac. 363, 43 Am. St. Rep. 658.

Nebraska.— Fawcett *v.* Powell, 43 Nebr. 437, 61 N. W. 586; Haggland *v.* Stuart, 29 Nebr. 69, 45 N. W. 263.

New Hampshire.— Perkins *v.* Prout, 47 N. H. 387, 93 Am. Dec. 449; Clark *v.* Pease, 41 N. H. 414.

New Jersey.— Haines *v.* Merrill Trust Co.,

and if the holders are partners the good faith of all must be shown.[38] If the transfer is made after maturity and fraud is shown slight circumstances will be sufficient to imply notice.[39] The burden of showing his good faith is on the holder, where the fraud proved by defendant is that of an agent on his principal[40]

56 N. J. L. 312, 28 Atl. 796; Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Merchants' Exch. Nat. Bank *v.* New Brunswick Sav. Inst., 33 N. J. L. 170; Duncan *v.* Gilbert, 29 N. J. L. 521.

New York.—American Exch. Nat. Bank *v.* New York Belting, etc., Co., 148 N. Y. 698, 43 N. E. 168; Franc *v.* Dickinson, 125 N. Y. 710, 26 N. E. 250, 34 N. Y. St. 864 [*reversing* 52 Hun (N. Y.) 373, 5 N. Y. Suppl. 303, 24 N. Y. St. 446]; Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402, 33 N. Y. St. 389, 10 L. R. A. 676 [*reversing* 4 N. Y. Suppl. 262, 21 N. Y. St. 692]; Vosburgh *v.* Diefendorf, 119 N. Y. 357, 23 N. E. 801, 29 N. Y. St. 448, 16 Am. St. Rep. 836; Cahen *v.* Everitt, 67 N. Y. App. Div. 86, 73 N. Y. Suppl. 549; Strickland *v.* Henry, 66 N. Y. App. Div. 23, 73 N. Y. Suppl. 12.

North Carolina.— Commercial Bank *v.* Burgwyn, 108 N. C. 62, 12 S. E. 952, 23 Am. St. Rep. 49; Pugh *v.* Grant, 86 N. C. 39; Meadows *v.* Cozart, 76 N. C. 450.

North Dakota.— St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867; Ravicz *v.* Nickells, 9 N. D. 536, 84 N. W. 353; Mooney *v.* Williams, 9 N. D. 329, 83 N. W. 237; Knowlton *v.* Schultz, 6 N. D. 417, 71 N. W. 550; Vickery *v.* Burton, 6 N. D. 245, 69 N. W. 193.

Ohio.— Davis *v.* Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375; McKesson *v.* Stanberry, 3 Ohio St. 156.

Oregon.— Owens *v.* Snell, etc., Co., 29 Oreg. 483, 44 Pac. 827.

Pennsylvania.— Real Estate Invest. Co. *v.* Russel, 148 Pa. St. 496, 30 Wkly. Notes Cas. (Pa.) 80, 24 Atl. 59; Gere *v.* Unger, 125 Pa. St. 644, 24 Wkly. Notes Cas. (Pa.) 7, 17 Atl. 511; Lerch Hardware Co. *v.* Columbia First Nat. Bank, 109 Pa. St. 240; Battles *v.* Laudenslager, 84 Pa. St. 446.

Rhode Island.— Third Nat. Bank *v.* Angell, 18 R. I. 1, 29 Atl. 500; Hazard *v.* Spencer, 17 R. I. 561, 23 Atl. 729.

South Dakota.— Spearfish Bank *v.* Graham, (S. D. 1902) 91 N. W. 340; Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856; Dunn *v.* Canton Nat. Bank, 11 S. D. 305, 77 N. W. 111; Jamison *v.* McFarland, 10 S. D. 574, 74 N. W. 1033; Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

Texas.—Hart *v.* West, 91 Tex. 184, 42 S. W. 544; Rische *v.* Planters' Nat. Bank, 84 Tex. 413, 19 S. W. 610; Blum *v.* Loggins, 53 Tex. 121; Hillebrant *v.* Ashworth, 18 Tex. 307; People's Nat. Bank *v.* Mulkey, (Tex. Civ. App. 1901) 61 S. W. 528.

Vermont.— Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697; McCasker *v.* Enright, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938. *Compare* Quinn *v.* Hard, 43 Vt. 375, 5 Am. Rep. 284.

Virginia.— Lynchburg Nat. Bank *v.* Scott, 91 Va. 652, 22 S. E. 487, 50 Am. St. Rep. 860, 29 L. R. A. 827; Wilson *v.* Lazier, 11 Gratt. (Va.) 477; Vathir *v.* Zane, 6 Gratt. (Va.) 246.

Wisconsin.— Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. St. Rep. 600; Kinney *v.* Kouse, 28 Wis. 183.

United States.— Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 14 S. Ct. 94, 37 L. ed. 1063; King *v.* Doane, 139 U. S. 166, 11 S. Ct. 465, 35 L. ed. 84; Stewart *v.* Lansing, 104 U. S. 505, 26 L. ed. 866; Smith *v.* Sac County, 11 Wall. (U. S.) 139, 20 L. ed. 102; Louisville, etc., R. Co. *v.* Ohio Valley Imp., etc., Co., 57 Fed. 42.

England.— Tatam *v.* Haslar, 23 Q. B. D. 345; Rees *v.* Headforth, 2 Campb. 574; Duncan *v.* Scott, 1 Campb. 100; Bailey *v.* Bidwell, 13 M. & W. 73.

Canada.—Arnold *v.* Campbell, 18 Can. L. J. 289; Withall *v.* Ruston, 7 L. C. Rep. 399, 5 R. J. R. Q. 327; Belanger *v.* Baxter, 6 Montreal Leg. N. 413, 12 Rev. Lég. 532; Walters *v.* Mahan, 6 Montreal Leg. N. 316; Exchange Bank *v.* Carle, 3 Montreal Q. B. 61, 31 L. C. Jur. 90, 15 Rev. Lég. 250; Banque Jacques Cartier *v.* Gagnon, 6 Quebec 88; Dumas *v.* Baxter, 14 Rev. Lég. 496.

Compare Hancock *v.* Hale, 17 Fla. 808.

See 7 Cent. Dig. tit. "Bills and Notes," § 1683.

The payee of a forged note, having assigned it, is conclusively presumed, in an action by the assignee to recover the amount paid for the note, to have known that the paper was not genuine (Ware *v.* McCormick, 96 Ky. 139, 16 Ky. L. Rep. 385, 28 S. W. 157, 959. See also Jackson *v.* Commercial Bank, 2 Rob. (La.) 128, 38 Am. Dec. 204; Dick *v.* Leverich, 11 La. 573), and if defendant pleads that the bill was given in renewal of a forgery, which defendant afterward discovered, the burden of proving his good faith is thereby thrown upon the holder (Mather *v.* Lord Maidstone, 1 C. B. N. S. 273, 3 Jur. N. S. 112, 26 L. J. C. P. 58, 5 Wkly. Rep. 163, 87 E. C. L. 273).

38. Commercial Bank *v.* Paddick, 90 Iowa 63, 57 N. W. 687; Frank *v.* Blake, 58 Iowa 750, 13 N. W. 50.

So of a corporation as to all its officers. Bennett State Bank *v.* Schloesser, 101 Iowa 571, 70 N. W. 705.

39. Taylor *v.* Mather, 3 T. R. 83, note *a*.

40. McLemore *v.* Cannon, 9 La. Ann. 22; Camden Safe Deposit, etc., Co. *v.* Abbott, 44 N. J. L. 257; Pool *v.* Watson, 50 N. Y. Super. Ct. 53; Hazard *v.* Spencer, 17 R. I. 561, 23 Atl. 729.

or of a partner on his firm;[41] but the presumption of *bona fides* is not rebutted by evidence that the depositor to whom a bank's check was originally given had misappropriated the funds on account of which the check was drawn,[42] or that the bill had been previously discounted at a usurious rate by the holder's step-father.[43] The burden of proving that the holder is a purchaser for value is shifted to him on proof of duress of the drawer of the bill.[44] In like manner evidence that the maker was sick and intoxicated at the time of making the note,[45] that the bill was given for a particular purpose and has been diverted from that purpose,[46] that the paper was only delivered in escrow,[47] or that it was given for a patent right, in disregard of statutory requirements,[48] shifts the burden of showing good faith to the holder.

(c) *Want or Failure of Consideration.*[49] The burden of proving himself a holder for value falls in some jurisdictions on plaintiff, upon proof of want of original consideration for the paper, as well as upon proof of fraud,[50] but in others the rule is that proof of original want of consideration will not change the pre-

So by unauthorized accommodation (Webster *v.* Howe Mach. Co., 54 Conn. 394, 8 Atl. 482; Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; McLellan *v.* Detroit File Works, 56 Mich. 579, 23 N. W. 321; Elmira Second Nat. Bank *v.* Weston, 31 N. Y. App. Div. 403, 52 N. Y. Suppl. 315; Exchange Bank *v.* Monteath, 24 Barb. (N. Y.) 371), but the burden of proving that it is accommodation paper is on defendant (Cheever *v.* Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646, 34 L. R. A. 69; Martin *v.* Niagara Falls Paper Mfg. Co., 44 Hun (N. Y.) 130).

41. *District of Columbia.*—Fisher *v.* Hume, 6 Mackey (D. C.) 9.

Illinois.— Charles *v.* Remick, 156 Ill. 327, 40 N. E. 970 (a retiring partner); Wright *v.* Brosseau, 73 Ill. 381.

New York.— St. Nicholas Nat. Bank *v.* Savery, 45 N. Y. Super. Ct. 97; Clark *v.* Dearborn, 6 Duer (N. Y.) 309.

Pennsylvania.— Real Estate Invest. Co. *v.* Russel, 148 Pa. St. 496, 30 Wkly. Notes Cas. (Pa.) 80, 24 Atl. 59.

United States.— National Exch. Bank *v.* White, 30 Fed. 412.

England.— Heath *v.* Sansom, 2 B. & Ad. 291, 22 E. C. L. 128.

42. Penn Bank *v.* Frankish, 91 Pa. St. 339.

43. Bassett *v.* Dodgin, 10 Bing. 40, 25 E. C. L. 28.

44. French *v.* Talbot Paving Co., 100 Mich. 443, 59 N. W. 166; Cummings *v.* Thompson, 18 Minn. 246; Clark *v.* Pease, 41 N. H. 414; Duncan *v.* Scott, 1 Campb. 100. See also Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560; Strickland *v.* Henry, 66 N. Y. App. Div. 23, 73 N. Y. Suppl. 12; Douai *v.* Lutjens, 21 N. Y. App. Div. 254, 47 N. Y. Suppl. 659 [*affirmed* in 165 N. Y. 622, 59 N. E. 1121]; Chemical Nat. Bank *v.* Colwell, 14 Daly (N. Y.) 361, 14 N. Y. St. 682.

45. Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595; Hale *v.* Brown, 11 Ala. 87.

46. *Alabama.*— Morton *v.* New Orleans, etc., R. Co., etc., Assoc., 79 Ala. 590.

California.— Sperry *v.* Spaulding, 45 Cal. 544.

Illinois.— Kirchoff *v.* Goezlin, 30 Ill. App. 190.

Iowa.— Union Nat. Bank *v.* Barber, 56 Iowa 559, 9 N. W. 890.

New York.— American Exch. Nat. Bank *v.* New York Belting, etc., Co., 148 N. Y. 698, 43 N. E. 168 [*affirming* 74 Hun (N. Y.) 446, 26 N. Y. Suppl. 822, 56 N. Y. St. 185]; Nickerson *v.* Ruger, 76 N. Y. 279; Farmers', etc., Nat. Bank *v.* Noxon, 45 N. Y. 762; Western Nat. Bank *v.* Wood, 64 Hun (N. Y.) 635, 19 N. Y. Suppl. 81, 46 N. Y. St. 649; Hale *v.* Shannon, 57 Hun (N. Y.) 466, 11 N. Y. Suppl. 129, 32 N. Y. St. 1079; Grocer's Bank *v.* Penfield, 7 Hun (N. Y.) 279 [*affirmed* in 69 N. Y. 502, 25 Am. Rep. 231]; Rochester *v.* Taylor, 23 Barb. (N. Y.) 18; Ross *v.* Bedell, 5 Duer (N. Y.) 462; Berman *v.* Zuckerman, 22 Misc. (N. Y.) 744, 49 N. Y. Suppl. 1070; Marine *v.* Peyser, 6 Misc. (N. Y.) 540, 27 N. Y. Suppl. 226, 58 N. Y. St. 13; Ives *v.* Jacobs, 1 N. Y. Suppl. 330, 17 N. Y. St. 843, 21 Abb. N. Cas. (N. Y.) 151.

Pennsylvania.— Dyer *v.* Adams, 1 Wkly. Notes Cas. (Pa.) 146; Riter *v.* Reed, 2 Phila. (Pa.) 342, 14 Leg. Int. (Pa.) 292.

South Dakota.— Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

West Virginia.— Union Trust Co. *v.* McClellan, 40 W. Va. 405, 21 S. E. 1025.

See 7 Cent. Dig. tit. "Bills and Notes," § 1684.

47. Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Lamb *v.* Burke, 132 Pa. St. 413, 20 Atl. 685.

48. New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40.

49. See also *supra*, XIV, E, 1, e, (III).

50. *Alabama.*— Battle *v.* Weems, 44 Ala. 105; Ross *v.* Dinkard, 35 Ala. 434; Thompson *v.* Armstrong, 7 Ala. 256; Marston *v.* Forward, 5 Ala. 347.

Florida.— Livingston *v.* Cooper, 22 Fla. 292.

Louisiana.—Martin *v.* Donovan, 15 La. Ann. 41; Harrison *v.* Poole, 4 Rob. (La.) 193.

Maine.— Small *v.* Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts.— Huntington *v.* Shute, 180

sumption of *bona fides*.[51] In like manner mere evidence of failure of consideration[52] or partial failure of consideration[53] is not sufficient to throw upon the

Mass. 371, 62 N. E. 380; Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726; Smith *v.* Edgeworth, 3 Allen (Mass.) 233; Estabrook *v.* Boyle, 1 Allen (Mass.) 412; Black River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387; Burnham *v.* Allen, 1 Gray (Mass.) 496; Delano *v.* Bartlett, 6 Cush. (Mass.) 364.

Michigan.— Dowagiac City Bank *v.* Dill, 84 Mich. 549, 47 N. W. 1109; Manistee Nat. Bank *v.* Seymour, 64 Mich. 59, 31 N. W. 140; Peabody *v.* McAvoy, 23 Mich. 526; Paton *v.* Coit, 5 Mich. 505, 72 Am. Dec. 58.

Missouri.— Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14.

Nebraska.— Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

See 7 Cent. Dig. tit. "Bills and Notes," § 1654.

So as to a note payable to bearer so far as to show that he is not the real payee but a later holder. Bissell *v.* Morgan, 11 Cush. (Mass.) 198.

51. *Arkansas.*— Trader *v.* Chidester, 41 Ark. 242, 48 Am. Rep. 38.

Indiana.— Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; Galvin *v.* Meridian Nat. Bank, 129 Ind. 439, 28 N. E. 847. *Compare* Zook *v.* Simonson, 72 Ind. 83.

Maryland.— Ellicott *v.* Martin, 6 Md. 509, 61 Am. Dec. 327.

Pennsylvania.— Dingman *v.* Amsink, 77 Pa. St. 114; Gray *v.* Kentucky Bank, 29 Pa. St. 365; Albrecht *v.* Strimpler, 7 Pa. St. 476; Brown *v.* Street, 6 Watts & S. (Pa.) 221; Knight *v.* Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99.

Virginia.— Wilson *v.* Lozier, 11 Gratt. (Va.) 477.

United States.—Goetz *v.* Kansas City Bank, 119 U. S. 551, 7 S. Ct. 318, 30 L. ed. 515.

England.—Whitaker *v.* Edmunds, 1 A. & E. 638, 1 M. & Rob. 366, 28 E. C. L. 301 [*modifying* Heath *v.* Sansom, 2 B. & Ad. 291, 22 E. C. L. 128].

See 7 Cent. Dig. tit. "Bills and Notes," § 1654.

Accommodation paper.— The burden of proof as to the holder's good faith is not changed to his shoulders by mere evidence that the instrument was accommodation paper (Hinkley *v.* St. Louis Fourth Nat. Bank, 77 Ind. 475; Harger *v.* Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Ross *v.* Bedell, 5 Duer (N. Y.) 462; Whittaker *v.* Edmunds, 1 A. & E. 638, 1 M. & Rob. 366, 28 E. C. L. 301; Percival *v.* Frampton, 2 C. M. & R. 180, 3 Dowl. P. C. 748, 4 L. J. Exch. 139, 5 Tyrw. 579; Mills *v.* Barber, 5 Dowl. P. C. 77, 2 Gale 5, 5 L. J. Exch. 204, 1 M. & W. 425; Clark *v.* Holmes, 2 F. & F. 79; Jacob *v.* Hungate, 1 M. & Rob. 445); and this has been held to be the rule notwithstanding plaintiff's admission of the fact on the record (Smith *v.* Martin, C. & M. 58, 1 Dowl. N. S. 418, 11 L. J. Exch. 129, 9 M. & W. 304, 41 E. C. L. 37; Edmunds *v.* Groves, 5 Dowl. P. C. 775, 1 Jur. 592, 6 L. J. Exch. 203, M. & H. 211, 2 M. & W. 642; Fearn *v.* Filica, 14 L. J. C. P. 15, 7 M. & G. 513, 8 Scott N. R. 241, 49 E. C. L. 513. And see Clark *v.* Thayer, 105 Mass. 216, 7 Am. Rep. 511, holding that one who takes a promissory note in good faith, for value, before its maturity, with knowledge of the previous death of its maker, and without notice that it is an accommodation note, may recover on it against the maker's estate, even if the indorser for whose accommodation it was made put it into circulation fraudulently as against the maker), but proof that the indorsement was an unauthorized accommodation by a partnership shifts the burden (Elmira Second Nat. Bank *v.* Weston, 31 N. Y. App. Div. 403, 52 N. Y. Suppl. 315).

Debt of third person.— Although a note has been shown to have been given for the debt of a third person the purchaser is *prima facie* a holder in good faith. Chicago, etc., R. Co. *v.* Edson, 41 Mich. 673, 3 N. W. 176.

On proof of there being no original consideration for the paper, it has been held that plaintiff must show himself to be a holder for value; and, he having done so, the burden is then shifted back to the maker to show that he had notice of the want of consideration at the time of purchasing the paper. Davis *v.* Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375. But in Maine, on proof that the note was for the sale of liquor, in violation of the statute, the holder need only prove that he paid value for it. Baxter *v.* Ellis, 57 Me. 178.

52. *Indiana.*— Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850.

Kansas.— See MacRitchie *v.* Johnson, 49 Kan. 321, 30 Pac. 477.

Kentucky.— McCarty *v.* Louisville Banking Co., 100 Ky. 4, 18 Ky. L. Rep. 569, 37 S. W. 144.

Louisiana.— Citizens' Bank *v.* Strauss, 26 La. Ann. 736.

Mississippi.— Winstead *v.* Davis, 40 Miss. 785.

Nebraska.— Battle Creek Nat. Bank *v.* Miller, 51 Nebr. 156, 70 N. W. 933; Crosby *v.* Ritchey, 47 Nebr. 924, 66 N. W. 1005.

New York.— Mechanics', etc., Nat. Bank *v.* Crow, 60 N. Y. 85; Many *v.* Disbrow, 2 N. Y. Leg. Obs. 88.

Pennsylvania.— Clarion Second Nat. Bank *v.* Morgan, 165 Pa. St. 199, 35 Wkly. Notes Cas. (Pa.) 484, 30 Atl. 957, 44 Am. St. Rep. 652; Lerch Hardware Co. *v.* Columbia First Nat. Bank, (Pa. 1886) 5 Atl. 778.

South Carolina.— McCaskill *v.* Ballard, 8 Rich. (S. C.) 470.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; McAlpin *v.* Finch, 18 Tex. 831; Watson *v.* Flanagan, 14 Tex. 354.

53. Tew *v.* Labiche, 4 La. Ann. 526; Dingman *v.* Amsink, 77 Pa. St. 114.

holder the burden of proving that he obtained the paper in good faith. If, however, the original consideration is shown to have been illegal, the presumption is against the holder, and he must prove himself to be a purchaser for value.[54]

f. Presentment, Demand, Protest, and Notice — (i) *Presentment and Demand* — (a) *In General.* In an action against an indorser of a demand note the burden is on plaintiff to show a demand on the maker within a reasonable time.[55]

(b) *Effect of Delay.* Injury to the drawer of a bill or check will be presumed from delay in making presentment and must be disproved by the holder.[56]

54. *California.*— Graham *v.* Larimer, 83 Cal. 173, 23 Pac. 286; Fuller *v.* Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

Indiana.— New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Springfield State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551.

Iowa.— Rock Island Nat. Bank *v.* Nelson, 41 Iowa 563.

Maine.— Wing *v.* Martel, 95 Me. 535, 50 Atl. 705; Wing *v.* Ford, 89 Me. 140, 35 Atl. 1023; Cottle *v.* Cleaves, 70 Me. 256; Swett *v.* Hooper, 62 Me. 54.

Massachusetts.— Emerson *v.* Burns, 114 Mass. 348; Smith *v.* Edgworth, 3 Allen (Mass.) 233; Holden *v.* Cosgrove, 12 Gray (Mass.) 216; Sistermans *v.* Field, 9 Gray (Mass.) 331.

Michigan.—Goodrich *v.* McDonald, 77 Mich. 486, 43 N. W. 1019; Bottomley *v.* Goldsmith, 36 Mich. 27; Paton *v.* Coit, 5 Mich. 505, 72 Am. Dec. 58.

New Hampshire.—Garland *v.* Lane, 46 N. H. 245.

New York.— Porter *v.* Knapp, 6 Lans. (N. Y.) 125. *Compare* Cowing *v.* Altman, 71 N. Y. 435, 27 Am. Rep. 70, holding that where a check is given for an illegal consideration, the burden of showing that the transferee had notice of its infirmity is upon the party assailing the validity of the check.

United States.— Marion County *v.* Clark, 94 U. S. 278, 24 L. ed. 59; Shain *v.* Goodwin, 46 Fed. 564.

England.— Wyat *v.* Campbell, M. & M. 80, 22 E. C. L. 478; Bailey *v.* Bidwell, 13 M. & W. 73.

See 7 Cent. Dig. tit. "Bills and Notes," § 1680.

So where it is shown that the note was given in renewal of a note given originally for an illegal sale of liquor. Holden *v.* Cosgrove, 12 Gray (Mass.) 216.

This is also true on proof of original usury (Smith *v.* Mohr, 64 Mo. App. 39; McDonald *v.* Aufdengarten, 41 Nebr. 40, 59 N. W. 762; Suiter *v.* Park Nat. Bank, 35 Nebr. 372, 53 N. W. 205; Colby *v.* Parker, 34 Nebr. 510, 52 N. W. 693; Lincoln Nat. Bank *v.* Davis, 25 Nebr. 376, 41 N. W. 281; Knox *v.* Williams, 24 Nebr. 630, 39 N. W. 786, 8 Am. St. Rep. 220; Darst *v.* Backus, 18 Nebr. 231, 24 N. W. 681; Olmsted *v.* New England Mortg. Security Co., 11 Nebr. 487, 9 N. W. 650; Wortendyke *v.* Meehan, 9 Nebr. 221, 2 N. W. 339; Seymour *v.* Strong, 1 Hill (N. Y.) 563); of illegal issue of a bond (Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; John Hancock Mut. L. Ins. Co. *v.* Huron, 80 Fed. 652), or of the misapplication of proceeds of a bond (Gilman *v.* New Orleans, etc., R. Co., etc., Assoc., 72 Ala. 566; Reid *v.* Mobile Bank, 70 Ala. 199).

55. Merritt *v.* Jackson, 181 Mass. 69, 62 N. E. 987.

Prima facie evidence of demand, a subsequent promise to pay, or payment actually made on account (Brennan *v.* Lowry, 4 Daly (N. Y.) 253; Hall *v.* Freeman, 2 Nott & M. (S. C.) 479, 10 Am. Dec. 621; Vaughan *v.* Fuller, 2 Str. 1246), a letter from the drawer of a bill asking for indulgence and promising to pay it (Croxen *v.* Worthen, 2 H. & H. 12, 3 Jur. 290, 8 L. J. Exch. 158, 5 M. & W. 5), or a subsequent admission of the dishonor of the bill with a promise to pay, even without proof that the indorser knew that no demand had been made (Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379) is *prima facie* evidence of a demand; and where a note was payable three months after sight, with interest, and interest payments were indorsed on it for several years, this was held to be presumptive evidence of due presentment before interest was paid (Way *v.* Bassett, 5 Hare 55, 10 Jur. 89, 15 L. J. Ch. 1, 26 Eng. Ch. 55).

Confessing a judgment to the holder of a promissory note is *prima facie* evidence of demand and notice or of a waiver, but this may be explained away by evidence of fraud or mistake. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

56. Stevens *v.* Park, 73 Ill. 387; Arnold *v.* Mangan, 89 Ill. App. 327; Knight *v.* Dunsmore, 12 Iowa 35; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177. See also Kirkpatrick *v.* Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785, holding that where an indorsed check which has been accepted as payment of a debt is not duly presented for payment, and is not paid because of the failure of the bank on which it was drawn, the burden of proof, in an action on the original debt, shifts to the holder to show that the debtor was not injured by such delay. But see Bradford *v.* Fox, 38 N. Y. 289 [*reversing* 39 Barb. (N. Y.) 203, 16 Abb. Pr. (N. Y.) 51], to the effect that where a creditor receives his debtor's bank check for the amount due, but fails to present it for payment, the burden is on the debtor to show that injury resulted to him from such neglect, in

(c) *Time of Demand.* Where the hour of making demand is not stated in a notary's certificate of protest it will be presumed to have been made in reasonable business hours.[57]

(II) *Protest and Notice*—(A) *In General.* There is no presumption that notice has been given to the drawer or indorser and the burden of proof is on the holder to show that he has given notice or has failed only after due diligence.[58] The burden is also on the holder to show that the notice was given in due time.[59]

(B) *Effect of Delay or Failure.* A drawer of a bill will be presumed to have been prejudiced by want of notice of non-acceptance.[60] Injury will further be presumed from the fact of negligence in giving notice of dishonor,[61] especially if the accepter or maker was solvent at the maturity of the bill or note and afterward became insolvent.[62]

(C) *Excuse For Delay or Failure.* The burden of proving an excuse for

an action against him on the original indebtedness.

Lack of funds.— In an action on a check, where plaintiff shows that there were no funds in the bank to pay it, the burden as to proof of injury or no injury because of laches in presenting the check or failure to notify the drawer of its non-payment is shifted from plaintiff to defendant. McClain *v.* Lowther, 35 W. Va. 297, 13 S. E. 1003. So if the holder shows that the drawer has himself drawn out the funds against which the check was drawn or that the drawer was solvent when the check was presented the burden is shifted on the drawer to show that he has sustained damage. Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

57. Fleming *v.* Fulton, 6 How. (Miss.) 473; De Wolf *v.* Murray, 2 Sandf. (N. Y.) 166.

A like presumption will be made from an averment in plaintiff's declaration that demand was made at the bank and payment refused by the cashier. Reed *v.* Wilson, 41 N. J. L. 29.

A statement of presentment, made "after the time limited for payment had expired," will be presumed to have been made at the proper time. Skelton *v.* Dustin, 92 Ill. 49.

58. *Alabama.*— German Security Bank *v.* McGarry, 106 Ala. 633, 17 So. 704; Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335; Flowers *v.* Bitting, 45 Ala. 448; Rives *v.* Parmley, 18 Ala. 256.

Connecticut.— Lockwood *v.* Crawford, 18 Conn. 361.

Florida.— Robinson *v.* Aird, (Fla. 1901) 29 So. 633; Marks *v.* Boone, 24 Fla. 177, 4 So. 532.

Iowa.— McKewer *v.* Kirtland, 33 Iowa 348.

Kentucky.— Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61.

Louisiana.— Miller *v.* Whitfield, 16 La. Ann. 10; State Bank *v.* Morgan, 13 La. Ann. 598; Ducros *v.* Jacobs, 10 Rob. (La.) 453; Tickner *v.* Roberts, 11 La. 14, 30 Am. Dec. 706.

Mississippi.— American L. Ins., etc., Co. *v.* Emerson, 4 Sm. & M. (Miss.) 177.

Missouri.— Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51.

New York.— Requa *v.* Guggenheim, 3 Lans. (N. Y.) 51; Jones *v.* Pridham, 3 E. D. Smith (N. Y.) 155.

Tennessee.— Barr *v.* Marsh, 9 Yerg. (Tenn.) 253.

Texas.— Earnest *v.* Taylor, 25 Tex. Suppl. 37.

Virginia.— Early *v.* Preston, 1 Patt. & H. (Va.) 228.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin.— Eaton *v.* McMahon, 42 Wis. 484.

See 7 Cent. Dig. tit. "Bills and Notes," § 1689.

A plea which denies that notice has been received is presumptively a good defense, although the declaration avers that notice was given. McPherson *v.* Allegheny Nat. Bank, 96 Pa. St. 135.

59. *Kentucky.*— Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599.

Louisiana.— Cooley *v.* Shannon, 20 La. Ann. 548.

Maryland.— Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558.

Virginia.— Friend *v.* Wilkinson, 9 Gratt. (Va.) 31; Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Early *v.* Preston, 1 Patt. & H. (Va.) 228.

England.— Lawson *v.* Sherwood, 1 Stark. 314, 2 E. C. L. 124.

See 7 Cent. Dig. tit. "Bills and Notes," § 1689.

Receipt of notice.— Proof that a bill was duly protested and that diligence was used in giving notice raises a presumption that such notice was duly received by the parties sought to be charged. Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538.

60. Crawford *v.* Louisiana State Bank, 1 Mart. N. S. (La.) 214; Austin *v.* Rodman, 8 N. C. 194, 9 Am. Dec. 630.

61. Whitfield *v.* Savage, 2 B. & P. 280; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Claridge *v.* Dalton, 4 M. & S. 226, 16 Rev. Rep. 440.

62. Holbrow *v.* Wilkins, 1 B. & C. 10, 2 D. & R. 59, 1 L. J. K. B. O. S. 11, 25 Rev. Rep. 285, 8 E. C. L. 5; Philips *v.* Astling, 2 Taunt. 206.

delay[63] or failure to make due presentment or give due notice[64] of dishonor is on the holder.

(D) *New Promise After Dishonor.*[65] A promise of payment made after dishonor by the indorser or drawer or an acknowledgment equivalent to such a promise is *prima facie* evidence of due notice,[66] it being assumed that he knows

63. U. S. *v.* Barker, 12 Wheat. (U. S.) 559, 6 L. ed. 728 [*affirming* 4 Wash. (U. S.) 464, 24 Fed. Cas. No. 14,520].

Collecting bank.— In an action against bankers or collecting agents to recover damages for their neglect to present a note intrusted to them for collection, or give notice of non-payment to the indorsers, the burden of proof is on defendants to show the insolvency of the indorsers, if they rely on that fact as a defense. Coghlan *v.* Dinsmore, 9 Bosw. (N. Y.) 453. And in an action against a bank on a note taken for collection for failure to protest, the burden of proof rests with the bank to show that the notary made the proper demand on the maker of the note, either at his place of business or at his residence. Ellsworth *v.* Gunton, 2 Hayw. & H. (U. S.) 21, 30 Fed. Cas. No. 18,294.

64. *Alabama.*— Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335; Rives *v.* Parmley, 18 Ala. 256.

Kentucky.— Hager *v.* Boswell, 4 J. J. Marsh. (Ky.) 61.

Louisiana.— Miller *v.* Whitfield, 16 La. Ann. 10.

Maryland.— Brandt *v.* Mickle, 28 Md. 436; Duvall *v.* Farmers Bank, 9 Gill & J. (Md.) 31.

Mississippi.— Stiles *v.* Inman, 55 Miss. 469; Richie *v.* McCoy, 13 Sm. & M. (Miss.) 541.

Missouri.— Martin *v.* Grabinsky, 38 Mo. App. 359.

North Carolina.— Asheville Nat. Bank *v.* Bradley, 117 N. C. 526, 23 S. E. 455; Denny *v.* Palmer, 27 N. C. 610.

Tennessee.—Barr *v.* Marsh, 9 Yerg. (Tenn.) 253.

Texas.— Earnest *v.* Taylor, 25 Tex. Suppl. 37.

Virginia.— Early *v.* Preston, 1 Patt. & H. (Va.) 228.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin.— Eaton *v.* McMahon, 42 Wis. 484.

See 7 Cent. Dig. tit. "Bills and Notes," § 1691.

Removal from state.— In an action by the indorsee against the indorser of a note, which was not presented to the maker for payment at maturity, the burden is on plaintiff to show that the maker had then removed from the state, or that due diligence was used to find him or ascertain his place of residence. Eaton *v.* McMahon, 42 Wis. 484.

Want of funds.— The burden of proof is on the holder of a bill to show that the drawer had no funds in the drawee's hands in order to excuse want of notice. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Baxter *v.* Graves, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374; Ralston *v.* Bullits, 3 Bibb (Ky.) 261; Blum *v.* Bidwell, 20 La. Ann. 43. But if the drawer of a bill, who has no funds in the hands of the drawee, relies on the defense that he, notwithstanding such fact, had reasonable ground to believe that his draft would be honored, such fact must be shown by him. Burnham *v.* Spring, 22 Me. 495; Wood *v.* McMeans, 23 Tex. 481. See also Sullivan *v.* Deadman, 23 Ark. 14.

65. As waiver of demand and notice see *infra*, XIV, E, 1, f, (III), (B).

66. *Alabama.*— Kennon *v.* McRea, 7 Port. (Ala.) 175.

Arkansas.— Walker *v.* Walker, 7 Ark. 542.

Connecticut.— Breed *v.* Hillhouse, 7 Conn. 523.

Illinois.— Tobey *v.* Berly, 26 Ill. 426.

Indiana.— Washer *v.* White, 16 Ind. 136.

Iowa.— Dubuque First Nat. Bank *v.* Carpenter, 34 Iowa 433.

Kentucky.— Higgins *v.* Morrison, 4 Dana (Ky.) 100; Ralston *v.* Bullitts, 3 Bibb (Ky.) 261.

Louisiana.— Ogleshy *v.* The D. S. Stacy, 10 La. Ann. 117 (holding that where the indorser "admits the justice of the claim" after suit brought, it is evidence against him of due notice of waiver); Debuys *v.* Mollere, 3 Mart. N. S. (La.) 318, 15 Am. Dec. 159.

Maine.— McPhetres *v.* Halley, 32 Me. 72.

Maryland.— Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190. See also Long *v.* Crawford, 18 Md. 220.

Massachusetts.— Harrison *v.* Bailey, 99 Mass. 620, 97 Am. Dec. 63; Martin *v.* Ingersoll, 8 Pick. (Mass.) 1.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

Mississippi.— Bibb *v.* Peyton, 11 Sm. & M. (Miss.) 275; Moore *v.* Ayres, 5 Sm. & M. (Miss.) 310; Robbins *v.* Pinckard, 5 Sm. & M. (Miss.) 51; Offit *v.* Vick, Walk. (Miss.) 99 (an acknowledgment that he had received notice and "supposed he would have to provide for the bill").

Missouri.— Harness *v.* Davies County Sav. Assoc., 46 Mo. 357 (where the drawer said that he knew the bill was not paid and that "it should be met if presented again"); Dorsey *v.* Watson, 14 Mo. 59; Mense *v.* Osbern, 5 Mo. 544 (a promise to pay "when he got the money from the maker in three months"); Pratte *v.* Hanly, 1 Mo. 35.

New Hampshire.— Hibbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733, where the indorser told the holder to present it again and that if the maker did not pay he "supposed he would have to."

New York.—Alleman *v.* Bowen, 61 Hun

whether notice has been given him or not;[67] but such promise is presumptive, and not conclusive, evidence, and raises a question of fact for the jury to determine.[68] By taking up a note after protest and giving an absolute bond for the payment of the money the indorser admits that he received notice and the burden of proving the contrary is afterward on him;[69] and a promise to pay part of the amount of a dishonored bill[70] or an offer to secure the holder if he would take half the amount[71] is also *prima facie* evidence of due notice. Notice may also be presumed from part payment after maturity,[72] but this presumption, although such payment is not contradicted, is not binding upon the jury.[73]

(N. Y.) 30, 15 N. Y. Suppl. 318, 39 N. Y. St. 822; Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54; Brennan *v.* Lowry, 4 Daly (N. Y.) 253; Smith *v.* Unangst, 20 Misc. (N. Y.) 564, 46 N. Y. Suppl. 340; Harral *v.* Sternberger, 17 Misc. (N. Y.) 274, 40 N. Y. Suppl. 353; Scott *v.* Parker, 5 N. Y. Suppl. 753, 25 N. Y. St. 865; Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467.

Ohio.— See Hudson *v.* Wolcott, 39 Ohio St. 618; Myers *v.* Standart, 11 Ohio St. 29 (a promise to pay in spite of an alleged defect which was not such in reality).

Pennsylvania.— Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Loose *v.* Loose, 36 Pa. St. 538.

Rhode Island.— Glaser *v.* Rounds, 16 R. I 235, 14 Atl. 863.

South Carolina.— Schmidt *v.* Radcliffe, 4 Strobh. (S. C.) 296, 53 Am. Dec. 678.

Vermont.— Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462; Nash *v.* Harrington, 1 Aik. (Vt.) 39.

Virginia.— Walker *v.* Laverty, 6 Munf. (Va.) 487.

United States.— U. S. Bank *v.* Layman, 1 Blatchf. (U. S.) 297, 2 Fed. Cas. No. 924, 20 Vt. 666, 11 Law Rep. 156; Sherman *v.* Clark, 3 McLean (U. S.) 91, 21 Fed. Cas. No. 12,763.

England.— Brownell *v.* Bonney, 1 Q. B. 39, 5 Jur. 6, 10 L. J. Q. B. 71, 4 P. & D. 523, 41 E. C. L. 427 (promises to pay irrespective of the informality of the notice); *Ex p.* Lowenthal, L. R. 9 Ch. 591, 43 L. J. Bankr. 83, 30 L. T. Rep. N. S. 668; Killby *v.* Rochussen, 18 C. B. N. S. 357, 114 E. C. L. 357; Cordery *v.* Colvin, 14 C. B. N. S. 374, 9 Jur. N. S. 1200, 32 L. J. C. P. 210, 8 L. T. Rep. N. S. 245, 108 E. C. L. 374; Potter *v.* Rayworth, 13 East 417; Lundie *v.* Robertson, 7 East 231; Bartholomew *v.* Hill, 7 H. & N. 1040; Norris *v.* Solomonson, 3 Hodges 14, 1 Jur. 55, 6 L. J. C. P. 100, 4 Scott 257, 36 E. C. L. 586 (where the drawer said he knew the bill was not paid and "would call and arrange it"); Patterson *v.* Becher, 6 Moore C. P. 319, 17 E. C. L. 484; Wood *v.* Brown, 1 Stark. 217, 2 E. C. L. 88 (where the drawer wrote a letter to the holder, saying that the bill would be satisfied next term); Vaughan *v.* Fuller, 2 Str. 1246.

See 7 Cent. Dig. tit. "Bills and Notes," § 1694.

If a party admits his liability after dishonor of the instrument (Gawtry *v.* Doane, 48 Barb. (N. Y.) 148 [*affirmed* in 51 N. Y. 84]; Keeler *v.* Bartine, 12 Wend. (N. Y.) 110; Rabey *v.* Gilbert, 6 H. & N. 536; Mills *v.* Gibson, 16 L. J. C. P. 249; Jackson *v.* Collins, 17 L. J. Q. B. 142), or after action brought (Hopley *v.* Dufresne, 15 East 275, 13 Rev. Rep. 463), it is *prima facie* evidence of notice.

67. McPhetres *v.* Halley, 32 Me. 72.

68. Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190; Morgan *v.* Wolstencroft, 1 Pa. Super. Ct. 13, 37 Wkly. Notes Cas. (Pa.) 293; Blodgett *v.* Durgin, 32 Vt. 361; Commercial Bank *v.* Clark, 28 Vt. 325; Brownell *v.* Bonney, 1 Q. B. 39, 5 Jur. 6, 10 L. J. Q. B. 71, 4 P. & D. 523, 41 E. C. L. 427; Hicks *v.* Duke of Beaufort, 1 Arn. 55, 4 Bing. N. Cas. 229, 2 Jur. 255, 7 L. J. C. P. 131, 5 Scott 598, 33 E. C. L. 684; Pickin *v.* Graham, 1 Cr. & M. 725, 2 L. J. Exch. 253, 3 Tyrw. 923; Booth *v.* Jacobs, 3 L. J. K. B. 134, 3 N. & M. 351, 28 E. C. L. 610.

The burden of proof is on an indorser, who seeks to avoid such promise on the ground of mistake. Schmidt *v.* Radcliffe, 4 Strobh. (S. C.) 296, 53 Am. Dec. 678.

69. Mills *v.* Rouse, 2 Litt. (Ky.) 203.

70. Horford *v.* Wilson, 1 Taunt. 12.

71. Dixon *v.* Elliott, 5 C. & P. 437, 24 E. C. L. 644.

From such offer a jury may infer either due notice or waiver of laches (Columbia Bank *v.* Mackall, 2 Cranch C. C. (U. S.) 631, 2 Fed. Cas. No. 873), and the jury may draw an inference of notice from part payment by the drawer or indorser (Horford *v.* Wilson, 1 Taunt. 12), and their verdict, finding a demand and notice on such evidence, will be sustained (Bibb *v.* Peyton, 11 Sm. & M. (Miss.) 275).

Security given by an indorser for the amount of the note, after its dishonor, it seems, raises a strong presumption of notice or a waiver of the want of it. Union Bank *v.* Govan, 10 Sm. & M. (Miss.) 333.

72. Gazzo *v.* Baudoin, 10 La. Ann. 157; Frost *v.* Harrison, 8 La. Ann. 123; Bibb *v.* Peyton, 11 Sm. & M. (Miss.) 275; Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

73. Bell *v.* Frankis, 11 L. J. C. P. 300, 4 M. & G. 446, 5 Scott N. R. 460, 43 E. C. L. 234.

The presumption so raised cannot be contradicted after verdict upon it by evidence that the payment was made without notice having been duly given. Cornwall *v.* Gould, 4 Pick. (Mass.) 444.

(E) *Notice by Mail.* Depositing in the post-office a properly addressed, prepaid letter, containing a notice of protest raises a presumption that the notice reached its destination by due course of mail.[74] The postmark on a letter is also *prima facie* evidence of the time when the notice was mailed,[75] although not conclusive.[76]

(F) *Authority of Notary.* The authority of the notary to give notice of dishonor is to be inferred from the fact that the bill was in his possession.[77]

(G) *Residence of Indorser.* The residence of a party to a bill or note is presumed, for the purpose of notice of dishonor, to be the same as it was at the time he signed the instruments,[78] although he may have removed from that place some time before without the knowledge of the holder.[79]

(III) *Waiver* — (A) *In General.* A waiver of demand and notice will not be readily presumed,[80] and the burden is on the holder of the instrument to prove it;[81] but if the words, "We waive demand on the promisor and notice to ourselves," appear in writing over the name of several indorsers on a note they are admissible as *prima facie* evidence of a waiver.[82]

74. *Alabama.*— Foster *v.* McDonald, 5 Ala. 376.

Minnesota.—Roberts *v.* Wold, 61 Minn. 291, 63 N. W. 739; Wilson *v.* Richards, 28 Minn. 337, 9 N. W. 872.

Missouri.—People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032.

Pennsylvania.— Jensen *v.* McCorkell, 154 Pa. St. 323, 32 Wkly. Notes Cas. (Pa.) 355, 23 Atl. 366, 35 Am. St. Rep. 843.

Virginia.— Slaughters *v.* Farland, 31 Gratt. (Va.) 134.

United States.— Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216.

Payment of postage.—Where a notary public's certificate shows that he has mailed notice of protest, a prepayment of postage as required by post-office regulations will be presumed. Brooks *v.* Day, 11 Iowa 46; Pier *v.* Heinrichshoffen, 67 Mo. 163, 29 Am. Rep. 501; National Butchers', etc., Bank *v.* De Groot, 43 N. Y. Super. Ct. 341.

In order to charge an indorser, where it is proper to send notice of protest by mail, which was not received by due course of mail, the burden is on plaintiff to show that the notice was properly mailed. Allen *v.* Georgia Nat. Bank, 60 Ga. 347; Friend *v.* Wilkinson, 9 Gratt. (Va.) 31; Hawkes *v.* Salter, 4 Bing. 715, 6 L. J. C. P. O. S. 180, 1 M. & P. 750, 29 Rev. Rep. 708, 13 E. C. L. 706; Hilton *v.* Fairclough, 2 Campb. 633, 12 Rev. Rep. 766. And see Moore *v.* Burr, 14 Ark. 230. So where notice of non-payment is sent through the post-office, addressed to the drawer of a bill at a particular place, it must be shown that he resided there or that it was the place at which notice should have been addressed to him. Crawford *v.* Mobile Branch Bank, 7 Ala. 205. And where the sending of a notice by mail is relied on as proof of notice of protest to an indorser, and there is positive evidence that he did not receive it, the time of depositing the notice in the post-office must be shown, to determine whether it was sent within a reasonable time. Apple *v.* Lesser, 93 Ga. 749, 21 S. E. 171.

75. Crawford *v.* Mobile Branch Bank, 7 Ala. 205; New Haven County Bank *v.* Mitchell, 15 Conn. 206; Eearly *v.* Preston, 1 Patt. & H. (Va.) 228; Kent *v.* Lowen, 1 Campb. 177; Stocken *v.* Collins, 9 C. & P. 653, 10 L. J. Exch. 227, 7 M. & W. 515, 38 E. C. L. 380; Fletcher *v.* Braddyll, 3 Stark. 64, 23 Rev. Rep. 758, 3 E. C. L. 596.

Drop letter.— There is no presumption that a drop letter was deposited in the post-office on the day of the date of its postmark. Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445.

76. Stocken *v.* Collins, 9 C. & P. 653, 10 L. J. Exch. 227, 7 M. & W. 515, 38 E. C. L. 380.

77. Burbank *v.* Beach, 15 Barb. (N. Y.) 326.

Where a certificate of protest is properly authenticated by the seal of the notary no proof of his signature or of his authority to act is necessary. Gillespie *v.* Neville, 14 Cal. 408; Crowley *v.* Barry, 4 Gill (Md.) 194; Ross *v.* Bedell, 5 Duer (N. Y.) 462; Sims *v.* Hundley, 6 How. (U. S.) 1, 12 L. ed. 319.

78. Rowland *v.* Rowe, 48 Conn. 432; New York Belting, etc., Co. *v.* Ela, 61 N. H. 352; Requa *v.* Collins, 51 N. Y. 144; Ward *v.* Perrin, 54 Barb. (N. Y.) 89; Utica Bank *v.* Phillips, 3 Wend. (N. Y.) 408.

79. Goodwin *v.* Macoy, 13 Ala. 271; *Ex p.* Baker, 4 Ch. D. 795, 6 L. J. Bankr. 60, 36 L. T. Rep. N. S. 339, 25 Wkly. Rep. 454.

80. Faulkner *v.* Faulkner, 73 Mo. 327.

81. Ballin *v.* Betcke, 11 Iowa 204. This is true whether such waiver be made before or after maturity of the paper. Edwards *v.* Tandy, 30 N. H. 540.

Date of waiver.— The burden of proof is upon the holder of a promissory note, under the plea of the general issue of defendant indorsers, to show the date of a waiver of protest. Wilkins *v.* Gillis, 20 La. Ann. 538, 96 Am. Dec. 425.

82. Farmer *v.* Rand, 14 Me. 225, 16 Me. 453. So the signature of defendant on a note which appears to be an indorsement and waiver of protest, not denied in the answer,

(B) *New Promise After Dishonor.*[83] Some of the authorities hold that knowledge of laches will be presumed and that the burden is on defendant, who promises to pay after dishonor, not only to prove the laches, but his ignorance of it at the time the promise was made.[84] Others are to the effect that where there has been laches on the holder's part in demand or notice, the burden is on him to prove that a subsequent promise to pay, which would amount to a waiver, was made with knowledge of such laches on the part of the drawer or indorser.[85]

g. Days of Grace. In a suit on a bill or note governed by foreign law, the provisions of that law as to the allowance of days of grace will be presumed to be the same as those of the law merchant, in the absence of evidence to the contrary.[86]

h. Payment — (I) *In General.* The party alleging payment must bear the burden of proving it,[87] and if he pleads by way of payment of a certificate of

and admitted at the trial, is *prima facie* evidence of both. Johnson *v.* Parsons, 140 Mass. 173, 4 N. E. 196.

Where an indorser, after protest of a note, said that he had received or seen the protest and would have to pay, but would try to save himself out of a bill of sale which he held from the maker covering almost all of his property, this will amount to presumptive evidence of due notice or a waiver of it. Long *v.* Crawford, 18 Md. 220.

83. As prima facie evidence of notice see *supra*, XIV, E, 1, f, (II), (D).

A promise as evidence of notice presupposes notice. A promise as waiver of notice presupposes laches. The former raises a presumption which may be rebutted; the latter is often conclusive by way of estoppel. Randolph Comm. Pap. § 1316, note 771.

84. *Alabama.*— Kennon *v.* McRea, 7 Port. (Ala.) 175.

Connecticut.— Breed *v.* Hillhouse, 7 Conn. 523.

Massachusetts.—Martin *v.* Ingersoll, 8 Pick. (Mass.) 1.

Pennsylvania.— Oxnard *v.* Varnum, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255; Moyer's Appeal, 87 Pa. St. 129; Loose *v.* Loose, 36 Pa. St. 538.

Vermont.— Nash *v.* Harrington, 1 Aik. (Vt.) 39.

Virginia.— Cardwell *v.* Allan, 33 Gratt. (Va.) 160.

England.—Stevens *v.* Lynch, 2 Campb. 332, 12 East 38.

See 7 Cent. Dig. tit. "Bills and Notes," § 1694.

85. *Illinois.*— Walker *v.* Rogers, 40 Ill. 278, 89 Am. Dec. 348; Morgan *v.* Peet, 32 Ill. 281.

Iowa.— Freeman *v.* O'Brien, 38 Iowa 406; Ballin *v.* Betcke, 11 Iowa 204.

Louisiana.— Louisiana State Bank *v.* Buhler, 22 La. Ann. 83; Mitchell *v.* Young, 21 La. Ann. 279; Vanwickle *v.* Downing, 19 La. Ann. 83; Harris *v.* Allnut, 12 La. 465.

Maine.— Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

New Hampshire.—Norris *v.* Ward, 59 N. H. 487; Edwards *v.* Tandy, 36 N. H. 540; Farrington *v.* Brown, 7 N. H. 271; Otis *v.* Hussey, 3 N. H. 346.

New Jersey.—Glassford *v.* Davis, 36 N. J. L. 348.

New York.—Baer *v.* Leppert, 5 Hun (N. Y.) 453; Hazelton *v.* Colburn, 1 Rob. (N. Y.) 345; Jones *v.* Savage, 6 Wend. (N. Y.) 658; Trimble *v.* Thorne, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302. But see Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

North Carolina.— Lilly *v.* Petteway, 73 N. C. 358.

Ohio.— Dayton City Nat. Bank *v.* Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958.

Rhode Island.— Glaser *v.* Rounds, 16 R. I. 235, 14 Atl. 863.

Wisconsin.— Schierl *v.* Baumel, 75 Wis. 69, 43 N. W. 724.

United States.— Good *v.* Sprigg, 2 Cranch C. C. (U. S.) 172, 10 Fed. Cas. No. 5,532.

See 7 Cent. Dig. tit. "Bills and Notes," § 1694.

86. Cribbs *v.* Adams, 13 Gray (Mass.) 597; Wood *v.* Corl, 4 Metc. (Mass.) 203; Lucas *v.* Ladew, 28 Mo. 342; Reed *v.* Wilson, 41 N. J. L. 29; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367. But see Goddin *v.* Shipley, 7 B. Mon. (Ky.) 575, holding that where the days of grace to be allowed on a note are not fixed in a state, by statute, they are fixed by custom, which must be proved, and three days of grace allowable will not be presumed in the absence of all evidence.

87. *Alabama.*— Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950.

Dakota.— Star Wagon Co. *v.* Matthiessen, 3 Dak. 233, 14 N. W. 107.

Illinois.— Ritter *v.* Schenk, 101 Ill. 387; Kent *v.* Mason, 79 Ill. 540; Bonnell *v.* Wilder, 67 Ill. 327; Douglas *v.* Pfeiffer, 46 Ill. 102; Grimes *v.* Hilliary, 51 Ill. App. 641; Witner *v.* Zeman, 30 Ill. App. 195.

Indiana.— Carver *v.* Torrey, 158 Ind. 76, 62 N. E. 697.

Louisiana.— Browder *v.* Hook, 24 La. Ann. 200; St. Armand *v.* Alexander, 18 La. Ann. 243.

Maryland.— Miller *v.* Palmer, 58 Md. 451.

Massachusetts.— Hilton *v.* Smith, 5 Gray (Mass.) 400.

Michigan.— Smith's Appeal, 52 Mich. 415, 18 N. W. 195; Marvin *v.* Newman, 39 Mich. 114.

deposit that he had paid a previous order given for the same debt by the payee of the certificate to another person he must prove such payment.[88] Payment on a note is an admission of the debt as then due; but if the time is material the party making payment must prove when it was made.[89]

(II) *Lapse of Time.* A demand note will be presumed to have been paid after the lapse of twenty years,[90] and this is true although the statute of limitations had not run because of the non-residence of the maker,[91] or although the payee had died after holding the paper eight years, and no administrator was appointed for twenty-one years.[92] The length of time that has elapsed since an alleged payment may be considered with other evidence by a jury in determining whether it was made.[93] If a payment is proved to have been made in a certain year it will be presumed to have been made on the last day of the year, in the absence of other proof as to the date.[94] But the inference of payment arising from mere lapse of time is not sufficient to overcome positive evidence that a note has not been paid,[95] and there is no such presumption from lapse of time against an alien enemy.[96]

(III) *Possession by Maker or Accepter.* Payment of a bill or note will

Nebraska.— Van Buskirk *v.* Chandler, 18 Nebr. 584, 26 N. W. 356.

New Hampshire.— Kendall *v.* Brownson, 47 N. H. 186.

North Carolina.— Morehead Banking Co. *v.* Walker, 121 N. C. 115, 28 S. E. 253; Ellison *v.* Rix, 85 N. C. 77.

Pennsylvania.— McCarty *v.* Scanlon, 187 Pa. St. 495, 41 Atl. 345.

Texas.— Guerin *v.* Patterson, 55 Tex. 124.

Vermont.— See Barber *v.* Slade, 30 Vt. 191, 73 Am. Dec. 299.

Wisconsin.— Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732; Knapp *v.* Runals, 37 Wis. 135.

United States.— Fullerton *v.* U. S. Bank, 1 Pet. (U. S.) 604, 7 L. ed. 280. See also Wallace *v.* McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95.

See 7 Cent. Dig. tit. "Bills and Notes," § 1695.

Where the indorser of a note holds it as collecting agent for his indorsee, and also holds a second and smaller note, belonging to the maker of the first note, with authority to collect and apply it to the payment of the first note, the burden of proving that he has done so is still on him, although a payment larger than the second note was made by him on the first the day before he collected the second, and the balance on the first note was afterward paid by the maker, who was presumed to have paid it all. Shephard *v.* Calhoun, 72 Ill. 337.

88. Alabama, etc., R. Co. *v.* Sanford, 36 Ala. 703.

89. McGehee *v.* Greer, 7 Port. (Ala.) 537.

In an action against an indorser, if he pleads payment by the accepter, and the latter paid the bill by mistake for another bill, which payment was promptly revoked, the acceptance restored, and the other bill surrendered, the holder must establish the fact of the mistake. Bogart *v.* Nevins, 6 Serg. & R. (Pa.) 361.

90. Pattie *v.* Wilson, 25 Kan. 326; Duffield *v.* Creed, 5 Esp. 52. And see Wells *v.* Washington, 6 Munf. (Va.) 532, holding that where there is a lapse of twenty years between the date of a note and the institution of a suit on it, payment must be presumed unless there is evidence of some acknowledgment of the debt within the time, or unless payment of interest, or a part payment of the principal, is proved. See also Estes *v.* Blake, 30 Me. 164; Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647; Walker *v.* Emerson, 20 Tex. 706, 73 Am. Dec. 207; Hervey *v.* Jacques, 20 U. C. Q. B. 366.

A note will not be presumed to have been paid after a lapse of five years (Nash *v.* Gibson, 16 Iowa 305), or from the neglect to present it until time enough had passed to outlaw it (Smith's Appeal, 52 Mich. 415, 18 N. W. 195). And the presumption from the lapse of fifteen years that a mortgage and note have been paid does not arise until fifteen years after they become due. Smith *v.* Niagara F. Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216.

91. Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592; Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153.

92. Sheldon *v.* Heaton, 22 N. Y. App. Div. 308, 47 N. Y. Suppl. 1124.

93. Manning *v.* Meredith, 69 Iowa 430, 29 N. W. 336.

94. Byers *v.* Fowler, 14 Ark. 86.

Where, after suit brought, there are subsequent settlements of account between the holder, indorser, and maker, they are admissible as evidence of payment for the consideration of the jury. Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690.

95. Delaney *v.* Brunette, 62 Wis. 615, 23 N. W. 22.

Delay to sue until the statute had nearly run out raises no presumption of payment. Newcombe *v.* Fox, 1 N. Y. App. Div. 389, 37 N. Y. Suppl. 294, 72 N. Y. St. 633.

96. Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12.

be presumed from possession, after maturity, by the maker or accepter,[97] and if a note is found among the maker's papers after his death it will be presumed to have been paid.[98] Payment will not be inferred, however, from possession by the maker[99] or accepter[1] before maturity; from possession by the maker as adminis-

97. *Alabama.*— Lipscomb *v.* De Lemos, 68 Ala. 592; Potts *v.* Coleman, 67 Ala. 221; Penn *v.* Edwards, 50 Ala. 63; Hill *v.* Gayle, 1 Ala. 275.

Arkansas.— Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868; Hollenburg *v.* Lane, 47 Ark. 394, 1 S. W. 687; Lane *v.* Farmer, 13 Ark. 63.

California.— Turner *v.* Turner, 79 Cal. 565, 21 Pac. 959.

Florida.— Perez *v.* Key West Bank, 36 Fla. 467, 18 So. 590.

Georgia.— Osborn *v.* Herron, 28 Ga. 313. See also McCamy *v.* Cavender, 92 Ga. 254, 18 S. E. 415.

Illinois.— Tedens *v.* Schumers, 112 Ill. 263.

Iowa.— Dougherty *v.* Deeney, 41 Iowa 19.

Kentucky.— Callahan *v.* Commonwealth Bank, 82 Ky. 231; Callahan *v.* Louisville First Nat. Bank, 78 Ky. 604, 1 Ky. L. Rep. 342, 39 Am. Rep. 262; Randle *v.* City Nat. Bank, 5 Ky. L. Rep. 185.

Louisiana.— Walton *v.* Young, 26 La. Ann. 164; Penny's Succession, 14 La. Ann. 194; Skannel *v.* Taylor, 12 La. Ann. 773; Bell *v.* Norwood, 7 La. 95; Miller *v.* Reynolds, 5 Mart. N. S. (La.) 665.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34.

Massachusetts.— McGee *v.* Prouty, 9 Metc. (Mass.) 547, 43 Am. Dec. 409; Baring *v.* Clark, 19 Pick. (Mass.) 220.

Missouri.— Lawson *v.* Gudgel, 45 Mo. 480; Stephenson *v.* Richards, 45 Mo. App. 544.

Nebraska.—Smith *v.* Gardner, 36 Nebr. 741, 55 N. W. 245; Peavey *v.* Hovey, 16 Nebr. 416, 20 N. W. 272.

New Hampshire.— Chandler *v.* Davis, 47 N. H. 462.

New York.— Gray *v.* Gray, 2 Lans. (N. Y.) 173; Reynale *v.* Harrison, 25 N. Y. Wkly. Dig. 558.

North Carolina.—Jones *v.* Bobbitt, 90 N. C. 391; Blount *v.* Starkey, 1 N. C. 65.

Ohio.— Larimore *v.* Wells, 29 Ohio St. 13. See also Wilson *v.* Goodin, Wright (Ohio) 219.

Pennsylvania.— Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393; Zeigler *v.* Gray, 12 Serg. & R. (Pa.) 42; Weidener *v.* Schweigart, 9 Serg. & R. (Pa.) 385. See also Connelly *v.* McKean, 64 Pa. St. 113.

Tennessee.— Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

Texas.— Halfin *v.* Winkleman, 83 Tex. 165, 18 S. W. 433; Hays *v.* Samuels, 55 Tex. 560; Close *v.* Fields, 9 Tex. 422, 13 Tex. 623.

Washington.— Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

United States.— Lonsdale *v.* Brown, 3 Wash. (U. S.) 404, 15 Fed. Cas. No. 8,492.

England.— Egg *v.* Barnett, 3 Esp. 196; Harmer *v.* Steele, 4 Exch. 1, 19 L. J. Exch. 34; Gibbon *v.* Featherstonhaugh, 1 Stark. 225, 2 E. C. L. 92.

See 7 Cent. Dig. tit. "Bills and Notes," § 1696.

Where the maker of a note is the son of the payee and a member of his family, and might have acquired possession of the note as well without payment as with, the presumption of payment does not arise from his possession of the note. Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977. See also to same effect Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188; Grey *v.* Grey, 47 N. Y. 552.

Where one of several makers brings suit against the others for contribution, his possession of the note will be evidence for the purpose of such suit that he has paid it. Ingram *v.* Croft, 7 La. 82; Chandler *v.* Davis, 47 N. H. 462; Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Rep. 525. *Contra*, Heald *v.* Davis, 11 Cush. (Mass.) 318, 59 Am. Dec. 147; Bates *v.* Cain, 70 Vt. 144, 40 Atl. 36.

98. Liddell *v.* Wright, 72 Ga. 899; Richardson *v.* Cambridge, 2 Allen (Mass.) 118, 79 Am. Dec. 767. See also Chandler *v.* Davis, 47 N. H. 462 (holding that where A and B gave their joint notes, and after the death of A they were found among his papers it was *prima facie* evidence that they were paid by him); Bracken *v.* Miller, 4 Watts & S. (Pa.) 102 (holding that the notes of a testator found among the papers of his executor many years after his death afford a reasonable presumption that they were paid by the executor without any other proof of the fact, especially where no claim has ever since been made by the creditor).

99. Morris *v.* Morton, 14 Nebr. 358, 15 N. W. 725; Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613; Eckert *v.* Cameron, 43 Pa. St. 120.

Until it is shown to have been issued and delivered to the payee, payment will not be inferred, from the possession of the note by the maker. Mygatt *v.* Pruden, 29 Ga. 43. See also Curry *v.* Kurtz, 33 Miss. 24, holding that the production of a bill of exchange by an accommodation accepter is not evidence of payment, unless it is shown that it has been in circulation after acceptance. And see Pfiel *v.* Vanbatenberg, 2 Campb. 439.

Where sale of a note is made by the pledgee the maker's possession will not amount to evidence of payment, except as to the amount secured to the pledgee, as against a purchaser of the premises mortgaged for its security, who has assumed to pay the note. Zimpleman *v.* Veeder, 98 Ill. 613.

1. Witte *v.* Williams, 8 S. C. 290, 28 Am. Rep. 294. See also Hankin *v.* Squires, 5 Biss. (U. S.) 186, 11 Fed. Cas. No. 6,025,

trator[2] or agent[3] of the holder; or where the possession was obtained by the unauthorized act of the holder's agent.[4]

(IV) *Possession by Payee.* A bill or note is presumed to be still unpaid while it is in the possession of the payee[5] or his personal representative,[6] and if it is alleged that a note was paid and left by inadvertence in the holder's hands, it will not be sufficient to show that the habits of the payee were generally careless in such matters.[7]

(V) *Receipt or Indorsement Showing Payment.* An indorsement of a payment on a note, whether of interest or prineipal, made at a time when the note is in force,[8] is *prima facie* evidence of such payment by the person legally obligated to pay,[9] but this has been held to be so only where it is the handwriting of

holding that the possession by the payee of a time draft, unaccepted and uncanceled, is not evidence *prima facie* that he had paid it. And see Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 543, 65 N. W. 759.

2. Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

If a note is in the possession of one who is the personal representative both of the payee and the maker it will be presumed that he holds it on account of the payee's estate, of which he is sole executor, rather than as one of several administrators of the maker. Haywood *v.* Lewis, 65 Ga. 221.

3. Bowman *v.* St. Louis Times, 87 Mo. 191.

4. Emerson *v.* Mills, 83 Tex. 385, 18 S. W. 805.

Where plaintiff's decedent held notes payable to defendant as collateral to defendant's note to decedent, and one of these notes was paid by the maker to defendant while decedent still held it as collateral, the fact that decedent afterward gave the note to defendant raises no presumption that defendant had paid the amount of the note to apply on his note to decedent. Jones *v.* Benrow, 122 N. C. 508, 29 S. E. 774.

5. *Arkansas.*— Davis *v.* Gaines, 28 Ark. 440.

California.— Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Turner *v.* Turner, 79 Cal. 565, 21 Pac. 959.

Colorado.—Reed *v.* Pueblo First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Georgia.— Haywood *v.* Lewis, 65 Ga. 221.

Illinois.— Stiger *v.* Bent, 111 Ill. 328; Ritter *v.* Shenk, 101 Ill. 387; Steumbaugh *v.* Hallam, 48 Ill. 305; Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437; Keyes *v.* Fuller, 9 Ill. App. 528.

New York.—Giesson *v.* Giesson, 1 Code Rep. N. S. (N. Y.) 414.

Vermont.— Hamblet *v.* Bliss, 55 Vt. 535.

Washington.— Brooks *v.* James, 16 Wash. 335, 47 Pac. 751.

Wisconsin.— Studebaker *v.* Langson, 89 Wis. 200, 61 N. W. 773; Somervail *v.* Gillies, 31 Wis. 152.

England.— Brembridge *v.* Osborne, 1 Stark. 374, 2 E. C. L. 145.

See 7 Cent. Dig. tit. "Bills and Notes," § 1695.

The presumption that an outstanding note is not paid is not changed by evidence that a brother of the maker said he had furnished him with money to pay it (Walker *v.* Douglas, 70 Ill. 445), or that the payee afterward received checks sufficient in amount to pay it (Smith's Appeal, 52 Mich. 415, 18 N. W. 195).

6. Ritter *v.* Schenk, 101 Ill. 387; Sturgis *v.* Baker, 39 Oreg. 541, 65 Pac. 810. See also Tisdale *v.* Maxwell, 58 Ala. 40, holding that where a note payable to two persons, not partners, is found by the executor of one of them among his testator's effects, it will be presumed that the note was unpaid.

7. Perry *v.* Gray, 106 Mass. 206.

If a note, after being transferred and dishonored, returns to the possession of the bank, and the bank also holds a check from the maker for the same amount drawn on it payable to it, it will be presumptive evidence that the note is paid. Burns *v.* Kelley, 41 Miss. 339.

8. "Received payment" indorsed by the payee of a draft before it is accepted and before notice of dishonor raises no presumption of payment by either drawer or drawee. Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 343. 65 N. W. 759.

9. *Alabama.*— Clark *v.* Simmons, 4 Port. (Ala.) 14.

Illinois.—Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444; Shephard *v.* Calhoun, 72 Ill. 337 (holding that where there is a general indorsement of a payment upon a note the maker primarily liable will be presumed to have made such payment and not the assignor of the note, especially where the indorsement is made by an assignor holding the note for collection against the maker); Giddings *v.* McCumber, 51 Ill. App. 373.

Louisiana.— Norcross *v.* Theurer, 3 Rob. (La.) 375.

Michigan.—Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 543, 65 N. W. 759; Morris *v.* Morris, 5 Mich. 171.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

North Carolina.— Young *v.* Alford, 118 N. C. 215, 23 S. E. 973. See also Jones *v.* Bobbitt, 90 N. C. 391.

Ohio.— Keys *v.* Baldwin, 9 Ohio Dec. (Reprint) 737, 17 Cinc. L. Bul. 113.

Pennsylvania.— Addams *v.* Seitzinger, 1 Watts & S. (Pa.) 243.

a holder, who was entitled to receive payment.[10] Such an indorsement will be presumed to have been made at the time it purports to bear date[11] and is *prima facie* for cash.[12] If a memorandum of payment of interest is indorsed on a note, it will be evidence of a payment on account of the note, and if made within six years will be presumptive evidence that the principal was then unpaid.[13] On the other hand if part payment has been made and not indorsed on a note, the want of such receipt will not be regarded as fatal, upon an application to vacate the sale of collateral mortgaged premises made under a power of sale to satisfy the note.[14]

(VI) *REBUTTAL OF PRESUMPTION.* The presumption of payment arising from surrender to the maker or possession by him,[15] from the delivery of money to the holder,[16] from a receipt or indorsement of payment,[17] or from the lapse of

Vermont.— McDaniels *v.* Lapham, 21 Vt. 222.

England.— Graves *v.* Key, 3 B. & Ad. 313, 23 E. C. L. 143; Scholey *v.* Walsby, Peake 24.

All cross demands existing at the time of an indorsement by the maker of a credit on a note are presumed to be covered by it. Baldwin *v.* Walden, 30 Ga. 829.

Where a penmark is drawn through the word "Paid," stamped on the note, the presumption is that such word was stamped by mistake. International Bank *v.* Bowen, 80 Ill. 541.

10. Curry *v.* Kurtz, 33 Miss. 24; Pfiel *v.* Vanbatenberg, 2 Campb. 439. See also Spann *v.* Ballard, Rice (S. C.) 440, holding that the mere production of a draft from the custody of the drawee, as it had been indorsed by the payee before presentment, even with a receipt indorsed, is insufficient to authorize a presumption of payment by the drawee, without proof that the receipt was in the handwriting of a person entitled to demand payment, or other sufficient evidence of payment *aliunde*. *Compare* Mims *v.* Morrison, 5 La. Ann. 650, holding that in the absence of evidence to the contrary it will be presumed that ar indorsement of a credit on a note in the maker's handwriting was placed there with the holder's assent.

If credits are indorsed without signature or proof of handwriting they may be presumed to have been indorsed by the payee, leaving to the holder the burden of explaining them away. Brown *v.* Gooden, 16 Ind. 444; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 49 Am. St. Rep. 505.

11. Pears *v.* Wilson, 23 Kan. 343; Bates *v.* Best, 13 B. Mon. (Ky.) 215; Clapp *v.* Hale, 112 Mass. 368, 17 Am. Rep. 111; Carter *v.* Carter, 44 Mo. 195. See also Smith *v.* Battens, 1 M. & Rob. 341. *Contra*, Shaffer *v.* Shaffer, 41 Pa. St. 51.

A receipt in full without any date written across the face of a note will be presumed to have been written at the time of the last payment indorsed on the note. Chapman *v.* Smooth, 66 Md. 8, 5 Atl. 462.

12. Kline *v.* Prindle, Wright (Ohio) 414.

13. Purdon *v.* Purdon, 12 L. J. Exch. 3, 10 M. & W. 562.

Unless indorsed before the statute ran out such indorsement is not evidence of payment. Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Such indorsement by a deceased holder is available as an admission against interest, without proof of actual payment made, it being a question for the jury whether the payment was actually made. Risley *v.* Wightman, 13 Hun (N. Y.) 163.

In New Jersey the indorsement of payment on a bill or note by or for the party receiving it is not sufficient proof of payment to take the note out of the statute of limitations. Parker *v.* Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407.

In South Carolina such indorsement is *prima facie* evidence of payment, but it is a question for the jury whether it was made in order to take the note out of the statute. Gibson *v.* Peebles, 2 McCord (S. C.) 418.

14. Lake *v.* Brown, 116 Ill. 83, 4 N. E. 773.

Where a bill is taken up by an indorser it is not necessary to indorse a receipt on the bill; and the bill may be proved in bankruptcy against the drawer without such indorsement. Palmer *v.* Blight, 2 Wash. (U. S.) 96, 18 Fed. Cas. No. 10,684.

15. *Alabama.*— Potts *v.* Coleman, 67 Ala. 221; Hill *v.* Gayle, 1 Ala. 275.

Arkansas.— Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

Illinois.— Allen *v.* Sawyer, 88 Ill. 414.

Indiana.—Fellows *v.* Kress, 5 Blackf. (Ind.) 536.

Iowa.— Milo Bank *v.* Mertz, 96 Iowa 725, 65 N. W. 318.

Kentucky.— Wells *v.* Robb, 9 Bush (Ky.) 26.

Massachusetts.— Page *v.* Page, 15 Pick. (Mass.) 368.

Missouri.— Stephenson *v.* Richards, 45 Mo. App. 544.

New York.— Arnold *v.* Crane, 8 Johns. (N. Y.) 79.

North Carolina.—Jones *v.* Bobbitt, 90 N. C. 391.

Ohio.— Larimore *v.* Wells, 29 Ohio St. 13. See 7 Cent. Dig. tit. "Bills and Notes," § 1697.

16. Dougherty *v.* Deeney, 45 Iowa 443. See also Matter of Clark, 16 Misc. (N. Y.) 405, 39 N. Y. Suppl. 722.

17. Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444; Jones *v.* Bobbitt, 90 N. C.

time[18] is not conclusive but may be rebutted. The presumption of non-payment arising from possession by the payee may be rebutted also,[19] and if it appears from payment of interest that the note was not paid the presumption may be rebutted by showing that the interest was paid by mistake.[20]

(VII) *EXTENSION OF TIME.* Payment of interest in advance raises a presumption of an agreement for time so far as the payment extends.[21]

(VIII) *PLACE OF PAYMENT.* Where no place of payment is expressed [22] commercial paper is presumed to be made payable at the place of date and is governed by the laws of that place.[23]

(IX) *AUTHORITY TO RECEIVE PAYMENT*—(A) *In General.* The fact that a person is in possession of an instrument is *prima facie* evidence of his right to receive payment of the same.[24]

391; Doty *v.* Janes, 28 Wis. 319. See also Pitcher *v.* Patrick, 1 Stew. & P. (Ala.) 478 (holding that lines drawn across a note raise the presumption that it has been satisfied, but that such presumption may be rebutted by evidence, to be determined by the jury); Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932 (holding that if a maker of a note when sued thereon by the payee alleges partial payment showing receipts made after the note, the burden of proving that such payment was on a different account is on plaintiff).

18. Fisher *v.* Philips, 4 Baxt. (Tenn.) 243.

19. *Arkansas.*— Davis *v.* Gaines, 28 Ark. 440.

Illinois.— Douglas *v.* Pfeiffer, 46 Ill. 102; Humpeler *v.* Hickman, 13 Ill. App. 537.

Iowa.— Coe *v.* Anderson, 92 Iowa 515, 61 N. W. 177.

Ohio.— Hughes *v.* Hind, Wright (Ohio) 650.

Wisconsin.— Somervail *v.* Gillies, 31 Wis. 152.

See 7 Cent. Dig. tit. "Bills and Notes," § 1697.

20. Ritter *v.* Schenk, 101 Ill. 387.

An alleged payment by the accepter of a bill may be avoided on the ground that the money belonged to his assignee and could not be so appropriated. Pritchard *v.* Hitchcock, 12 L. J. C. P. 322, 6 M. & G. 151, 6 Scott N. R. 851, 46 E. C. L. 151.

21. Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340, 19 L. R. A. 599; Armendt *v.* Perkins, 17 Ky. L. Rep. 1327, 32 S. W. 270; St. Paul Trust Co. *v.* St. Paul Chamber of Commerce, 64 Minn. 439, 67 N. W. 350; Walley *v.* Deseret Nat. Bank, 14 Utah 305, 47 Pac. 147.

22. If the place of payment is expressed it is presumed that the parties knew the law of that place and intended to be governed by it.

Illinois.— McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651.

Indiana.— Fordyce *v.* Nelson, 91 Ind. 447; Smith *v.* Muncie Nat. Bank, 29 Ind. 158; Aurora *v.* West, 22 Ind. 88, 85 Am. Dec. 413.

Iowa.— Arnold *v.* Potter, 22 Iowa 194.

Kentucky.—Short *v.* Trabue, 4 Metc. (Ky.) 299.

Mississippi.— Allen *v.* Bratton, 47 Miss. 119; Martin *v.* Martin, 1 Sm. & M. (Miss.) 176.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118.

Pennsylvania.— Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532.

Tennessee.— Brown *v.* Gardner, 4 Lea (Tenn.) 145.

Wisconsin.— Newman *v.* Kershaw, 10 Wis. 333.

Presumption not conclusive.— The mere fact that a note is made payable in another state than that where executed does not, however, raise a conclusive presumption that the contract was made with reference to the laws of that state. Thornton *v.* Dean, 19 S. C. 593, 45 Am. Rep. 796.

Presumption that drawee's address is place of payment see *supra*, I, D, 2, a, (I), (A), (2) [7 Cyc. 634].

23. *Connecticut.*—Tillotson *v.* Tillotson, 34 Conn. 335.

Iowa.— Bigelow *v.* Burnham, 83 Iowa 120, 49 N. W. 104, 32 Am. St. Rep. 294.

Michigan.— Strawberry Point Bank *v.* Lee, 117 Mich. 122, 75 N. W. 444.

New Hampshire.— Jones *v.* Rider, 60 N. H. 452.

Ohio.— Scott *v.* Perlee, 6 Ohio Dec. (Reprint) 757, 7 Am. L. Rec. 737 [*affirmed* in 39 Ohio St. 63, 48 Am. Rep. 421].

Texas.— Bullard *v.* Thompson, 35 Tex. 313, where it would have been usurious if referred to the place of actual delivery.

Virginia.— Backhouse *v.* Selden, 29 Gratt. (Va.) 581; Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

24. *Indiana.*— Paulman *v.* Claycomb, 75 Ind. 64.

Kansas.— Streeter *v.* Poor, 4 Kan. 412.

Louisiana.— Bourg *v.* Bringier, 8 Mart. N. S. (La.) 507.

New York.— Cothran *v.* Collins, 29 How. Pr. (N. Y.) 113.

South Carolina.— Cone *v.* Brown, 15 Rich. (S. C.) 262.

Tennessee.— Stewart *v.* Donnelly, 4 Yerg. (Tenn.) 177.

The presumption that a person, not in actual possession, has no authority to receive

(B) *Of Agent.* An agent in possession has *prima facie* authority to receive payment and surrender a note,[25] but either possession or proof *aliunde* of express authority to collect is indispensable.[26]

i. Usury. The burden of proof is on a defendant who alleges that a note is usurious.[27]

2. Admissibility — a. Acceptance — (I) *In General.* An acceptance which is ambiguous may be explained by parol,[28] and where an acceptance is not dated, the actual time of giving it may be proved by parol.[29]

(II) *Fact of Acceptance.* Where, in an action on a draft accepted by defendant, the defense is that the acceptance was conditional on the doing of certain work by the drawer, evidence that at maturity defendant asked for an extension is admissible to negative such defense.[30] And evidence that an order addressed to a manufacturing corporation by a workman in their employ was received by the paymaster and treated by him as he treated all such orders drawn on the corporation by their workmen, is competent evidence of the acceptance of this order by the corporation.[31]

(III) *Showing Absolute Acceptance to Be Conditional.* If an acceptance is absolute on its face a contemporaneous condition cannot be shown by parol.[32] Even though the contemporaneous condition be in writing it will not

payment may be rebutted by evidence showing authority. Swegle *v.* Wells, 7 Oreg. 222. See also South Branch Lumber Co. *v.* Littlejohn, 31 Nebr. 606, 48 N. W. 476.

25. Whelan *v.* Reilly, 61 Mo. 565, 578; Cone *v.* Brown, 15 Rich. (S. C.) 262; Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567.

26. Lochenmeyer *v.* Fogarty, 112 Ill. 572; Stiger *v.* Bent, 111 Ill. 328; Dixon *v.* Haslett, 2 Treadw. (S. C.) 615; Bartel *v.* Brown, 104 Wis. 493, 80 N. W. 801.

Possession is not in all cases necessary to confer authority to collect. Townsend *v.* Studer, 109 Iowa 103, 80 N. W. 210.

27. Moody *v.* Hawkins, 25 Ark. 191; Williams *v.* Banks, 19 Md. 22; Gillette *v.* Ballard, 25 N. J. Eq. 491; Cutler *v.* Wright, 22 N. Y. 472. See, generally, Usury.

Usury will not be presumed merely because interest is agreed on from a date prior to the actual making of the note (Rutherford *v.* Smith, 28 Tex. 322; Andrews *v.* Hart, 17 Wis. 297) or because the agent who made the loan for the maker has taken usury (Algur *v.* Gardner, 54 N. Y. 360).

If a lender forces personal property on a borrower as part of the loan made to him on discounting the bill, the burden will be on the holder to disprove the usury implied by showing the actual value of the property transferred. Davis *v.* Hardacre, 2 Campb. 375.

28. *Maine.*—Gallagher *v.* Black, 44 Me. 99.

Massachusetts.— Procter *v.* Hartigan, 139 Mass. 554, 2 N. E. 99; Nevada Bank *v.* Luce, 139 Mass. 488, 1 N. E. 926.

Mississippi.— Shackelford *v.* Hooker, 54 Miss. 716.

Wisconsin.— Lamon *v.* French, 25 Wis. 37.

United States.— U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774.

England.— Swan *v.* Cox, 1 Marsh. 176, 4 E. C. L. 460.

As against a bona fide holder for value it may not be shown by parol that what might be fairly taken for an acceptance was not so intended. Gallagher *v.* Black, 44 Me. 99, where the writing was a receipt indorsed on the bill. And in the case of a promise "to pay a draft for stock," parol evidence is inadmissible to show that usage meant a purchase and consignment of stock to the accepter; there being no ambiguity on the face of the acceptance. Coffman *v.* Campbell, 87 Ill. 98.

29. Kenner *v.* Their Creditors, 1 La. 120.

30. Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387.

Letter authorizing bill to be drawn.— Defendants by letter authorized A to draw upon them for an amount which they admitted to be due him. A drew a draft upon defendants in favor of plaintiff, who received it on the faith of defendants' letter. In an action upon the draft against the drawees, it was held that the letter was admissible to prove their acceptance. Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268.

31. Lannan *v.* Smith, 7 Gray (Mass.) 150.

Custom as to acceptances.— Where plaintiff relied upon a parol acceptance of a bill of exchange, evidence of a custom of defendants to accept always in writing, and make corresponding entries on their books, is competent as tending to show in this case that the bill had not been accepted. Smith *v.* Clark, 12 Iowa 32.

32. *Alabama.*— Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Goodwin *v.* McCoy, 13 Ala. 271.

Illinois.— Haines *v.* Nance, 52 Ill. App. 406.

Mississippi.— Heaverin *v.* Donnell, 7 Sm. & M. (Miss.) 244, 45 Am. Dec. 302.

New Jersey.— Meyer *v.* Beardsley, 30 N. J. L. 236.

North Carolina.— Penniman *v.* Alexander, 111 N. C. 427, 16 S. E. 408.

be admissible to defeat a *bona fide* holder for value having no knowledge of it.[33]

b. Accident or Mistake. Parol evidence is admissible in an action on a note for the purpose of showing accident or mistake.[34]

c. Authority of Agent. Where it is incumbent on the holder of a bill or note to prove the agent's authority as agent of the maker or indorser, this may be done by parol evidence;[35] and even though the bill itself shows the agent to have acted under a special written authority, other evidence is admissible to establish this authority.[36]

d. Consideration — (I) *In General.* The real consideration for a bill or note may be shown by parol, where it is admissible as a defense,[37] for example,

Pennsylvania.— Mason *v.* Graff, 35 Pa. St. 448.

Wisconsin.— Foster *v.* Clifford, 44 Wis. 569, 28 Am. Rep. 603.

England.— Hoare *v.* Graham, 3 Campb. 57, 13 Rev. Rep. 752; Besant *v.* Cross, 10 C. B. 895, 15 Jur. 828, 20 L. J. C. P. 173, 2 L. M. & P. 351, 70 E. C. L. 895; Adams *v.* Wordley, 2 Gale 29, 5 L. J. Exch. 158, 1 M. & W. 374.

So if an acceptance be expressly conditioned on the completion of a certain contract of a given date, it cannot be shown by parol to have been conditioned on any other unfinished contract unknown to the payee at the time. Hunting *v.* Emmart, 55 Md. 265.

33. U. S. *v.* Metropolis Bank, 15 Pet. (U. S.) 377, 10 L. ed. 774; Montague *v.* Perkins, 22 Eng. L. & Eq. 516; Bowerbank *v.* Monteiro, 4 Taunt. 844, 14 Rev. Rep. 679. See also Kervan *v.* Townsend, 25 N. Y. App. Div. 256, 49 N. Y. Suppl. 137.

Thus the breach of a condition against negotiating a bill of exchange cannot be set up against such a holder (Merritt *v.* Duncan, 7 Heisk. (Tenn.) 156, 19 Am. Rep. 612), although it would be available against a holder with notice (Greer *v.* Bently, 19 Ky. L. Rep. 1251, 43 S. W. 219).

34. Hamilton *v.* Conyers, 28 Ga. 276; Officer *v.* Howe, 32 Iowa 142; Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130; Fishback *v.* Woodford, 1 J. J. Marsh. (Ky.) 84, 19 Am. Dec. 55; Inskoe *v.* Proctor, 6 T. B. Mon. (Ky.) 311; Hampton *v.* Blakely, 3 McCord (S. C.) 469. But see Wood *v.* Goodrich, 9 Yerg. (Tenn.) 266, holding that proof by plaintiff that a note sued on was by agreement to fall due at a certain date, but by mistake of the parties, produced by the fraud of defendant, it was made payable at a different date is inadmissible.

Mistake in indorsement.— In an action against an indorser, who claimed to be one without recourse, evidence by defendant that the note was secured by a mortgage, which he formally assigned when he indorsed the note, and that in such assignment it was expressly stipulated that no recourse should be had to him on the note and mortgage, was admissible, as tending to prove mistake in the indorsement. Johnson *v.* Williard, 83 Wis. 420, 53 N. W. 776 [*distinguishing* Brinker *v.* Meyer, 81 Wis. 33, 50 N. W. 782].

Rate of interest.—A mistake in a note in the recital of the rate of interest may be shown by parol. Hathaway *v.* Brady, 23 Cal. 121.

35. McWhirt *v.* McKee, 6 Kan. 412; Morse *v.* Green, 13 N. H. 32, 38 Am. Dec. 471; Cain *v.* Mack, 33 Tex. 135; Miller *v.* Moore, 1 Cranch C. C. (U. S.) 471, 17 Fed. Cas. No. 9,584. And see, generally, PRINCIPAL AND AGENT.

36. Page *v.* Lathrop, 20 Mo. 589.

Evidence of agency.— Where an agent has executed a draft for his principal, the agent's statements as to a former draft, executed by him under similar circumstances and paid by his principal, are admissible as evidence of his agency (McDonough *v.* Heyman, 38 Mich. 334); and admissions on the principal's part of his authority to execute another similar acceptance are admissible in confirmation of other evidence showing a general authority for the acceptance in question (Llewellyn *v.* Winckworth, 14 L. J. Exch. 329, 13 M. & W. 598). But where the payee's indorsement has been made by an agent, the payee's admission in writing of his agent's authority is not competent evidence of that fact in an action by the indorsee against the maker. Clark *v.* Peabody, 22 Me. 500.

37. *Alabama.*— Baker *v.* Boon, 100 Ala. 622, 13 So. 481; Guice *v.* Thornton, 76 Ala. 466; Ramsey *v.* Young, 69 Ala. 157; Tisdale *v.* Maxwell, 58 Ala. 40 (that it was furnished in unequal amounts by the two payees); Newton *v.* Jackson, 23 Ala. 335; Murrah *v.* Decatur Branch Bank, 20 Ala. 392; Long *v.* Davis, 18 Ala. 801; Self *v.* Herrington, 11 Ala. 489; Cuthbert *v.* Bowie, 10 Ala. 163; Litchfield *v.* Falconer, 2 Ala. 280; Swinton *v.* Steele, 1 Ala. 357.

California.— Stretch *v.* Talmadge, 65 Cal. 510, 4 Pac. 513; Howard *v.* Stratton, 64 Cal. 487, 2 Pac. 263.

Connecticut.— Rose *v.* Phillips, 33 Conn. 570.

Georgia.— Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467; Anderson *v.* Brown, 72 Ga. 713; Pitts *v.* Allen, 72 Ga. 69; Lathrop *v.* Hickson, 67 Ga. 445; Rodgers *v.* Rosser, 57 Ga. 319; Scaife *v.* Beall, 43 Ga. 333; Knight *v.* Knight, 28 Ga. 165; Butts *v.* Cuthbertson, 6 Ga. 166.

Illinois.— Mann *v.* Smyser, 76 Ill. 365;

that it was for forbearance or extension given,[38] for accommodation,[39] or that there was no consideration.[40] So it is admissible to show that the consideration was

Kirkham *v.* Boston, 67 Ill. 599; Morgan *v.* Fallenstein, 27 Ill. 31; Martin *v.* Stubbings, 27 Ill. App. 121 [*affirmed* in 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620].

Indiana.— Dowden *v.* Wood, 124 Ind. 233, 24 N. E. 1042; Coapstick *v.* Bosworth, 121 Ind. 6, 22 N. E. 772; New Castle First Nat. Bank *v.* Nugen, 99 Ind. 160; Braden *v.* Graves, 85 Ind. 92; Bragg *v.* Stanford, 82 Ind. 234; Everhart *v.* Puckett, 73 Ind. 409; Hazzard *v.* Duke, 64 Ind. 220.

Iowa.— Pembroke *v.* Hayes, 114 Iowa 576, 87 N. W. 492; Taylor *v.* Wightman, 51 Iowa 411, 1 N. W. 607.

Louisiana.— Parker *v.* Broas, 20 La. Ann. 167; Griffin *v.* Cowan, 15 La. Ann. 487; Saramia *v.* Courrege, 13 La. Ann. 25.

Maine.— Leighton *v.* Bowen, 75 Me. 504; Maine Mut. Mar. Ins. Co. *v.* Farrar, 66 Me. 133.

Maryland.— Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

Massachusetts.—Hill *v.* Whidden, 158 Mass. 267, 33 N. E. 526; Rice *v.* Howland, 147 Mass. 407, 18 N. E. 229; Corlies *v.* Howe, 11 Gray (Mass.) 125, 71 Am. Dec. 693; Walker *v.* Sherman, 11 Metc. (Mass.) 170; Ilsley *v.* Jewett, 2 Metc. (Mass.) 168.

Michigan.— Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267; Garton *v.* Union City Nat. Bank, 34 Mich. 279; Wright *v.* Irwin, 33 Mich. 32.

Mississippi.— Ohleyer *v.* Bernheim, 67 Miss. 75, 7 So. 319; Cocke *v.* Blackbourn, 57 Miss. 689; Pollen *v.* James, 45 Miss. 129; Eckford *v.* Hogan, 44 Miss. 398; Marsh *v.* Lisle, 34 Miss. 173; Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489; Elliott *v.* Connell, 5 Sm. & M. (Miss.) 91.

Nebraska.— Walker *v.* Haggerty, 30 Nebr. 120, 46 N. W. 221; Wilson *v.* Ellsworth, 25 Nebr. 246, 41 N. W. 177.

New Hampshire.— Cross *v.* Rowe, 22 N. H. 77.

New York.— Miller *v.* McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Smith *v.* Rowley, 34 N. Y. 367; Smith *v.* Sergeant, 67 Barb. (N. Y.) 243; Bird *v.* Faulkner, 55 N. Y. Super. Ct. 529.

North Carolina.— Flaum *v.* Wallace, 103 N. C. 296, 9 S. E. 567; Perry *v.* Hill, 68 N. C. 417.

Pennsylvania.— Van Haagen Soap Co.'s Estate, 141 Pa. St. 214, 21 Atl. 598, 12 L. R. A. 223; Snyder *v.* Wilt, 15 Pa. St. 59; Packer *v.* Hook, 16 Serg. & R. (Pa.) 327.

South Carolina.— Smith *v.* Prothro, 2 S. C. 371; Hampton *v.* Blakely, 3 McCord (S. C.) 469.

Tennessee.— Fort *v.* Orndoff, 7 Heisk. (Tenn.) 167.

Texas.— Taylor *v.* Merrill, 64 Tex. 494; Hicks *v.* Morris, 57 Tex. 658; Bender *v.* Pryor, 31 Tex. 341.

Vermont.— Labbee *v.* Johnson, 66 Vt. 234, 28 Atl. 986; Sowles *v.* Sowles, 11 Vt. 146.

Wisconsin.— Trustees *v.* Saunders, 84 Wis. 570, 54 N. W. 1094.

See 7 Cent. Dig. tit. "Bills and Notes," § 1738.

As to necessity of consideration see *supra*, III, A [7 Cyc. 690 *et seq.*].

As to presumption of consideration see *supra*, XIV, E, 1, c.

38. Morgan *v.* Fallenstein, 27 Ill. 31; Kelly *v.* Theiss, 21 Misc. (N. Y.) 311, 47 N. Y. Suppl. 145.

39. Moynihan *v.* McKeon, 16 Misc. (N. Y.) 343, 38 N. Y. Suppl. 61, 74 N. Y. St. 316; Breitengross *v.* Farr, 100 Wis. 215, 75 N. W. 893; Goldsmith *v.* Holmes, 13 Sawy. (U. S.) 526, 36 Fed. 484, 1 L. R. A. 816.

40. *Alabama.*— Guice *v.* Thornton, 76 Ala. 466; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Corbin *v.* Sistrunk, 19 Ala. 203.

Connecticut.— Bunnell *v.* Butler, 23 Conn. 65.

Georgia.— Snowden *v.* Grice, 62 Ga. 615.

Illinois.— Oertel *v.* Schroeder, 48 Ill. 133; Penny *v.* Graves, 12 Ill. 287.

Indiana.— Bragg *v.* Stanford, 82 Ind. 234; Pierce *v.* Hight, 76 Ind. 355; Collier *v.* Mahan, 21 Ind. 110.

Iowa.— Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82; Cedar Rapids First Nat. Bank *v.* Hurford, 29 Iowa 579.

Kansas.— Dodge *v.* Oatis, 27 Kan. 762.

Louisiana.— Reeve *v.* Doughty, 19 La. Ann. 164; Griffin *v.* Cowan, 15 La. Ann. 487; Douatt *v.* Louge, 11 La. Ann. 399.

Maine.— Wise *v.* Neal, 39 Me. 422.

Maryland.— Sumwalt *v.* Ridgely, 20 Md. 107.

Massachusetts.— Corlies *v.* Howe, 11 Gray (Mass.) 125, 71 Am. Dec. 693.

Michigan.— Kulenkamp *v.* Groff, 71 Mich. 675, 40 N. W. 57, 15 Am. St. Rep. 283, 1 L. R. A. 954; Maltz *v.* Fletcher, 52 Mich. 484, 18 N. W. 228.

Mississippi.— Wren *v.* Hoffman, 41 Miss. 616.

Missouri.— Voght *v.* Butler, 105 Mo. 479, 16 S. W. 512; Harwood *v.* Brown, 23 Mo. App. 69.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617; Eaton *v.* Eaton, 35 N. J. L. 290.

New York.— Dryer *v.* Brown, 52 Hun (N. Y.) 321, 5 N. Y. Suppl. 486, 23 N. Y. St. 695; McCulloch *v.* Hoffman, 10 Hun (N. Y.) 133; Von Kamen *v.* Roes, 20 N. Y. Suppl. 548, 48 N. Y. St. 920; Slade *v.* Halsted, 7 Cow. (N. Y.) 322.

Vermont.— Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105.

Wisconsin.— Ward *v.* Perrigo, 33 Wis. 143; Smith *v.* Carter, 25 Wis. 283.

United States.— Corcoran *v.* Hodges, 2

illegal[41] or had failed;[42] or that a note was given as a payment to be credited on the maker's account[43] or as collateral for an existing debt,[44] or was not to be construed as a relinquishment or waiver of a set-off claimed against such debt.[45] The rule admitting parol evidence in such cases does not, however, do away with the rule excluding such evidence, when offered for the purpose of contradicting or varying a written instrument;[46] and parol evidence is not admissible in an action on a note to show a contemporaneous agreement that it might be extinguished by a part payment.[47] So it is inadmissible to show that the maker should not be held

Cranch C. C. (U. S.) 452, 6 Fed. Cas. No. 3,228.

Canada.— Davis *v.* McSherry, 7 U. C. Q. B. 490.

See 7 Cent. Dig. tit. "Bills and Notes," § 1739.

41. *Arkansas.*— Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288.

Georgia.— Dixon *v.* Edwards, 48 Ga. 142.

Kentucky.— Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90.

Louisiana.— Reeve *v.* Doughty, 19 La. Ann. 164; Griffin *v.* Cowan, 15 La. Ann. 487.

Mississippi.— Newsom *v.* Thighen, 30 Miss. 414.

New York.— Von Kamen *v.* Roes, 20 N. Y. Suppl. 548, 48 N. Y. St. 920.

South Carolina.— Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

42. *Alabama.*— Cuthbert *v.* Bowie, 10 Ala. 163; Smith *v.* Armistead, 7 Ala. 698; Litchfield *v.* Falconer, 2 Ala. 280; Morehead *v.* Gayle, 2 Stew. & P. (Ala.) 224.

California.— Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543.

Connecticut.— Pettibone *v.* Roberts, 2 Root (Conn.) 258.

Florida.— Branch *v.* Wilson, 12 Fla. 543.

Georgia.— Pinsoon *v.* Bass, 114 Ga. 295, 40 S. E. 747; Powell *v.* Subers, 67 Ga. 448; Lufburrow *v.* Henderson, 30 Ga. 482; Smith *v.* Brooks, 18 Ga. 440; Tompkins *v.* Tegner, 17 Ga. 103.

Hawaii.— Grimes *v.* Walker, 1 Hawaii 21.

Illinois.— Mann *v.* Smyser, 76 Ill. 365; Kirkham *v.* Boston, 67 Ill. 599; Jones *v.* Buffum, 50 Ill. 277; Oertel *v.* Schroeder, 48 Ill. 133; Morgan *v.* Fallenstein, 27 Ill. 31; Hill *v.* Enders, 19 Ill. 163; Penny *v.* Graves, 12 Ill. 287.

Indiana.— Brown *v.* Summers, 91 Ind. 151; Pierce *v.* Hight, 76 Ind. 355; Jones *v.* Noe, 71 Ind. 368; Campbell *v.* Gates, 17 Ind. 126.

Iowa.— Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82; Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145; Scott *v.* Sweet, 2 Greene (Iowa) 224.

Kansas.— Blood *v.* Northrup, 1 Kan. 28.

Louisiana.— Reeve *v.* Doughty, 19 La. Ann. 164; Griffin *v.* Cowan, 15 La. Ann. 487; Grieve *v.* Sagory, 3 Mart. (La.) 599.

Maine.— Wise *v.* Neal, 39 Me. 422.

Maryland.— Hamburger *v.* Miller, 48 Md. 317; Sumwalt *v.* Ridgely, 20 Md. 107.

Massachusetts.— Sawyer *v.* Orr, 140 Mass. 234, 5 N. E. 822.

Michigan.— Maltz *v.* Fletcher, 52 Mich. 484, 18 N. W. 228.

Minnesota.— Warner *v.* Schulz, 74 Minn. 252, 77 N. W. 25.

Mississippi.— Buckels *v.* Cunningham, 6 Sm. & M. (Miss.) 358.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617.

New York.— Slade *v.* Halsted, 7 Cow. (N. Y.) 322.

Pennsylvania.— Volkenaud *v.* Drum, 154 Pa. St. 616, 32 Wkly. Notes Cas. (Pa.) 284, 26 Atl. 611.

Wisconsin.— Foster *v.* Clifford, 44 Wis. 569, 28 Am. Rep. 603; Ward *v.* Perrigo, 33 Wis. 143; Smith *v.* Carter, 25 Wis. 283; Hubbard *v.* Galusha, 23 Wis. 398; Peterson *v.* Johnson, 22 Wis. 21, 94 Am. Dec. 581.

Canada.— Fisher *v.* Archibald, 8 Nova Scotia Dec. 298.

See 7 Cent. Dig. tit. "Bills and Notes," § 1739.

43. Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80.

44. Keeler *v.* Commercial Printing Co., 16 Wash. 526, 48 Pac. 239.

45. Bohn Mfg. Co. *v.* Harrison, 13 Mont. 293, 34 Pac. 313.

46. *Alabama.*—Adams *v.* Thomas, 54 Ala. 175.

California.—Langan *v.* Langan, 89 Cal. 186, 26 Pac. 764.

Louisiana.— Douatt *v.* Louge, 11 La. Ann. 399; Dwight *v.* Kemper, 8 La. Ann. 452.

New York.— Halliday *v.* Hart, 30 N. Y. 474.

Texas.— Saunders *v.* Brock, 30 Tex. 421.

See 7 Cent. Dig. tit. "Bills and Notes," § 1738.

Thus it has been held inadmissible to show that the consideration for a bill of exchange and acceptance was an agreement to surrender a note which was not surrendered, upon the ground that such evidence would tend to make the acceptance a conditional one. Foster *v.* Clifford, 44 Wis. 569, 28 Am. Rep. 603; Charles *v.* Denis, 42 Wis. 56, 24 Am. Rep. 383.

47. Ewing *v.* Clark, 76 Mo. 545.

It is not admissible to show that a note given by A to B, in consideration of C's note to A and a debt due from C to B, was given only to facilitate the collection of C's debt, and was only to be paid by A when C had paid him. Gillett *v.* Ballou, 29 Vt. 296. So it has been held inadmissible to show that a note was given for the transfer of certain debts and was only to be paid out of the proceeds collected. Walters *v.* Smith, 23 Ill. 342. But in defense to a note containing in

liable,[48] that the note was intended as a mere receipt for money placed in the maker's hands for a special purpose and was so used,[49] that it was to be paid out of a particular fund only,[50] that the consideration was in part an unperformed agreement,[51] or, on a note for land, to show a contract other than the deed, for the purpose of impeaching the note.[52] Nor can the maker of a note show that it was given for more than was due "to keep down a fuss."[53]

(II) *Of Indorsement.* As against his immediate indorsee, an indorser in blank may introduce parol evidence going to show the consideration of the transfer.[54] Thus the indorser may show that his indorsement was wholly without consideration;[55] that he was merely the agent of the indorsee[56] or indorsed for his accommodation;[57] that the consideration for the transfer has failed[58] or been diverted;[59] that the indorsement was intended as a receipt and given on payment of the note[60] or merely to effect a transfer;[61] as a measure of damages, that the real consideration was less than the face of the note;[62] or that it was intended as a security for certain payments, the balance being payable to the indorser after such payments were satisfied.[63]

e. Declarations and Admissions of Former Holder. Declarations against interest made by the owner of a note before he has parted with its title or possession and when he alone is interested are admissible in evidence,[64] at least as

brackets the words, "for two mills, remit as soon as sold," such evidence has been held admissible. Ward *v.* Perrigo, 33 Wis. 143.

48. Kulenkamp *v.* Groff, 71 Mich. 675, 40 N. W. 57, 15 Am. St. Rep. 283, 1 L. R. A. 594, except so far as it may tend to show him to be an accommodation party.

49. Dickson *v.* Harris, 60 Iowa 727, 13 N. W. 335.

50. Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

51. McKegney *v.* Widekind, 6 Bush (Ky.) 107; Hyde *v.* Tenwinkel, 26 Mich. 93.

52. Stookey *v.* Hughes, 18 Ill. 55.

Where notes were given in carrying out a written contract for land, the maker was not allowed to show a contemporaneous parol agreement for a certain rate of allowance for deficiency that might appear in the quantity of timber on the land purchased with the notes. Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497.

53. Ellis *v.* Drake, 52 Ga. 617.

54. *Connecticut.*— Pettibone *v.* Roberts, 2 Root (Conn.) 258.

Illinois.— Kirkham *v.* Boston, 67 Ill. 599. See also Bradshaw *v.* Combs, 102 Ill. 428.

Indiana.— Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Brown *v.* Summers, 91 Ind. 151.

Maine.— Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389.

Massachusetts.— Baldwin *v.* Dow, 130 Mass. 416.

New York.— Denniston *v.* Bacon, 10 Johns. (N. Y.) 198.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

55. Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441; Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389; Rising Sun Nat. Bank *v.* Brush, 10 Biss. (U. S.) 188, 6 Fed. 132; Foster *v.* Jolly, 1 C. M. & R. 703, 4 L. J. Exch. 65. Or that it was with notice of defense and as collateral for an existing debt. Keeler *v.* Commercial Printing Co., 16 Wash. 526, 48 Pac. 239.

56. Lovejoy *v.* Citizens' Bank, 23 Kan. 331.

57. Breneman *v.* Furniss, 90 Pa. St. 186, 35 Am. Rep. 651.

58. Smith *v.* Carter, 25 Wis. 283.

59. Avery *v.* Miller, 86 Ala. 495, 6 So. 38.

60. Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Cole *v.* Smith, 29 La. Ann. 551, 29 Am. Rep. 343; Davis *v.* Morgan, 64 N. C. 570; Morris *v.* Faurot, 21 Ohio St. 155, 8 Am. Rep. 45.

61. Allin *v.* Williams, 97 Cal. 403, 32 Pac. 441.

62. Cook *v.* Cockrill, 1 Stew. (Ala.) 475, 18 Am. Dec. 67.

63. Scammon *v.* Adams, 11 Ill. 575; Wood *v.* Matthews, 73 Mo. 477.

64. *Alabama.*— Remy *v.* Duffee, 4 Ala. 365.

Georgia.— Glanton *v.* Griggs, 5 Ga. 424.

Illinois.— Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Thorp *v.* Goewey, 85 Ill. 611; Williams *v.* Judy, 8 Ill. 282, 44 Am. Dec. 699; Kane *v.* Torbit, 23 Ill. App. 311.

Indiana.— Shade *v.* Creviston, 93 Ind. 591; Abbott *v.* Muir, 5 Ind. 444.

Louisiana.— Pilcher *v.* Kerr, 7 La. Ann. 144.

Maine.— Whittier *v.* Vose, 16 Me. 403; Shirley *v.* Todd, 9 Me. 83. See also Fullerton *v.* Rundlett, 27 Me. 31.

Massachusetts.— Stevens *v.* Parker, 5 Allen (Mass.) 333; Fisher *v.* Leland, 4 Cush. (Mass.) 456, 50 Am. Dec. 805.

Mississippi.— Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903; Brown *v.* McGraw, 12 Sm. & M. (Miss.) 267.

against a purchaser after maturity;[65] but declarations made by a party after he ceases to be the holder are not competent in a suit upon the note or in relation to it by a subsequent *bona fide* holder for value.[66]

f. Execution and Delivery — (1) *Execution* — (A) *Circumstances of Execution.* Parol evidence is admissible as between the immediate parties to prove the circumstances under which the paper was executed.[67]

New Jersey.— Reed *v.* Vancleve, 27 N. J. L. 352, 72 Am. Dec. 369.

South Carolina.— Crayton *v.* Collins, 2 McCord (S. C.) 457; Martin *v.* Lightner, 2 McCord (S. C.) 214.

Contra, Clews *v.* Kehr, 90 N. Y. 633; Osborn *v.* Robbins, 37 Barb. (N. Y.) 481; Paige *v.* Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68; Beach *v.* Wise, 1 Hill (N. Y.) 612; Whitaker *v.* Brown, 8 Wend. (N. Y.) 490; Kent *v.* Walton, 7 Wend. (N. Y.) 256; Wilson *v.* Law, 26 N. Y. Wkly. Dig. 509; Dodge *v.* Freedmans Sav., etc., Co., 93 U. S. 379, 23 L. ed. 920.

See 7 Cent. Dig. tit. "Bills and Notes," § 1790.

Admissions that a note has been paid, made by the holder of a note while he is the owner, are admissible in evidence in an action by such holder for the use of another. Remy *v.* Duffee, 4 Ala. 365. See also Hart *v.* Freeman, 42 Ala. 567.

Self-serving declarations.— Declarations in his own favor, made by the indorser of a note when notice of its dishonor is given to him, the holder not being present, are not admissible in evidence. Emerson *v.* Harmon, 14 Me. 271.

65. *Illinois.*— Sandifer *v.* Hoard, 59 Ill. 246; Curtiss *v.* Martin, 20 Ill. 557.

Indiana.— Blount *v.* Riley, 3 Ind. 471.

Maine.— Eaton *v.* Corson, 59 Me. 510; Hatch *v.* Dennis, 10 Me. 244.

Massachusetts.— Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89.

Missouri.— Robb *v.* Schmidt, 35 Mo. 290.

Ohio.— Hollister *v.* Hunt, 9 Ohio 8.

South Carolina.— Sharp *v.* Smith, 7 Rich. (S. C.) 3.

Tennessee.— Drennon *v.* Smith, 3 Head (Tenn.) 389.

Vermont.— Wheeler *v.* Walker, 12 Vt. 427. See also Miller *v.* Bingham, 29 Vt. 82.

Canada.— Myers *v.* Cornell, 2 U. C. Q. B. 279.

See 7 Cent. Dig. tit. "Bills and Notes," § 1790.

66. *Alabama.*— Perry *v.* Graves, 12 Ala. 246; Carmichael *v.* Brooks, 9 Port. (Ala.) 330.

Arkansas.— Patton *v.* Gee, 36 Ark. 506.

Connecticut.— Scripture *v.* Newcomb, 16 Conn. 588.

Illinois.— Thorp *v.* Goewey, 85 Ill. 611.

Indiana.— Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Stoner *v.* Ellis, 6 Ind. 152; Fleming *v.* Newman, 5 Blackf. (Ind.) 220.

Kentucky.— Crane *v.* Gunn, 4 B. Mon. (Ky.) 10; Bartlett *v.* Marshall, 2 Bibb (Ky.) 467.

Louisiana.— Dowty *v.* Sullivan, 19 La. Ann. 448.

Maine.— Norton *v.* Heywood, 20 Me. 359; Russell *v.* Doyle, 15 Me. 112; Matthews *v.* Houghton, 10 Me. 420.

Massachusetts.— Bond *v.* Fitzpatrick, 4 Gray (Mass.) 89; Wheeler *v.* Rice, 8 Cush. (Mass.) 205; Butler *v.* Damon, 15 Mass. 223.

Missouri.— Labadie *v.* Chouteau, 37 Mo. 413; Blancjour *v.* Tutt, 32 Mo. 576; Porter *v.* Rea, 6 Mo. 48.

Montana.— Shober *v.* Jack, 3 Mont. 351.

Nebraska.—Zimmerman *v.* Kearney County Bank, 57 Nebr. 800, 78 N. W. 366; Commercial Nat. Bank *v.* Brill, 37 Nebr. 626, 56 N. W. 382.

New Hampshire.— Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Forsaith *v.* Stickney, 16 N. H. 575.

New York.— Van Gelder *v.* Van Gelder, 81 N. Y. 625; Van Aernam *v.* Granger, 86 Hun (N. Y.) 476, 33 N. Y. Suppl. 885, 67 N. Y. St. 507; Smith *v.* Schanck, 18 Barb. (N. Y.) 344; German American Bank *v.* Slade, 15 Misc. (N. Y.) 287, 36 N. Y. Suppl. 983, 72 N. Y. St. 427; Thorne *v.* Woodhull, Anth. N. P. (N. Y.) 141.

North Carolina.— Maddox *v.* Atlantic, etc., R. Co., 115 N. C. 624, 20 S. E. 190; Wooten *v.* Outlaw, 113 N. C. 281, 18 S. E. 252.

Pennsylvania.— Bickell *v.* Thomas, 3 Phila. (Pa.) 356, 16 Leg. Int. (Pa.) 61.

South Carolina.— De Bruhl *v.* Patterson, 12 Rich. (S. C.) 363; Crayton *v.* Collins, 2 McCord (S. C.) 457.

Vermont.— Hough *v.* Barton, 20 Vt. 455; Washburn *v.* Ramsdell, 17 Vt. 299.

See 7 Cent. Dig. tit. "Bills and Notes," § 1790½.

67. *Alabama.*— Litchfield *v.* Falconer, 2 Ala. 280.

Arkansas.— Cagle *v.* Lane, 49 Ark. 465, 5 S. W. 790.

Colorado.— Fisk *v.* Reser, 19 Colo. 88, 34 Pac. 572.

Illinois.— Hammond *v.* Goodale, 38 Ill. App. 365; Johnson *v.* Lawson, 29 Ill. App. 146.

Indiana.— Chicago, etc., R. Co. *v.* West, 37 Ind. 211.

Maine.— Herrick *v.* Bean, 20 Me. 51.

Maryland.— Banks *v.* McCosker, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; Rose *v.* Coffield, 53 Md. 18, 36 Am. Rep. 389.

Massachusetts.— Levin *v.* Vannevar, 137 Mass. 532.

Michigan.— Ferguson *v.* Davis, 65 Mich. 677, 32 N. W. 892; Smith *v.* Van Blarcom, 45 Mich. 371, 8 N. W. 90.

Minnesota.— Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

(B) *Proof of Execution* — (1) NOTE WITH SUBSCRIBING WITNESS. The execution of a note should be proved by the subscribing witness if there be one.[68] If, however, such witness is dead, is out of the jurisdiction,[69] or does not recollect his signature,[70] the execution may be proved by other evidence. So the admission of the maker that he executed the note on which suit is brought does away with the necessity of calling the subscribing witness.[71]

Missouri.— Smalley *v.* Hale, 37 Mo. 102.

New Hampshire.— Cross *v.* Rowe, 22 N. H. 77.

New Jersey.—Duncan *v.* Gilbert, 29 N. J. L. 521.

New York.— Bell *v.* Shibley, 33 Barb. (N. Y.) 610; Auerbach *v.* Peetsch, 18 N. Y. Suppl. 452, 43 N. Y. St. 493.

Rhode Island.— Sweet *v.* Stevens, 7 R. I. 375.

South Dakota.— Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856.

Vermont.— Labbee *v.* Johnson, 66 Vt. 234, 28 Atl. 986.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

Thus parol evidence is admissible to show the coverture of the maker which was not disclosed in the note (Mount *v.* Zisken, 7 N. J. L. J. 71), that the note was given to take up another note (Duncan *v.* Gilbert, 29 N. J. L. 521), when a written memorandum on the note was made (Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518), or that the execution of the note was obtained by threats of criminal prosecution against one of the maker's family (Snyder *v.* Willey, 33 Mich. 483).

68. *Indiana.*— Taylor *v.* Gay, 6 Blackf. (Ind.) 150.

New Jersey.— Williams *v.* Davis, 2 N. J. L. 259.

Pennsylvania.— January *v.* Goodman, 1 Dall. (Pa.) 208, 1 L. ed. 103.

South Carolina.— Harper *v.* Solomon, 1 Brev. (S. C.) 3. *Compare* Gervais *v.* Baird, 2 Brev. (S. C. 37.

Tennessee.— Shepherd *v.* Goss, 1 Overt. (Tenn.) 487.

United States.— Turner *v.* Green, 2 Cranch C. C. (U. S.) 202, 24 Fed. Cas. No. 14,256.

Contra, Suyder *v.* Travers, 45 Ill. App. 253, by statute.

See 7 Cent. Dig. tit. "Bills and Notes," § 1709.

In an action on a sealed note against the obligor's executor, testimony of a subscribing witness that he believes his name subscribed thereto to be his own handwriting and that he remembers having attested but one note for the obligor is competent to prove the execution of the note, although the witness states that he does not believe the signature of the obligor to be in that person's handwriting or that the paper he attested was a sealed one. Churchill *v.* Speight, 3 N. C. 515. So where a deposing witness exhibits a copy of a note sued on, and his name appears as attesting witness, and he says that he has seen the original, he so identifies it that he may be asked whether the alleged maker executed it. Hazzard *v.* Vickery, 78 Ind. 64.

Evidence that the alleged attesting witness, who at the date of the note was under twelve years old and an office boy of the payee, could not, six years afterward, recollect whether or not he signed as such witness is competent on the issue whether the note was signed in the presence of an attesting witness. Tompson *v.* Fisher, 123 Mass. 559.

69. *Iowa.*— Ballinger *v.* Davis, 29 Iowa 512.

Louisiana.— Chaffe *v.* Cupp, 5 La. Ann. 684.

Massachusetts.— Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

New Jersey.— Williams *v.* Davis, 2 N. J. L. 259.

Pennsylvania.— January *v.* Goodman, 1 Dall. (Pa.) 208, 1 L. ed. 103.

Tennessee.— Shepherd *v.* Goss, 1 Overt. (Tenn.) 487.

See 7 Cent. Dig. tit. "Bills and Notes," § 1709.

Proof of absence.— Proof that an attesting witness to a note, when last seen, was engaged in business out of the state, coupled with a return *non est inventus* on a subpœna by a constable of the city in which the attesting witness lived before going out of the state, is sufficient to let in secondary evidence of the genuineness of the signature. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

Proof of handwriting of witness.— Where the maker of a note has made his mark to it and the witness to the note is out of the state (Reed *v.* Wilson, 39 Me. 585; Whitaker *v.* Bussey, 2 Nott & M. (S. C.) 374; Shiver *v.* Johnson, 2 Brev. (S. C.) 397. See also Blackman *v.* Stogner, Cheves Eq. (S. C.) 175) or dead (Chaffe *v.* Cupp, 5 La. Ann. 684) proof of the handwriting of the witness is sufficient.

70. Quimby *v.* Buzzell, 16 Me. 470; Vernon *v.* Hammet, 1 Hill (S. C.) 269. See also Crabtree *v.* Clark, 20 Me. 337; Walker *v.* Warfield, 6 Metc. (Mass.) 466.

71. Hall *v.* Phelps, 2 Johns. (N. Y.) 451; Williams *v.* Floyd, 11 Pa. St. 499; Perry *v.* Lawless, 5 U. C. Q. B. 514.

Sufficiency of admission.— The maker of a note payable to A or bearer, and attested by a subscribing witness, was called upon for payment, but the note was neither shown to him, nor the amount or date of it mentioned. The maker acknowledged that he had given a note to A, and said that he would pay it at a future day. It was held that this was not an admission of the execution of the note,

(2) NOTE WITH NO SUBSCRIBING WITNESS. In the absence of any subscribing witness the execution of a note may be shown by admissions of the maker,[72] by proof of his handwriting,[73] or by circumstantial evidence.[74]

(c) *Proof of Non-Execution* — (1) IN GENERAL. In an action on a note, the execution of which is denied, evidence that at the date of the note other transactions took place between the parties which render it improbable that the note was executed and which are inconsistent with its execution is admissible.[75]

which would supersede the necessity of proving it by the subscribing witness. Shaver *v.* Ehle, 16 Johns. (N. Y.) 201.

72. *California.*— Hilborn *v.* Alford, 22 Cal. 482.

Illinois.— See Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679; Crawford *v.* Crane, 61 Ill. App. 459.

Indiana.—Kennedy *v.* Graham, 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25.

Iowa.— Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847.

Kentucky.— Templeton *v.* Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507, 696. See also Fordsville Banking Co. *v.* Thompson, 23 Ky. L. Rep. 1276, 65 S. W. 6.

Louisiana.— Lopez *v.* Berghel, 15 La. 42.

Massachusetts.— See Greenfield Bank *v.* Crafts, 2 Allen (Mass.) 269.

Michigan.— Hunter *v.* Parsons, 22 Mich. 96.

Missouri.— Smith *v.* Witton, 69 Mo. 458.

New Hampshire.— Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.— Durant *v.* Abendroth, 15 N. Y. St. 339; Pentz *v.* Winterbottom, 5 Den. (N. Y.) 51.

Vermont.— Hodges *v.* Eastman, 12 Vt. 358.

See 7 Cent. Dig. tit. "Bills and Notes," § 1709.

Admission in affidavit of defense.— An affidavit of defense admitting that defendant made the note may be read in evidence in the same case by plaintiff, who is payee, to prove the making of the note. Bowen *v.* De Lattre, 6 Whart. (Pa.) 430.

Admissions of partner.— In an action brought against an alleged surviving partner, upon a promissory note alleged to have been signed by the deceased partner in the name of the firm, admissions by the signer in his lifetime that he signed the note are admissible. Adams *v.* Brownson, 1 Tyler (Vt.) 452.

Part payment.— If one makes a payment on a note purporting to be executed by him, promises frequently to pay the balance, and does not dispute the genuineness of the note, he will be presumed, in a suit thereon, to have executed it, in the absence of evidence to the contrary. Warren *v.* Able, 91 Ind. 107.

But an indorsement of payment upon a note, without proof of payment, is of itself no evidence tending to prove that the person purporting to have been the maker of the note had recognized its validity. Brown *v.* Munger, 16 Vt. 12.

73. *Illinois.*— Williams *v.* Miami Powder Co., 36 Ill. App. 107.

Indiana.— Taylor *v.* Gay, 6 Blackf. (Ind.) 150.

Massachusetts.— Keith *v.* Lothrop, 10 Cush. (Mass.) 453.

Pennsylvania.— Watson *v.* Brewster, 1 Pa. St. 381; Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190.

South Carolina.— Tuten *v.* Stone, 12 Rich. (S. C.) 448.

See 7 Cent. Dig. tit. "Bills and Notes," § 1709.

Comparison of notes signed by mark.— Promissory notes found among the papers of an illiterate deceased person, purporting to have been signed by him with his mark, and which he had paid, are, on the trial of an action against his administrator upon another promissory note, also purporting to have been signed by the intestate with his mark, admissible in evidence for the purpose of comparing the marks thereon with that affixed to the note in suit. Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856. But see Travers *v.* Snyder, 38 Ill. App. 379.

74. Lothrop *v.* Union Bank, 16 Colo. 257, 27 Pac. 696; Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626; Stricker *v.* Barnes, 122 Ind. 348, 23 N. E. 263; Hays *v.* Morgan, 87 Ind. 231; Holmes *v.* Riley, 14 Kan. 131. See also De Arman *v.* Taggart, 65 Mo. App. 82, holding that where there is evidence that defendant made a note in controversy in a certain store, and that the paper used was taken from the proprietor's book of blank notes, such blank book is admissible in evidence to show that the form and character of the note in suit corresponded with the blanks.

Note withheld by defendant.— Where a promissory note upon which action is brought is wrongfully withheld by defendant, the testimony of one who has seen the note is admissible to show that the note is in the handwriting of defendant and bears his signature. Prescott *v.* Ward, 10 Allen (Mass.) 203.

Testimony of eye-witness.— It is not essential, where the execution of a note is put in issue, to prove its execution by an eye-witness. Melvin *v.* Hodges, 71 Ill. 422.

75. Hunter *v.* Harris, 131 Ill. 482, 23 N. E. 626.

Habits of alleged maker.— In an action on a note, where defendant denies that he executed it, evidence is admissible in his behalf as to his habit of giving notes; but it must be confined to his general reputation in that regard. Travers *v.* Snyder, 38 Ill. App. 379.

Statements of alleged co-maker.— The question being as to the fact of defendant's signature to a promissory note, the testimony of another person whose name was on the note that he himself had not signed it is

On an issue as to the execution of a note by defendant's intestate, evidence tending to show that such intestate did not owe any money to the person to whom the note was executed is admissible to show the improbability of its execution.[76]

(2) FORGERY. Where the defense set up is forgery, evidence as to the financial dealings of the parties is admissible as tending to show the probability or improbability of defendant having signed the note.[77]

(D) *Time of Execution.* Although a note bears a written date, the actual date of its execution may be shown by parol,[78] but parol evidence is not admissible to prove a mistake in date in a suit brought by an innocent purchaser and to his disadvantage.[79]

admissible. Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

76. Carpenter *v.* Wilmot, 24 Mo. App. 589.

Pecuniary condition of parties.— On an issue as to the making of a note by an intestate it is not relevant that when it was given and when it became due he had a large sum of money lying idle. Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273. So evidence that the deceased was "a man of property" and had money "loaned out" when he died is not competent to disprove his execution of a note, particularly as it was not shown that at any time from the execution of the note to his death deceased had money on hand. Pettiford *v.* Mayo, 117 N. C. 27, 23 S. E. 252. And in an action against a personal representative on notes of the deceased it is error to admit, as evidence of non-execution of the notes, the fact that the deceased several years prior to the dates of the notes received a large legacy of money. Taylor *v.* Gale, 14 Wash. 57, 44 Pac. 110. And the fact that the payee had no money to loan cannot be shown by his reputation for being "hard up" at the time the note was alleged to have been given. Bliss *v.* Johnson, 162 Mass. 323, 38 N. E. 446.

77. Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86. See also Gitchell *v.* Ryan, 24 Ill. App. 372, holding that evidence that defendant was not indebted to plaintiff is admissible, although there is no plea of want of consideration, as it tends to show that defendant did not execute the note. And on an issue as to whether plaintiff had signed a certain check, or whether it had been forged by the payee, evidence by the payee that a criminal intimacy between herself and plaintiff had been discovered by her husband, and that the check in question had been paid by plaintiff in remuneration, is competent to show a state of affairs which would render it probable that plaintiff had given her the check. Crane *v.* Horton, 5 Wash. 479, 32 Pac. 223. And see Stevenson *v.* Stewart, 11 Pa. St. 307.

Ability to commit forgery.— Where, in an action on a note, the defense is forgery, it cannot be shown that plaintiff had the capacity, skill, and appliances to commit the forgery. Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698. See also Vaughn *v.* Wilson, 31 Mo. App. 489, holding that in an action on a note which one of the joint makers alleges was forged, evidence that his signature could be successfully imitated by the other joint maker is inadmissible. And see Stratton *v.* Nye, 45 Nebr. 619, 63 N. W. 928.

Similar transactions.— In an action on a note claimed by defendant to have been forged it is not competent for him to show that the payee had at other times and unconnected with the note in suit negotiated forged paper. Monitor Plow Works *v.* Born, 33 Nebr. 747, 51 N. W. 129. See also Hartford Bank *v.* Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274; Dodge *v.* Haskell, 69 Me. 429; Benedict *v.* Rose, 24 S. C. 297.

78. *Alabama.*— Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

Iowa.— Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Kansas.— Clary *v.* Smith, 20 Kan. 83.

Maine.— Drake *v.* Rogers, 32 Me. 524. See also Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551; Cumberland Bank *v.* Mayberry, 48 Me. 198.

Minnesota.— Almich *v.* Downey, 45 Minn. 460, 48 N. W. 197.

Mississippi.— Dean *v.* De Lezardi, 24 Miss. 424.

New Hampshire.— Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179.

New York.— Germania Bank *v.* Distler, 4 Hun (N. Y.) 633, 67 Barb. (N. Y.) 333 [*affirmed* in 64 N. Y. 642].

Ohio.— Jessup *v.* Dennison, 2 Disn. (Ohio) 150.

Pennsylvania.— McSparran *v.* Neeley, 91 Pa. St. 17.

Tennessee.— Biggs *v.* Piper, 86 Tenn. 589, 8 S. W. 851.

See 7 Cent. Dig. tit. "Bills and Notes," § 1711.

If an acceptance payable on a particular day be not dated parol evidence is admissible to show that the day designated is the last day of grace. Kenner *v.* Their Creditors, 1 La. 120, 8 Mart. N. S. (La.) 36.

79. Huston *v.* Young, 33 Me. 85.

Thus a note dated on Monday is good in the hands of a *bona fide* holder, although really executed and delivered on Sunday, and the illegal delivery cannot be proved against such holder.

Connecticut.— Greathead *v.* Walton, 40 Conn. 226.

Georgia.— Harrison *v.* Powers, 76 Ga. 218; Ball *v.* Powers, 62 Ga. 757.

(II) *Delivery*—(A) *Conditional Delivery.* As between the parties or others having notice, conditional delivery of a bill or note may be set up in defense and may be shown by parol evidence.[80]

(B) *Time of Delivery.* It may be shown that an instrument dated on Sunday was really delivered on another day and is therefore valid.[81]

g. Explaining Ambiguity. Parol evidence is admissible to explain an ambiguity apparent on the face of the paper,[82] especially where there is a disagree-

Iowa.— Clinton Nat. Bank *v.* Graves, 48 Iowa 228.

Maine.— Cumberland Bank *v.* Mayberry, 48 Me. 198.

Massachusetts.—Cranson *v.* Goss, 107 Mass. 439, 9 Am. Rep. 45.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

New Hampshire.— State Capitol Bank *v.* Thompson, 42 N. H. 369.

Wisconsin.— Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28.

80. *Alabama.*— Hopper *v.* Eiland, 21 Ala. 714.

Connecticut.—McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.

Illinois.— Belleville Sav. Bank *v.* Bornman, 124 Ill. 200, 16 N. E. 210.

Iowa.— Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459.

Maryland.— Ricketts *v.* Pendleton, 14 Md. 320.

Massachusetts.— Robertson *v.* Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466; Wilson *v.* Powers, 131 Mass. 539; Watkins *v.* Bowers, 119 Mass. 383.

Minnesota.— Smith *v.* Mussetler, 58 Minn. 159, 59 N. W. 995; Merchants' Exch. Bank *v.* Luckow, 37 Minn. 542, 35 N. W. 434.

Missouri.— Hurt *v.* Ford, (Mo. 1896) 36 S. W. 671.

New York.— Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. 32; Benton *v.* Martin, 52 N. Y. 570; Simmons *v.* Thompson, 29 N. Y. App. Div. 559, 51 N. Y. Suppl. 1018; Lattimer *v.* Hill, 8 Hun (N. Y.) 171.

Rhode Island.— Sweet *v.* Stevens, 7 R. I. 375.

South Dakota.— McCormick Harvesting Mach. Co. *v.* Faulkner, 7 S. D. 363, 64 N. W. 163, 58 Am. St. Rep. 839.

Tennessee.— Alexander *v.* Wilkes, 11 Lea (Tenn.) 221; Breeden *v.* Grigg, 8 Baxt (Tenn.) 163; Majors *v.* McNeilly, 7 Heisk (Tenn.) 294.

United States.— Burke *v.* Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. ed. 698.

England.— Jefferies *v.* Austin, 1 Str. 674.

An indorser may show against his immediate indorsee, or a later holder with notice, that the indorsement was delivered in escrow only. Ricketts *v.* Pendleton, 14 Md. 320; Bell *v.* Ingestre, 12 Q. B. 317, 64 E. C. L. 317; Goggerley *v.* Cuthbert, 2 B. & P. N. R. 170, 9 Rev. Rep. 632.

Where a note was delivered, or was placed in escrow to be delivered, on a certain condition, and the depositary died before the performance of the condition, his declarations as to the condition are admissible in defense against an indorsee after maturity of the note. Goodson *v.* Johnson, 35 Tex. 622.

81. *Alabama.*—Aldridge *v.* Decatur Branch Bank, 17 Ala. 45.

Illinois.— King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131.

Maine.— Hilton *v.* Houghton, 35 Me. 143; Drake *v.* Rogers, 32 Me. 524.

Massachusetts.— Stacy *v.* Kemp, 97 Mass. 166.

Missouri.— Fritsch *v.* Heislen, 40 Mo. 555.

New Hampshire.— Marshall *v.* Russell, 44 N. H. 509; Smith *v.* Bean, 15 N. H. 577; Clough *v.* Davis, 9 N. H. 500.

Vermont.— Goss *v.* Whitney, 24 Vt. 187; Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Rep. 157.

82. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Lockhard *v.* Avery, 8 Ala. 502. See also McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148.

Georgia.— Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617.

Louisiana.— Union Bank *v.* Meeker, 4 La. Ann. 189, 50 Am. Dec. 559.

Maine.— Gallagher *v.* Black, 44 Me. 99.

Maryland.—McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102.

Michigan.— Kendrick *v.* Beard, 81 Mich. 182, 45 N. W. 837.

Minnesota.— Kelly *v.* Bronson, 26 Minn. 359, 4 N. W. 607.

Missouri.— Amonett *v.* Montague, 63 Mo. 201; Cox *v.* Beltzhoover, 11 Mo. 142, 47 Am. Dec. 145.

New Jersey.— Martin *v.* Bell, 18 N. J. L. 167.

New York.— Chase *v.* Senn, 7 N. Y. Suppl. 65, 26 N. Y. St. 110.

Ohio.— Kelsey *v.* Hibbs, 13 Ohio St. 340; Wright *v.* Merchant, 2 Ohio Dec. (Reprint) 742, 5 West. L. Month. 194.

United States.— Clay *v.* Field, 138 U. S. 464, 11 S. Ct. 419, 34 L. ed. 1044. See also Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333.

Thus parol evidence is admissible to show that a note imperfectly described in a collateral mortgage is the one referred to (Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684; Aull *v.* Lee, 61 Mo. 160); to identify the wife of one who signs a note as "J. A. Robson, agent for his Wife" (Rawlings *v.* Robson, 70 Ga. 595); to explain abbreviations used in a note (Comstock *v.* Savage, 27 Conn. 184; Lacy *v.* Dubuque Lumber Co., 43 Iowa 510; Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; State Bank *v.* Muskingum Branch Ohio State Bank, 29 N. Y. 619;

ment between the note and a contemporaneous collateral mortgage for the same debt;[83] but parol evidence is not admissible for the purpose of explaining a patent ambiguity in a bill or note.[84]

h. Fraud — (I) *In General.* Parol evidence is admissible to show that the execution of a note was obtained through false and fraudulent representations.[85]

(II) *Indorsement Procured by Fraud.* Parol evidence is admissible to show that the indorsement of a note was procured by fraud.[86]

i. Indorsement. The regular and usual evidence of the transfer by indorsement of a negotiable note is by proof of the handwriting of the indorser.[87]

Genesee Bank *v.* Patchin Bank, 19 N. Y. 312; Farmers', etc., Bank *v.* Day, 13 Vt. 36); to identify the payee of a due-bill, which names none (Nicholas *v.* Krebs, 11 Ala. 230. See also Barkley *v.* Tarrant, 20 S. C. 574, 47 Am. Rep. 853); to explain the word "duplicate" in a note (McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102); to show that the person countersigning a bank-bill was the cashier as required by law (Utica Bank *v.* Magher, 18 Johns. (N. Y.) 341); to show that the place of payment designated as "my office" was in Montgomery (Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314); to show that A was the payee intended in a note by A and B to the "order of myself" (Jenkins *v.* Bass, 88 Ky. 397, 10 Ky. L. Rep. 987, 11 S. W. 293, 21 Am. St. Rep. 344); or to explain the words, "Charge the amount against me and my share of my mother's estate" (Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 23 N. Y. St. 160, 11 Am. St. Rep. 621), "what moneys may be due me" (Capron *v.* Anness, 136 Mass. 271), or "to be paid out of the last payment" (Proctor *v.* Hartigan, 143 Mass. 462, 9 N. E. 841); but not to explain that "legally due" was intended for "equitably due" (McDuffie *v.* Magoon, 26 Vt. 518).

83. Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348.

84. *Illinois.*— Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186.

Indiana.— Johnston *v.* Griest, 85 Ind. 503.

Maine.— Porter *v.* Porter, 51 Me. 376; Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Nebraska.— Fisk *v.* McNeal, 23 Nebr. 726, 37 N. W. 616, 8 Am. St. Rep. 162.

New York.— Lent *v.* Hodgman, 15 Barb. (N. Y.) 274.

85. *Alabama.*— Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

Connecticut.— See Knotwell *v.* Blanchard, 41 Conn. 614.

Georgia.— Matheson *v.* Jones, 30 Ga. 306, 76 Am. Dec. 647.

Illinois.— Kirkham *v.* Boston, 67 Ill. 599.

Indiana.— Hines *v.* Driver, 72 Ind. 125.

Iowa.— Officer *v.* Howe, 32 Iowa 142.

Maine.— Stoyell *v.* Stoyell, 82 Me. 332, 19 Atl. 860; Nichols *v.* Baker, 75 Me. 334; Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389.

Massachusetts.— Ramsdell *v.* Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503; Case *v.* Gerrish, 15 Pick. (Mass.) 49.

Mississippi.— Simmons *v.* Cutreer, 12 Sm. & M. (Miss.) 584.

Missouri.— Fisk *v.* Collins, 9 Mo. 137.

New Hampshire.— Goodwin *v.* Horne, 60 N. H. 485.

New Jersey.— Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617; Armstrong *v.* Hall, 1 N. J. L. 178.

New York.— Pelly *v.* Onderdonk, 61 Hun (N. Y.) 314, 15 N. Y. Suppl. 915, 40 N. Y. St. 648; New York Exch. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593; New York, etc., Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574; Hunter *v.* Batterson, 27 Misc. (N. Y.) 642, 58 N. Y. Suppl. 396.

Pennsylvania.— Resh *v.* Allentown First Nat. Bank, 93 Pa. St. 397; Maples *v.* Browne, 48 Pa. St. 458.

Vermont.— Harrington *v.* Wright, 48 Vt. 427.

Wisconsin.— Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548.

See, generally, FRAUD; and 20 Cent. Dig. tit. "Evidence," § 2016.

Duress.— Where, in an action on a negotiable instrument, plaintiff's title as a *bona fide* holder is impeached by evidence sufficient to raise any question on that point for the jury, defendant has a right to offer evidence of matter of defense which would be good against the original payee, such as the fact that the note was obtained from him by duress. Cortland First Nat. Bank *v.* Green, 43 N. Y. 298.

Fraud of agent.— Where an agent buys land with the money of his principal and takes notes for the price in his own name, it is competent for the principal to prove the fact by parol and assert title to the money. Andrews *v.* Jones, 10 Ala. 460.

86. *Illinois.*— Kirkman *v.* Boston, 67 Ill. 599; Van Buskirk *v.* Day, 32 Ill. 260.

Maine.— Larrabee *v.* Fairbanks, 24 Me. 363, 41 Am. Dec. 389.

Maryland.— Hamburger *v.* Miller, 48 Md. 317.

Pennsylvania.— Hill *v.* Ely, 5 Serg. & R. (Pa.) 363, 9 Am. Dec. 376.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

87. Smith *v.* Prescott, 17 Me. 277.

Accompanying guaranty.— In an action on a promissory note, purporting to be indorsed by defendant, a guaranty signed by defendant on the same note is admissible in evidence of the genuineness of the indorsement. Cabot Bank *v.* Russell, 4 Gray (Mass.) 167.

j. Instrument Sued on. The note, when its execution is not denied, proves itself and may be offered in evidence.[88] The note is also admissible, although its execution is put in issue by proper plea, if there is any evidence, proper for the jury, tending to show that defendant executed it.[89] So proof of the genuineness of the signature authorizes the introduction of the note.[90]

k. Nature of Liability and Relation Between Parties — (i) *In General.* As between the parties liable upon a bill or note parol evidence is generally admissi-

Admissions of indorser.— In an action by an indorsee of a note against the maker, evidence of the admission of the indorsement by the indorser is inadmissible. Robertson *v.* Crockett, 1 Yerg. (Tenn.) 203. But see McKown *v.* Mathes, 19 La. 542; Powell *v.* Adams, 9 Mo. 766.

Parol evidence of the indorsement of a promissory note, without production of the note, is inadmissible, unless the note is not in the power of the party. De Pusey *v.* Du Pont, 1 Del. Ch. 77. So in a suit by the indorsee of a promissory note against the maker to recover the amount of the note plaintiff must prove the indorsement of the payee by introducing the note and not a copy in evidence. Hammond *v.* Freeman, 9 Ark. 62. But evidence that the name of the payee, indorsed on a promissory note, is the signature by which his business was transacted at the time of the indorsement, is admissible to prove the indorsement binding upon him, without proving it to be in his own handwriting. Brigham *v.* Peters, 1 Gray (Mass.) 139.

88. McCallum *v.* Driggs, 35 Fla. 277, 17 So. 407; Buckner *v.* Bush, 1 Duv. (Ky.) 394, 85 Am. Dec. 634; Rickey *v.* Morrison, 69 Mich. 139, 37 N. W. 56; Myers *v.* Irwin, 2 Serg. & R. (Pa.) 368.

Erasure of indorsement.— In an action on a note, on which the indorsement of a part payment had been erased, the note may be read in evidence, without previous explanation of the erasure. Kimball *v.* Lamson, 2 Vt. 138.

Note containing omission.— In an action on a note payable "twenty-four after date," the note is admissible in evidence without other testimony, under an averment in the declaration that twenty-four months after date was the time meant by the parties, the jury being the judges of the fact of the time of payment intended. Corner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

Proof of the execution and required registration of an instrument obviates the necessity of proving the execution of the note attached to the instrument, which the latter was intended to secure. Steiner *v.* McCall, 61 Ala. 413.

89. *Alabama.*— Morris *v.* Varner, 32 Ala. 499. See also Catlin *v.* Gilder, 3 Ala. 536; Bell *v.* Rhea, 1 Ala. 83.

Colorado.— Lothrop *v.* Roberts, 16 Colo. 250, 27 Pac. 698.

Illinois.— Melvin *v.* Hodges, 71 Ill. 422.

Indiana.— Rotan *v.* Stoeber, 81 Ind. 145; Pate *v.* Aurora First Nat. Bank, 63 Ind. 254; Carter *v.* Pomeroy, 30 Ind. 438; Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Louisiana.— James *v.* Rand, 43 La. Ann. 179, 8 So. 623.

Michigan.— Hunter *v.* Parsons, 22 Mich. 96.

New York.— Pentz *v.* Winterbottom, 5 Den. (N. Y.) 51.

Pennsylvania.— Clark *v.* Freeman, 25 Pa. St. 133; Watson *v.* Brewster, 1 Pa. St. 381.

Texas.— Muckleroy *v.* Bethany, 27 Tex. 551.

Wisconsin.— Holmes *v.* Cook, 50 Wis. 172, 6 N. W. 507.

See 7 Cent. Dig. tit. "Bills and Notes," § 1700.

Admission of signature.—Where a plea of *non est factum* has been filed to a suit on a note, the note is admissible in evidence on proof of defendant's admission that he signed it and without any explanation of its contents where no alterations appear on the face of the note. Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Proof of indorsements.— In an action on a note by the payee against the maker, the payee makes out a *prima facie* case by showing possession, and he need not therefore set out in the complaint or establish by evidence indorsements on the back of it in order to introduce the note in evidence. Anniston Pipe Works *v.* Mary Pratt Furnace Co., 94 Ala. 606, 10 So. 259; Howry *v.* Eppinger, 34 Mich. 29. But see Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90; Youngs *v.* Bell, 4 Cal. 201, which hold that in an action by an indorsee against the maker, proof of the indorsement of the note is necessary to make it admissible, unless such proof is waived by defendant when the indorsement is offered. And see Newton *v.* Principaal, 82 Mich. 271, 46 N. W. 234, holding that where plaintiff's title to a note accrues through the indorsement of the payee's name by his alleged agent, the note is not admissible without proof of the agent's authority to make the indorsement.

90. Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89; Brooks *v.* Allen, 62 Ind. 401; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Proof of handwriting.— In an action on a note, preliminary proof of the handwriting of the makers is sufficient to admit it in evidence. Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190. But it is not necessary to give positive proof of the handwriting of the maker, in order to suhmit the note to the jury. A qualified expression of belief that it is his handwriting is sufficient. Watson *v.* Brewster, 1 Pa. St. 381.

ble to show their actual relation to one another.[91] Thus one joint maker may show, as against his co-makers, that he was only a surety for the others or for one of them;[92] but he cannot prove special conditions of suretyship which are

91. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227; Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

California.— McPherson *v.* Weston, 85 Cal. 90, 24 Pac. 733.

Connecticut.— Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

Georgia.— Scofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032; Cauthen *v.* Central Georgia Bank, 69 Ga. 733; Camp *v.* Simmons, 62 Ga. 73.

Illinois.— Robertson *v.* Deatherage, 82 Ill. 511; Paul *v.* Berry, 78 Ill. 158; Kennedy *v.* Evans, 31 Ill. 258.

Indiana.— Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Nurre *v.* Chittenden, 56 Ind. 462; Lacy *v.* Lofton, 26 Ind. 324; Dunn *v.* Sparks, 7 Ind. 490.

Iowa.— Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834.

Kentucky.— Chapeze *v.* Young, 87 Ky. 476, 9 S. W. 399; Lewis *v.* Williams, 4 Bush (Ky.) 678.

Louisiana.— Louisiana State Bank *v.* Rowell, 7 Mart. N. S. (La.) 341.

Maine.— Coolidge *v.* Wiggin, 62 Me. 568; Smith *v.* Morrill, 54 Me. 48; Lord *v.* Moody, 41 Me. 127; Crosby *v.* Wyatt, 23 Me. 156.

Maryland.—Chapman *v.* Davis, 4 Gill (Md.) 166.

Massachusetts.— Winchester *v.* Whitney, 138 Mass. 549; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1; Sweet *v.* McAllister, 4 Allen (Mass.) 353; Clapp *v.* Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639; Weston *v.* Chamberlin, 7 Cush. (Mass.) 404; Carpenter *v.* King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405.

Michigan.— Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734; Cook *v.* Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870.

Minnesota.— Pray *v.* Rhodes, 42 Minn. 93, 43 N. W. 838.

Mississippi.— Hunt *v.* Chambliss, 7 Sm. & M. (Miss.) 532.

New Hampshire.— Paul *v.* Rider, 58 N. H. 119; Maynard *v.* Fellows, 43 N. H. 255; Benton *v.* Willard, 17 N. H. 593.

New Jersey.—Apgar *v.* Hiler, 24 N. J. L. 812.

New York.— Easterly *v.* Barber, 66 N. Y. 433; Robison *v.* Lyle, 10 Barb. (N. Y.) 512 (although one of the several makers adds to his name the word "security"); Palmer *v.* Stephens, 1 Den. (N. Y.) 471.

North Carolina.— Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416; Smith *v.* Haynes, 82 N. C. 448; Love *v.* Wall, 8 N. C. 313.

Ohio.— Oldham *v.* Broom, 28 Ohio St. 41; Douglas *v.* Waddle, 1 Ohio 413, 13 Am. Dec. 630.

Oregon.— Hoffman *v.* Habighorst, 38 Oreg. 261, 63 Pac. 610, 53 L. R. A. 908; Montgomery *v.* Page, 29 Oreg. 320, 44 Pac. 689.

Pennsylvania.— Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394.

Rhode Island.— Thompson *v.* Taylor, 12 R. I. 109.

South Carolina.—Anderson *v.* Pearson, 2 Bailey (S. C.) 107.

Tennessee.— Coleman *v.* Norman, 10 Heisk. (Tenn.) 590.

Texas.— Victoria First Nat. Bank *v.* Skidmore, (Tex. Civ. App. 1895) 30 S. W. 564; Kellogg *v.* Iron City Nat. Bank, (Tex. Civ. App. 1894) 27 S. W. 897.

Vermont.— Martin *v.* Marshall, 60 Vt. 321, 13 Atl. 420; Adams *v.* Flanagan, 36 Vt. 400; Lathrop *v.* Wilson, 30 Vt. 604; Lapham *v.* Barnes, 2 Vt. 213.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

Wisconsin.— Kiel *v.* Choate, 92 Wis. 517, 67 N. W. 431.

United States.— Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152; Heckscher *v.* Binney, 3 Woodb. & M. (U. S.) 333, 11 Fed. Cas. No. 6,316.

Canada.— Northfield *v.* Lawrence, 7 Montreal Super. Ct. 148, 21 Rev. Lég. 359; Blake *v.* Harvey, 1 U. C. C. P. 417.

See 7 Cent. Dig. tit. "Bills and Notes," § 1723.

92. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227.

Connecticut.— Orvis *v.* Newell, 17 Conn. 97.

Illinois.— Robertson *v.* Deatherage, 82 Ill. 511; Klepper *v.* Borchsenius, 13 Ill. App. 318.

Indiana.— Harshman *v.* Armstrong, 43 Ind. 126.

Kansas.— Water Power Co. *v.* Brown, 23 Kan. 676.

Kentucky.— Covington First Nat. Bank *v.* Gaines, 87 Ky. 597, 10 Ky. L. Rep. 451, 9 S. W. 396; Emmons *v.* Overton, 18 B. Mon. (Ky.) 643.

Maine.— Fernald *v.* Dawley, 26 Me. 470.

Massachusetts.— McGee *v.* Prouty, 9 Metc. (Mass.) 547, 43 Am. Dec. 409.

Michigan.— Eastman *v.* Cleaver, 72 Mich. 167, 40 N. W. 238.

New Hampshire.— Davis *v.* Barrington, 30 N. H. 517.

New York.— Hubbard *v.* Gurney, 64 N. Y. 457; Artcher *v.* Douglass, 5 Den. (N. Y.) 509; King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Pain *v.* Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369.

Ohio.— Steubenville Bank *v.* Hoge, 6 Ohio 17.

Pennsylvania.— Holt *v.* Bodey, 18 Pa. St. 207.

Vermont.— Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956; Lapham *v.* Barnes, 2 Vt. 213.

See 7 Cent. Dig. tit. "Bills and Notes," § 1723.

not implied in their legal relation and which contradict the writing.[93] Parol evidence is also admissible against parties having knowledge of the relation of the makers to one another,[94] but not against a *bona fide* holder for value without notice.[95]

(II) *BLANK INDORSEMENT.* Most authorities hold that the implications and intendments which the law merchant has attached to blank indorsements of negotiable commercial paper render them express and complete contracts which cannot be explained or varied by parol.[96] But, on the other hand, on the theory

93. Thompson *v.* Hall, 45 Barb. (N. Y.) 214.

94. *Georgia.*— Perry *v.* Hodnett, 38 Ga. 103.

Kansas.— Rose *v.* Williams, 5 Kan. 483.

Massachusetts.— Horne *v.* Bodwell, 5 Gray (Mass.) 457; Carpenter *v.* King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Harris *v.* Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254.

Michigan.— Stevens *v.* Oaks, 58 Mich. 343, 25 N. W. 309.

North Carolina.— Coffey *v.* Reinhardt, 114 N. C. 509, 19 S. E. 370; Goodman *v.* Litaker, 84 N. C. 8, 37 Am. Rep. 602; Welfare *v.* Thompson, 83 N. C. 276.

Texas.— Smith *v.* Doak, 3 Tex. 215.

Utah.— Gillett *v.* Taylor, 14 Utah 190, 46 Pac. 1099, 60 Am. St. Rep. 890.

Vermont.— Harrington *v.* Wright, 48 Vt. 427.

Washington.— Bank of British Columbia *v.* Jeffs, 15 Wash. 230, 46 Pac. 247.

England.— Oriental Financial Corp. *v.* Overend, L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813 [*affirmed* in L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322]; Ewin *v.* Lancaster, 6 B. & S. 571, 12 L. T. Rep. N. S. 632, 13 Wkly. Rep. 857, 118 E. C. L. 571; Bailey *v.* Edwards, 4 B. & S. 761, 11 Jur. N. S. 134, 34 L. J. Q. B. 41, 9 L. T. Rep. N. S. 646, 12 Wkly. Rep. 337, 116 E. C. L. 761; Pooley *v.* Harradine, 7 E. & B. 431, 90 E. C. L. 431.

95. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227.

Connecticut.— Bull *v.* Allen, 19 Conn. 101; Orvis *v.* Newell, 17 Conn. 97.

Georgia.— Venable *v.* Lippold, 102 Ga. 208, 29 S. E. 181.

Indiana.— Roberts *v.* Masters, 40 Ind. 461.

Maine.— Rice *v.* Cook, 71 Me. 559; Hughes *v.* Littlefield, 18 Me. 400.

Minnesota.— Benedict *v.* Olsen, 37 Minn. 431, 35 N. W. 10.

New Hampshire.— Maynard *v.* Fellows, 43 N. H. 255.

New Jersey.— Pintard *v.* Davis, 21 N. J. L. 632, 47 Am. Dec. 172 [*affirming* 20 N. J. L. 205].

North Carolina.— Christian *v.* Parrott, 114 N. C. 215, 19 S. E. 151; Lewis *v.* Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. Rep. 725.

Ohio.— Slipher *v.* Fisher, 11 Ohio 299; Farrington *v.* Gallaway, 10 Ohio 543.

Vermont.— Benedict *v.* Cox, 52 Vt. 247.

Washington.— Allen *v.* Chambers, 13 Wash. 327, 43 Pac. 57.

United States.— Sprigg *v.* Mt. Pleasant Bank, 10 Pet. (U. S.) 257, 9 L. ed. 416.

England.— Price *v.* Edmunds, 10 B. & C. 578, 8 L. J. K. B. O. S. 119, 21 E. C. L. 246; Strong *v.* Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201; Manley *v.* Boycot, 2 E. & B. 46, 17 Jur. 1118, 22 L. J. Q. B. 265, 75 E. C. L. 46.

96. *Alabama.*—Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; Preston *v.* Ellington, 74 Ala. 133; Day *v.* Thompson, 65 Ala. 269; Tankersley *v.* Graham, 8 Ala. 247; Holt *v.* Moore, 5 Ala. 521; Hightower *v.* Ivy, 2 Port. (Ala.) 308; Dupuy *v.* Gray, Minor (Ala.) 357.

Colorado.— Doom *v.* Sherwin, 20 Colo. 234, 38 Pac. 56; Dunn *v.* Ghost, 5 Colo. 134; Martin *v.* Cole, 3 Colo. 113.

Dakota.— Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367.

Georgia.— Bedell *v.* Scarlett, 75 Ga. 56; Dunn *v.* Welsh, 62 Ga. 241; Meador *v.* Dollar Sav. Bank, 56 Ga. 665; Stapler *v.* Burns, 43 Ga. 382; Bartlett *v.* Lee, 33 Ga. 491; Stubbs *v.* Goodall, 4 Ga. 166.

Illinois.— Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304 [*affirming* 62 Ill. App. 387]; Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257; Courteney *v.* Hogan, 93 Ill. 161; Skelton *v.* Dustin, 92 Ill. 49; Schnell *v.* North Side Planing Mill Co., 89 Ill. 581; Finley *v.* Green, 85 Ill. 535; Beattie *v.* Browne, 64 Ill. 360; Mason *v.* Burton, 54 Ill. 349.

Indiana.— Smythe *v.* Scott, 106 Ind. 245, 6 N. E. 145; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113; Holton *v.* McCormick, 45 Ind. 411; Roberts *v.* Masters, 40 Ind. 461; Campbell *v.* Robbins, 29 Ind. 271; Parker *v.* Morton, 29 Ind. 89; Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358; Snyder *v.* Oatman, 16 Ind. 265; Vore *v.* Hurst, 13 Ind. 551, 74 Am. Dec. 268; Bowers *v.* Headen, 4 Ind. 318; Odam *v.* Beard, 1 Blackf. (Ind.) 191.

Iowa.— Geneser *v.* Wissner, 69 Iowa 119, 28 N. W. 471; Sands *v.* Wood, 1 Iowa 263; Friend *v.* Beebe, 3 Greene (Iowa) 279.

Kansas.— Doolittle *v.* Ferry, 20 Kan. 230, 27 Am. Rep. 166; Pemberton *v.* Hoosier, 1 Kan. 108. *Compare* Lovejoy *v.* Citizens' Bank, 23 Kan. 331.

Maine.— Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478; Sanborn *v.* Southard, 25 Me. 409, 43 Am. Dec. 288; Crocker *v.* Getchell, 23 Me. 392; Smith *v.* Frye, 14 Me. 457;

that a blank indorsement of negotiable commercial paper is a contract only so far expressed in writing as to raise a presumption of a certain undertaking which is not conclusive except in favor of subsequent *bona fide* holders for value, there are many authorities which permit the introduction of parol evidence to explain the true contract as between the original and immediate parties to the paper.[97]

Fuller *v.* McDonald, 8 Me. 213, 23 Am. Dec. 499.

Maryland.— Harvard Pub. Co. *v.* Benjamin, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402; Gist *v.* Drakeley, 2 Gill (Md.) 330, 41 Am. Dec. 426.

Massachusetts.—Baldwin *v.* Dow, 130 Mass. 416; Wright *v.* Morse, 9 Gray (Mass.) 337, 69 Am. Dec. 291; Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473; Howe *v.* Merrill, 5 Cush. (Mass.) 80.

Michigan.— Ortmann *v.* Canadian Bank of Commerce, 39 Mich. 518.

Minnesota.— Rowler *v.* Braun, 63 Minn. 32, 65 N. W. 124, 56 Am. St. Rep. 449; Clarke *v.* Patrick, 60 Minn. 269, 62 N. W. 284; Knoblauch *v.* Foglesong, 38 Minn. 352, 37 N. W. 586; Coon *v.* Pruden, 25 Minn. 105; Barnard *v.* Gaslin, 23 Minn. 192; St. Paul First Nat. Bank *v.* St. Paul Nat. Mar. Bank, 20 Minn. 63; Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105; Borup *v.* Nininger, 5 Minn. 523; Levering *v.* Washington, 3 Minn. 323.

Missouri.— Lewis *v.* Dunlap, 72 Mo. 174; Rodney *v.* Wilson, 67 Mo. 123, 29 Am. Rep. 499.

Nebraska.— Cropsey *v.* Averill, 8 Nebr. 151.

New Hampshire.— Barry *v.* Morse, 3 N. H. 132.

New Jersey.—Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 39 Atl. 650; Kling *v.* Kehoe, 58 N. J. L. 529, 33 Atl. 946; Johnson *v.* Ramsey, 43 N. J. L. 279, 39 Am. Rep. 580.

New York.— Albion Bank *v.* Smith, 27 Barb. (N. Y.) 489; Bookstaver *v.* Jayne, 3 Thomps. & C. (N. Y.) 397; Higgins *v.* Barrowcliffe, 46 N. Y. Super. Ct. 540.

North Carolina.— Hill *v.* Shields, 81 N. C. 250, 31 Am. Rep. 499.

Ohio.— Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354.

Oregon.— Smith *v.* Caro, 9 Oreg. 278.

South Carolina.— Charleston First Nat. Bank *v.* Gary, 18 S. C. 282.

South Dakota.— Schmitz *v.* Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

Texas.— McMichael *v.* Jarvis, 78 Tex. 671, 15 S. W. 111; Latham *v.* Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Crockett *v.* Shaw, 29 Tex. 507.

Vermont.— Sanford *v.* Norton, 17 Vt. 285.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

Washington.—Allen *v.* Chambers, 13 Wash. 327, 43 Pac. 57.

Wisconsin.— Eaton *v.* McMahon, 42 Wis. 484; Charles *v.* Denis, 42 Wis. 56, 24 Am. Rep. 383.

United States.— Martin *v.* Cole, 104 U. S. 30, 26 L. ed. 647; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316; Van Vleet *v.* Sledge, 45 Fed. 743; Alexandria Bank *v.* Deneale, 2 Cranch C. C. (U. S.) 488, 2 Fed. Cas. No. 846; Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303.

See 7 Cent. Dig. tit. "Bills and Notes," § 1793.

97. *Connecticut.*— Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353; Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Case *v.* Spaulding, 24 Conn. 578; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282; Beckwith *v.* Angell, 6 Conn. 315.

Florida.— Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 89.

Georgia.— Bryan *v.* Windsor, 99 Ga. 176, 25 S. E. 268; Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54; Lynch *v.* Goldsmith, 64 Ga. 42; Stapler *v.* Burns, 43 Ga. 382; Carhart *v.* Wynn, 22 Ga. 24.

Illinois.— Maxwell *v.* Vansant, 46 Ill. 58; Drummond *v.* Yager, 10 Ill. App. 380.

Indiana.— Spencer *v.* Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113; Hazzard *v.* Duke, 64 Ind. 220; Coxe *v.* Wilson, 40 Ind. 204.

Iowa.— Marshalltown First Nat. Bank *v.* Crabtree, 86 Iowa 731, 52 N. W. 559; Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278; Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834; James *v.* Smith, 30 Iowa 55; Harrison *v.* McKim, 18 Iowa 485.

Kansas.— Water Power Co. *v.* Brown, 23 Kan. 676; McWhirt *v.* McKee, 6 Kan. 412.

Kentucky.— Chapeze *v.* Young, 87 Ky. 476, 10 Ky. L. Rep. 465, 9 S. W. 399; Lewis *v.* Williams, 4 Bush (Ky.) 678.

Maine.— Hagerthy *v.* Phillips, 83 Me. 336, 22 Atl. 223; Coolidge *v.* Wiggin, 62 Me. 568; Patten *v.* Pearson, 57 Me. 428; Smith *v.* Morrill, 54 Me. 48; Sturtevant *v.* Randall, 53 Me. 149.

Massachusetts.— Baxter Nat. Bank *v.* Talbot, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; Weston *v.* Chamberlin, 7 Cush. (Mass.) 404; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232.

Michigan.— Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734.

Nebraska.— True *v.* Bullard, 45 Nebr. 409, 63 N. W. 824; Holmes *v.* Lincoln First Nat. Bank, 38 Nebr. 326, 56 N. W. 1011, 41 Am. St. Rep. 733.

New York.— Easterly *v.* Barber, 66 N. Y. 433; Kohn *v.* Consolidated Butter, etc., Co., 30 Misc. (N. Y.) 725, 63 N. Y. Suppl. 265.

North Carolina.— Adrian *v.* McCaskill, 103 N. C. 182, 9 S. E. 284, 14 Am. St. Rep. 788, 3 L. R. A. 759; Smith *v.* Haynes, 82 N. C. 448; Iredell County *v.* Wasson, 82

On the same theory such evidence is held to be admissible as against subsequent holders with notice.[98]

(III) *INDORSEMENT BEFORE DELIVERY.* The rule very generally obtains that the character of the undertaking of a party who places his name on the back of a note before its delivery to the payee may be shown by parol.[99] Such evidence

N. C. 308; Mendenhall *v.* Davis, 72 N. C. 150; Davis *v.* Morgan, 64 N. C. 570.

Ohio.— Bailey *v.* Stoneman, 41 Ohio St. 148; Hudson *v.* Wolcott, 39 Ohio St. 618; Morris *v.* Faurot, 21 Ohio St. 155, 8 Am. Rep. 45; Hays *v.* May, Wright (Ohio) 80; Mann *v.* Lindsay, 1 Ohio Dec. (Reprint) 79, 1 West. L. J. 553.

Pennsylvania.— Cake *v.* Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600; Breneman *v.* Furniss, 90 Pa. St. 186, 35 Am. Rep. 651; Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394; Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622; Hill *v.* Ely, 5 Serg. & R. (Pa.) 363, 9 Am. Dec. 376; Girard Bank *v.* Comly, 2 Miles (Pa.) 405.

Rhode Island.— Thompson *v.* Taylor, 12 R. I. 109.

Tennessee.—Taylor *v.* French, 2 Lea (Tenn.) 257, 31 Am. Rep. 609; Iser *v.* Cohen, 1 Baxt. (Tenn.) 421.

Vermont.— Rhodes *v.* Risley, 1 D. Chipm. (Vt.) 52, 1 Am. Dec. 696.

Virginia.— Woodward *v.* Foster, 18 Gratt. (Va.) 200.

West Virginia.—Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515.

Wisconsin.— Kiel *v.* Choate, 92 Wis. 517, 67 N. W. 431, 53 Am. St. Rep. 936.

United States.— Susquehanna Bridge, etc., Co. *v.* Evans, 4 Wash. (U. S.) 480, 23 Fed. Cas. No. 13,635.

England.— Pike *v.* Street, M. & M. 226, 22 E. C. L. 514; Castrique *v.* Buttigieg, 10 Moore P. C. 94, 4 Wkly. Rep. 445, 14 Eng. Reprint 427; Kidson *v.* Dilworth, 5 Price 564, 19 Rev. Rep. 565.

See 7 Cent. Dig. tit. "Bills and Notes," § 1793.

Against his immediate indorsee, an indorser may prove a contemporaneous written agreement that the indorsement should be without recourse. Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204.

98. *Georgia.*— Hardy *v.* White, 69 Ga. 454.

Louisiana.— McDonough *v.* Goule, 8 La. 472.

Michigan.— Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720.

New York.— Van Valkenburgh *v.* Stupplebeen, 49 Barb. (N. Y.) 99.

Utah.— Gregg *v.* Groesbeck, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

Vermont.— Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

See 7 Cent. Dig. tit. "Bills and Notes," § 1793.

99. *Connecticut.*— Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353; Riddle *v.* Stevens, 32 Conn. 378, 87 Am. Dec. 181; Clark *v.* Merriam, 25 Conn. 576; Castle *v.* Candee, 16 Conn. 223; Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282.

Georgia.— Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54.

Illinois.— Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935; Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; De Witt County Nat. Bank *v.* Nixon, 125 Ill. 615, 18 N. E. 203; Eberhart *v.* Page, 89 Ill. 550; Stowell *v.* Raymond, 83 Ill. 120; Boynton *v.* Pierce, 79 Ill. 145; Lincoln *v.* Hinzey, 51 Ill. 435; White *v.* Weaver, 41 Ill. 409; Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481; Cushman *v.* Dement, 4 Ill. 497; Featherstone *v.* Hendrick, 59 Ill. App. 497; Brown *v.* Reasner, 5 Ill. App. 45.

Indiana.— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Houck *v.* Graham, 106 Ind. 195; 6 N. E. 594, 55 Am. Rep. 727; Stack *v.* Beach, 74 Ind. 571, 39 Am. Rep. 113; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Browning *v.* Merritt, 61 Ind. 425; Houston *v.* Bruner, 39 Ind. 376; Snyder *v.* Oatman, 16 Ind. 265; Sill *v.* Leslie, 16 Ind. 236; Harris *v.* Pierce, 6 Ind. 162; Wells *v.* Jackson, 6 Blackf. (Ind.) 40.

Kansas.— Fullerton *v.* Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33.

Kentucky.— Levi *v.* Mendell, 1 Duv. (Ky.) 77; Kellogg *v.* Dunn, 2 Metc. (Ky.) 215.

Louisiana.— Cooley *v.* Lawrence, 4 Mart. (La.) 639.

Maryland.— Ownings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353; Baltimore Third Nat. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304.

Massachusetts.— Brown *v.* Butler, 99 Mass. 179; Patch *v.* Washburn, 16 Gray (Mass.) 82; Essex Co. *v.* Edmands, 12 Gray (Mass.) 273, 71 Am. Dec. 758; Pearson *v.* Stoddard, 9 Gray (Mass.) 199; Riley *v.* Gerrish, 9 Cush. (Mass.) 104; Austin *v.* Boyd, 24 Pick. (Mass.) 64; Ulen *v.* Kittredge, 7 Mass. 233.

Minnesota.—McComb *v.* Thompson, 2 Minn. 139, 72 Am. Dec. 84; Winslow *v.* Boyden, 1 Minn. 383; Rey *v.* Simpson, 1 Minn. 380; Pierse *v.* Irvine, 1 Minn. 369. But see Dennis *v.* Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603.

Mississippi.— Richardson *v.* Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 481; Jennings *v.* Thomas, 13 Sm. & M. (Miss.) 617.

Missouri.— Faulkner *v.* Faulkner, 73 Mo. 327; Cahn *v.* Dutton, 60 Mo. 297; Mammon *v.* Hartman, 51 Mo. 168; Seymour *v.* Farrell, 51 Mo. 95; Kuntz *v.* Tempel, 48 Mo. 71; Beidman *v.* Gray, 35 Mo. 282; Schneider *v.* Schiffman, 20 Mo. 571; Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286.

has been admitted at the suit of the payee to show that the indorser was a maker,[1] a surety or maker,[2] a guarantor,[3] an indorser,[4] a second indorser,[5] an indorser or guarantor,[6] a second indorser or guarantor,[7] or a surety.[8] Parol evidence may explain such indorsement, whether the note is negotiable or not,[9] and although the indorsement was made after maturity,[10] or although the payee's indorsement without recourse was afterward placed above it;[11] but parol evidence cannot be allowed to prejudice a *bona fide* holder.[12] So parol evidence has been held to be

New Jersey.— Johnson *v.* Ramsay, 43 N. J. L. 279, 39 Am. Rep. 580; Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Ackerman *v.* Westervelt, 26 N. J. L. 92 note; Watkins *v.* Kirkpatrick, 26 N. J. L. 84; Crozer *v.* Chamber, 20 N. J. L. 256; Clawson *v.* Gustin, 5 N. J. L. 821.

New York.— Coulter *v.* Richmond, 59 N. Y. 478; Smith *v.* Smith, 37 N. Y. Super. Ct. 203; Carter *v.* Howard, 17 Misc. (N. Y.) 381, 39 N. Y. Suppl. 1060; Wyckoff *v.* Wilson, 9 N. Y. Suppl. 628. But see Prosser *v.* Luqueer, 4 Hill (N. Y.) 420, 40 Am. Dec. 288.

North Carolina.— Hoffman *v.* Moore, 82 N. C. 313.

Ohio.— Bright *v.* Carpenter, 9 Ohio 139, 34 Am. Dec. 432.

Oregon.— Deering *v.* Creighton, 19 Oreg. 118, 24 Pac. 198, 20 Am. St. Rep. 800.

Rhode Island.— Thompson *v.* Taylor, 12 R. I. 109.

South Carolina.— Baker *v.* Scott, 5 Rich. (S. C.) 305.

Tennessee.— Jamaica Bank *v.* Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Morrison Lumber Co. *v.* Lookout Mountain Hotel Co., 92 Tenn. 6, 20 S. W. 292; Rivers *v.* Thomas, 1 Lea (Tenn.) 649, 27 Am. Rep. 784.

Texas.— Latham *v.* Houston Flour Mills, 68 Tex. 127, 3 S. W. 462; Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

Vermont.— Strong *v.* Riker, 16 Vt. 554; Sandford *v.* Norton, 14 Vt. 228; Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 293.

West Virginia.—Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 787, 24 S. E. 612; Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Wisconsin.— Cady *v.* Shepard, 12 Wis. 639.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341; Rey *v.* Simpson, 22 How. (U. S.) 341, 16 L. ed. 260.

Contra, Salisbury *v.* Cambridge City First Nat. Bank, 37 Nebr. 872, 56 N. W. 727, 40 Am. St. Rep. 527; Newton Wagon Co. *v.* Diers, 10 Nebr. 284, 4 N. W. 995; Temple *v.* Baker, 125 Pa. St. 634, 24 Wkly. Notes Cas. (Pa.) 1, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709; Schafer *v.* Farmers', etc., Bank, 59 Pa. St. 144, 98 Am. Dec. 323; Watson *v.* Hurt, 6 Gratt. (Va.) 633.

See 7 Cent. Dig. tit. "Bills and Notes," § 1794½.

1. Lincoln *v.* Hinzey, 51 Ill. 435; Holz *v.* Woodside Brewing Co., 83 Hun (N. Y.) 192, 31 N. Y. Suppl. 397, 63 N. Y. St. 810; McPhillips *v.* Jones, 73 Hun (N. Y.) 516, 26 N. Y. Suppl. 101, 56 N. Y. St. 164.

At the suit of the payee's immediate indorsee this has also been held. Browning *v.* Merritt, 61 Ind. 425.

2. Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101.

3. Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237; Eilbert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176.

Suit of indorsee.— This has also been held true at the suit of the payee's immediate indorsee (Browning *v.* Merritt, 61 Ind. 425) or at the suit of an indorsee after maturity (Levi *v.* Mendell, 1 Duv. (Ky.) 77; Seymour *v.* Farrell, 51 Mo. 95).

4. Eberhart *v.* Page, 89 Ill. 550; Hamilton *v.* Johnston, 82 Ill. 39; Mammon *v.* Hartman, 51 Mo. 168; Beidman *v.* Gray, 35 Mo. 282; Lewis *v.* Harvey, 18 Mo. 74, 59 Am. Dec. 286; Hendrie *v.* Kinnear, 84 Hun (N. Y.) 141, 32 N. Y. Suppl. 417, 65 N. Y. St. 691; Cady *v.* Shepard, 12 Wis. 639.

At suit of the payee's immediate indorsee this is also true. Seymour *v.* Mickey, 15 Ohio St. 515.

5. Patch *v.* Washburn, 16 Gray (Mass.) 82, unless it was taken by the payee as the contract of a joint maker, and the indorser has estopped himself from setting up a different contract.

6. Kellogg *v.* Dunn, 2 Metc. (Ky.) 215.

7. Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

8. Baker *v.* Robinson, 63 N. C. 191.

9. Wells *v.* Jackson, 6 Blackf. (Ind.) 40.

10. McCelvey *v.* Noble, 12 Rich. (S. C.) 167.

11. Watkins *v.* Kirkpatrick, 26 N. J. L. 84, where plaintiff was an indorsee of the payee after maturity, and defendant was allowed to show that he indorsed the note as a surety.

12. Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461.

Thus the indorser of a note before its delivery cannot show an agreement with the payee that he should only be liable as an accommodation indorser (Chaffe *v.* Memphis, etc., R. Co., 64 Mo. 193) or that he should not be liable at all (Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48).

Even at the suit of a holder with notice of the character of the indorsement, such evidence is inadmissible to show that the indorser intended a joint making and not an indorsement. Vore *v.* Hurst, 13 Ind. 551, 74

inadmissible even against the payee to change the nature of the contract by showing it to be an original promise as joint maker,[13] to show that an indorsement and not a guaranty was intended,[14] or otherwise to explain such indorsement;[15] and an irregular indorser cannot show an agreement with the maker unknown to the payee, by which his liability was to be that of an indorser,[16] that the maker was only authorized to fill the indorsement with a contract of guaranty,[17] that the maker and indorser were to be liable jointly upon a joint consideration,[18] or that the indorsement was merely made by defendant as an officer of the corporation which made the note in order to show his approval of it.[19]

(iv) *Indorsement Without Recourse.* An indorser cannot show, as against a subsequent holder without notice, that his indorsement was intended to be without recourse and that he was not to be held liable,[20] but the words "without recourse," following the name of the first, and preceding the name of a second, indorser of a bill or note may, as between the original parties to the indorsement, be shown by parol evidence to apply to the former instead of the latter.[21]

Am. Dec. 268. So where the note was payable to the order of the maker, and indorsed by him above defendant, it is inadmissible to prove at the suit of the original holder that an indorsement and not a joint making was intended (Bigelow *v.* Colton, 13 Gray (Mass.) 309, 74 Am. Dec. 633. See also Dennis *v.* Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603), or that anything but an accommodation indorsement was intended (Heidenheimer *v.* Blumenkron, 56 Tex. 308).

13. Kellogg *v.* Dunn, 2 Metc. (Ky.) 215; Heath *v.* Van Cott, 9 Wis. 516.

14. Essex Co. *v.* Edmands, 12 Gray (Mass.) 273, 71 Am. Dec. 758; Peckham *v.* Gilman, 7 Minn. 446.

15. Spencer *v.* Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806; Collins *v.* Everett, 4 Ga. 226; Smith *v.* Brabham, 48 S. C. 337, 26 S. E. 651.

16. Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411; Allen *v.* Brown, 124 Mass. 77; Peckham *v.* Gilman, 7 Minn. 446.

17. Draper *v.* Weld, 13 Gray (Mass.) 580. Or that a guaranty, and not an indorsement, was intended. Drake *v.* Markle, 21 Ind. 433, 83 Am. Dec. 358.

18. Lake *v.* Stetson, 13 Gray (Mass.) 310 note.

19. Gilson *v.* Stevens Mach. Co., 124 Mass. 546.

20. *Alabama.*— Day *v.* Thompson, 65 Ala. 269.

Connecticut.— Dale *v.* Gear, 38 Conn. 15, 9 Am. Rep. 353.

Dakota.— Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367.

District of Columbia.— Hutchinson *v.* Brown, 19 D. C. 136.

Illinois.— Beattie *v.* Browne, 64 Ill. 360; Mason *v.* Burton, 54 Ill. 349.

Indiana.— Brown *v.* Nichols, 123 Ind. 492, 24 N. E. 339; Lee *v.* Pile, 37 Ind. 107; Campbell *v.* Robbins, 29 Ind. 271; Parker *v.* Morton, 29 Ind. 89; Blair *v.* Williams, 7 Blackf. (Ind.) 132; Wilson *v.* Black, 6 Blackf. (Ind.) 509; Odam *v.* Beard, 1 Blackf. (Ind.) 191.

Iowa.— American Emigrant Co. *v.* Clark, 47 Iowa 671; Skinner *v.* Church, 36 Iowa 91; Sands *v.* Wood, 1 Iowa 263.

Kansas.— Doolittle *v.* Ferry, 20 Kan. 230, 27 Am. Rep. 166.

Maine.—Goodwin *v.* Davenport, 47 Me. 112, 74 Am. Dec. 478; Crocker *v.* Getchell, 23 Me. 392.

Massachusetts.— Babson *v.* Webber, 9 Pick. (Mass.) 163.

Minnesota.— Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

Missouri.— Lewis *v.* Dunlap, 72 Mo. 174.

North Carolina.— Hill *v.* Shields, 81 N. C. 250, 31 Am. Rep. 499.

Texas.— Cresap *v.* Manor, 63 Tex. 485; Crockett *v.* Shaw, 29 Tex. 507.

Vermont.— Loomis *v.* Fay, 24 Vt. 240.

Wisconsin.— Eaton *v.* McMahon, 42 Wis. 484; Charles *v.* Denis, 42 Wis. 56, 24 Am. Rep. 383.

United States.— Martin *v.* Cole, 104 U. S. 30, 26 L. ed. 647; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316; Cox *v.* Jones, 2 Cranch C. C. (U. S.) 370, 6 Fed. Cas. No. 3,303.

Canada.— Decelle *v.* Samoiselle, 32 L. C. Jur. 236.

See 7 Cent. Dig. tit. "Bills and Notes," § 1793.

Nor conversely to show him to be liable notwithstanding the words "without recourse." Cross *v.* Hollister, 47 Kan. 652, 28 Pac. 693; Youngberg *v.* Nelson, 51 Minn. 172, 53 N. W. 629, 38 Am. St. Rep. 497.

A surety cannot show that he signed the note merely to encourage the principal and was not to be liable (Dendy *v.* Gamble, 59 Ga. 434) or was to be liable only for a few days (Mansfield *v.* Barber, 59 Ga. 851).

21. Corbett *v.* Fetzer, 47 Nebr. 269, 66 N. W. 417. See also Fitchburg Bank *v.* Greenwood, 2 Allen (Mass.) 434.

Against his immediate indorsee, an indorser may prove that the words "without recourse," after being omitted by mistake, were added by consent, and were subsequently stricken out without the indorser's consent. Beal *v.* Wood, 5 Mo. App. 591.

(v) *Successive Indorsements.* Between the immediate parties, or at the suit of a holder with notice, the liability of indorsers may be shown to be different from the order in which their names appear on the paper.[22]

(vi) *Personal or Representative Liability.* Parol evidence is not admissible to show that defendant signed the note in a representative capacity,[23] such as agent[24] or trustee,[25] even though he has added such designations to his signature. It has also been held that a note reading, "We promise to pay," and signed with the name of a corporation and the names of its officers with the addition of their respective official designations cannot be shown to be the obligation of the corporation.[26]

22. *Georgia.*— Camp *v.* Simmons, 62 Ga. 73.

Iowa.— Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834.

Kentucky.— Scott *v.* Doneghy, 17 B. Mon. (Ky.) 321.

Louisiana.— Connely *v.* Bourg, 16 La. Ann. 108, 79 Am. Dec. 568.

Maryland.— Rhinehart *v.* Schall, 69 Md. 352, 16 Atl. 126.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; Brown *v.* Butler, 99 Mass. 179.

Michigan.— Brewer *v.* Boynton, 71 Mich. 254, 39 N. W. 49; Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734.

Missouri.— State *v.* McWilliams, 7 Mo. App. 99.

New Hampshire.— Whitehouse *v.* Hanson, 42 N. H. 9.

New Jersey.— Watkins *v.* Kirkpatrick, 26 N. J. L. 84.

New York.— Little *v.* Tyng, 1 N. Y. City Ct. 309; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22.

Pennsylvania.— Slack *v.* Kirk, 67 Pa. St. 380, 27 Leg. Int. (Pa.) 268.

An accommodation drawer and the indorsing payee who was accommodated may be shown to be joint promisors as to the accepter, although not so as to the holder. Ware *v.* Macon City Bank, 59 Ga. 840.

23. *Illinois.*— Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Indiana.— Hiatt *v.* Simpson, 8 Ind. 256.

Kentucky.— Megibben *v.* Shawhan, 10 Ky. L. Rep. 407.

Massachusetts.— Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Missouri.— Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Duncan *v.* Kirtley, 54 Mo. App. 655.

Texas.— Gregory *v.* Leigh, 33 Tex. 813.

Vermont.— Arnold *v.* Sprague, 34 Vt. 402.

See 7 Cent. Dig. tit. "Bills and Notes," § 1720.

24. *Georgia.*—Bedell *v.* Scarlett, 75 Ga. 56.

Indiana.— Kenyon *v.* Williams, 19 Ind. 44.

Iowa.— Junge *v.* Bowman, 72 Iowa 648, 34 N. W. 612.

Louisiana.— Bogan *v.* Calhoun, 19 La. Ann. 472.

Massachusetts.— Bartlett *v.* Hawley, 120 Mass. 92.

New York.— Phelps *v.* Borland, 30 Hun (N. Y.) 362; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558.

Ohio.— Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612. See also Robinson *v.* Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Dec. 829.

South Carolina.— Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645; Moore *v.* Cooper, 1 Speers (S. C.) 87; Taylor *v.* McLean, 1 McMull. (S. C.) 352.

See 7 Cent. Dig. tit. "Bills and Notes," § 1720.

But where from the face of a note it is doubtful whether the party making it acted for himself or as agent of another, parol evidence is admissible to show the character of the transaction (Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657; Deshler *v.* Hodges, 3 Ala. 509; Lazarus *v.* Shearer, 2 Ala. 718; La Salle Nat. Bank *v.* Tolu Rock, etc., Co., 14 Ill. App. 141; Laflin, etc., Powder Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100. See also May *v.* Hewitt, 33 Ala. 161), at least as between the original parties (Martin *v.* Smith, 65 Miss. 1, 3 So. 33; Dessau *v.* Bours, 1 McAll. (U. S.) 20, 7 Fed. Cas. No. 3,825. See also Webb *v.* Burke, 5 B. Mon. (Ky.) 51; Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 432).

25. Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529; Williams *v.* Lafayette Second Nat. Bank, 83 Ind. 237.

26. Mathews *v.* Dubuque Mattress Co., 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676; McCandless *v.* Belle Plaine Canning Co., 78 Iowa 161, 42 N. W. 635, 16 Am. St. Rep. 429, 4 L. R. A. 396; Heffner *v.* Brownell, 75 Iowa 341, 39 N. W. 640; Rendell *v.* Harriman, 75 Me. 497, 46 Am. Rep. 421; Davis *v.* England, 141 Mass. 587, 6 N. E. 731. See also Megibben *v.* Shawhan, 10 Ky. L. Rep. 407; Providence Tool Co. *v.* U. S. Manufacturing Co., 120 Mass. 35.

There are cases, however, which hold that in an action on a note purporting to have been executed by corporate officers, extrinsic evidence is admissible to show that they executed the same in their official capacity as the note of the corporation (Swarts *v.* Cohen, 11 Ind. App. 20, 38 N. E. 536; Kranniger *v.* People's Bldg. Soc., 60 Minn. 94, 61 N. W.

1. Payment — (I) *Fact of Payment.* In general any facts tending to show payment of a note are relevant and admissible.[27] Thus payment of a note may be proved by parol testimony,[28] and where a note comes from the possession of the party seeking to enforce payment, all indorsements of payments thereon are evidence that such payments have been made.[29] Payment may also be proved by a separate receipt,[30] although the note stipulated on its face, "No credit allowed unless indorsed on the note at the time of payment."[31] It has been held, however, that books of account are not admissible to prove payments on a note.[32] So

904; Souhegan Nat. Bank *v.* Boardman, 46 Minn. 293, 48 N. W. 1116; Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261; Gerber *v.* Stuart, 1 Mont. 172; Schaefer *v.* Bidwell, 9 Nev. 209; Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182; Stearns *v.* Allen, 25 Hun (N. Y.) 558; Miller *v.* Way, 5 S. D. 468, 59 N. W. 467), at least as between the original parties (Bean *v.* Pioneer Min. Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; Benham *v.* Smith, 53 Kan. 495, 36 Pac. 997; Shaffer *v.* Hohenschild, 2 Kan. App. 516, 43 Pac. 979; Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152) or subsequent holders with notice (Kline *v.* Tescott Bank, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107, 18 L. R. A. 533).

27. Moran *v.* Abbey, 58 Cal. 163; Smith *v.* Graves, 63 Ill. 422; Mack *v.* Leedle, 78 Iowa 164, 42 N. W. 636; Estes *v.* Fry, 22 Mo. App. 53.

In an action by a pledgee against his pledgor, payment to the latter is admissible to disprove an alleged payment to the pledgee by the agent who collected the note. Lockhart *v.* Fessenich, 58 Wis. 588, 17 N. W. 302.

The drawer of a draft, which has been returned bearing the usual marks of payment, may testify that it has been paid. State *v.* Brooks, 85 Iowa 366, 52 N. W. 240.

28. Mead *v.* Brooks, 8 Ala. 840; Stewart *v.* McDonald, 18 La. Ann. 194; Carden *v.* Finley, 8 L. C. Jur. 139. See also Dull *v.* Gordon, 24 La. Ann. 478 (holding that where a note is offered in evidence by defendant to show its payment but is rejected on the ground of insufficiency of proof, parol evidence is then admissible as the next best evidence to prove payment); McQuarrie *v.* Brand, 28 Ont. 69; Hamilton *v.* Perry, 5 Quebec 76.

29. Harrell *v.* Durrance, 9 Fla. 490; Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444; Long *v.* Kingdon, 25 Ill. 66; Henderson *v.* Reeves, 6 Blackf. (Ind.) 101. But see Brierly *v.* Johns, 28 La. Ann. 245 (holding that in an action on a note the verity of unsigned indorsements of payments cannot be established by parol evidence); Turrell *v.* Morgan, 7 Minn. 368, 82 Am. Dec. 101 (holding that indorsements of payment made upon a promissory note form no part of it, so as to be evidence on the introduction of the note itself. They are independent writings, competent to be read in evidence only after proof that they were made or assented to by the party sought to be charged with them).

But where the maker of a note seeking to avoid its payment produces and offers the same in evidence, a memorandum indorsed thereon, not of payments by him, is not evidence in his favor, unless it is shown to have been made while the note was in the possession of the payee or other legal holder or made by someone having authority to make it. Chamberlain *v.* Chamberlain, 116 Ill. 480, 6 N. E. 444. See also Gould *v.* Tatum, 21 Ark. 329, holding that in an action on a note, an indorsement of part payment thereon by the attorney for plaintiffs, reciting that it was received by one of plaintiffs who had never had possession of the note, is not admissible as evidence, unless the authority of the attorney to make the indorsement is proven.

30. Cunningham *v.* Batchelder, 32 Me. 316 (holding that a receipt given by plaintiff to defendant which stipulates that it is in full of all demands, will defeat an action on a note if it is unexplained and uncontradicted); Rodgers *v.* Kichline, 28 Pa. St. 231. See also Williamson *v.* Reddish, 45 Iowa 550; Butts *v.* Capital Nat. Bank, 21 Nebr. 586, 33 N. W. 250; *In re* Rhoads, 189 Pa. St. 460, 42 Atl. 116; Gilson *v.* Gilson, 16 Vt. 464 (holding that where payment of a note was to be made by paying debts of the payee to third persons, the written receipt of such persons is admissible to show such payments); Paige *v.* Perno, 10 Vt. 491.

31. Howe Mach. Co. *v.* Simler, 59 Ind. 307.

32. Inslee *v.* Prall, 25 N. J. L. 665. But see Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524 (holding that on an issue as to whether defendant's testator had paid the note in suit, which was given as part of the price of land, entries in testator's account-book in his handwriting, charging him with the price of the land, describing it, and crediting him with certain items, the sum of which balanced said price, and one of which was the same as the amount of the note, although this latter was not expressly referred to, were admissible in connection with evidence that the note was given as part of the consideration, and that the various items of the consideration paid corresponded with the items in the account); Meyer *v.* Reichardt, 112 Mass. 108 (holding that where the maker and the holder of a note had mutually compared memoranda respectively made by them of part payments thereon, in an action on the note for the benefit of the estate of the deceased holder, such memoranda of the maker are admissible in his favor to prove payment).

The books of a firm are not admissible,

the pecuniary circumstances of the maker and holder are not competent as evidence from which a payment may be inferred.[33]

(II) *Medium of Payment.* Evidence to show that a bill or note is payable otherwise than its terms indicate is inadmissible.[34] Thus it cannot be shown that it was intended that a bill or note should be paid in work,[35] in real estate,[36] in debts of other persons,[37] in goods,[38] or out of a particular fund.[39] So it is not

whether supported by the testimony of the party who made the entries or not, to prove the payment of a note of the firm in an action on such note. Brannin *v.* Foree, 12 B. Mon. (Ky.) 506. But see Jermain *v.* Denniston, 6 N. Y. 276, holding that entries made in the books of a bank, and in a bank pass-book, while a note belonged to the bank, are evidence in an action on the note, brought by one who took it after due, that it had been paid.

33. Daby *v.* Ericsson, 45 N. Y. 786; Alexander *v.* Dutcher, 7 Hun (N. Y.) 439.

An allegation that individual checks were given in payment on behalf of the drawer's firm cannot be supported by evidence of other similar payments for the firm in other business. Howe *v.* Whitehead, 130 Mass. 268.

34. *Alabama.*— Clark *v.* Hart, 49 Ala. 86; Hair *v.* La Brouse, 10 Ala. 548.

Arkansas.— Featherston *v.* Wilson, 4 Ark. 154.

District of Columbia.— Linville *v.* Holden, 2 MacArthur (D. C.) 329.

Georgia.— James *v.* Benjamin, 72 Ga. 185.

Illinois.— Bristow *v.* Catlett, 92 Ill. 17.

Indiana.— Moody *v.* Shaw, 85 Ind. 88; Tucker *v.* Talbot, 15 Ind. 114; Burns *v.* Jenkins, 8 Ind. 417.

Iowa.— Kimhall *v.* Bryan, 56 Iowa 632, 10 N. W. 218; Barhydt *v.* Bonney, 55 Iowa 717, 8 N. W. 672.

Kentucky.— Baugh *v.* Ramsey, 4 T. B. Mon. (Ky.) 155.

Louisiana.— Veeche *v.* Grayson, 1 Mart. N. S. (La.) 133.

Maryland.— Penniman *v.* Winner, 54 Md. 127.

Massachusetts.— Perry *v.* Bigelow, 128 Mass. 129; Spring *v.* Lovett, 11 Pick. (Mass.) 417.

Michigan.— Phelps *v.* Abbott, 114 Mich. 8, 72 N. W. 3; Oliver *v.* Shoemaker, 35 Mich. 464.

Minnesota.— Singer Mfg. Co. *v.* Potts, 59 Minn. 240, 61 N. W. 23; Butler *v.* Paine, 8 Minn. 324.

Mississippi.— Pack *v.* Thomas, 13 Sm. & M. (Miss.) 11, 51 Am. Dec. 135; Cole *v.* Hundley, 8 Sm. & M. (Miss.) 473; Smith *v.* Elder, 7 Sm. & M. (Miss.) 507.

Missouri.— Cockrill *v.* Kirkpatrick, 9 Mo. 697; Higgins *v.* Cartwright, 25 Mo. App. 609; Gardner *v.* Matthews, 11 Mo. App. 269.

New York.— Schmittler *v.* Simon, 7 N. Y. St. 273; Eaves *v.* Henderson, 17 Wend. (N. Y.) 190.

Ohio.— Morris *v.* Edwards, 1 Ohio 189.

Pennsylvania.— Hill *v.* Gaw, 4 Pa. St. 493; Bond *v.* Haas, 2 Dall. (Pa.) 133, 1 L. ed. 320.

South Carolina.—Gazoway *v.* Moore, Harp. (S. C.) 401.

Tennessee.— Bender *v.* Montgomery, 8 Lea (Tenn.) 586; Fields *v.* Stunston, 1 Coldw. (Tenn.) 40; Ellis *v.* Hamilton, 4 Sneed (Tenn.) 512.

Texas.— Riley *v.* Treanor, (Tex. Civ. App. 1894) 25 S. W. 1054.

Vermont.— Gilman *v.* Moore, 14 Vt. 457; Downs *v.* Webster, Brayt. (Vt.) 79.

Virginia.— Hilb *v.* Peyton, 22 Gratt. (Va.) 550.

Wisconsin.— La Fayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761; Racine County Bank *v.* Keep, 13 Wis. 209.

United States.— Wells *v.* Carr, 25 Fed. 541.

England.— Edwards *v.* Jones, 2 M. & W. 414.

See 7 Cent. Dig. tit. "Bills and Notes," § 1760.

Subsequent agreement.— The maker of a note may show by parol that after the note was made it was agreed that payment should be in something other than money. Wilson *v.* McClenny, 32 Fla. 363, 13 So. 873.

35. Borden *v.* Peay, 20 Ark. 293; Goodrich *v.* Stanley, 23 Conn. 79; Stein *v.* Fogarty, (Ida. 1896) 43 Pac. 681; Bradley *v.* Anderson, 5 Vt. 152. But see Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604 (holding that the maker of a note may prove a subsequent agreement with the payee for crediting on it services rendered by the maker); Hagood *v.* Swords, 2 Bailey (S. C.) 305 (holding that in an action by the payee against the maker of a note, the latter may prove a parol agreement on the part of the payee, made when the note was given, to consider certain services, rendered since the giving of the note, as payment of the note).

36. Linville *v.* Holden, 2 MacArthur (D. C.) 329; Barhydt *v.* Bonney, 55 Iowa 717, 8 N. W. 672; Holt *v.* Chandler, (Tex. Civ. App. 1895) 29 S. W. 532.

37. Murchie *v.* Cook, 1 Ala. 41.

38. Cox *v.* Wallace, 5 Blackf. (Ind.) 199; Lang *v.* Johnson, 24 N. H. 302.

A contemporaneous agreement to pay a note in timber, followed by such payment, may be proved by parol. Zimmerman *v.* Adee, 126 Ind. 15, 25 N. E. 828; Buchanan *v.* Adams, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666.

39. *California.*— Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283; Guy *v.* Bibend, 41 Cal. 322; Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529.

Illinois.— Murchie *v.* Peck, 160 Ill. 175, 43 N. E. 356; Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617.

admissible to prove by parol that a certificate of deposit for so many "dollars" meant the depreciated bank-notes or other currency in which the deposit had been made,[40] or a currency used in the deposit and since then depreciated;[41] and it has been held that parol evidence is not admissible to show that other than lawful money was intended,[42] or that "lawful money" means "lawful silver money";[43] but it may be shown by parol that "current funds" are equivalent to money.[44]

(III) *Place of Payment.* Where no place is mentioned in a note at which payment is to be made, it seems that parol evidence is admissible to show at what place it was agreed that payment should be made.[45]

Indiana.— Nill *v.* Comparet, 15 Ind. 243; Tucker *v.* Talbott, 15 Ind. 114.

Iowa.— Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 94.

Massachusetts.— Perry *v.* Bigelow, 128 Mass. 129; Currier *v.* Hale, 8 Allen (Mass.) 47.

New York.— Gridley *v.* Dole, 4 N. Y. 486; Lewis *v.* Jones, 7 Bosw. (N. Y.) 366.

Oregon.— Wilson *v.* Wilson, 26 Oreg. 251, 38 Pac. 185.

Texas.— Franklin *v.* Smith, 1 Tex. Unrep. Cas. 229.

United States.— Gorrell *v.* Home L. Ins. Co., 63 Fed. 371, 11 C. C. A. 240.

See 7 Cent. Dig. tit. "Bills and Notes," § 1760.

Where checks are drawn by contractors for county work, "to be paid as soon as we settle with the county," parol evidence is admissible to show that the checks were to be paid out of a fund due by the county on the contract. Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915. See also Andrews *v.* Hess, 20 N. Y. App. Div. 194, 46 N. Y. Suppl. 796.

40. Osgood *v.* McConnell, 32 Ill. 74. See also Lawrence *v.* Schmidt, 35 Ill. 440, 85 Am. Dec. 371; Howes *v.* Austin, 35 Ill. 396.

Confederate currency.— Parol evidence is admissible to show that Confederate currency was intended or was not intended in the case of a note made and payable in one of the seceded states during the Civil war.

Alabama.— Whitfield *v.* Riddle, 52 Ala. 467; Wilcoxen *v.* Reynolds, 46 Ala. 529.

North Carolina.— Bryan *v.* Harrison, 76 N. C. 360.

South Carolina.— Halfacre *v.* Whaley, 4 S. C. 173; Smith *v.* Prothro, 2 S. C. 371; Neely *v.* McFadden, 2 S. C. 169; Craig *v.* Pervis, 14 Rich. Eq. (S. C.) 150; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259.

Tennessee.— Stewart *v.* Smith, 3 Baxt. (Tenn.) 231; Carmichael *v.* White, 11 Heisk. (Tenn.) 262.

Texas.— Johnson *v.* Blount, 48 Tex. 38; Lobdell *v.* Fowler, 33 Tex. 346; Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234. See also Taylor *v.* Bland, 60 Tex. 29.

United States.— Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

Contra, Roane *v.* Green, 24 Ark. 210. See also Hill *v.* Erwin, 44 Ala. 661.

See 7 Cent. Dig. tit. "Bills and Notes," § 1760½.

41. Chicago Mar. Bank *v.* Ogden, 29 Ill. 248; Chicago Mar. Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249.

So "current money of Missouri" cannot be shown to mean paper money (Cockrill *v.* Kirkpatrick, 9 Mo. 697), or "Illinois currency," "currency," or "current funds" to mean depreciated bank-bills (Marc *v.* Kupfer, 34 Ill. 286; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Chicago Mar. Bank *v.* Berney, 28 Ill. 90), or "current bankable funds" (Taylor *v.* Turley, 33 Md. 500; Turley *v.* Taylor, 6 Baxt. (Tenn.) 376), or "any current bank paper, or State treasury notes of the State of Texas," to mean Confederate currency (Woods *v.* Parker, 36 Tex. 131).

42. *Alabama.*— Leslie *v.* Langham, 40 Ala. 524.

Arkansas.— Roane *v.* Green, 24 Ark. 210.

Kentucky.— Baugh *v.* Ramsey, 4 T. B. Mon. (Ky.) 155.

Mississippi.— Pack *v.* Thomas, 13 Sm. & M. (Miss.) 11, 51 Am. Dec. 135.

North Carolina.— Terrell *v.* Walker, 66 N. C. 244.

Pennsylvania.— McMinn *v.* Owen, 2 Dall. (Pa.) 173, 1 L. ed. 336; Lee *v.* Biddis, 1 Dall. (Pa.) 175, 1 L. ed. 88.

South Carolina.— Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259.

Tennessee.— Noe *v.* Hodges, 3 Humphr. (Tenn.) 162.

43. Alsop *v.* Goodwin, 1 Root (Conn.) 196.

44. American Emigrant Co. *v.* Clark, 47 Iowa 671; Haddock *v.* Woods, 46 Iowa 433.

Currency.— In an action on a draft, payable in currency, parol evidence is admissible to show the sense in which the word "currency" was used by the parties. Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321.

45. Moore *v.* Davidson, 18 Ala. 209; McKee *v.* Boswell, 33 Mo. 567; Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65. See also Meyer *v.* Hibsher, 47 N. Y. 265, holding that parol evidence may be received of an agreement by all the parties to a promissory note that payment shall be made at a particular place. But see McLaren *v.* Georgia Mar. Bank, 52 Ga. 131; Patten *v.* Newell, 30 Ga. 271, which hold that parol evidence is inadmissible to show that paper, on its face payable generally, was intended by the parties to be payable at a chartered bank. And see

(iv) *Receipt of Payment.* A receipt of payment or a credit indorsed on a bill or note may be explained by parol.[46] It cannot, however, be shown by parol that a stock certificate, described in a note as collateral, was to be regarded as payment, if the note was not paid at maturity.[47]

(v) *Time of Payment.* Parol evidence is not admissible to show a contemporaneous verbal agreement extending or changing the time of maturity expressed in the paper,[48] to show an agreement at the time of making the note that it would

Pierce *v.* Whitney, 29 Me. 188; Blodgett *v.* Durgin, 32 Vt. 361.

46. *Illinois.*— Richardson *v.* Hadsall, 106 Ill. 476; Gilpatrick *v.* Foster, 12 Ill. 355; Grooms *v.* Lieurance, 98 Ill. App. 394.

Indiana.— Robertson *v.* Garshwiler, 81 Ind. 463.

Kentucky.— Baugh *v.* Brassfield, 5 J. J. Marsh. (Ky.) 78.

Massachusetts.— Kingman *v.* Tirrell, 11 Allen (Mass.) 97.

Michigan.— Rawlings *v.* Fisher, 110 Mich. 19, 67 N. W. 977; Flint First Nat. Bank *v.* Union Cent. L. Ins. Co., 107 Mich. 543, 65 N. W. 759.

Minnesota.— Sears *v.* Wempner, 27 Minn. 351, 7 N. W. 362.

Missouri.— Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188.

New Jersey.— Swain *v.* Frazier, 35 N. J. Eq. 326.

Vermont.— McDaniels *v.* Lapham, 21 Vt. 222.

England.— Scholey *v.* Walsby, Peake 24.

See 7 Cent. Dig. tit. "Bills and Notes," § 1768.

If a check is marked "Received payment," according to the custom of a bank which marked in this way all checks that were to be presented to other banks, such mark may be explained by parol evidence to that effect. Scott *v.* Betts, Lalor (N. Y.) 363.

Even recitals in a deed are only *prima facie* evidence of payment of the consideration for which a note is given. Lazell *v.* Lazell, 12 Vt. 443, 36 Am. Dec. 352.

A receipt indorsed on the margin of the record of a collateral mortgage may be rebutted. Patch *v.* King, 29 Me. 448.

But a receipt on account of a bond for the exact amount due cannot be lightly questioned by circumstantial evidence after the lapse of more than twenty years. Robert *v.* Garnie, 3 Cai. (N. Y.) 14.

47. Perry *v.* Bigelow, 128 Mass. 129.

48. *Alabama.*— Doss *v.* Peterson, 82 Ala. 253, 2 So. 644; Walker *v.* Clay, 21 Ala. 797; Litchfield *v.* Falconer, 2 Ala. 280.

Arkansas.— Borden *v.* Peay, 20 Ark. 293; Joyner *v.* Turner, 19 Ark. 690.

Georgia.— James *v.* Benjamin, 72 Ga. 185; McCrary *v.* Caskey, 27 Ga. 54.

Illinois.— Cairo, etc., R. Co. *v.* Parker, 84 Ill. 613; Harlow *v.* Boswell, 15 Ill. 56.

Indiana.— Foglesong *v.* Wickard, 75 Ind. 258; Miller *v.* White, 7 Blackf. (Ind.) 491; Graves *v.* Clark, 6 Blackf. (Ind.) 183.

Iowa.— Stucksleger *v.* Smith, 27 Iowa 286.

Kansas.—Getto *v.* Binkert, 55 Kan. 617, 40 Pac. 925.

Kentucky.— Kincaid *v.* Higgins, 1 Bibb (Ky.) 396; Curran *v.* Askin, 7 Ky. L. Rep. 367.

Maine.— Ockington *v.* Law, 66 Me. 551; Eaton *v.* Emerson, 14 Me. 335.

Maryland.— McSherry *v.* Brooks, 46 Md. 103.

Massachusetts.— Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. 497; Newman *v.* Kettelle, 13 Pick. (Mass.) 118.

Mississippi.— Hennerin *v.* Donnell, 7 Sm. & M. (Miss.) 244, 45 Am. Dec. 302.

Missouri.— Inge *v.* Hance, 29 Mo. 399.

Nebraska.— Van Etten *v.* Howell, 40 Nebr. 850, 59 N. W. 389.

New Hampshire.— Crosby *v.* Wyatt, 10 N. H. 318.

New York.— Skiller *v.* Richmond, 48 Barb. (N. Y.) 428; Canda *v.* Zeller, 3 N. Y. Suppl. 128, 21 N. Y. St. 164; Farmers', etc., Bank *v.* Whinfield, 24 Wend. (N. Y.) 419; Frost *v.* Everett, 5 Cow. (N. Y.) 497.

North Carolina.— Terrell *v.* Walker, 66 N. C. 244.

Pennsylvania.— Clarke *v.* Allen, 132 Pa. St. 40, 18 Atl. 1071; Heist *v.* Hart, 73 Pa. St. 286; Anspach *v.* Bast, 52 Pa. St. 356; Hill *v.* Gaw, 4 Pa. St. 493; Davis *v.* Cammel, Add. (Pa.) 233; Chester County Nat. Bank *v.* Jones, 10 Wkly. Notes Cas. (Pa.) 436.

South Carolina.— Diercks *v.* Roberts, 13 S. C. 338.

Tennessee.— Ellis *v.* Hamilton, 4 Sneed (Tenn.) 512; Blakemore *v.* Wood, 3 Sneed (Tenn.) 470; Campbell *v.* Upshaw, 7 Humphr. (Tenn.) 185, 46 Am. Dec. 75.

Texas.— Reid *v.* Allen, 18 Tex. 241; Rockmore *v.* Davenport, 14 Tex. 602, 65 Am. Dec. 132.

Wisconsin.— Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751; Strachan *v.* Muxlow, 24 Wis. 21.

England.— Woodbridge *v.* Spooner, 3 B. & Ald. 233, 5 E. C. L. 140, 1 Chit. 661, 18 E. C. L. 361, 22 Rev. Rep. 365; Moseley *v.* Hanford, 10 B. & C. 729, 8 L. J. K. B. O. S. 261, 21 E. C. L. 308; Hoare *v.* Graham, 3 Campb. 57, 13 Rev. Rep. 752; Free *v.* Hawkins, Holt 550, 3 E. C. L. 217, 1 Moore C. P. 535, 8 Taunt. 92, 4 E. C. L. 56.

Canada.— Porteous *v.* Muir, 8 Ont. 127; Bradbury *v.* Oliver, 5 U. C. Q. B. O. S. 703. See also Reed *v.* Reed, 11 U. C. Q. B. 26.

See 7 Cent. Dig. tit. "Bills and Notes," § 1761.

be renewed at maturity,[49] or to show that a note payable one day after date was to be paid at a later day.[50] So the maker of a note cannot show that the payee agreed, at the time of making, not to bring suit for a specified time.[51]

m. Presentment, Demand, Protest, and Notice — (i) *Certificate of Notary* — (a) *In General.* At common law the notarial protest was evidence only in the case of a foreign protest of a foreign bill of exchange, except where it became admissible as secondary evidence on the death of the acting notary;[52] but by statute in many jurisdictions the notary's certificate as to demand of payment or notice of dishonor is *prima facie* evidence of the facts stated in it.[53] This

Even though the time is not expressed and the instrument is payable on demand only by implication of law it cannot be shown by parol to be payable at some other time. Nicholas *v.* Krebs, 11 Ala. 230; Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; St. Charles First Nat. Bank *v.* Hunt, 25 Mo. App. 170; Sheldon *v.* Heaton, 88 Hun (N. Y.) 535, 34 N. Y. Suppl. 856, 68 N. Y. St. 825; Van Allen *v.* Allen, 1 Hilt. (N. Y.) 524; Thompson *v.* Ketchum, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; Self *v.* King, 28 Tex. 552. But see Horner *v.* Horner, 145 Pa. St. 258, 23 Atl. 441, holding that where no time for payment is mentioned in a note the legal inference is that it is payable on demand, but that in an action by the payee against the maker such inference may be rebutted by proof of a parol contemporaneous agreement fixing the time of payment. See also Gray *v.* Anderson, 99 Iowa 342, 68 N. W. 790, 61 Am. St. Rep. 243; Union Bank *v.* Meeker, 4 La. Ann. 189, 50 Am. Dec. 559.

49. *Colorado.*— Dorsey *v.* Armor, 10 Colo. App. 255, 50 Pac. 726.

Kentucky.— Kennedy *v.* Gaddie, 17 Ky. L. Rep. 735, 32 S. W. 408.

New Jersey.— Stiles *v.* Vandewater, 48 N. J. L. 67, 4 Atl. 658.

New York.— Bailey *v.* Lane, 21 How. Pr. (N. Y.) 475; Bull's Head Bank *v.* Koehler, 1 N. Y. City Ct. 264.

Pennsylvania.— Heist *v.* Hart, 73 Pa. St. 286; Anspach *v.* Bast, 52 Pa. St. 356; Shallcross *v.* Muench, 2 Pearson (Pa.) 345.

South Carolina.— Dreicks *v.* Roberts, 13 S. C. 338.

Tennessee.— Ellis *v.* Hamilton, 4 Sneed (Tenn.) 512.

Utah.— Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

See 7 Cent. Dig. tit. "Bills and Notes," § 1762.

50. *Kansas.*— Getto *v.* Binkert, 55 Kan. 617, 40 Pac. 925.

New York.— Willse *v.* Whitaker, 22 Hun (N. Y.) 242.

Pennsylvania.— Coughenour *v.* Suhre, 71 Pa. St. 462; Wagner *v.* Wright, 10 Wkly. Notes Cas. (Pa.) 483.

Texas.— Gibson *v.* Irby, 17 Tex. 173.

Wisconsin.— Cooper *v.* Tappan, 4 Wis. 362.

See 7 Cent. Dig. tit. "Bills and Notes," § 1761.

51. Schroer *v.* Wessell, 89 Ill. 113; Mahan *v.* Sherman, 7 Blackf. (Ind.) 378 (until an account should be settled and applied on it); Church, etc., Pembroke Second Precinct *v.* Stetson, 5 Pick. (Mass.) 506 (so long as the interest should be paid); Dow *v.* Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Campbell *v.* Hodgson, Gow 74, 5 E. C. L. 876 (until as much as possible should be obtained from the principal).

52. *Alabama.*— Rives *v.* Parmley, 18 Ala. 256.

Arkansas.— Sullivan *v.* Deadman, 19 Ark. 484; Real Estate Bank *v.* Bizzell, 4 Ark. 189.

Illinois.— McAllister *v.* Smith, 17 Ill. 328, 25 Am. Dec. 651; Bond *v.* Bragg, 17 Ill. 69; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

Kentucky.— U. S. Bank *v.* Leathers, 10 B. Mon. (Ky.) 64; Taylor *v.* Illinois Bank, 7 T. B. Mon. (Ky.) 576.

Missouri.— Williams *v.* Smith, 21 Mo. 419.

New Hampshire.— Carter *v.* Burley, 9 N. H. 558.

New York.— Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

Ohio.— Case *v.* Heffner, 10 Ohio 180.

South Carolina.— Payne *v.* Winn, 2 Bay (S. C.) 374.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

United States.— Union Bank *v.* Hyde, 6 Wheat. (U. S.) 572, 5 L. ed. 333.

England.— Chesmer *v.* Noyes, 4 Campb. 129; Dupays *v.* Shepherd, Holt 297; Anonymous, 12 Mod. 345.

See 7 Cent. Dig. tit. "Bills and Notes," § 1121.

At common law the certificate of protest is the only evidence admissible to prove the dishonor of a foreign bill, and its omission cannot be supplied by other evidence. Cullum *v.* Casey, 9 Port. (Ala.) 131, 33 Am. Dec. 304; Chase *v.* Taylor, 4 Harr. & J. (Md.) 54; Orr *v.* Maginnis, 7 East 359, 3 Smith K. B. 328; Brough *v.* Parkings, 2 Ld. Raym. 992; Gale *v.* Walsh, 5 T. R. 239, 2 Rev. Rep. 580; Rogers *v.* Stephens, 2 T. R. 713, 1 Rev. Rep. 605.

The notice of dishonor formed at common law no part of the notarial protest. Rives *v.* Parmley, 18 Ala. 256; Thorp *v.* Craig, 10 Iowa 461; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

53. *Alabama.*— Brennan *v.* Vogt, 97 Ala. 647, 11 So. 893; Martin *v.* Brown, 75 Ala. 442; Bradley *v.* Northern Bank, 60 Ala. 252; Rives *v.* Parmley, 18 Ala. 256; Mobile Bank *v.* Marston, 7 Ala. 108; Booker *v.* Lowry, 1

statement applies, however, only to such facts as are stated,[54] and, moreover,

Ala. 399; Curry *v.* Mobile Bank, 8 Port. (Ala.) 360.

Arkansas.— Johnson *v.* Cocke, 12 Ark. 672.

California.—Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43; Kellogg *v.* Pacific Box Factory, 57 Cal. 327; McFarland *v.* Pico, 8 Cal. 626; Tevis *v.* Randall, 6 Cal. 632, 65 Am. Dec. 547; Connolly *v.* Goodwin, 5 Cal. 220.

Connecticut.— Union Bank *v.* Middlebrook, 33 Conn. 95.

Georgia.— Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348; Field *v.* Thornton, 1 Ga. 306.

Illinois.— Montelius *v.* Charles, 76 Ill. 303.

Indiana.— Dickerson *v.* Turner, 12 Ind. 223; Turner *v.* Rogers, 8 Ind. 139; Fisher *v.* State Bank, 7 Blackf. (Ind.) 610.

Iowa.— Bradshaw *v.* Hedge, 10 Iowa 402.

Kentucky.— Trabue *v.* Sayre, 1 Bush (Ky.) 129; Tyler *v.* Commonwealth Bank, 7 T. B. Mon. (Ky.) 555; Commonwealth Bank *v.* Pursley, 3 T. B. Mon. (Ky.) 238.

Louisiana.— Harrison *v.* Bowen, 16 La. 282; Peyroux *v.* Dubertrand, 11 La. 32.

Maine.— Pattee *v.* McCrillis, 53 Me. 410; Orono Bank *v.* Wood, 49 Me. 26; Loud *v.* Merrill, 45 Me. 516; Lewiston Falls Bank *v.* Leonard, 43 Me. 144, 69 Am. Dec. 49; Bradley *v.* Davis, 26 Me. 45; Fales *v.* Wadsworth, 23 Me. 553.

Maryland.— Howard Bank *v.* Carson, 50 Md. 18; Moses *v.* Franklin Bank, 34 Md. 574; Tate *v.* Sullivan, 30 Md. 464, 96 Am. Dec. 597; Wetherall *v.* Garrett, 28 Md. 450; Staylor *v.* Ball, 24 Md. 183; Ricketts *v.* Pendleton, 14 Md. 320; Citizens' Bank *v.* Howell, 8 Md. 530, 63 Am. Dec. 714; Crowley *v.* Barry, 4 Gill (Md.) 194; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554.

Massachusetts.— Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

Michigan.— Martin *v.* Smith, 108 Mich. 278, 66 N. W. 61.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863; Kern *v.* Von Phul, 7 Minn. 426, 82 Am. Dec. 105.

Mississippi.— Witkowski *v.* Maxwell, 69 Miss. 56, 10 So. 453.

Missouri.— Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393; Faulkner *v.* Faulkner, 73 Mo. 327; Jarvis *v.* Garnett, 39 Mo. 268; Moore *v.* State Bank, 6 Mo. 379; Draper *v.* Clemens, 4 Mo. 52; Robinson *v.* Johnson, 1 Mo. 434; Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. 51; Greffet *v.* Dowdall, 17 Mo. App. 280.

New Hampshire.— Dakin *v.* Graves, 48 N. H. 45; Simpson *v.* White, 40 N. H. 540; Rushworth *v.* Moore, 36 N. H. 188.

New Jersey.— Burk *v.* Shreve, 39 N. J. L. 214.

New York.— State Bank *v.* Mudgett, 44 N. Y. 514; McAndrew *v.* Radway, 34 N. Y. 511; McLean *v.* Ryan, 36 N. Y. App. Div. 281, 55 N. Y. Suppl. 232 [*affirmed* in 165 N. Y. 620, 59 N. E. 1126]; Gawtry *v.* Doane, 48 Barb. (N. Y.) 148 [*affirmed* in 51 N. Y. 84]; Union Bank *v.* Gregory, 46 Barb. (N. Y.) 98; Vergennes Bank *v.* Cameron, 7 Barb. (N. Y.) 143; Pierson *v.* Boyd, 2 Duer (N. Y.) 33; Dunn *v.* Devlin, 2 Daly (N. Y.) 122.

North Carolina.— Gordon *v.* Price, 32 N. C. 385.

Ohio.— Daniel *v.* Downing, 26 Ohio St. 578; Treon *v.* Brown, 14 Ohio 482; Layman *v.* Brown, 1 Disn. (Ohio) 75, 12 Ohio Dec. (Reprint) 496.

Pennsylvania.— Baumgardner *v.* Reeves, 35 Pa. St. 250; Sherer *v.* Easton Bank, 33 Pa. St. 134; Bennett *v.* Young, 18 Pa. St. 261; Mullen *v.* Morris, 2 Pa. St. 85; Brittain *v.* Doylestown Bank, 5 Watts & S. (Pa.) 87, 39 Am. Dec. 110; Jenks *v.* Doylestown Bank, 4 Watts & S. (Pa.) 505; Craig *v.* Shallcross, 10 Serg. & R. (Pa.) 377; Browne *v.* Philadelphia Bank, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463.

South Carolina.— Dobson *v.* Laval, 4 McCord (S. C.) 57; Williamson *v.* Turner, 2 Bay (S. C.) 410, 1 Am. Dec. 652.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Sulzbacher *v.* Charleston Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828; Spence *v.* Crockett, 5 Baxt. (Tenn.) 576; Colms *v.* Tennessee Bank, 4 Baxt. (Tenn.) 422; Caruthers *v.* Harbert, 5 Coldw. (Tenn.) 362, 98 Am. Dec. 421; Golladay *v.* Union Bank, 2 Head (Tenn.) 57; Gardner *v.* State Bank, 1 Swan (Tenn.) 420; Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Texas.— Munzesheimer *v.* Allen, 3 Tex. App. Civ. Cas. § 55.

Vermont.— Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin.— Central Bank *v.* St. John, 17 Wis. 157; Adams *v.* Wright, 14 Wis. 408.

United States.— Sims *v.* Hundley, 6 How. (U. S.) 1, 12 L. ed. 319; Townsley *v.* Sumrall, 2 Pet. (U. S) 170, 7 L. ed. 386; Nicholls *v.* Webb, 8 Wheat. (U. S.) 333, 5 L. ed. 628; Eldrege *v.* Chacon, Crabbe (U. S.) 296, 8 Fed. Cas. No. 4,329; Jones *v.* Heaton, 1 McLean (U. S.) 317, 13 Fed. Cas. No. 7,468.

Canada.— Russell *v.* Crofton, 1 U. C. C. P. 428; Codd *v.* Lewis, 8 U. C. Q. B. 242; Smith *v.* Hall, 3 U. C. Q. B. 315.

See 7 Cent. Dig. tit. "Bills and Notes," § 1122.

If the original certificate of protest is lost a duplicate may be received in evidence. Kellam *v.* McKoon, 31 Hun (N. Y.) 519.

54. *Alabama.*— Martin *v.* Brown, 75 Ala. 442.

Connecticut.— Union Bank *v.* Middlebrook, 33 Conn. 95.

properly stated,[55] in the certificate, which is evidence only when the facts are duly certified.[56] Moreover, the certificate is not conclusive evidence, but is only presumptive evidence of the facts.[57] Accordingly it may be explained or contradicted by other evidence.[58] In like manner the presumption raised by the certificate does not exclude the admission of other evidence of demand or notice.[59]

(B) *Foreign Notary.* A notary's certificate of protest, made in another state, of an instrument payable in that state, is uniformly held to be admissible as evidence of the facts therein stated.[60] As in the case of domestic certificates

Georgia.— Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348.

Iowa.— Thorp *v.* Craig, 10 Iowa 461; Bradshaw *v.* Hedge, 10 Iowa 402; Sather *v.* Rogers, 10 Iowa 231.

Maryland.— Howard Bank *v.* Carson, 50 Md. 18.

New York.— U. S. Bank *v.* Davis, 2 Hill (N. Y.) 451.

Tennessee.— Smith *v.* McManus, 7 Yerg. (Tenn.) 477, 27 Am. Dec. 519.

Vermont.— Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

Wisconsin.— Sumner *v.* Bowen, 2 Wis. 524.

See 7 Cent. Dig. tit. "Bills and Notes," § 1122.

55. Moore *v.* Worthington, 2 Duv. (Ky.) 307; Ticonic Bank *v.* Stackpole, 41 Me. 302, 66 Am. Dec. 246; Reier *v.* Strauss, 54 Md. 278, 39 Am. Rep. 390; Sumner *v.* Bowen, 2 Wis. 524.

The officer making the protest has no authority to certify facts beyond that expressly conferred on him by statute. Whitman *v.* Farmers Bank, 8 Port. (Ala.) 258.

56. Stewart *v.* Russell, 38 Ala. 619; Leigh *v.* Lightfoot, 11 Ala. 935; Williams *v.* Smith, 48 Me. 135; Loud *v.* Merrill, 45 Me. 516; Dorsey *v.* Merritt, 6 How. (Miss.) 390; Faulkner *v.* Faulkner, 73 Mo. 327.

Acts in other state.— The certificate is not evidence of the acts of a notary performed by him in another state than his own. Dutchess County Bank *v.* Ibbotson, 5 Den. (N. Y.) 110. See also Gordon *v.* Dreux, 6 Rob. (La.) 399, holding that where a notary gives notice of protest while acting outside of his parish, his certificate is not entitled to the same credit as an official certificate.

Omission of seal.— In Iowa a notary's protest is inadmissible in evidence, unless his seal be affixed, although it is allowable for him to affix the seal when this objection is made. Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

57. *California.*— Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43; Fisk *v.* Miller, 63 Cal. 367; Kellogg *v.* Pacific Box Factory, 57 Cal. 327.

Maryland.— Howard Bank *v.* Carson, 50 Md. 18; Nailor *v.* Bowie, 3 Md. 251.

Missouri.— Clough *v.* Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393.

New York.— Meise *v.* Newman, 76 Hun (N. Y.) 341, 27 N. Y. Suppl. 708, 59 N. Y. St. 143.

Tennessee.— City Sav. Bank *v.* Kensington, (Tenn. Ch. 1896) 37 S. W. 1037.

See 7 Cent. Dig. tit. "Bills and Notes," § 1122.

58. *Alabama.*— Mobile Bank *v.* Marston, 7 Ala. 108; Booker *v.* Lowry, 1 Ala. 399; Curry *v.* Mobile Bank, 8 Port. (Ala.) 360.

California.— Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. 43.

Louisiana.— Union Bank *v.* Cushman, 12 Rob. (La.) 237; Marsoudet *v.* Jacobs, 6 Rob. (La.) 276; Jones *v.* Mansker, 15 La. 51; Poydras *v.* Bell, 14 La. 391: Gale *v.* Kemper, 10 La. 205; Preston *v.* Daysson, 7 La. 7.

Maine.— Orono Bank *v.* Wood, 49 Me. 26; Bradley *v.* Davis, 26 Me. 45.

Maryland.— Howard Bank *v.* Carson, 50 Md. 18.

Mississippi.— Seltzer *v.* Fuller, 6 Sm. & M. (Miss.) 185; Wood *v.* American L. Ins., etc., Co., 7 How. (Miss.) 609.

New York.— Meise *v.* Newman, 76 Hun (N. Y.) 341, 27 N. Y. Suppl. 708, 59 N. Y. St. 143; Townsend *v.* Auld, 10 Misc. (N. Y.) 343, 31 N. Y. Suppl. 29, 63 N. Y. St. 418.

Pennsylvania.— Hastings *v.* Barrington, 4 Whart. (Pa.) 486.

Tennessee.— Spence *v.* Crockett, 5 Baxt. (Tenn.) 576; Caruthers *v.* Harbert, 5 Coldw. (Tenn.) 362, 98 Am. Dec. 421; Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

Virginia.— Nelson *v.* Fotterall, 7 Leigh (Va.) 179.

Wisconsin.— Adams *v.* Wright, 14 Wis. 408.

See 7 Cent. Dig. tit. "Bills and Notes," § 1123.

59. *Alabama.*— Martin *v.* Brown, 75 Ala. 442.

Illinois.— Eddy *v.* Peterson, 22 Ill. 535.

Indiana.— Dickerson *v.* Turner, 12 Ind. 223.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Coons, 36 La. Ann. 271; Dubuys *v.* Farmer, 22 La. Ann. 478; Follain *v.* Dupre, 11 Rob. (La.) 454; Peyroux *v.* Davis, 17 La. 479; McDonough *v.* Thompson, 11 La. 566.

Maine.— Homes *v.* Smith, 16 Me. 181.

Maryland.— Wetherall *v.* Claggett, 28 Md. 465; Sasscer *v.* Farmers Bank, 4 Md. 409.

Minnesota.— Rogers *v.* Stevenson, 16 Minn. 56.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

60. *Alabama.*— Bradley *v.* Northern Bank, 60 Ala. 252.

Arkansas.— Fletcher *v.* Arkansas Nat. Bank, 62 Ark. 265, 35 S. W. 228, 54 Am. St. Rep. 294.

of protest, however, such certificate is only *prima facie* evidence of the facts and is not conclusive.[61]

(c) *Presentment and Demand by Clerk.* A certificate of protest signed by a notary, but founded on a presentment and demand made by his clerk, is insufficient,[62] in the absence of a custom at the place of protest or a statute authorizing it.[63]

(II) *Records of Notary*—(A) *In General.* In some states a notary's record, made in the usual and regular course of business, is admissible as evidence of demand and notice.[64]

Indiana.— Shanklin *v.* Cooper, 8 Blackf. (Ind.) 41.

Kentucky.— Harmon *v.* Wilson, 1 Duv. (Ky.) 322; Tyler *v.* Commonwealth Bank, 7 T. B. Mon. (Ky.) 555.

Louisiana.— Schorr *v.* Woodlief, 23 La. Ann. 473; Schneider *v.* Cochrane, 9 La. Ann. 235, 61 Am. Dec. 204; Phillips *v.* Flint, 3 La. 146; Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306.

Maine.— Ticonic Bank *v.* Stackpole, 41 Me. 302; Beckwith *v.* St. Croix Mfg. Co., 23 Me. 284; Freeman's Bank *v.* Perkins, 18 Me. 292; Warren *v.* Warren, 16 Me. 259; Clark *v.* Bigelow, 16 Me. 246.

Maryland.—Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554.

Massachusetts.— Johnson *v.* Brown, 154 Mass. 105, 27 N. E. 994.

Minnesota.— Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863.

Michigan.— Atwater *v.* Streets, 1 Dougl. (Mich.) 455.

New Hampshire.— Rushworth *v.* Moore, 36 N. H. 188; Grafton Bank *v.* Moore, 14 N. H. 142; Carter *v.* Burley, 9 N. H. 558.

New York.— Lawson *v.* Pinckney, 40 N. Y. Super. Ct. 187; Halliday *v.* McDougall, 20 Wend. (N. Y.) 81; Wells *v.* Whitehead, 15 Wend. (N. Y.) 527.

North Carolina.—Elliott *v.* White, 51 N. C. 98.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345.

Pennsylvania.— Starr *v.* Sanford, 45 Pa. St. 193.

South Carolina.— Cape Fear Bank *v.* Stinemetz, 1 Hill (S. C.) 44.

Virginia.— Nelson *v.* Fotterall, 7 Leigh (Va.) 179. But see Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673.

Wisconsin.— Carruth *v.* Walker, 8 Wis. 252, 76 Am. Dec. 235.

United States.—Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254; Dickins *v.* Beal, 10 Pet. (U. S.) 572, 9 L. ed. 538; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170, 7 L. ed. 386; Lonsdale *v.* Brown, 4 Wash. (U. S.) 86, 15 Fed. Cas. No. 8,493.

England.— Du Costa *v.* Cole, Skin. 272.

See 7 Cent. Dig. tit. "Bills and Notes," § 1127.

61. Nelson *v.* Fotterall, 7 Leigh (Va.) 179.

62. *Kentucky.*— Commonwealth Bank *v.* Garey, 6 B. Mon. (Ky.) 626; Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

Mississippi.— Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63; Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408.

New York.— Gawtry *v.* Doane, 51 N. Y. 84; Hunt *v.* Maybee, 7 N. Y. 266; Gessner *v.* Smith, 2 N. Y. Suppl. 655, 18 N. Y. St. 1013; Marsh *v.* Palmo, 1 Code Rep. (N. Y.) 13; Warnick *v.* Crane, 4 Den. (N. Y.) 460.

South Carolina.— Williamson *v.* Turner, 2 Bay (S. C.) 410, 1 Am. Dec. 652.

Texas.— Locke *v.* Huling, 24 Tex. 311.

United States.— Whitehead *v.* Jones, 2 McLean (U. S.) 28, 29 Fed. Cas. No. 17,563.

See also *supra*, XII, B, 3 [7 Cyc. 1054 *et seq.*]; and 7 Cent. Dig. tit. "Bills and Notes," § 1072.

63. *Kentucky.*— Chenowith *v.* Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

Louisiana.— Buckley *v.* Seymour, 30 La. Ann. 1341; Citizens' Bank *v.* Bry, 3 La. Ann. 630; State Bank *v.* Lawless, 3 La. Ann. 129; Follain *v.* Dupre, 11 Rob. (La.) 454.

Maryland.— Atwell *v.* Grant, 11 Md. 101.

Mississippi.—Dwight *v.* Richardson, 12 Sm. & M. (Miss.) 325; Chew *v.* Read, 11 Sm. & M. (Miss.) 182.

Missouri.— Miltenberger *v.* Spaulding, 33 Mo. 421.

See 7 Cent. Dig. tit. "Bills and Notes," § 1072.

64. *Alabama.*— Stewart *v.* Russell, 38 Ala. 619; Phillips *v.* Poindexter, 18 Ala. 579.

Delaware.—Hatfield *v.* Perry, 4 Harr. (Del.) 463.

Louisiana.— Whittemore *v.* Leake, 14 La. 392.

Maryland.— Sasscer *v.* Farmers' Bank, 4 Md. 409; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554.

United States.—McAfee *v.* Doremus, 5 How. (U. S.) 53, 12 L. ed. 46 (construing Louisiana law); Thornton *v.* Stoddert, 1 Cranch C. C. (U. S.) 534, 23 Fed. Cas. No. 14,000.

See 7 Cent. Dig. tit. "Bills and Notes," § 1746.

Entry by clerk of notary.— The mere fact that the clerk of a notary who made the entry cannot be found after diligent inquiry will not render such a record admissible. Wilbur *v.* Selden, 6 Cow. (N. Y.) 162.

Where the notary kept no record, the contents of a notice of dishonor sent by him may be proved by parol. Terbell *v.* Jones, 15 Wis. 253.

(B) *Deceased Notary.* The books or records of a notary, proved to have been regularly kept, are generally admissible in evidence, after his decease, to prove a demand for payment, and notice of non-payment, of a note.[65]

(III) *Curing Defects in Certificate.* Defects in a certificate of protest may be cured by other evidence.[66]

(IV) *Secondary Evidence of Contents of Notice.* The contents of a written notice of the dishonor of a note may be proved by parol[67] without giving notice to produce such writing.[68]

(V) *Waiver.* The waiver of demand and notice may be proved by parol,[69].

65. *Delaware.*—Wilmington Bank *v.* Cooper, 1 Harr. (Del.) 10.

Maine.— Homes *v.* Smith, 16 Me. 181.

Massachusetts.— Porter *v.* Judson, 1 Gray (Mass.) 175.

Mississippi.— Booth *v.* Watson, 5 Sm. & M. (Miss.) 295; Duncan *v.* Watson, 2 Sm. & M. (Miss.) 121; Bodley *v.* Scarborough, 5 How. (Miss.) 729; Ogden *v.* Glidewell, 5 How. (Miss.) 179; Barnard *v.* Planters' Bank, 4 How. (Miss.) 98.

New York.— McKnight *v.* Lewis, 5 Barb. (N. Y.) 681; National Butchers', etc., Bank *v.* De Groot, 43 N. Y. Super. Ct. 341; Dunn *v.* Parsons, 21 N. Y. Suppl. 901, 50 N. Y. St. 94; Bank of Metropolis *v.* Jacobs, 2 N. Y. City Ct. 1; Hart *v.* Wilson, 2 Wend. (N. Y.) 513; Butler *v.* Wright, 2 Wend. (N. Y.) 369; Halliday *v.* Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262.

South Carolina.— Dobson *v.* Laval, 4 McCord (S. C.) 57. But see Williamson *v.* Patterson, 2 McCord (S. C.) 132.

Tennessee.—McNeill *v.* Elam, Peck (Tenn.) 268; Bell *v.* Perkins, Peck (Tenn.) 261, 14 Am. Dec. 745.

Vermont.— Austin *v.* Wilson, 24 Vt. 630.

United States.—Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628; Whitney *v.* Huntt, 5 Cranch C. C. (U. S.) 120, 29 Fed. Cas. No. 17,589.

See 7 Cent. Dig. tit. "Bills and Notes," § 1128.

The presentment of a bill drawn in one state upon another may be proved by a sworn copy of such record. Halliday *v.* McDougall, 20 Wend. (N. Y.) 81.

Deceased attorney.— Notice of the dishonor of a draft cannot be proved by the affidavit of an attorney at law, since deceased, it not appearing that the act was done in discharge of a duty and in the regular course of business. Bradbury *v.* Bridges, 38 Me. 346.

Deceased clerk of notary.— An entry made in the notary's book by his deceased clerk is admissible as evidence of demand (Gawtry *v.* Doane, 51 N. Y. 84. But see *contra*, Barkalow *v.* Johnson, 16 N. J. L. 397) or protest Poole *v.* Dicas, 1 Bing. N. Cas. 649, 27 E. C. L. 803, 7 C. & P. 79, 32 E. C. L. 509, 1 Hodges 162, 4 L. J. C. P. 196, 1 Scott 600; Sutton *v.* Gregory, Peake Add. Cas. 150, 4 Rev. Rep. 899).

66. Saul *v.* Brand, 1 La. Ann. 95; Follain *v.* Dupré, 11 Rob. (La.) 454; Union Bank *v.* Penn, 7 Rob. (La.) 79; Bradley *v.* Davis, 26 Me. 45; Wetherall *v.* Claggett, 28 Md. 465; Nailor *v.* Bowie, 3 Md. 251; Cayuga County Bank *v.* Warden, 6 N. Y. 19.

67. Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408; Paton *v.* Lent, 4 Duer (N. Y.) 231.

68. *Alabama.*— John *v.* Selma City Nat. Bank, 62 Ala. 529, 34 Am. Rep. 35.

Louisiana.—Abat *v.* Rion, 9 Mart. (La.) 465, 13 Am. Dec. 313.

Maine.— Brooks *v.* Blaney, 62 Me. 456; Central Bank *v.* Allen, 16 Me. 41.

Massachusetts.— Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180.

Mississippi.— Offit *v.* Vick, Walk. (Mass.) 99.

Missouri.— Johnston *v.* Mason, 27 Mo. 511.

New Jersey.— Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408.

New York.— Scott *v.* Betts, Lalor (N. Y.) 363; Johnson *v.* Haight, 13 Johns. (N. Y.) 470.

North Carolina.— Faribault *v.* Ely, 13 N. C. 67.

Pennsylvania.— Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355.

United States.— Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216.

England.—Kine *v.* Beaumont, 3 B. & B. 288, 7 Moore C. P. 112, 24 Rev. Rep. 678, 7 E. C. L. 734; Ackland *v.* Pearce, 2 Campb. 599; Roberts *v.* Bradshaw, 1 Stark. 28, 2 E. C. L. 21.

Contra, Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

See 7 Cent. Dig. tit. "Bills and Notes," § 1757.

A duplicate protest of a bill may be given in evidence without producing the original bill, if it be shown that the bill was lost after protest. Usher *v.* Gaither, 2 Harr. & M. (Md.) 457.

69. *Arkansas.*—Andrews *v.* Simms, 33 Ark. 771.

Delaware.— Farmers' Bank *v.* Waples, 4 Harr. (Del.) 429.

Indiana.— Schmied *v.* Frank, 86 Ind. 250.

Iowa.— Creshine *v.* Taylor, 29 Iowa 492. See also Gray *v.* Anderson, 99 Iowa 342, 68 N. W. 790, 61 Am. St. Rep. 243.

Louisiana.— Helm *v.* Ducayet, 20 La. Ann. 417; Debuys *v.* Mollere, 3 Mart. N. S. (La.) 318, 15 Am. Dec. 159.

Maine.— Keyes *v.* Winter, 54 Me. 399; Fullerton *v.* Rundlett, 27 Me. 31; Sanborn *v.* Southard, 25 Me. 409, 43 Am. Dec. 288;

and a waiver of demand may be proved by parol even where there is a written waiver of notice.[70] Thus it may be shown by parol that all parties agreed that their rights and liabilities should be fixed by simple demand of payment at the bank where the note was made payable.[71]

n. Release. Parol evidence is admissible to show a release by plaintiff,[72] or as against a holder with notice to show a contemporaneous agreement to allow a rebate for shortage in the goods for which the note was given [73] or to show a contemporaneous verbal agreement for a release on the surrender of the property for which the note was given, followed by the surrender of the property.[74]

Crocker *v.* Getchell, 23 Me. 392; Lane *v.* Steward, 20 Me. 98; Fuller *v.* McDonald, 8 Me. 213, 23 Am. Dec. 499.

Massachusetts.— Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436.

Missouri.— Kaiser *v.* Nial, 9 Mo. App. 590.

New Hampshire.— Edwards *v.* Tandy, 36 N. H. 540.

New York.— Porter *v.* Kemball, 53 Barb. (N. Y.) 467.

Ohio.— Dye *v.* Scott, 35 Ohio St. 194, 35 Am. Rep. 604.

Pennsylvania.— Barclay *v.* Weaver, 19 Pa. St. 396, 57 Am. Dec. 661; Patterson *v.* Todd, 18 Pa. St. 426, 57 Am. Dec. 622.

Tennessee.— Dick *v.* Martin, 7 Humphr. (Tenn.) 263.

United States.— See Union Bank *v.* Hyde, 5 Wheat. (U. S.) 572, 5 L. ed. 333.

See 7 Cent. Dig. tit. "Bills and Notes," § 1759.

Contemporaneous parol waiver.—There are cases, however, which hold that verbal waiver at the time of drawing the bill, or of indorsing it, tends to vary the instrument itself, and is therefore inadmissible.

Alabama.—Carlton *v.* Fellows, 13 Ala. 437; Hightower *v.* Ivy, 2 Port. (Ala.) 308.

California.— Goldman *v.* Davis, 23 Cal. 256.

Connecticut.—Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Minnesota.— Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; Barnard *v.* Gaslin, 23 Minn. 192.

Mississippi.— Baskerville *v.* Harris, 41 Miss. 535.

Missouri.— Beeler *v.* Frost, 70 Mo. 185; Rodney *v.* Wilson, 67 Mo. 123, 29 Am. Rep. 499.

New Hampshire.— Barry *v.* Morse, 3 N. H. 132.

New York.— Albion Bank *v.* Smith, 27 Barb. (N. Y.) 489; Degroot *v.* Blake, Anth. N. P. (N. Y.) 297.

South Dakota.— Schmitz *v.* Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

Wisconsin.— Charles *v.* Denis, 42 Wis. 56, 24 Am. Rep. 383.

Parol testimony will not be received to show that the words "protest waived" were intended to waive "due diligence" in the collection of the note. Burke *v.* Ward, (Tex. Civ. App. 1895) 32 S. W. 1047. See also McKenzie *v.* Harris, 2 Tex. Unrep. Cas. 180.

Usage of bank.— Where a bank had kept posted a notice that all indorsers of notes to the bank would be required to waive demand and notice, and a note was indorsed to the bank by one who had been for several years a customer of the bank, but no such waiver was written upon the note, it was held that parol evidence of this usage of the bank, and of the assent of the indorser, could not be shown, to change the contract implied in law from the indorsement. Piscataqua Exch. Bank *v.* Carter, 20 N. H. 246, 51 Am. Dec. 217.

70. Mills *v.* Beard, 19 Cal. 158; Drinkwater *v.* Tebbetts, 17 Me. 16.

The consideration necessary to support a waiver, as well as the waiver itself, may be proved by parol. Creshire *v.* Taylor, 29 Iowa 492.

71. Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65.

Evidence is admissible of a conversation between the holder and the indorser, in which the latter requested the holder not to let the note go to protest or give notice of dishonor, as he would "pay it without that." Smith *v.* Lownsdale, 6 Oreg. 78.

72. Schultz *v.* Noble, 77 Cal. 79, 19 Pac. 182; Daggett *v.* Whiting, 35 Conn. 366.

73. Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543. See also Williams *v.* Culver, 30 Oreg. 375, 48 Pac. 365.

A parol agreement by a life-insurance company to allow a rebate of a certain proportion of the amount of a premium note at maturity does not contradict the note itself. Michigan Mut. L. Ins. Co. *v.* Williams, 155 Pa. St. 405, 26 Atl. 655.

74. Van Valkenburgh *v.* Stupplebeen, 49 Barb. (N. Y.) 99. So an agreement to pay a certain amount in two years if the note was released, coupled with a formal release of the note. Clarke *v.* Tappin, 32 Conn. 56.

Parol evidence is inadmissible to show a contemporaneous verbal agreement to release the maker and surrender the note (Warren Academy *v.* Starrett, 15 Me. 443; Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232), to look to the accepter of a bill and discharge the drawer (Hancock *v.* Fairfield, 30 Me. 299), or not to hold one maker if plaintiff could recover against the other parties (Tower *v.* Richardson, 6 Allen (Mass.) 351; McEwan *v.* Ortman, 34 Mich. 325; Foster *v.* Jolly, 1 C. M. & R. 703, 4 L. J. Exch. 65).

o. Usury. Parol evidence is admissible to show an agreement for usurious interest and to prove that it was paid.[75]

p. Varying Terms of Bill or Note. The admissibility of evidence to vary the terms of a bill or note is governed by the general rules of evidence.[76]

q. Competency of Party to Instrument as Witness. A party to a negotiable instrument is not competent as a witness, after the instrument has been negotiated, to show that it was void at the time of its execution;[77] and the rule has

75. Seekel *v.* Norman, 71 Iowa 264, 32 N. W. 334; Rohan *v.* Hanson, 11 Cush. (Mass.) 44. See also Jackson *v.* Kirby, 37 Vt. 448; and, generally, USURY.

76. See, generally, EVIDENCE.

77. *District of Columbia.*— Eastwood *v.* Creecy, 1 MacArthur (D. C.) 232. *Compare* Keifer *v.* Carusi, 7 D. C. 156, holding that although a party to a negotiable instrument cannot impeach its validity after its negotiation, yet, as the signature of a married woman thereto is a nullity by reason of her incapacity to contract, her testimony is admissible to impeach it, although it purports to be made by her.

Illinois.— Walters *v.* Witherell, 43 Ill. 388; Curtiss *v.* Marrs, 29 Ill. 508. *Compare* Bradley *v.* Morris, 4 Ill. 182.

Maine.— Lincoln *v.* Fitch, 42 Me. 456; Clapp *v.* Hanson, 15 Me. 345; Lane *v.* Padelford, 14 Me. 94; Adams *v.* Carver, 6 Me. 390; Chandler *v.* Morton, 5 Me. 374.

Massachusetts.— Thayer *v.* Crossman, 1 Metc. (Mass.) 416; Van Schaack *v.* Stafford, 12 Pick. (Mass.) 565; Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123; Fox *v.* Whitney, 16 Mass. 118; Churchill *v.* Suter, 4 Mass. 156; Parker *v.* Lovejoy, 3 Mass. 565; Warren *v.* Merry, 3 Mass. 27.

Mississippi.— Partee *v.* Silliman, 44 Miss. 272.

New Hampshire.— Bryant *v.* Ritterbush, 2 N. H. 212; Houghton *v.* Page, 1 N. H. 60.

New York.— Skilding *v.* Warren, 15 Johns. (N. Y.) 270; Mann *v.* Swann, 14 Johns. (N. Y.) 270; Coleman *v.* Wise, 2 Johns. (N. Y.) 165; Winton *v.* Saidler, 3 Johns. Cas. (N. Y.) 185. But see New York cases *infra*, this note.

Ohio.— Rohrer *v.* Morningstar, 18 Ohio 579; Treon *v.* Brown, 14 Ohio 482.

Pennsylvania.— Barton *v.* Fetherolf, 39 Pa. St. 279; Harding *v.* Mott, 20 Pa. St. 469; Wilt *v.* Snyder, 17 Pa. St. 77; Rosenberger *v.* Bitting, 15 Pa. St. 278; Thompson *v.* Gettysburg Bank, 3 Grant (Pa.) 119; Parke *v.* Smith, 4 Watts & S. (Pa.) 287; Davenport *v.* Freeman, 3 Watts & S. (Pa.) 557; Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 304; Gest *v.* Espy, 2 Watts (Pa.) 265; Griffith *v.* Reford, 1 Rawle (Pa.) 196; Montgomery Bank *v.* Walker, 9 Serg. & R. (Pa.) 229, 11 Am. Dec. 709; Hepburn *v.* Cassel, 6 Serg. & R. (Pa.) 113; Baird *v.* Cochran, 4 Serg. & R. (Pa.) 397; McFerran *v.* Powers, 1 Serg. & R. (Pa.) 102; Baring *v.* Shippen, 2 Binn. (Pa.) 154.

Wisconsin.— Dunbar *v.* Breese, 1 Pinn. (Wis.) 109.

United States.— Smyth *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031; Metropolis Bank *v.* Jones, 8 Pet. (U. S.) 12, 8 L. ed. 850; U. S. Bank *v.* Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316.

England.— Walton *v.* Shelley, 1 T. R. 296 [*overruled* in Jordaine *v.* Lashbrooke, 7 T. R. 601].

Contra.—*Alabama.*—State Bank *v.* Seawell, 18 Ala. 616; Manning *v.* Manning, 8 Ala. 138; Todd *v.* Stafford, 1 Stew. (Ala.) 199.

Arkansas.— Tucker *v.* Wilamouicz, 8 Ark. 157.

Connecticut.— Townsend *v.* Bush, 1 Conn. 260.

Indiana.— Prather *v.* Lentz, 6 Blackf. (Ind.) 244.

Iowa.— Richards *v.* Marshman, 2 Greene (Iowa) 217.

Kentucky.— Bement *v.* McClaren, 1 B. Mon. (Ky.) 296. See also Gorham *v.* Carroll, 3 Litt. (Ky.) 221.

Maryland.— Hunt *v.* Edwards, 4 Harr. & J. (Md.) 283; Ringgold *v.* Tyson, 3 Harr. & J. (Md.) 172.

Michigan.— Orr *v.* Lacey, 2 Dougl. (Mich.) 230.

New Jersey.— Brittin *v.* Freeman, 17 N. J. L. 191. See also Rosevelt *v.* Gardner, 3 N. J. L. 791.

New York.— Truscott *v.* Davis, 4 Barb. (N. Y.) 495; Williams *v.* Walbridge, 3 Wend. (N. Y.) 415; Utica Bank *v.* Hillard, 5 Cow. (N. Y.) 153; Stafford *v.* Rice, 5 Cow. (N. Y.) 23. But see New York cases *supra* this note.

South Carolina.— Knight *v.* Packard, 3 McCord (S. C.) 71.

Tennessee.— Stump *v.* Napier, 2 Yerg. (Tenn.) 35. See also Jones *v.* Matthews, 8 Lea (Tenn.) 84, 41 Am. Rep. 633.

Texas.— Hillebrant *v.* Ashworth, 18 Tex. 307.

Vermont.— Nichols *v.* Holgate, 2 Aik. (Vt.) 138.

Virginia.— Taylor *v.* Beck, 3 Rand. (Va.) 316.

England.— Jordaine *v.* Lashbrooke, 7 T. R. 601 [*overruling* Walton *v.* Shelley, 1 T. R. 296].

A party to a **non-negotiable instrument** is competent as a witness to prove it void. Watts *v.* Smith, 24 Miss. 77; Williams *v.* Miller, 10 Sm. & M. (Miss.) 139.

See 7 Cent. Dig. tit. "Bills and Notes," § 1771.

Where the payee sues the maker (Eastwood *v.* Creery, 1 MacArthur (D. C.) 232; Mitchell *v.* Cotten, 2 Fla. 136) or an indorsee sues his immediate indorser (Smith *v.* Mc-

been held to apply not only to actions directly upon the instrument, but to all others where its validity comes collaterally in question.[78] Facts occurring subsequent to the execution which destroy the title of the holder or avoid the instrument may, however, be proved by such a witness,[79] as may facts which do not impeach the original validity of the instrument.[80] So a party to a negotiable instrument may be received to prove that it was negotiated after it became due.[81]

3. WEIGHT AND SUFFICIENCY — a. In General. In actions on negotiable paper the production of it by plaintiff, with proof of the genuineness of the signatures and of the indorsements, entitles plaintiff, without any additional evidence, to recover, unless defendant makes out some satisfactory defense.[82]

Glinchy, 77 Me. 153) the rule does not apply. See also Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204, holding that an indorser of a promissory note is a competent witness to prove an agreement in writing, made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterward been put into circulation, but is held by the party to whom the indorsement was made.

78. Deering *v.* Sawtel, 4 Me. 191.

Signature as agent.— The rule that a party to a negotiable instrument shall not be permitted to show by his own testimony that it was invalid when he became a party to it applies to a person signing as agent. Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123.

79. *Maine.*— Buck *v.* Appleton, 14 Me. 284.

Massachusetts.— Thayer *v.* Crossman, 1 Metc. (Mass.) 416; Parker *v.* Hanson, 7 Mass. 470; Warren *v.* Merry, 3 Mass. 27.

New York.— Powell *v.* Waters, 17 Johns. (N. Y.) 176; Woodhull *v.* Holmes, 10 Johns. (N. Y.) 231.

Ohio.— Rohrer *v.* Morningstar, 18 Ohio 579.

Pennsylvania.— Pennypacker *v.* Umberger, 22 Pa. St. 492; Maynard *v.* Nekervis, 9 Pa. St. 81.

See 7 Cent. Dig. tit. "Bills and Notes," § 1771.

Alteration after indorsement.— An indorser may prove an alteration of the note made after the indorsement. Shamburgh *v.* Commagere, 10 Mart. (La.) 18.

80. *Illinois.*— Curtis *v.* Marrs, 29 Ill. 508.

Maine.— Franklin Bank *v.* Pratt, 31 Me. 501; Davis *v.* Sawtelle, 30 Me. 389.

Massachusetts.— Brown *v.* Babcock, 3 Mass. 29.

Mississippi.— Partee *v.* Silliman, 44 Miss. 272.

New York.— McFadden *v.* Maxwell, 17 Johns. (N. Y.) 188; White *v.* Kibling, 11 Johns. (N. Y.) 128.

Pennsylvania.— Kirkpatrick *v.* Muirhead, 16 Pa. St. 117; Appleton *v.* Donaldson, 3 Pa. St. 381; Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 304.

See 7 Cent. Dig. tit. "Bills and Notes," § 1771.

81. Adams *v.* Carver, 6 Me. 390; Baker *v.* Arnold, 1 Cai. (N. Y.) 258; Crayton *v.* Collins, 2 McCord (S. C.) 457. See also Pine *v.* Smith, 11 Gray (Mass.) 38, holding that a negotiable promissory note indorsed on the last day of grace is dishonored, and the maker is a competent witness to impeach it.

The indorser of a note negotiated after it is overdue is a competent witness to prove that it was paid before it was so negotiated. American Bank *v.* Jenness, 2 Metc. (Mass.) 288; Thayer *v.* Crossman, 1 Metc. (Mass.) 416. And the maker of a note against whom the holder has obtained judgment is a competent witness, in a suit brought by an indorsee against an indorser, to prove payment. Routh *v.* Helm, 6 How. (Miss.) 127. See also Gray *v.* Thomas, 12 Sm. & M. (Miss.) 111; Williams *v.* Miller, 10 Sm. & M. (Miss.) 139; Metropolitan Nat. Bank *v.* Jansen, 108 Fed. 572, 47 C. C. A. 497.

82. Mechanics', etc., Bank *v.* Livingston, 6 Misc. (N. Y.) 81, 26 N. Y. Suppl. 25, 55 N. Y. St. 394 (holding that by production of the note plaintiff makes a *prima facie* case, and it then devolves on defendant to defeat the apparent right); Graves *v.* Bonham First Nat. Bank, 77 Tex. 555, 14 S. W. 163 (holding that in an action by the holder of a promissory note payable to bearer, against the maker, where the execution of the note is not denied by plea, the introduction of the note in evidence makes a *prima facie* case for plaintiff); Cummings *v.* Gassett, 19 Vt. 308; Waynesville Nat. Bank *v.* Irons, 8 Fed. 1. See also Sprague Nat. Bank *v.* Haulenbeek, 49 Hun (N. Y.) 608, 1 N. Y. Suppl. 629, 16 N. Y. St. 786, holding that where plaintiff in an action on a note introduced the note, which, with the indorsement of the payee's name and of others, was read in evidence, and notice of protest was admitted by defendant, as the law raised the presumption that the note was transferred to plaintiff before maturity, on testimony on behalf of defendant that he had made the note and given it to another to get it discounted and bring him the proceeds, which was not done, and that no value was ever received by him for the note, plaintiff was entitled to recover.

Action against indorser.— In a suit by indorsees against their immediate indorser for non-payment, proof of non-payment and notice is sufficient to sustain it. Bradshaw *v.* Hubbard, 6 Ill. 390. And in an action by an indorser who has paid the bill after judgment against a prior indorser or party to a bill of exchange, the damage sustained by plaintiff for the breach of the obligation of

b. Execution and Delivery — (I) *Execution.* In an action on a note, proof of defendant's signature to the note declared on is sufficient *prima facie* evidence that the whole body of the note written over it is his act;[83] but it is not sufficient evidence of the execution of notes on which suit is brought to prove by a witness that he had formerly been in possession of notes which defendant admitted to be his genuine notes, that the notes in question were like those, and that the witness believed them to be genuine.[84] So evidence of the teller of a bank on which a check was drawn that no person of the name signed thereto had an account with the bank is *prima facie* evidence that the check was fictitious.[85]

(II) *Delivery.* A note is established *prima facie* by plaintiff producing it or accounting for its absence and by his proving its execution by the maker. An actual delivery of the note need not be shown.[86]

defendant is shown, *prima facie*, by the judgment and its payment. Kelsey *v.* Hibbs, 13 Ohio St. 340.

Lost note.— On a trial by the court, an affidavit stating the substance of a lost note is *prima facie* evidence of the contents of the note, and supported by the oath of one witness will sustain a judgment. Cleveland *v.* Roberts, 14 Ind. 511.

83. Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324. But see Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521, where it appeared that one executed a single bill, and opposite his name, on the left, in the place for the subscribing witness, the name of another was written, who was sought to be held as co-promisor, because the word "Witness" did not appear. It was held that the signature of defendant to the paper was not *prima facie* evidence that it was his promise, to go to the jury on proof of execution merely, and that it was error so to instruct the jury.

Lost note.— In a suit on a note purporting to be lost, where the plea *non est factum* is relied on, one witness is sufficient to prove the execution of the note, and to authorize a recovery. Albro *v.* Lawson, 17 B. Mon. (Ky.) 642.

84. Brown *v.* Piatt, 2 Cranch, C. C. (U. S.) 253, 4 Fed. Cas. No. 2,026.

Admissions in former suit.— On a second trial of an action against a cosurety for contribution, the original answer of defendant, which admitted the execution of the note and the cosuretyship, but which had been struck from the record when an amended answer was filed, denying the same, although competent, was not conclusive, evidence of the facts therein admitted. Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684.

Admissions of partner.— In an action against partners on a note made in the firm name, the admission by one of the partners of the making of the note is not sufficient evidence to sustain a judgment against the other. Davidson *v.* Hutchins, 1 Hilt. (N. Y.) 123.

85. People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538. But in a suit on a bill of exchange alleged to be the bill of defendant bank, the cashier's testimony that the drawing of the bill does not appear on the books of the bank will not overcome the presumption arising from the face of the bill. Allison *v.* Hubbell, 17 Ind. 559.

86. Taylor *v.* Gay, 6 Blackf. (Ind.) 150; Pate *v.* Brown, 85 N. C. 166; Eave *v.* Cantzon, 1 Brev. (S. C.) 308. See also Holliday *v.* Lewis, 14 Hun (N. Y.) 478, where it appeared that a father while in the army left his child with the father's mother, to whom he gave some money. On the latter's death, a note was found among papers held by her as administratrix of her husband payable to the child. The father had been home on a furlough at about the date of the note. It was held that the finding of a sufficient delivery of the note was justified. But see Mills *v.* Husson, 63 Hun (N. Y.) 632, 18 N. Y. Suppl. 519, 45 N. Y. St. 802, holding that the mere production of a note thirty-five years after maturity, by the administrator of the payee, which note was not mentioned in an inventory of the assets of the testator filed eleven years thereafter, or proven as a claim in proceedings in bankruptcy against one of the makers thirteen years thereafter, and on which no proceedings were taken against the makers by the payee in his lifetime, or by his representatives after his decease, affords no proof of delivery of the note or its validity.

As to presumption of delivery from possession see *supra*, XIV, E, 1, a, (II), (A).

Delivery on performance of condition.— Several notes were given for the consideration money for a farm sold. The notes were deposited in the hands of a third person until the performance of a certain written agreement. The grantee took possession of the farm, the title to which was never disputed, according to agreement, and paid all the notes but one, in an action on which by the payee against the maker it was held that the jury might infer from the circumstances a delivery of the note to plaintiff, with the assent of defendant, and that the facts were sufficient evidence of the performance of the condition on which the note was deposited in the hands of a third person, or that defendant had waived the condition or dispensed with the performance. Grote *v.* Grote, 10 Johns. (N. Y.) 402.

c. Consideration. Evidence of illegality of consideration of the contract on which the note in suit was based is sufficient if it produces the amount of conviction essential in civil cases. It need not remove all reasonable doubt as in criminal cases.[87]

d. Presentment, Demand, Protest, and Notice — (I) *In General.* Proof of demand and notice must be strict.[88] A mere probability that demand was made at the proper place[89] and notice given at the proper time[90] is not sufficient; but proof that a note was presented and protested for non-payment sufficiently shows that payment was refused,[91] and proof of notice is unnecessary where there is an express waiver.[92]

(II) *Authority to Demand Payment.* Possession of a note at the time

Note found in papers of deceased maker.— A finding that a note was signed by the maker, and was found among his private papers after his death, together with a special finding that the maker had declared that he had signed such a note and had left it in the bank for the payee's benefit, so that the latter would lose nothing in case of his death, does not warrant the conclusion that the note had been delivered. Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319.

87. Ware *v.* Jones, 61 Ala. 288.

Misrepresentations as to consideration.— Defendant in an action on a note is not bound to prove misrepresentations as to the consideration beyond a reasonable doubt, but only by a preponderance of evidence. Gordon *v.* Parmelee, 15 Gray (Mass.) 413. See also Reeves *v.* Graffling, 67 Ga. 512, holding that, under a plea to a suit on a guano note that the guano had not been inspected and branded, the fact of no inspection or branding need not be shown beyond a reasonable doubt. But see Punch *v.* Williams, 34 Wis. 268, holding that evidence that a note was without consideration, or given under a mistake as to the amount of the indebtedness between the maker and the payee, will not be sufficient to prevent a recovery thereon, unless it leaves no reasonable doubt as to the truth of the facts alleged.

88. *Alabama.*— German Security Bank *v.* McGarry, 106 Ala. 633, 17 So. 704.

Arkansas.— Moore *v.* Burr, 14 Ark. 230.

Delaware.— Newport Nat. Bank *v.* Tweed, 4 Houst. (Del.) 97.

Florida.— Marks *v.* Boone, 24 Fla. 177, 4 So. 532; Whitaker *v.* Morrison, 1 Fla. 25, 44 Am. Dec. 627.

Georgia.— Apple *v.* Lesser, 93 Ga. 749, 21 S. E. 171; Allen *v.* Georgia Nat. Bank, 60 Ga. 347.

Indiana.— Kohler *v.* Montgomery, 17 Ind. 220; Turner *v.* Rogers, 8 Ind. 139.

Kansas.— Couch *v.* Sherrill, 17 Kan. 622.

Kentucky.— Sebree Deposit Bank *v.* Moreland, 96 Ky. 150, 16 Ky. L. Rep. 404, 28 S. W. 153, 29 L. R. A. 305.

Louisiana.— Bird *v.* Doyal, 20 La. Ann. 541; New Orleans Sav. Bank *v.* Richards, 8 La. 550.

Maryland.— People's Bank *v.* Brooke, 31 Md. 7, 1 Am. Rep. 11; Williams *v.* Brailsford, 25 Md. 126; Farmers', etc., Bank *v.* Allen, 18 Md. 475; Brailsford *v.* Williams, 15 Md. 150, 74 Am. Dec. 559; Farmers' Bank *v.* Bowie, 4 Md. 290; Whiteford *v.* Burckmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640.

Michigan.— Nevins *v.* Lansingburgh Bank, 10 Mich. 547; Cicotte *v.* Morse, 8 Mich. 424.

Mississippi.— Stiles *v.* Inman, 55 Miss. 469; Downs *v.* Planters' Bank, 1 Sm. & M. (Miss.) 261, 40 Am. Dec. 92.

New Hampshire.—Carter *v.* Burley, 9 N. H. 558.

New Jersey.— Martinis *v.* Johnson, 21 N. J. L. 239; Barkalow *v.* Johnson, 16 N. J. L. 397.

New York.— Alleman *v.* Bowen, 61 Hun (N. Y.) 30, 15 N. Y. Suppl. 318, 39 N. Y. St. 822; Davenport *v.* Gilbert, 4 Bosw. (N. Y.) 532; Taylor *v.* Stringer, 1 Hilt. (N. Y.) 377; Anchor Brewing Co. *v.* May, 17 N. Y. Suppl. 661, 44 N. Y. St. 274; Smedes *v.* Utica Bank, 20 Johns. (N. Y.) 372.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

Virginia.— Corbin *v.* Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin.— Smith *v.* Hill, 6 Wis. 154.

United States.— Mechanics' Bank *v.* Taylor, 2 Cranch C. C. (U. S.) 217, 16 Fed. Cas. No. 9,383.

England.— Lawson *v.* Sherwood, 1 Stark. 314, 2 E. C. L. 124.

See 7 Cent. Dig. tit. "Bills and Notes," § 1840.

Notice by mail.— Where an indorser of a note is notified by mail of its dishonor, the proof of the place to which notice was sent and of the sending of it must be clear. Schoneman *v.* Fegley, 14 Pa. St. 376.

89. Martinis *v.* Johnson, 21 N. J. L. 239.

90. Lockwood *v.* Crawford, 18 Conn. 361; Martinis *v.* Johnson, 21 N. J. L. 239.

91. Dailey *v.* Sharkey, 29 Mo. App. 518; Burgess *v.* Vreeland, 24 N. J. L. 71, 59 Am. Dec. 408.

92. Smith *v.* Lockridge, 8 Bush (Ky.) 423.

A waiver contained in a collateral instrument and specially pleaded will dispense with proof of notice. Riker *v.* A. & W. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413.

and place named as the place of payment is evidence of authority to demand payment.[93]

(III) *Waiver.* The clearest evidence is necessary to show a waiver by indorsers of notice and protest.[94] Proof of an indorser's offer, in case the indorsee would send the note, etc., to waive demand and notice, on the back of it, does not establish such waiver as matter of law.[95]

e. Payment. Payment of a bill or note may be proved without actual production of the paper[96] and may be shown by circumstantial evidence.[97] In like manner proof of payment is often unnecessary.[98] Payment to a collecting agent cannot be proved, without producing the bill itself, by showing that he received it for collection, delivered it to his bankers, and received credit for a bill for the same amount.[99] So an entry to the credit of a depositor's personal account is not sufficient proof of payment by him as executor.[1] Whether the circumstances show or establish a payment is a question of fact; and the presumption is against the alleged payment, where the bill was not produced at the time and bears no mark of payment, and the books of the parties show no memorandum of the fact.

93. *Louisiana.*— Follain *v.* Duprê, 11 Rob. (La.) 454.

Maryland.— Agnew *v.* Gettysburg Bank, 2 Harr. & G. (Md.) 478.

Massachusetts.— Bachellor *v.* Priest, 12 Pick. (Mass.) 399.

Missouri.— Draper *v.* Clemens, 4 Mo. 52.

New Jersey.— Sussex Bank *v.* Baldwin, 17 N. J. L. 487.

New York.— Cole *v.* Jessup, 10 N. Y. 96, 10 How. Pr. (N. Y.) 515; Hunt *v.* Maybee, 7 N. Y. 266; Burbank *v.* Beach, 15 Barb. (N. Y.) 326; Gessner *v.* Smith, 2 N. Y. Suppl. 655, 18 N. Y. St. 1013.

Pennsylvania.— Morris *v.* Foreman, 1 Dall. (Pa.) 193, 1 L. ed. 96, 1 Am. Dec. 235.

See 7 Cent. Dig. tit. "Bills and Notes," § 1071.

As to possession as evidence of ownership see *supra*, XIV, E, 1, d, (I).

94. Oswego Bank *v.* Knower, Lalor (N. Y.) 122.

A request by the indorser of a note to the holder to push the maker is not evidence of waiver of demand and notice, but is evidence from which the jury may infer due demand and notice. Riggs *v.* St. Clair, 1 Cranch C. C. (U. S.) 606, 20 Fed. Cas. No. 11,829.

After an alleged waiver of protest and notice, an effort of the holder to protest the note is only presumptive, and not conclusive, that what had transpired did not amount to a waiver. Anthony *v.* Pittman, 66 Ga. 701.

95. Pratt *v.* Chase, 122 Mass. 262.

96. Shearm *v.* Burnard, 10 A. & E. 593, 8 L. J. Q. B. 261, 2 P. & D. 565, 37 E. C. L. 318.

In foreclosure of a collateral mortgage parol evidence is admissible to show payments on the notes referred to in the mortgage, without producing or accounting for them. Catterlin *v.* Armstrong, 79 Ind. 514.

97. Minter *v.* Cupp, 98 Mo. 26, 10 S. W. 862 (satisfaction of a collateral trust deed on the record); Gaylord *v.* Gibson, 36 N. Y. App. Div. 548, 55 N. Y. Suppl. 670; Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360 (a sale of other property for the purpose and a contemporaneous statement of payer as to his purpose).

The holder may be estopped from denying payment if he informs a surety that the principal has paid and the surety neglects on that account to take proceedings for several years and is damaged by the delay. Whitaker *v.* Kirby, 54 Ga. 277. And this has been held to be so if the holder of a note secured by trust deed represents to the purchaser of the land that his note has been paid, although he was induced to make the representation by fraud. Staats *v.* Bigelow, 2 MacArthur (D. C.) 367.

98. Thus where a partnership is dissolved and its assets transferred to one partner and the other afterward receives and converts a draft of the partnership to his own use he will be liable for conversion without proof that the draft has been paid. Bullard *v.* Hascall, 25 Mich. 132. And payment is sufficiently proved as to all the makers by judgment to that effect in favor of one in a joint action of trover brought by them against the payee for retaining the note after it was paid. Spencer *v.* Dearth, 43 Vt. 98.

99. Atkins *v.* Owen, 2 A. & E. 35, 4 L. J. K. B. 15, 4 N. & M. 123, 29 E. C. L. 38.

1. Scholey *v.* Walton, 13 L. J. Exch. 122, 12 M. & W. 510.

The fact that an action is barred on the note by the statute of limitations is not such evidence of payment as will entitle the maker to a transfer of land, which was conditioned on the payment of the note. Cook *v.* Reynolds, 58 Miss. 243. But see *contra*, Jordan *v.* Fountain, 51 Ga. 332.

2. Hankin *v.* Squires, 5 Biss. (U. S.) 186, 11 Fed. Cas. No. 6,025.

If a note is taken up by the holder at the surety's request and is delivered to the surety to enable him to make proof of claim in bankruptcy against the maker, but is never actually paid to the holder, the surety will not be discharged by such apparent payment. North Bridgewater Sav. Bank *v.* Soule, 129 Mass. 528.

F. Trial[3]— **1. Conduct of Trial — a. In General.** The details relating to the conduct of the trial of an action on commercial paper are, in the absence of rules of court or statutory provisions, largely within the sound judicial discretion of the court.[4]

b. Notice of Assessment of Damages. After appearance defendants in an action upon a promissory note or bill of exchange are entitled to notice of, and to be heard upon, the assessment of damages.[5]

c. Preliminary Proof and Offer of Evidence — (i) *Admissibility of Instrument in First Instance.* The instrument itself is properly admissible in evidence before proof of demand, protest, and notice;[6] of its consideration;[7] or of its acceptance, in case of an action against the drawee of a bill of exchange.[8] Nor is it necessary to prove the identity of the payee of an order with plaintiff, before the order is admitted in evidence.[9] But where the execution of the instrument is denied under oath, it is proper to exclude it from the jury until some evidence of its execution shall have been given.[10]

(ii) *Offer to Prove Failure or Want of Consideration.* An offer to prove failure or want of consideration, in defense to an action by the holder of commercial paper, must be accompanied by an offer to prove that plaintiff is not a *bona fide* holder.[11]

(iii) *Offer to Prove Illegality or Fraud.* An offer to prove illegality or fraud in defense need not be accompanied by an offer to prove that plaintiff

3. As to trial generally see Trial.

4. Thus the call of a case out of its regular order, there being no defense except a plea of the general issue, and no evidence save the note sued on (Matthews *v.* Bates, 93 Ga. 317, 20 S. E. 320), the allowance of latitude in receiving testimony, where the defense is fraud and misrepresentation (Gutsch *v.* Pittsley, 51 Mich. 566, 17 N. W. 59), the refusal to hear further testimony in an action tried by the court, where in its opinion the testimony has established the *bona fides* of the holder, against whom the defense set up is not available (Brookman *v.* Milbank, 50 N. Y. 378), or a refusal to compel plaintiff to file a declaration in an action under summary process, in order that defendant may plead a discharge beyond the jurisdiction (Knox *v.* Simpson, 2 Speers (S. C.) 631) have been held to be within the court's discretion.

5. Mason *v.* Reynolds, 33 Mich. 60.

Statute construed.— In an action on a promissory note, where judgment is given for plaintiff on demurrer, defendant is entitled to notice of assessment of damages by the clerk. The provisions of 2 N. Y. Rev. Stat. p. 356, §§ 1–4, are not repealed by the code. King *v.* Stafford, 5 How. Pr. (N. Y.) 30.

6. Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67.

7. Pennington *v.* Woodall, 17 Ala. 685.

8. Bent *v.* Brainard, 1 Mo. 283.

9. Fletcher *v.* Conly, 2 Greene (Iowa) 88.

10. Woolen *v.* Wire, 110 Ind. 251, 11 N. E. 236. See also *supra*, XIV, E, 2, j.

A contract of guaranty written at or before trial over a blank indorsement is inadmissible, if denied under oath, without some evidence to show an oral contract of guaranty. Windheim *v.* Ohlendorf, 3 Ill. App. 436.

11. *Florida.*— Livingston *v.* Roberts, 18 Fla. 70.

Illinois.— Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246.

Indiana.— Blair *v.* Buser, 1 Wils. (Ind.) 333.

Kansas.— MacRitchie *v.* Johnson, 49 Kan. 321, 30 Pac. 477.

Nebraska.— Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

Compare Conley *v.* Winsor, 41 Mich. 253, 2 N. W. 31 [*citing* Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192; Paton *v.* Coit, 5 Mich. 505, 72 Am. Dec. 58], where it was held that in an action by the indorsee of a note the maker may show a failure of consideration, without first proving that the indorsee was not a *bona fide* bolder without notice, and that the burden of proving that it was received from the indorser in good faith for value but before maturity then rested upon plaintiff.

See 7 Cent. Dig. tit. "Bills and Notes," § 1859.

As to presumption of bona fides see *supra*, XIV, E, 1, e.

Effect of unnecessary proof as to bona fides.— In an action by the indorsees against the maker of a promissory note, after plaintiffs proved the execution of the note sued on and assignment of it to them they might rest their case; but having also offered proof that they received their assignment before the maturity of the note it was incumbent upon them to go on and offer all the proof they had upon this point before resting their case, and they were not at liberty to offer further proof as to this point by way of rebuttal. Herrick *v.* Swomley, 56 Md. 439.

is not a *bona fide* holder. In such a case the burden of proof is shifted and plaintiff must show *bona fides*.[12]

d. Effect of Offering or Introducing Note in Evidence. Offering or introducing a note in evidence upon the trial without objection dispenses with the necessity of proving the signatures on the note[13] and cures any insufficiency of the complaint in the statement of the consideration.[14]

e. Right to Open and Close. As a general rule plaintiff, in an action upon a bill of exchange or promissory note, is entitled to open and close the case.[15] Where, however, the answer admits the execution and delivery of the paper and sets up an affirmative defense, the affirmative is with defendant, who consequently has the right to open and close.[16]

2. Province of Court and Jury — a. In General. In an action on commercial paper all controverted questions of fact are for the determination of the jury,[17] if there is anything in evidence to warrant the submission.[18] Questions of

12. *Nebraska.*— Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

New York.—Ogden *v.* Pope, 18 N. Y. Suppl. 140, 44 N. Y. St. 646.

Oregon.— Owens *v.* Snell, etc., Co., 29 Oreg. 483, 44 Pac. 827.

Pennsylvania.— Simes *v.* Blair, 5 Wkly. Notes Cas. (Pa.) 235.

Canada.— Hanscome *v.* Cotton, 15 U. C. Q. B. 42.

See 7 Cent. Dig. tit. "Bills and Notes," § 1859.

Proper order of proof.— "When the maker proves that the paper had its origin in fraud, or was fraudulently put in circulation, it is incumbent upon the holder to prove that he received it *bona fide*, before maturity, and for value. He is not required, however, to prove that he had no knowledge of the specific facts which impeach its original validity. When the general proof is made by the holder that he received the paper before due, *bona fide* and for value, it then devolves upon the maker to prove that the holder had actual notice of the specific facts which would render it originally invalid." Johnson *v.* McMurry, 72 Mo. 278, 282. See also Hamilton *v.* Marks, 63 Mo. 167.

As to burden of proof of bona fides see *supra*, XIV, E, 1, e.

13. Robertson *v.* Fullerton, 15 La. Ann. 318; Gordon *v.* Nelson, 16 La. 321.

14. Frank *v.* Irgins, 27 Minn. 43, 6 N. W. 380.

15. Pate *v.* Aurora First Nat. Bank, 63 Ind. 254; Kenny *v.* Lynch, 61 N. Y. 654; Redmond *v.* Tone, 10 N. Y. Suppl. 506, 32 N. Y. St. 260.

The defense of a want of consideration in a promissory note does not relieve plaintiff from satisfying the jury on the whole evidence that the note was supported by a sufficient consideration, and hence he has the opening and closing argument. Franklin *v.* Smith, 1 Tex. Unrep. Cas. 229.

Where a supplemental answer contradicts the statements in the original answer, by which an issue as to the making of the note and its delivery as well as its transfer to plaintiff has been raised, plaintiff is properly compelled to open and close the case and to produce evidence in support of his action, notwithstanding the matters set up in the supplemental answer. Slauson *v.* Englehart, 34 Barb. (N. Y.) 198.

16. Lindsley *v.* European Petroleum Co., 3 Lans. (N. Y.) 176, 10 Abb. Pr. N. S. (N. Y.) 107, 41 How. Pr. (N. Y.) 56.

The plea of payment of a note sued on admits its execution and the right to open and close the argument is with defendant. Kent *v.* Mason, 79 Ill. 540.

To entitle defendant to the opening and closing argument he must admit enough to make out a *prima facie* case in favor of plaintiff. Reid *v.* Sewell, 111 Ga. 880, 36 S. E. 937. See also Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749.

17. *Alabama.*— Slaughter *v.* First Nat. Bank, 109 Ala. 157, 19 So. 430; Orr *v.* Burwell, 15 Ala. 378.

California.— Nagle *v.* Homer, 8 Cal. 353.

Georgia.— Dupree *v.* Price, 37 Ga. 235; McGinnis *v.* Chamberlain, 30 Ga. 32.

Indiana.— Huff *v.* Cole, 45 Ind. 300.

Iowa.— Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690.

Massachusetts.—Nichols *v.* Allen, 112 Mass. 23.

Michigan.— Dow Law Bank *v.* Godfrey, 126 Mich. 521, 85 N. W. 1075, 86 Am. St. Rep. 559.

Missouri.— Carter *v.* Carter, 44 Mo. 195; Wright Inv. Co. *v.* Fillingham, 85 Mo. App. 534; Dunbar *v.* Fifield, 85 Mo. App. 484.

New York.— Nesbit *v.* Bendheim, 15 N. Y. Suppl. 300, 39 N. Y. St. 109; Hubbard *v.* Farrington, 5 N. Y. Suppl. 103, 22 N. Y. St. 511.

North Carolina.— Wilkings *v.* McKenzie, 3 N. C. 508.

Rhode Island.— Hunt *v.* Williams, 15 R. I. 595, 10 Atl. 645.

Virginia.— Nelson *v.* Fotterall, 7 Leigh (Va.) 179.

See 7 Cent. Dig. tit. "Bills and Notes," § 1862.

18. Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956; Alpena Nat. Bank *v.* Greenbaum,

law are, as in actions generally, for the determination of the court,[19] while a mixed question of law and fact should be submitted to the jury under proper instructions.[20]

b. Execution and Delivery of Instrument — (I) *In General.* The question of the execution and delivery of a bill of exchange or promissory note is for the determination of the jury, subject to the instructions of the court as to the law.[21] But whether admissions of indebtedness by the maker are sufficient to dispense with proof of execution and legal transfer to plaintiff is a question for the court,[22] as is the intention with which a party executed a note, whether to bind himself or as trustee for another.[23]

(II) *Fraud in Procuring* — (A) *In General.* Where the defense in an action on a bill of exchange or promissory note is that the instrument was procured by fraud, a question of fact is presented for the determination of the jury.[24]

(B) *Negligence of Maker.* The question as to whether the maker of a bill or note alleged to have been obtained by fraud and false representations exercised proper precautions before executing and delivering the instrument is one of fact for the jury under appropriate instructions[25] or for the court when trying the issue without a jury.[26] But in order that the question may be submitted there must be some evidence tending to show negligence on the part of the maker.[27] If, however, the facts are admitted it is a question of law.[28]

80 Mich. 1, 44 N. W. 1123; Redmond *v.* Tone, 10 N. Y. Suppl. 506, 32 N. Y. St. 260; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695; Lewis *v.* Latham, 74 N. C. 283; Rood *v.* Gilbert, 52 Vt. 368.

19. Owings *v.* McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

Allowance of attorney's fee.— In an action on a promissory note the allowance of an attorney's fee not exceeding ten per cent of the recovery is discretionary with the court and not in the province of the jury. Aultman *v.* Stout, 15 Nebr. 585, 19 N. W. 464. See also Fowler *v.* Bell, (Tex. Civ. App. 1896) 35 S. W. 822.

20. Gooch *v.* Massey, 4 Humphr. (Tenn.) 374.

21. Carter *v.* Pomeroy, 30 Ind. 438; Young *v.* Power, 41 Miss. 197; Hickok *v.* Bunting, 67 N. Y. App. Div. 560, 73 N. Y. Suppl. 967; Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105.

Authority of agent.— It is for the jury to say whether a promissory note was signed by an agent with the authority of the maker. Weed *v.* Carpenter, 10 Wend. (N. Y.) 403.

Day of delivery.— Where a note was shown to have been signed on Sunday, but bore date of a different day, it is for the jury to determine under all the circumstances on what day it was delivered. Flanagan *v.* Meyer, 41 Ala. 132.

Notice to indorsee of agreement.— In an action on a note by the indorsee, where there is evidence that after the transfer the payee obtained the note from plaintiff for the purpose of procuring other persons to sign it as makers, it is for the jury to determine whether plaintiff had notice of the agreement between the payee and defendant maker that the note should be of no effect until signed by such other persons. Ward *v.* Johnson, 57 Minn. 301, 59 N. W. 189.

22. McNeil *v.* Holbrook, 12 Pet. (U. S.) 84, 9 L. ed. 1009.

23. Lewis *v.* Harris, 4 Metc. (Ky.) 353.

24. *Connecticut.*— Caldwell *v.* Sigourney, 19 Conn. 37.

Illinois.— Knowles *v.* Knowles, 128 Ill. 110, 21 N. E. 196.

Indiana.— Fowler *v.* Swift, 3 Ind. 188.

Michigan.— Walton *v.* Mason, 109 Mich. 486, 67 N. W. 692.

New York.— Vosburgh *v.* Diefendorf, 1 N. Y. Suppl. 58, 16 N. Y. St. 493.

Canada.— Smith *v.* Fleming, 13 N. Brunsw. 147.

See 7 Cent. Dig. tit. "Bills and Notes," § 1865.

25. *Illinois.*— Munson *v.* Nichols, 62 Ill. 111.

Indiana.— Baldwin *v.* Bricker, 86 Ind. 221.

Iowa.— Hopkins *v.* Hawkeye Ins. Co., 57 Iowa 203, 10 N. W. 605, 42 Am. Rep. 41.

Minnesota.— Yellow Medicine County Bank *v.* Wiger, 59 Minn. 384, 61 N. W. 452.

Missouri.— Frederick *v.* Clemmens, 60 Mo. 313.

Pennsylvania.— Leas *v.* Walls, 101 Pa. St. 57, 47 Am. Rep. 699; Brown *v.* Reed, 79 Pa. St. 370, 21 Am. Rep. 75.

Wisconsin.— Dodd *v.* Dunne, 71 Wis. 578, 37 N. W. 430.

See 7 Cent. Dig. tit. "Bills and Notes," § 1864.

Whether an illiterate maker of a note who was induced to sign it under representations that it was an entirely different document used ordinary care is a question of fact for the jury, in a suit on the note by an indorsee thereof. Sim *v.* Pyle, 84 Ill. 271. See also Baldwin *v.* Bricker, 86 Ind. 221.

26. Kingman *v.* Reinemer, 58 Ill. App. 173.

27. Anderson *v.* Walter, 34 Mich. 113.

28. Kellogg *v.* Curtis, 65 Me. 59.

c. Consideration — (I) *In General.* Where the consideration of a note is disputed and there is conflicting testimony the jury must decide the point.[29]

(II) *Failure, Illegality, or Want of Consideration.* The question of failure or want of consideration,[30] or illegality in the consideration,[31] should be submitted to the jury if there is evidence tending to establish a defense based upon such failure, want, or illegality.[32]

(III) *Performance of Contract Constituting Consideration.* Whether a contract constituting the consideration for the execution or acceptance of commercial paper has been duly performed or not is a question of fact.[33]

d. Identification and Interpretation of Instrument — (I) *In General.* Where the identity of a note in suit is at issue its identification is a question of fact for the jury.[34]

(II) *Determination of Amount.* Where the figures in the margin of a bill or note and the amount as written in the body of the instrument conflict, by reason of the latter's being so obscurely written as to be uncertain and ambiguous, the determination of the amount intended is a question for the jury.[35]

(III) *Determination of Time and Manner of Payment.* Where it is doubtful from an inspection of the instrument when or in what manner it is payable, the time or manner of payment is a question of fact to be submitted to the jury;[36] but what is a reasonable time within which a note payable on demand is

29. *Georgia.*— Russell *v.* Smith, 97 Ga. 287, 23 S. E. 5.

Kansas.— Calvin *v.* Sterritt, 41 Kan. 215, 21 Pac. 103; Horton's Bank *v.* Brooks, (Kan. App. 1900) 62 Pac. 675.

Ohio.— Murphy *v.* Hageman, Wright (Ohio) 293.

Oregon.— First Nat. Bank *v.* Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393.

Pennsylvania.— Swain *v.* Ettling, 32 Pa. St. 486; Heffner *v.* Wenrich, 32 Pa. St. 423; Kirkpatrick *v.* Muirhead, 16 Pa. St. 117.

West Virginia.— Mercantile Bank *v.* Boggs, 48 W. Va. 289, 37 S. E. 587.

See 7 Cent. Dig. tit. "Bills and Notes," § 1866.

Accommodation notes.— The question whether a note was made for the accommodation of the payee, or whether the latter paid value therefor, is solely for the jury. Howard *v.* Moller, 9 Misc. (N. Y.) 215, 29 N. Y. Suppl. 599, 60 N. Y. St. 848; Dowden *v.* Calvin, 2 N. Y. Suppl. 161; Potteiger *v.* Potteiger, (Pa. 1887) 8 Atl. 632; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595.

30. Knowles *v.* Knowles, 128 Ill. 110, 21 N. E. 196; Murray *v.* Beckwith, 48 Ill. 391; Morris *v.* Bowman, 12 Gray (Mass.) 467.

Partial failure — Determination of amount. — In an action on a note between the original parties, where the defense is an unliquidated and partial failure of the consideration, the amount of such failure must be determined by the jury. Herbert *v.* Ford, 29 Me. 546.

31. Thedford *v.* McClintock, 47 Ala. 647; Nelson *v.* Stamper, 43 Ga. 332; Baker *v.* Callender, 118 Mass. 390.

Compounding felony.— Where in an action on a note evidence was given that several days before its execution the payee had charged the maker with a felony, and had threatened prosecution, which charges and threats were not retracted, the question whether the note was given to compound felony should be submitted to the jury, although the charge and threat were not repeated at the time of the execution of the note. Taylor *v.* Jaques, 106 Mass. 291.

Where the maker is sued by an indorsee, and pleads that the note was given upon an illegal contract, and also that the note was not transferred until after maturity, all the evidence in respect to the contract between the original parties and the indorsement and delivery of the note to the indorsee should be submitted to the jury. Kittle *v.* De Lamater, 3 Nebr. 325.

32. Stiles *v.* Steele, 37 Kan. 552, 15 Pac. 561; Redmond *v.* Tone, 10 N. Y. Suppl. 506, 32 N. Y. St. 260.

33. Wilder *v.* Sprague, 50 Me. 354; Hammett *v.* Barnard, 1 Hun (N. Y.) 198 [*affirmed* in 62 N. Y. 615]; Walsh *v.* McCloskey, 5 N. Y. Suppl. 427, 25 N. Y. St. 932 [*affirmed* in 125 N. Y. 705, 26 N. E. 752, 34 N. Y. St. 1012]; Corn Exch. Bank *v.* Scheppers, 111 U. S. 440, 4 S. Ct. 505, 28 L. ed. 474; Searight *v.* Calhraith, 4 Dall. (U. S.) 325, 21 Fed. Cas. No. 12,585.

34. Thorp *v.* Goewey, 85 Ill. 611; Warlick *v.* Peterson, 58 Mo. 408; Commercial Bank *v.* Wood, 7 Watts & S. (Pa.) 89. But see Riley *v.* Dickens, 19 Ill. 29, holding that the question whether the note presented in evidence is the note declared on is for the court.

35. Burnham *v.* Allen, 1 Gray (Mass.) 496; Paine *v.* Ringold, 43 Mich. 341, 5 N. W. 421; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

36. Los Angeles Traction Co. *v.* Wilshire, 135 Cal. 654, 67 Pac. 1086; State Bank *v.* Postal, 12 Misc. (N. Y.) 546, 34 N. Y. Suppl. 18, 67 N. Y. St. 873.

Where notes were payable in "cash notes," and it appeared from the wording of the notes

to be considered as payable, in questions between the indorsee and maker, is for the court on facts found by the jury.[37]

(IV) *IDENTIFICATION OF MAKER OR PAYEE.* Where an issue is raised as to the identity of the maker or payee of commercial paper it is a question of fact for the determination of the jury.[38]

(V) *NEGOTIABILITY.* It is the province of the court and not of the jury to decide on the negotiability of an instrument, unless in new cases where the law merchant is doubtful, when evidence of custom may be received.[39]

e. Title and Ownership of Instrument — (I) *IN GENERAL.* Where there is an issue as to the title to and ownership of the instrument in suit, the question should be left to the decision of the jury.[40]

(II) *AUTHORITY TO SUE AND COLLECT.* Where the authority of plaintiff to sue and collect is shown by the uncontradicted evidence of the owner, it is error to submit the question of such authority to the jury.[41]

(III) *BONA FIDES OF HOLDER.* The question whether plaintiff is a *bona fide* holder is one of fact to be submitted, under proper instructions, to the determination of the jury,[42] unless there is an entire absence of testimony tending

that a payment was intended more beneficial to the maker than money, the manner of payment was left to the jury as a question of fact. Ward *v.* Lattimer, 2 Tex. 245.

37. Dennett *v.* Wyman, 13 Vt. 485. But see Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268, holding that where a note was given payable on demand, but with an agreement that it should remain unpaid as long as the payee was satisfied with security given for its payment, the question as to when it became due was one of fact for the jury.

38. *Illinois.*— Frankland *v.* Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

Missouri.— Tilford *v.* Ramsey, 37 Mo. 563.

South Carolina.— Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. (S. C.) 95.

Texas.— Stevens *v.* Morris, 35 Tex. 709.

Wisconsin.— Jewett *v.* Whalen, 11 Wis. 124.

But see Bedell *v.* Scarlett, 75 Ga. 56, holding that where negotiable paper complete on its face appears to have been negotiated in the fair and usual course of trade the question as to whom the credit was given to, whether to the maker personally, although he has signed as agent, or to his principal, is not one of fact for the jury.

See 7 Cent. Dig. tit. "Bills and Notes," § 1872.

Effect of signing initials.— Whether one signing his initials to a note intended to become liable thereon as maker is for the jury. Palmer *v.* Stephens, 1 Den. (N. Y.) 471.

39. Myers *v.* York, etc., R. Co., 43 Me. 232 [*citing* Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295].

40. *Georgia.*— Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111.

Kentucky.— Vanbuskirk *v.* Levy, 3 Metc. (Ky.) 133.

Minnesota.— Hartshorn *v.* Green, 1 Minn. 92.

Mississippi.— Anderson *v.* Patrick, 7 How. (Miss.) 347.

Missouri.— Jenks *v.* Glenn, 86 Mo. App. 329.

New York.— Bridgford *v.* Crocker, 3 Thomps. & C. (N. Y.) 273.

Pennsylvania.— Holohan *v.* Mix, 134 Pa. St. 88, 19 Atl. 496.

Wisconsin.— Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232.

See 7 Cent. Dig. tit. "Bills and Notes," § 1876.

Whether a transfer of a note was a purchase or a discount in case of any doubt or conflict of testimony, is peculiarly a question for the jury. American L. Ins., etc., Co. *v.* Dobbin, Lalor (N. Y.) 252.

41. Horrigan *v.* Wyman, 90 Mich. 121, 51 N. W. 187.

If the evidence respecting an agent's authority to collect is ambiguous the court cannot pass upon it but must submit it to the jury. Moore *v.* Hall, 48 Mich. 143, 11 N. W. 844.

42. *Connecticut.*— Rowland *v.* Apothecaries' Hall Co., 47 Conn. 384.

Illinois.— Murray *v.* Beckwith, 48 Ill. 391.

Iowa.— Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301; Merchants' Nat. Bank *v.* McNulty, 36 Iowa 229.

Maryland.— Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Herrick *v.* Swomley, 56 Md. 439; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Michigan.— Burroughs *v.* Ploff, 73 Mich. 607, 41 N. W. 704.

Missouri.— Iron Mountain Bank *v.* Murdock, 62 Mo. 70.

Montana.— Harrington *v.* Butte, etc., Min. Co., 27 Mont. 1, 69 Pac. 102.

Nebraska.— Wilcox State Bank *v.* Wilkie, 35 Nebr. 579, 53 N. W. 603.

New York.— Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602, 40 N. Y. St. 491, 27 Am. St. Rep. 484; Vosburgh *v.* Diefendorf, 119 N. Y. 357, 23 N. E. 801, 29 N. Y. St. 448, 16 Am. St. Rep. 836; Cahen *v.* Everitt, 67 N. Y. App. Div. 86, 73 N. Y. Suppl. 549; Wright *v.* Bartholomew, 66 N. Y. App. Div. 357, 72 N. Y. Suppl. 706; Brown *v.* James, 2 N. Y.

to show *mala fides*.[43] Where all the facts are admitted[44] or where the question is whether notice is imputable from the face of the instrument itself[45] the question is one of law for the court.

(IV) *GIVEN IN PAYMENT, AS SECURITY, OR FOR COLLECTION.* Whether the instrument was transferred in satisfaction of a precedent debt, as security, or for collection merely is a question of fact for the jury.[46]

f. Indorsement. Controverted questions as to the indorsement of commercial paper are as a rule to be determined by the jury.[47] On the other hand the question whether the instrument in suit has been properly indorsed is one of law for the court and should not be submitted to the jury.[48]

g. Presentment, Demand, and Enforcement — (I) *IN GENERAL.* Under proper instructions from the court as to what is necessary to constitute a legal presentment or demand, it is for the jury to determine upon the evidence whether such a presentment or demand has been made or not.[49]

App. Div. 105, 37 N. Y. Suppl. 529, 73 N. Y. St. 144; Cunningham *v.* Scott, 90 Hun (N. Y.) 410, 35 N. Y. Suppl. 881, 70 N. Y. St. 543; Pelly *v.* Onderdonk, 61 Hun (N. Y.) 314, 15 N. Y. Suppl. 915, 40 N. Y. St. 648; Mendelson *v.* Sheffield, 59 N. Y. Super. Ct. 118, 13 N. Y. Suppl. 606, 37 N. Y. St. 879; Pool *v.* Watson, 50 N. Y. Super. Ct. 53; Bailey *v* Griswold, 36 N. Y. Super. Ct. 68; Duncan *v.* Gösche, 8 Bosw. (N. Y.) 243, 21 How. Pr. (N. Y.) 344; Clark *v.* Dearborn, 6 Duer (N. Y.) 309; Western Nat. Bank *v.* Flannagan, 14 Misc. (N. Y.) 317, 35 N. Y. Suppl. 848, 70 N. Y. St. 324; Close *v.* Potter, 5 Misc. (N. Y.) 543, 25 N. Y. Suppl. 972.

Oregon.— Owens *v.* Snell, etc., Co., 29 Oreg. 483, 44 Pac. 827.

Pennsylvania.— Bedford Bank *v.* Stever, 169 Pa. St. 574, 32 Atl. 603; Charnley *v.* Dulles, 8 Watts & S. (Pa.) 353; Simes *v.* Blair, 5 Wkly. Notes Cas. (Pa.) 235; Wagner *v.* Kline, 1 Del. Co. (Pa.) 478.

South Dakota.— Spearfish Bank *v.* Graham, (S. D. 1902) 91 N. W. 340.

Vermont.— Gould *v.* Stevens, 43 Vt. 125, 5 Am. Rep. 265; Benior *v.* Paquin, 40 Vt. 199; Roth *v.* Colvin, 32 Vt. 125.

United States.— Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Smith *v.* Strader, 4 How. (U. S.) 404, 11 L. ed. 1031.

England.— Gill *v.* Cubitt, 3 B. & C. 466, 5 D. & R. 324, 3 L. J. K. B. O. S. 48, 10 E. C. L. 215; Beckwith *v.* Corrall, 3 Bing. 444, 11 E. C. L. 220, 2 C. & P. 261, 12 E. C. L. 561, 4 L. J. C. P. O. S. 139, 11 Moore C. P. 335; Egan *v.* Threlfall, 5 D. & R. 326, 16 E. C. L. 237.

See 7 Cent. Dig. tit. "Bills and Notes," § 1879.

43. Lowe *v.* Higginbotham, 36 Kan. 466, 13 Pac. 790.

44. Holbrook *v.* Wilson, 4 Bosw. (N. Y.) 64.

45. Campbell *v.* Rusch, 9 Iowa 337 (effect of words, "in according to contract"); Pittsburg Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323 (effect of words, "second of exchange, first unpaid").

46. *Illinois.*— Stephens *v.* Thornton, 26 Ill. 323.

Maine.— Maine Mut. Mar. Ins. Co. *v.* Stockwell, 67 Me. 382.

New Hampshire.— Rice *v.* Porter, 17 N. H. 133.

New York.— Union Mills First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 48 N. Y. St. 283; Davis *v.* Standard Nat. Bank, 50 N. Y. App. Div. 210, 63 N. Y. Suppl. 764; Taylor *v.* Allen, 36 Barb. (N. Y.) 294; Atlantic F. & M. Ins. Co. *v.* Boies, 6 Duer (N. Y.) 583.

Oklahoma.— Winfield Nat. Bank *v.* McWilliams, 9 Okla. 493, 60 Pac. 229.

Pennsylvania.— Gleason *v.* Crider, 14 Pa. Co. Ct. 670.

United States.— St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. ed. 683.

See 7 Cent. Dig. tit. "Bills and Notes," § 1878.

47. Thus whether a note was indorsed in the usual course of business (Bachellor *v.* Priest, 12 Pick. (Mass.) 399); the character in which defendant put his name on the back of the note, whether as indorser or maker (Western Boatmen's Benev. Assoc. *v.* Wolff, 45 Mo. 104); whether the indorsement was made for accommodation or discount (Bridgeport City Bank *v.* Empire Stone Dressing Co., 19 How. Pr. (N. Y.) 51); whether for accommodation of maker or payee (Jessup, etc., Paper Co. *v.* Parker, 1 N. Y. Suppl. 328); whether there was fraud in procuring or using an indorsement (Eccles *v.* Ballard, 2 McCord (S. C.) 388); the date of an indorsement, whether before or after maturity (McMahan *v.* Bremond, 16 Tex. 331); and the authority intended to be given by a blank indorsement made with the agreement that the indorsee should fill it up (Kimbroe *v.* Lamb, 3 Humphr. (Tenn.) 17) have all been held questions of fact for the jury under proper instructions from the court.

48. Gray Tie, etc., Co. *v.* Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

49. Way *v.* Butterworth, 106 Mass. 75; Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 45 Am. Dec. 290.

Proper course of procedure.— It is not erroneous in a judge to refuse to rule, at the

(II) *Diligence to Charge Indorser or Drawer.* While there is a considerable conflict of authority upon the question, some courts holding that due diligence to charge an indorser or drawer is a question of law only,[50] others that it is a pure question of fact,[51] the better view, and that supported by the weight of authority, is to the effect that it is a mixed question of law and fact, to be decided by the jury under the direction of the court upon a general verdict or to be decided by the court, where the facts are undisputed or are found by a special verdict.[52]

(III) *Waiver.* Whether the facts and circumstances proved amount to a waiver of presentment to and demand upon, or of attempted enforcement against, the parties primarily liable is a question of fact for the jury.[53]

request of both parties, that certain facts in evidence do or do not amount in law to a demand upon the maker of a promissory note so as to charge an indorser. The proper course is to instruct the jury what is necessary to constitute legal demand and to leave it to them to determine upon the evidence whether such a demand has been made or not. Farnum *v.* Davidson, 3 Cush. (Mass.) 232.

What constitutes due presentment sufficient to charge an indorser is a conclusion of law. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

50. *Delaware.*— Pyle *v.* McMonagle, 2 Harr. (Del.) 468, presentment for payment.

Kentucky.— Johnson *v.* Lewis, 1 Dana (Ky.) 182, enforcement against maker.

Louisiana.— Bolton *v.* Harrod, 9 Mart. (La.) 326, 13 Am. Dec. 306, presentment for acceptance.

Maryland.— Brooks *v.* Elgin, 6 Gill (Md.) 254 (enforcement against parties liable to assignor); Patton *v.* Wilmot, 1 Harr. & J. (Md.) 477 (enforcement against maker).

New York.— Elting *v.* Brinkerhoff, 2 Hall (N. Y.) 459 (presentment for acceptance); Aymar *v.* Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538.

Pennsylvania.— Muncy Borough School Dist. *v.* Com., 84 Pa. St. 464, presentment for acceptance.

See 7 Cent. Dig. tit. "Bills and Notes," § 1883.

51. Gray *v.* Bell, 3 Rich. (S. C.) 71, 2 Rich. (S. C.) 67, 44 Am. Dec. 277 (demand); Browne *v.* Depau, Harp. (S. C.) 251 (presentment for acceptance); Eccles *v.* Ballard, 2 McCord (S. C.) 388 (demand); Bronaugh *v.* Scott, 5 Call (Va.) 78 (enforcement against maker); Dulany *v.* Hodgkin, 5 Cranch (U. S.) 333, 3 L. ed. 117 (enforcement against maker); Ish *v.* Mills, 1 Cranch C. C. (U. S.) 567, 13 Fed. Cas. No. 7,104 (enforcement against maker); Boehm *v.* Sterling, 2 Esp. 575, 7 T. R. 423 (presentment for acceptance).

52. *Alabama.*— Knott *v.* Venable, 42 Ala. 186; Fulford *v.* Johnson, 15 Ala. 385; Montgomery Branch State Bank *v.* Gaffney, 9 Ala. 153.

Connecticut.— Oley *v.* Miller, 74 Conn. 304, 50 Atl. 744.

Louisiana.— Richardson *v.* Fenner, 10 La. Ann. 599.

Maine.— Thorn *v.* Rice, 15 Me. 263.

Massachusetts.— Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473.

Minnesota.— Hart *v.* Eastman, 7 Minn 74.

Missouri.— Salisbury *v.* Renick, 44 Mo. 554; Singer *v.* Dickneite, 51 Mo. App. 245; Selby *v.* McCullough, 26 Mo. App. 66.

New Hampshire.— Hadduck *v.* Murray, 1 N. H. 140, 8 Am. Dec. 43.

New York.— Adams *v.* Leland, 5 Bosw. (N. Y.) 411; Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520; Remer *v.* Downer, 23 Wend. (N. Y.) 620, 25 Wend. (N. Y.) 277; Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192; Ireland *v.* Kip, Anth. N. P. (N. Y.) 195.

North Carolina.— Brown *v.* Johnson, 12 N. C. 293.

Ohio.— Bassenhorst *v.* Wilby, 45 Ohio St. 333, 13 N. E. 75.

Pennsylvania.— Bennett *v.* Young, 18 Pa. St. 261; Charnley *v.* Dulles, 8 Watts & S. (Pa.) 353; Donaldson *v.* Patterson, 33 Leg. Int. (Pa.) 24, 23 Pittsb. L. J. 127; Kennedy *v.* Davis, 1 Del. Co. (Pa.) 313.

Rhode Island.— Wilbur *v.* Williams, 16 R. I. 242, 14 Atl. 878.

Texas.— Chambers *v.* Hill, 26 Tex. 472.

Wisconsin.— Walsh *v.* Dart, 23 Wis. 334, 99 Am. Dec. 177.

England.— Mellish *v.* Rawdon, 9 Bing. 416, 2 L. J. C. P. 29, 2 Moore & S. 570, 23 E. C. L. 640; Mullick *v.* Radakissen, 2 C. L. R. 1664, 9 Moore P. C. 46, 14 Eng. Reprint 215; Shute *v.* Robins, 3 C. & P. 80, M. & M. 133, 14 E. C. L. 460; Parker *v.* Gordon, 7 East 385, 6 Esp. 41, 3 Smith K. B. 358, 8 Rev. Rep. 646; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195; Muilman *v.* D'Eguino, 2 H. Bl. 565; Straker *v.* Graham, 4 M. & W. 721; Fry *v.* Hill, 7 Taunt. 397, 18 Rev. Rep. 512, 2 E. C. L. 416 (presentment for acceptance).

See 7 Cent. Dig. tit. "Bills and Notes," § 1883.

53. *Arkansas.*— Lary *v.* Young, 13 Ark. 401, 58 Am. Dec. 332.

Illinois.— Curtiss *v.* Martin, 20 Ill. 557.

Massachusetts.— Pratt *v.* Chase, 122 Mass. 262.

New York.— Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379.

United States.— Union Bank *v.* Magruder, 7 Pet. (U. S.) 287, 8 L. ed. 687; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595.

h. Acceptance. What acts upon the part of the drawee of a bill of exchange are tantamount to acceptance is a question for the jury to determine under proper instructions.[54]

i. Payment. Where a defense of payment is set up it is a question for the jury to determine whether or not the transaction put in evidence to sustain the defense did in fact constitute a payment, either partial or in full.[55] It is also a question of fact for the jury, under proper instructions by the court, to determine whether a new note, delivered to and accepted by the holder of that in suit, was applied at the time in payment of such note, the evidence on that point being conflicting.[56]

j. Presumption of Dishonor. Commercial paper payable on demand is not presumptively dishonored until the lapse of a reasonable time after payment thereof may be legally demanded; and what shall be deemed a reasonable time is a question of law for the court, when there is no dispute as to the facts.[57]

England.— North Staffordshire Loan, etc., Co. *v.* Wythies, 2 F. & F. 563.

Contra, Wilson *v.* Huston, 13 Mo. 146, 53 Am. Dec. 138. See also Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703, where it was held that it is always a question of law for the court whether the circumstances of any particular case are to be treated as a waiver of demand.

See 7 Cent. Dig. tit. "Bills and Notes," § 1884.

The promise of an indorser or drawer to pay a bill after laches in giving notice is a matter for the jury to consider as evidence of a waiver. Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580; Pratte *v.* Hanly, 1 Mo. 35.

Whether an indorser knows the facts on which his liability depends is itself a question of fact for the jury to determine. Kennon *v.* McRea, 7 Port. (Ala.) 175; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595; Hopley *v.* Dufresne, 15 East 275, 13 Rev. Rep. 463.

54. Brooks *v.* Elgin, 6 Gill (Md.) 254; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529.

Conditional acceptance. — Whether acceptance of a bill is conditional or unconditional is a question of law. Sproat *v.* Matthews, 1 T. R. 182. Whether the condition has been fulfilled is a question of fact. Nagle *v.* Homer, 8 Cal. 353; McCutchen *v.* Rice, 56 Miss. 455.

55. *Alabama.*— Tubb *v.* Madding, Minor (Ala.) 129.

Iowa. — Dougherty *v.* Deeney, 45 Iowa 443.

Massachusetts.— Dean *v.* Toppin, 130 Mass. 517.

Montana.— Knox *v.* Gerhauser, 3 Mont. 267.

New York.— Evans *v.* Deming, 2 N. Y. St. 349. *Compare* Small *v.* Smith, 1 Den. (N. Y.) 583.

North Carolina.— Runyon *v.* Clark, 49 N. C. 52. See also Jones *v.* Bobbitt, 90 N. C. 391.

Oregon.— Sturgis *v.* Baker, 39 Oreg. 541, 65 Pac. 810.

Pennsylvania.— Piper *v.* White, 56 Pa. St. 90; Rodgers *v.* Kichline, 28 Pa. St. 231.

Rhode Island.— Capwell *v.* Machon, 21 R. I. 520, 45 Atl. 259.

See, generally, PAYMENT; and 7 Cent. Dig. tit. "Bills and Notes," § 1885.

Check of third person.— In an action on a draft, whether the acceptance by plaintiff from the drawees of a check drawn by a third person to plaintiff's order was received as an absolute payment is for the jury. Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804.

Possession of bill by accepter.— Whether the mere naked possession of a bill of exchange by the accepter affords any evidence of payment depends upon the circumstances under which it was drawn and is a question for the jury. Close *v.* Fields, 2 Tex. 232.

56. Wheelock *v.* Berkeley, 138 Ill. 153, 27 N. E. 942; Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248; Yates *v.* Valentine, 71 Ill. 643; Connecticut Trust, etc., Co. *v.* Melendy, 119 Mass. 449; Taft *v.* Boyd, 13 Allen (Mass.) 84; Hamilton Bank *v.* Mudgett, 34 Hun (N. Y.) 100; Exchange Nat. Bank *v.* Johnson, 30 Fed. 588.

57. Himmelmann *v.* Hotaling, 40 Cal. 111, 6 Am. Rep. 600. But see Bacon *v.* Harris, 15 R. I. 599, 10 Atl. 647, holding that the question of what is a reasonable time in which a note payable on demand may be negotiated, before it shall be considered overdue, is a mixed question of law and fact and in general should be left to the jury. See also Barbour *v.* Fullerton, 36 Pa. St. 105, holding that at what time a note, payable on demand, made in another state and governed by its laws, is to be considered overdue so as to let in a defense against an indorsee which would be available against the payee, is a question of fact for the jury under proper instructions.

An acknowledgment of liability and a promise to pay, made by an indorser after default by the maker, raise a presumption that he knew of the dishonor of the note; and if there is evidence to the contrary it is a question for the jury whether such presumption has

Similarly it is a question of law whether a demand of payment from the indorser carries with it an implication that the bill has been previously dishonored.[58]

k. Notice of Dishonor — (1) *In General.* The weight of authority is to the effect that what constitutes due diligence in giving notice to the drawer or indorser of commercial paper of its dishonor, and the reasonableness and sufficiency of such notice, are questions of law, when the facts are ascertained or admitted, and questions of fact to be submitted to the jury under proper instructions in case of a conflict of evidence.[59] Some courts, however, have regarded these questions as pure questions of law,[60] and have held that it is for the trial

been rebutted. Loose *v.* Loose, 36 Pa. St. 538.

58. Sinclair *v.* Lynah, 1 Speers (S. C.) 244.

59. *Arkansas.*— Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

Connecticut.— Belden *v.* Lamb, 17 Conn. 441.

Kentucky.— Dodge *v.* Commonwealth Bank, 2 A. K. Marsh. (Ky.) 610.

Louisiana.—Follain *v.* Dupré, 11 Rob. (La.) 471; Spencer *v.* Stirling, 10 Mart. (La.) 88; Chandler *v.* Sterling, 9 Mart. (La.) 565; Pinder *v.* Nathan, 4 Mart. (La.) 346.

Maine.— Thorn *v.* Rice, 15 Me. 263.

Maryland.— Staylor *v.* Ball, 24 Md. 183; Whitridge *v.* Ryder, 22 Md. 548; Sasscer *v.* Farmers' Bank, 4 Md. 409; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

Massachusetts.— Wyman *v.* Adams, 12 Cush. (Mass.) 210; Wheeler *v.* Field, 6 Metc. (Mass.) 290; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Field *v.* Nickerson, 13 Mass. 131; Weld *v.* Gorham, 10 Mass. 366.

Michigan.— Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

Mississippi.— Fleming *v.* Fulton, 6 How. (Miss.) 473.

Missouri.— Fugitt *v.* Nixon, 44 Mo. 295; Linville *v.* Welch, 29 Mo. 203. *Compare* McCune *v.* Belt, 38 Mo. 281; Bank of Commerce *v.* Chambers, 14 Mo. App. 152.

New Hampshire.— Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Hadduck *v.* Murray, 1 N. H. 140, 8 Am. Dec. 43.

New Jersey.— Woodruff *v.* Daggett, 20 N. J. L. 526; Ferris *v.* Saxton, 4 N. J. L. 1; Halsey *v.* Salmon, 3 N. J. L. 916.

New York.—Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402; Cayuga County Bank *v.* Warden, 6 N. Y. 19; Carroll *v.* Upton, 3 N. Y. 272; Dole *v.* Gold, 5 Barb. (N. Y.) 490; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 330; Betts *v.* Cox, 2 N. Y. City Ct. 31; Spencer *v.* Salina Bank, 3 Hill (N. Y.) 520; Remer *v.* Downer, 23 Wend. (N. Y.) 620, 25 Wend. (N. Y.) 277; Utica Bank *v.* Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281; Ontario Bank *v.* Petrie, 3 Wend. (N. Y.) 456; Van Hoesen *v.* Van Alstyne, 3 Wend. (N. Y.) 75; Sice *v.* Cunningham, 1 Cow. (N. Y.) 397; Utica Bank *v.* De Mott, 13 Johns. (N. Y.) 432; Bryden *v.* Bryden, 11 Johns. (N. Y.) 187.

North Carolina.— Johnston *v.* McGinn, 15 N. C. 277; Brittain *v.* Johnston, 12 N. C. 293.

Ohio.— Walker *v.* Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Davis *v.* Herrick, 6 Ohio 55; Lenhart *v.* Ramey, 2 Ohio Cir. Dec. 77.

Pennsylvania.— Sherer *v.* Easton Bank, 33 Pa. St. 134; Haly *v.* Brown, 5 Pa. St. 178; Charnley *v.* Dulles, 8 Watts & S. (Pa.) 353; Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 264; Jones *v.* Wardell, 6 Watts & S. (Pa.) 399; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355; Axford *v.* Thompson, 3 Del. Co. (Pa.) 554.

South Carolina.— Diercks *v.* Roberts, 13 S. C. 338; Central Nat. Bank *v.* Adams, 11 S. C. 452, 32 Am. Rep. 495; Thompson *v.* State Bank, 3 Hill (S. C.) 77, 30 Am. Dec. 354.

Texas.—Munzesheimer *v.* Allen, 3 Tex. App. Civ. Cas. § 55.

Utah.— Durnell *v.* Sowden, 5 Utah 216, 14 Pac. 334.

Vermont.—Nash *v.* Harrington, 1 Aik. (Vt.) 39.

Virginia.— Early *v.* Preston, 1 Patt. & H. (Va.) 228.

West Virginia.— Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Wisconsin.— Parkison *v.* McKim, 1 Pinn. (Wis.) 214.

United States.— U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517.

England.— Haynes *v.* Birks, 3 B. & P. 599; Bateman *v.* Joseph, 2 Campb. 461, 12 East 433, 11 Rev. Rep. 443; Russel *v.* Langstaffe, Dougl. (3d ed.) 514; Hilton *v.* Shepherd, 6 East 14, note *a*; Tindal *v.* Brown, 1 T. R. 167, 2 T. R. 186, 1 Rev. Rep. 171.

See 7 Cent. Dig. tit. "Bills and Notes," § 1888.

60. *Alabama.*— Saltmarsh *v.* Tuthill, 13 Ala. 390.

Maryland.— Ricketts *v.* Pendleton, 14 Md. 320; Philips *v.* McCurdy, 1 Harr. & J. (Md.) 187.

Michigan.— Nevius *v.* Lansingburgh Bank, 10 Mich. 547.

Mississippi.— Routh *v.* Robertson, 11 Sm. & M. (Miss.) 382.

Missouri.— Sanderson *v.* Reinstadler, 31 Mo. 483.

New York.— Remer *v.* Downer, 23 Wend. (N. Y.) 620.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345.

United States.— Watson *v.* Tarpley, 18 How. (U. S.) 517, 15 L. ed. 509.

England.— Hutchinson *v.* Bowker, 5 M. & W. 535.

court to determine what is a reasonable time for giving notice,[61] or the sufficiency, in itself, of a written notice.[62] Others have held them to be pure questions of fact.[63] Whether notice has been actually received or not is a question of fact to be submitted to the jury upon the whole evidence.[64]

(II) *Waiver.* Whether the facts and circumstances proved amount to a waiver of notice of dishonor is not a matter of law but of fact.[65]

l. Usury. The question whether certain facts existed invalidating a bill for usury is for the jury.[66]

m. Cancellation, Revocation, and Discharge. The cancellation or revocation of commercial paper is a question of fact to be submitted to the jury,[67] as is the discharge of a maker, drawer, or indorser, where it is not express, but by implication from facts.[68]

n. Alteration. Where it is pleaded in defense that the instrument has been altered, the intention with which the alteration was made, whether fraudulently or merely to correct a mistake, is a question for the jury.[69] So too where it is claimed that an alteration has been made by consent, the question whether it has been so made or not is for the jury.[70]

3. Producing Instrument For Inspection or Cancellation. Judgment cannot be rendered unless the instrument is filed or unless its non-production is accounted

See 7 Cent. Dig. tit. "Bills and Notes," § 1888.

61. *Illinois.*— Dickerson *v.* Derrickson, 39 Ill. 574.

Kentucky.— Noble *v.* Commonwealth Bank, 3 A. K. Marsh. (Ky.) 262; Lawrence *v.* Ralston, 3 Bibb (Ky.) 102.

Maryland.— Brooks *v.* Elgin, 6 Gill (Md.) 254; Philips *v.* McCurdy, 1 Harr. & J. (Md.) 187.

North Carolina.— Pons *v.* Kelly, 3 N. C. 204, 2 Am. Dec. 617 note.

Pennsylvania.— Bank of North America *v.* McKnight, 1 Yeates (Pa.) 145.

Tennessee.— Rosson *v.* Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

Virginia.— Brown *v.* Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Early *v.* Preston, 1 Patt. & H. (Va.) 228.

United States.— Columbia Bank *v.* Lawrence, 1 Pet. (U. S.) 578, 7 L. ed. 269.

England.— Gladwell *v.* Turner, L. R. 5 Exch. 59, 39 L. J. Exch. 3, 21 L. T. Rep. N. S. 674, 18 Wkly. Rep. 317; Darbishire *v.* Parker, 6 East 3, 2 Smith K. B. 195; Tindal *v.* Brown, 1 T. R. 167, 2 T. R. 186, 1 Rev. Rep. 171.

See 7 Cent. Dig. tit. "Bills and Notes," § 1888.

62. *Alabama.*— Stanley *v.* Mobile Bank, 23 Ala. 652.

Michigan.—Platt *v.* Drake, 1 Dougl. (Mich.) 296.

New York.—Ransom *v.* Mack, 2 Hill (N. Y.) 587, 38 Am. Dec. 602.

Ohio.— Townsend *v.* Lorain Bank, 2 Ohio St. 345.

Wisconsin.— Parkison *v.* McKim, 1 Pinn. (Wis.) 214.

See 7 Cent. Dig. tit. "Bills and Notes," § 1888.

63. *Louisiana.*— Nugent *v.* Mazange, 2 Mart. (La.) 264.

Pennsylvania.— Gurly *v.* Gettysburg Bank, 7 Serg. & R. (Pa.) 324.

South Carolina.— Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694; Scarborough *v.* Harris, 1 Bay (S. C.) 177, 1 Am Dec. 609.

United States.—Whitney *v.* Huntt, 5 Cranch C. C. (U. S.) 120, 29 Fed. Cas. No. 17,589.

England.— Harpham *v.* Child, 1 F. & F. 652.

See 7 Cent. Dig. tit. "Bills and Notes," § 1888.

64. Stanley *v.* Mobile Bank, 23 Ala. 652; Stewart *v.* Allison, 6 Serg. & R. (Pa.) 324, 9 Am. Dec. 433.

65. Lary *v.* Young, 13 Ark. 401, 58 Am. Dec. 332; Carmichael *v.* Pennsylvania Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408; Axford *v.* Thompson, 3 Del. Co. (Pa.) 554; Union Bank *v.* Magruder, 7 Pet. (U. S.) 287, 8 L. ed. 687. *Contra*, Orear *v.* McDonald, 9 Gill (Md.) 350, 52 Am. Dec. 703; Wilson *v.* Huston, 13 Mo. 146, 53 Am. Dec. 138.

66. Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668; Burt *v.* Gwinn, 4 Harr. & J. (Md.) 507. And see, generally, Usury.

67. Stockton *v.* Graves, 10 Ind. 294; Ulrich *v.* Hower, 156 Pa. St. 414, 33 Wkly. Notes Cas. (Pa.) 17, 27 Atl. 243; Rees *v.* Jackson, 64 Pa. St. 486, 3 Am. Rep. 608.

68. Wilson *v.* Lenox, 1 Cranch (U. S.) 196, 2 L. ed. 79.

69. Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43; Bowers *v.* Jewell, 2 N. H. 543; Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775; Atwood *v.* Griffin, 2 C. & P. 368, R. & M. 425, 31 Rev. Rep. 669, 12 E. C. L. 622. See also Alterations of Instruments, 2 Cyc. 257, note 100.

70. Bowers *v.* Jewell, 2 N. H. 543; Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438; Semple *v.* Cole, 3 Jur. 268. See also Alterations of Instruments, 2 Cyc. 257, note 99.

for and indemnity given to the parties liable thereon.[71] It has, however, been held that if a note has never been indorsed and is in fact lost, recovery thereon will not be defeated because of its non-production at the trial.[72]

4. INSTRUCTIONS. It is the duty of the court to instruct the jury as to the law applicable to the issues raised by the pleadings.[73] So it has been held that the jury

71. *Alabama.*— Bird *v.* Daniel, 9 Ala. 302.
Illinois.— Dowden *v.* Wilson, 71 Ill. 485; Hodgen *v.* Latham, 30 Ill. 188; Mason *v.* Buckmaster, 1 Ill. 27.
Iowa.— Brandt *v.* Foster, 5 Iowa 287.
Maine.— See Perkins *v.* Cushman, 44 Me. 484, where it was held that in an action on a promissory note, where the note itself is not produced, the proof must show the existence of a note corresponding to the one set forth in the declaration.
Minnesota.— Armstrong *v.* Lewis, 14 Minn. 406.
Mississippi.— Pipes *v.* Norton, 47 Miss. 61.
Missouri.— Brooks *v.* Mastin, 69 Mo. 58; Bank of Commerce *v.* Hoeber, 8 Mo. App. 171.
New Jersey.— Vanauken *v.* Hornbeck, 14 N. J. L. 178, 25 Am. Dec. 509.
New York.— Clift *v.* Moses, 112 N. Y. 426, 20 N. E. 392, 21 N. Y. St. 777; Van Alstyne *v.* National Commercial Bank, 4 Abb. Dec. (N. Y.) 449.
North Carolina.— Shields *v.* Whitaker, 82 N. C. 516; Morrow *v.* Allman, 65 N. C. 508.
Ohio.— Burridge *v.* Geauga Bank, Wright (Ohio) 688.
Texas.— Armstrong *v.* Lipscomb, 11 Tex. 649. See also Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848, where it was held that where suit has been brought on a note it is not error for the court to grant a motion requiring plaintiff to file the note for the inspection of defendant, who has denied in his answer the signature of the note.
United States.— Morgan *v.* Reintzel, 7 Cranch (U. S.) 273, 3 L. ed. 340; Palmer *v.* Blight, 2 Wash. (U. S.) 96, 18 Fed. Cas. No. 10,684.
Compare Diven *v.* Spicer, 1 Kan. 103, holding that an allegation in a petition of the existence of a note, if not denied, is to be taken as true; and there being no issue upon its existence, plaintiff is not bound to produce it for inspection.
See 7 Cent. Dig. tit. "Bills and Notes," §§ 1584–1586.

Attachment to declaration sufficient.— In an action against the indorser of a dishonored promissory note, plaintiff proved a consideration and rested. The note was attached to the declaration filed in the case and on the cross-examination of defendant's witnesses was produced and proved. It was held that a judgment for plaintiff would not be disturbed on the ground that he had not produced the note. Harmon *v.* Moffitt, 6 D. C. 297.

The payee of the first bill of a set of exchange, the third bill of which is still out and purports to bear his signature, cannot recover of the drawer without producing or accounting for the third bill or showing that payment to him will wholly exonerate the drawer. Foltier *v.* Schroder, 19 La. Ann. 17, 92 Am. Dec. 521. But see Downes *v.* Church, 13 Pet. (U. S.) 205, 10 L. ed. 127, where it was held that in an action on a foreign bill of exchange drawn in parts, the holder of the second of the set, which had been protested for non-acceptance, was entitled to recover thereon without producing the first of the set or accounting therefor.

72. O'Neil *v.* O'Neil, 123 Ill. 361, 14 N. E. 844.

73. *Alabama.*— Turnley *v.* Black, 44 Ala. 159; Cowan *v.* Harper, 2 Stew. & P. (Ala.) 236.
Connecticut.— Pottle *v.* Thomas, 12 Conn. 565.
Illinois.— Keith *v.* Mafit, 38 Ill. 303.
Indiana.— Olds Wagon-Works *v.* Combs, 124 Ind. 62, 24 N. E. 589.
Maryland.— Lewis *v.* Kramer, 3 Md. 265.
Michigan.— Wolf *v.* Troxell, 94 Mich. 573, 54 N. W. 383.
Nebraska.— Galloway *v.* Hicks, 26 Nebr. 531, 42 N. W. 709.
Vermont.— Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697.
See, generally, TRIAL; and 7 Cent. Dig. tit. "Bills and Notes," § 1895 *et seq.*

Fraud.— Where fraud is set up in defense to an action on a bill of exchange or promissory note, it is the duty of the court, leaving the facts to the consideration of the jury, fully to instruct them as to the elements of fraud and as to its effect in the consideration of the instrument or in plaintiff's manner of obtaining it. Shepard *v.* Hall, 1 Conn. 329; Bowser *v.* Spiesshofer, 4 Ind. App. 348, 30 N. E. 942. Where, however, the only defenses are fraud and want of consideration, it is proper to charge that to defeat plaintiff's recovery it must appear that the payee obtained the note sued on through fraud as alleged, and that plaintiff had notice thereof before he bought the note. Richards *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301.

Where there is no evidence to rebut the presumption of ownership raised by the production on the trial of a note whose execution and indorsement are not questioned, it is error to refuse an instruction to that effect (Applegarth *v.* Tillery, 105 N. C. 407, 11 S. E. 509); but if the issue can be determined without any special instruction as to the law of ownership, it is error for the court to neglect to instruct the jury as to that law or as to what facts will constitute ownership (Barnes *v.* Peet, 77 Mich. 391, 43 N. W. 1025).

should be instructed as to what constitutes a sufficient demand of payment and notice of dishonor.[74]

5. VERDICT. A general verdict by the jury is sufficient. It is unnecessary for them to include specifically the various items aggregating the gross sum.[75]

6. JUDGMENT — a. By Default — (I) *IN GENERAL.* Judgment for plaintiff by default cannot be entered if a plea in bar has been filed and not disposed of.[76] A judgment by default final may be rendered, however, without the intervention of a jury to assess the damages.[77]

(II) *PROOF NECESSARY.* It is not necessary for plaintiff, on default, to prove the execution of the note sued on[78] or his ownership of it.[79] He must, however, produce it, or account for its absence.[80]

74. *Alabama.*— See Stewart *v.* Russell, 38 Ala. 619.

Florida.— Marks *v.* Boone, 24 Fla. 177, 4 So. 532.

Georgia.— Anthony *v.* Pitman, 66 Ga. 701.

Iowa.—Abbott *v.* Striblen, 6 Iowa 191.

Maryland.—Atwell *v.* Grant, 11 Md. 101; Nailor *v.* Bowie, 3 Md. 251.

Mississippi.— Harrison *v.* Crowder, 6 Sm. & M. (Miss.) 464, 45 Am. Dec. 290; Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63.

Pennsylvania.— Cabarga *v.* Seeger, 17 Pa. St. 514.

Tennessee.—Caruthers *v.* Harbert, 5 Coldw. (Tenn.) 362, 98 Am. Dec. 421; Farmers', etc., Bank *v.* Harris, 2 Humphr. (Tenn.) 311.

See 7 Cent. Dig. tit. "Bills and Notes," § 1903.

75. Abbott *v.* Curtis, etc., Mfg. Co., 25 Fed. 402. See also Lear *v.* Smith, Litt. Sel. Cas. (Ky.) 122.

76. McCoy *v.* Harrell, 40 Ala. 232; Crow *v.* Decatur Bank, 5 Ala. 249. See also Cummings *v.* Wallace, 4 Heisk. (Tenn.) 102, where it was held that granting a motion to strike out two of three pleas filed in an action on a note, and to enter a judgment by default, one plea remaining, which might have sustained a verdict, was erroneous.

Several defendants.— If several parties be joined in an action, some appear and plead, and there be judgment by default against others, this judgment cannot be rendered final against those who do not plead and continued as to the rest. Chapman *v.* Arrington, 3 Stew. (Ala.) 480. But where, in an action against the makers and indorsers of a promissory note, which the indorser alone defended, there was a verdict for plaintiff, judgment can be rendered against all the defendants, on an assessment of damages against the makers. Ellison *v.* Marquette Circuit Judge, 41 Mich. 222, 49 N. W. 925.

77. Henderson *v.* Howard, 2 Ala. 342; Randolph *v.* Parish, 9 Port. (Ala.) 76; Malone *v.* Hathaway, 3 Stew. (Ala.) 29; Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537.

78. *Alabama.*— Ledbetter, etc., Land, etc., Assoc. *v.* Venton, 108 Ala. 644, 18 So. 692.

Indiana.— Runnion *v.* Crane, 4 Blackf. (Ind.) 466.

Kentucky.—Gill *v.* Johnson, 1 Metc. (Ky.) 649.

Louisiana.— Kearney *v.* Fenner, 14 La. Ann. 870.

New York.— Maples *v.* Mackey, 15 Hun (N. Y.) 533.

United States.— Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 3 L. ed. 317.

See 7 Cent. Dig. tit. "Bills and Notes," § 1922.

Proof on writ of inquiry.— In an action upon a promissory note, the same proof of the cause of action is required, upon the execution of a writ of inquiry, as upon the trial of an issue. Spann *v.* Golden, 1 Brev. (S. C.) 300.

In Kansas, by statute, judgment may be rendered for the amount claimed without the introduction of any evidence. Cooper *v.* Brinkman, 38 Kan. 442, 17 Pac. 157.

79. Gill *v.* Johnson, 1 Metc. (Ky.) 649; Wilcox *v.* Sweet, 24 Mich. 355; Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537. But see Nowlin *v.* Rand, (Miss. 1891) 8 So. 511, holding that if a note is payable to the order of a third party, a judgment by default will be reversed on appeal where there is no indorsement and a consequent lack of legal title in plaintiff.

As to possession as evidence of ownership see *supra,* XIV, E, 1, d, (I).

Proof of indorsement.— A judgment by default taken in a suit on a note by a party claiming the ownership of it by the blank indorsement of the payee does not relieve plaintiff from the necessity of proving the indorsement. Collins *v.* McDonald, 14 La. Ann. 735.

80. Brandt *v.* Foster, 5 Iowa 287. See also Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 218, 3 L. ed. 317; Farmers' Bank *v.* Lloyd, 2 Cranch C. C. (U. S.) 411, 8 Fed. Cas. No. 4,661, which hold that upon executing a writ of inquiry in an action upon a promissory note it is necessary to produce a note corresponding with that stated in the declaration.

As to production of note for inspection and cancellation generally see *supra,* XIV, F, 3.

On a retrial of a defaulted action on a promissory note, the note need not be again introduced in evidence, if it be found that the alleged defense does not exist. Morton *v.* Coffin, 29 Iowa 235.

(III) *MATTERS ADMITTED.* Where judgment is taken by default, the material and traversable allegations of plaintiff's pleadings must be taken to be true.[81]

b. Capacity in Which Judgment May Be Rendered Against Obligors. Statutes in some states provide, where one of the parties sued is a principal and the other is a surety, for the rendition of judgment against each defendant in the capacity in which he signed.[82] Where this is true, an execution issued on the judgment should require the officer to exhaust the property of the maker before levying on that of a surety or indorser.[83]

c. Joint or Separate Judgments. At common law there must be a recovery against all or none of those declared against,[84] unless some defendant has shown a defense personal to himself, not affecting the original joint liability;[85] but by

81. Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599.

Admission of liability.— A judgment by default, in an action on a promissory note, is an admission of the cause of action, and defendant's liability to the amount of the note, unless it appear by the note that part of it has been paid. Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282. See also Lanueau *v.* Ervin, 12 Rich. (S. C.) 31; Trabue *v.* Stonum, 20 Tex. 453.

Immaterial allegations.—Allegations which are not material or traversable cannot be taken to be true. Accordingly the days alleged when a bill was presented and the notice of protest given may be proved to be different from those alleged. Brown *v.* Hall, 2 A. K. Marsh. (Ky.) 599; Jackson *v.* Henderson, 3 Leigh (Va.) 196.

Rate of interest.— Where the petition claims only legal interest, a default admits no more, and if the note, proved before the clerk to enable him to assess damages, stipulates for a higher rate, and the clerk assesses the interest at such higher rate, the judgment will be reversed *pro tanto*. Graves *v.* Farquhar, 20 Tex. 455.

82. Carlton *v.* White, 99 Ga. 384, 27 S. E. 704; Rose *v.* Madden, 1 Kan. 445; Kupfer *v.* Sponhorst, 1 Kan. 75; Smead *v.* Burnet, 1 Handy (Ohio) 271, 12 Ohio Dec. (Reprint) 137; Hennessy *v.* Masterson, 12 R. I. 303. But see Foote *v.* Sprague, 13 Kan. 155, holding that in an action on a promissory note against two persons, who executed the note apparently as joint principals, but who were in fact one a principal and the other his surety, and where the pleadings show this fact and the petition asks for a judgment against the surety only as a surety, and no issue is made upon the subject, and the surety does not ask the court to render a judgment against himself only as a surety, and it does not seem that the attention of the court was ever called to the fact that the surety was only a surety, it is not error for the court to render judgment against the makers of the note as though they were both principals. See, generally, PRINCIPAL AND SURETY.

Conditions precedent.—A surety who would avail himself of the provision of the statute authorizing him to be certified as such in the records of the judgment must make his demand at the time the judgment is entered. Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

Insolvency of maker.— It is no ground of objection on the part of an indorser that judgment was rendered against both himself and the maker as principals, where it was shown that the maker was insolvent at the date of the note. Williams *v.* Planters', etc., Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. 617.

83. Hennessy *v.* Masterson, 12 R. I. 303. But see Dickerson *v.* Turner, 12 Ind. 223, holding that in an action on a bill of exchange, an admission out of court by the drawer thereof that the other defendant in the case was the principal drawer of the bill, will not authorize an order to the sheriff to satisfy an execution first out of the goods of the alleged principal drawer.

84. *Illinois.*— Howell *v.* Barrett, 8 Ill. 433; Kimmell *v.* Weil, 95 Ill. App. 15.

Indiana.— Goodlet *v.* Britton, 6 Blackf. (Ind.) 500; Davis *v.* Graniss, 5 Blackf. (Ind.) 79.

Kentucky.— Buford *v.* McDaniel, 1 A. K. Marsh. (Ky.) 426; Long *v.* Carlyle, 1 A. K. Marsh. (Ky.) 401.

New York.— Genesee Bank *v.* Field, 19 Wend. (N. Y.) 643.

Pennsylvania.— Foster *v.* Collner, 107 Pa. St. 305.

See 7 Cent. Dig. tit. "Bills and Notes," § 1929.

In a suit against joint indorsers, there must be a judgment against all or none. Seligman *v.* Gray, 66 Mich. 341, 33 N. W. 510 [*citing* Anderson *v.* White, 39 Mich. 130; Anderson *v.* Robinson, 38 Mich. 407; Mace *v.* Page, 33 Mich. 38; Ballou *v.* Hill, 23 Mich. 60; Winslow *v.* Herrick, 9 Mich. 380].

Service upon one defendant.—A judgment against the maker and indorser of a note will be reversed as to both where one of them was not served with process. Covenant Mut. L. Ins. Co. *v.* Clover, 36 Mo. 392. See also Church *v.* Edson, 39 Mich. 113.

Severance as to one defendant.—Where the holder of a joint and several note sues all the makers he cannot sever and take judgment against one only. Platner *v.* Johnson, 3 Hill (N. Y.) 476; Genesee Bank *v.* Field, 19 Wend. (N. Y.) 643.

85. Kimmell *v.* Weil, 95 Ill. App. 15.

statute in some states judgment may be rendered, if plaintiff recovers, against such one or more of defendants as are found liable to him,[86] and the cause may be continued as to the others.[87] Statutes too sometimes authorize a joint and several judgment to be rendered on a joint note,[88] but a joint judgment against the surviving maker of a note and the personal representatives of the other maker cannot be sustained.[89]

d. Kind of Money in Which Judgment Should Be Rendered. If by its terms a note is payable in gold it is proper for the court to render judgment for gold.[90] It has also been held that if a note is payable in a particular kind of currency, a general money judgment for the amount of the note is erroneous.[91]

e. When Judgment Is Authorized by Verdict or Findings. The technical phraseology of a verdict is immaterial if the intention of the jury is clearly evi-

Coverture.—Where one of two joint makers sued on a note establishes a defense on the ground of coverture judgment may be rendered against the other. McGuire *v.* Johnson, 2 Lans. (N. Y.) 305.

Infancy.— In a suit against three on a joint note made by them, where one is discharged on his plea of infancy, judgment may be rendered against the other two in the same suit. Coe *v.* Hamilton, Morr. (Iowa) 319.

86. *Alabama.*— Burns *v.* Moore, 76 Ala. 338, 52 Am. Rep. 332.

Illinois.— Schoepfer *v.* Tommack, 97 Ill. App. 562; Kimmell *v.* Weil, 95 Ill. App. 15.

Missouri.— McCoy *v.* Green, 83 Mo. 626.

Virginia.— Muse *v.* Farmers' Bank, 27 Gratt. (Va.) 252; Raine *v.* Rice, 2 Patt. & H. (Va.) 529.

Wisconsin.— Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521; Van Ness *v.* Corkins, 12 Wis. 186.

See 7 Cent. Dig. tit. "Bills and Notes," § 1929.

The effect of such statutes is that if suit be brought against parties severally liable upon a bill of exchange or a promissory note payable in money and part of the defendants are defaulted judgment may be at once entered against them, and the suit shall thereby be severed, and shall thereafter proceed to trial against the other defendants in the same manner as if it had been commenced against such remaining defendants only, and at the conclusion of such trial plaintiff may have another judgment in said cause against any other defendant or defendants found liable upon the trial; but plaintiff shall in no event be entitled to more than one satisfaction. Schoepfer *v.* Tommack, 97 Ill. App. 562; Kimmel *v.* Weil, 95 Ill. App. 15.

87. Smith *v.* Coopers, 9 Iowa 376; Bussing *v.* Scott, 7 Ohio Dec. (Reprint) 252, 2 Cinc. L. Bul. 18.

Action against maker and guarantor.— In an action on a note against the maker and the guarantors of payment plaintiff may enter a several judgment on a verdict against the maker without waiting until the trial of the issues with the other defendants. Bank of Commerce *v.* Smith, 57 Minn. 374, 59 N. W. 311.

Dismissal as to one defendant.— The cause may be dismissed as to one defendant maker and judgment taken against the other. Young *v.* Brown, 10 Iowa 537; Nevbitt *v.* Natchez Steam Packet Co., 5 How. (Miss.) 196. So in an action against several makers or indorsers of a note it is competent for plaintiff to discontinue as to one not served and take judgment against the residue. Smith *v.* Robinson, 11 Ala. 270; Harrison *v.* Agricultural Bank, 2 Sm. & M. (Miss.) 307. But see Austell *v.* McLarin, 51 Ga. 467, holding that in an action on a joint and several promissory note against two persons who lived in different counties, a judgment against the non-resident defendant alone is improper.

88. Kuykendall *v.* Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748.

Objection by one defendant to judgment against another.— One defendant cannot object to a judgment rendered against another defendant. Jackson *v.* Marshall, 6 Tex. 324. See also East Haddam Bank *v.* Shailor, 20 Conn. 18, to the effect that where the holder of a note discounted it on the representation that three indorsers were jointly interested in its proceeds, when in fact one of them was agent only for the others, the two interested cannot object to a joint judgment against all on the ground of the agent's want of interest.

89. Nelson *v.* Humes, 12 Ill. App. 52. See also Churchill *v.* Trapp, 3 Abb. Pr. (N. Y.) 306, holding that where the executor of an indorser is jointly sued with the maker separate judgments must be entered against them.

90. Belloc *v.* Davis, 38 Cal. 242; Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; Smith *v.* Wood, 37 Tex. 616. See also Scott *v.* Call, 1 Wash. (Va.) 115, holding that on a note stipulating for the payment of so many pounds in sterling money, judgment must be rendered in such money, and not in its value in current money.

Gold or currency.— Where the maker of a note payable "in gold, or its equivalent in United States currency," fails to make a tender in currency, and suit is brought against him, judgment may be rendered for the amount in gold as a liquidated demand. Bridges *v.* Reynolds, 40 Tex. 204.

91. Mitchell *v.* Waring, 4 J. J. Marsh. (Ky.) 233.

dent, and the clerk should enter judgment in accordance with that intention.[92] A general verdict for plaintiff, coupled with a special finding which would render the instrument invalid in the hands of the original payee, will support a judgment for plaintiff.[93] A defective statement of a good defense will be aided by a verdict for defendant, and the court is not justified in ordering a judgment for plaintiff *non obstante veredicto* unless defendant's pleadings be totally defective in some essential particular.[94]

f. When Should Include Interest. In a judgment on a note bearing interest the interest should be computed and made a part of the judgment,[95] provided plaintiff has demanded judgment for interest in his pleading.[96]

g. Enforcement of Judgment. The purchaser of a note, upon which he has obtained a judgment against the maker, is not precluded from seeking satisfaction of the judgment by reason of the fact that he has not paid for the note.[97] If it is stipulated that the principal shall become due in default of payment of any instalment of interest, a judgment for principal and interest may be enforced *instanter*, and plaintiff is not restricted to taking out execution, as the several instalments of interest would have become due in case of no default.[98]

G. Amount Recoverable — 1. General Measure of Damages — a. Rule Stated. Aside from reëxchange[99] or statutory damages in lieu thereof, the face value of the bill or note,[1] including principal and interest, is generally the measure

92. McGregor *v.* Armill, 2 Iowa 30; Loggins *v.* Buck, 33 Tex. 113.

Absence of finding as to amount of recovery.— No judgment can be entered upon a general verdict for plaintiff in which there is no finding of the amount of recovery. Burghart *v.* Brown, 60 Mo. 24. But see Cooper *v.* Poston, 1 Duv. (Ky.) 92, 85 Am. Dec. 610, holding that where the pleadings and contract show the amount which plaintiff is entitled to recover, it is the duty of the court to render judgment therefor on a general verdict for plaintiff.

93. Salander *v.* Lockwood, 66 Ind. 285.

A special verdict that defendant executed the note, and that plaintiff purchased it before maturity in due course of business, without knowledge of any defense thereto, is sufficient to warrant a judgment for plaintiff. Sprinkle *v.* Taylor, 1 Ind. App. 74, 27 N. E. 122. But in an action by an indorsee against the maker, where the defense is such as would render the note invalid in its inception as between the original parties, a general verdict for defendant, coupled with a special finding that plaintiff had purchased the note before its maturity for a valuable consideration and without any notice or knowledge of any defense thereto, will not support a judgment for defendant. Bremmerman *v.* Jennings, 61 Ind. 334.

Where the ownership of the note is in issue, a special verdict finding the amount due and the date of the loan, without any finding as to plaintiff's ownership of the note, will not support a judgment for plaintiff. Pumphrey *v.* Walker, 75 Iowa 408, 39 N. W. 671.

94. Andros *v.* Childers, 14 Oreg. 447, 13 Pac. 65.

95. *California*— Emeric *v.* Tams, 6 Cal. 155; Guy *v.* Franklin, 5 Cal. 416.

Delaware.— Connoway *v.* Spicer, 1 Houst. (Del.) 274.

Indiana.— Stanton *v.* Woodcock, 19 Ind. 273.

Kentucky.— Kelly *v.* Smith, 1 Metc. (Ky.) 313; Knox *v.* Atterberry, 3 Dana (Ky.) 580.

Texas.— Fisk *v.* Holden, 17 Tex. 408.

As to interest as part of amount recoverable see *infra*, XIV, G, 4.

Interest is to be reckoned in the same currency in which the principal is payable.—Holt *v.* Given, 43 Ala. 612; Billingsley *v.* Billingsley, 24 Ala. 518; Ijams *v.* Rice, 17 Ala. 404.

Where there is error in the amount of a judgment, due to a miscalculation of the interest due, it may be reformed on the motion of the aggrieved party even in an appellate court. Buchtel *v.* Mason, 67 Mich. 605, 35 N. W. 172.

96. Hubbard *v.* Blow, 4 Call (Va.) 224; Brooke *v.* Gordon, 2 Call (Va.) 212.

Under an old statute in Virginia judgment might be entered and execution issued for interest, although it was not demanded in the declaration. Baird *v.* Peter, 4 Munf. (Va.) 76.

97. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694.

Separate executions against maker and indorser.— The holder of an indorsed note after demand, non-payment, and notice to the indorser, may recover separate judgments against the maker and indorser, and may sue out several executions on the judgments recovered, although he is entitled to but one satisfaction. Columbia Bank *v.* Ross, 4 Harr. & M. (Md.) 456.

98. Ausem *v.* Byrd, 6 Ind. 475.

99. See *infra*, XIV, G, 5.

1. **A note is prima facie evidence of the amount due to the payee,** and throws upon the maker the burden of showing that less is due than the sum named in the note. Carpenter *v.* Joliet First Nat. Bank, 119 Ill. 352, 10 N. E. 18.

of damages which is recoverable in an action on the bill or note by the holder thereof.[2]

b. Applications and Qualifications of Rule—(I) *In General.* Where therefore negotiable paper has been put in circulation, and there is no infirmity or defense between the antecedent parties thereto, a purchaser is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid for it.[3] On the other hand where it is shown that a note was given as indemnity against a contingent loss, the damages recoverable between the original parties will be limited to the amount of the actual loss.[4]

(II) *After Judgment Against Maker.* In an action against the indorser of a note, judgment having been obtained against the maker, the measure of damages is the amount of the judgment against the maker and the accrued interest and costs.[5]

(III) *In Action by Bona Fide Holder.* Where a negotiable instrument which is void as between the original parties reaches the hands of a *bona fide* holder for value before maturity, so as to exempt it in his hands from the infirmities to which it is subject as between the original parties, all that the holder can recover on it is what he or some prior holder through whom he derives his title paid for it with interest and costs.[6]

The amount of a note is prima facie evidence that this was the price paid for it upon assignment, but the assignor may show that the real price he received was less than the face of the note. Puterbaugh *v.* Hammond, 106 Ill. 257; Shaeffer *v.* Hodges, 54 Ill. 337; Foust *v.* Gregg, 68 Ind. 399; Black *v.* Duncan, 60 Ind. 522; Youse *v.* McCreary, 2 Blackf. (Ind.) 243; Smallwood *v.* Woods, 1 Bibb (Ky.) 542.

2. *Alabama.*— Kennedy *v.* Young, 25 Ala. 563.

Colorado.— Dunn *v.* Ghost, 5 Colo. 134.

District of Columbia.— Schuehardt *v.* Thornton, 6 D. C. 294.

Indiana.— Moore *v.* Moore, 68 Ind. 152; Zehner *v.* Kepler, 16 Ind. 290.

Kansas.— St. Louis, etc., R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303.

Nevada.— Barber *v.* Gillson, 18 Nev. 89, 1 Pac. 452.

New York.— Hartnett *v.* Adler, 15 Daly (N. Y.) 69, 2 N. Y. Suppl. 713, 19 N. Y. St. 798; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

Texas.— Petri *v.* Fond du Lac First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657, 84 Tex. 212, 20 S. W. 777.

Washington.— McNamara *v.* Jose, 28 Wash. 461, 68 Pac. 903.

United States.— U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517.

See 7 Cent. Dig. tit. "Bills and Notes," § 1935.

3. *Indiana.*—Murphy *v.* Lucas, 58 Ind. 360.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140.

Massachusetts.— Fowler *v.* Strickland, 107 Mass. 552; Babson *v.* Webber, 9 Pick. (Mass.) 163.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Baker *v.* Arnold, 3 Cai. (N. Y.) 279.

Ohio.— Baily *v.* Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Kitchen *v.* Loudenback, 3 Ohio Cir. Ct. 228.

Pennsylvania.— Moore *v.* Baird, 30 Pa. St. 138.

Texas.— Petri *v.* Fond du Lac Nat. Bank, 84 Tex. 212, 20 S. W. 777; Denton Lumber Co. *v.* Fond du Lac First Nat. Bank, (Tex. 1892) 18 S. W. 962.

Wisconsin.— Bange *v.* Flint, 25 Wis. 544.

United States.— Wade *v.* Chicago, etc., R. Co., 149 U. S. 327, 13 S. Ct. 892, 37 L. ed. 755; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Chillicothe Branch Ohio State Bank *v.* Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683.

England.— Reid *v.* Furnival, 5 C. & P. 499, 1 Cr. & M. 538, 2 L. J. Exch. 199, 24 E. C. L. 675; Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737; *Ex p.* Lee, 1 P. Wms. 782, 24 Eng. Reprint 614; Johnson *v.* Kennion, 2 Wils. C. P. 262.

See 7 Cent. Dig. tit. "Bills and Notes," § 1935.

4. Colman *v.* Post, 10 Mich. 422, 82 Am. Dec. 49; Rogers *v.* Smith, 47 N. Y. 324.

Where a premium note is given for an ordinary open policy, the maker is not liable beyond the earned premium, while the note remains in the possession of the corporation to which it was given. Maine Mut. Mar. Ins. Co. *v.* Stockwell, 67 Me. 382; Maine Mut. Mar. Ins. Co. *v.* Farrar, 66 Me. 133.

5. Watson *v.* Hahn, 1 Colo. 385; Corgan *v.* Frew, 39 Ill. 31, 89 Am. Dec. 286.

6. *Alabama.*— Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668.

Arkansas.— Smith *v.* Corege, 53 Ark. 295, 14 S. W. 93.

Maine.— French *v.* Grindle, 15 Me. 163.

New Jersey.— Holcomb *v.* Wyckoff, 35 N. J. L. 35, 10 Am. Rep. 219; Allaire *v.*

(iv) *In Action by Indorsee.* While an indorsee may recover the full amount of the note against the maker[7] or against the indorser if he has paid full value for it[8] an indorsee can recover from his immediate indorser no more than he actually paid for the note, with lawful interest thereon.[9]

(v) *In Action by Payee Holding Collateral Security.* A payee who holds collateral security for the debt evidenced by a note[10] is entitled to judgment for the full amount of the note against the indorser, notwithstanding his collateral security.[11]

(vi) *Where Credits Are Indorsed.* If credits are indorsed on a note these of course must be allowed in estimating the amount for which judgment should be entered.[12]

2. Party Entitled to Damages.[13] The damages recoverable on a protested bill belong to the party at whose risk and expense the bill was remitted,[14] and the

Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158.

New York.— Perry *v.* Council Bluffs City Waterworks Co., 67 Hun (N. Y.) 456, 22 N. Y. Suppl. 151, 51 N. Y. St. 326; Todd *v.* Shelbourne, 8 Hun (N. Y.) 510; Huff *v.* Wagner, 63 Barb. (N. Y.) 215.

Pennsylvania.— Beckhaus *v.* Commercial Nat. Bank, (Pa. 1888) 12 Atl. 72.

Tennessee.— Oppenheimer *v.* Farmers', etc., Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, 33 L. R. A. 767; Green *v.* Stuart, 7 Baxt. (Tenn.) 418; Petty *v.* Hannum, 2 Humphr. (Tenn.) 102, 36 Am. Dec. 303.

Paper fraudulently transferred.— A party will be protected as holder of negotiable paper, although fraudulently transferred, when he has received it before maturity, without notice of the fraud, and in good faith, to the extent of the consideration paid for it. Moore *v.* Ryder, 65 N. Y. 438; Farmers', etc., Nat. Bank *v.* Noxon, 45 N. Y. 762; Park Bank *v.* Watson, 42 N. Y. 490, 1 Am. Rep. 573; Hyman *v.* American Electric Forge Co., 18 Misc. (N. Y.) 381, 41 N. Y. Suppl. 655, 75 Am. St. Rep. 1041; Coddington *v.* Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342.

7. Ingalls *v.* Lee, 9 Barb. (N. Y.) 647; Cook *v.* Clark, 4 E. D. Smith (N. Y.) 213.

8. Fall River Nat. Bank *v.* Buffinton, 97 Mass. 498.

9. *Alabama.*— Hutchins *v.* McCann, 7 Port. (Ala.) 94; Cook *v.* Cockrill, 1 Stew. (Ala.) 475, 18 Am. Dec. 67.

California.— Coye *v.* Palmer, 16 Cal. 158.

Illinois.— Short *v.* Coffeen, 76 Ill. 245; Shaeffer *v.* Hodges, 54 Ill. 337; Raplee *v.* Morgan, 3 Ill. 561.

Indiana.— Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454; Schmied *v.* Frank, 86 Ind. 250; Foust *v.* Gregg, 68 Ind. 399.

Kentucky.— Hurst *v.* Chambers, 12 Bush (Ky.) 155; Short *v.* Trabue, 4 Metc. (Ky.) 299; Metcalf *v.* Pilcher, 6 B. Mon. (Ky.) 529.

Maine.— French *v.* Grindle, 15 Me. 163.

Missouri.— Whisler *v.* Bragg, 31 Mo. 124; Muldrow *v.* Agnew, 11 Mo. 616; Klunk *v.* O'Fallow, 1 Mo. 481.

Nebraska.— Faulkner *v.* White, 33 Nebr. 199, 50 N. W. 328.

New York.—Ingalls *v.* Lee, 9 Barb. (N. Y.) 647; Cram *v.* Hendricks, 7 Wend. (N. Y.) 569; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Braman *v.* Hess, 13 Johns. (N. Y.) 52; Brown *v.* Mott, 7 Johns. (N. Y.) 361; Livingston *v.* Hastie, 2 Cai. (N. Y.) 246.

Rhode Island.— Aldrich *v.* Jackson, 5 R. I. 218.

South Carolina.— Brock *v.* Thompson, 1 Bailey (S. C.) 322.

Tennessee.— May *v.* Campbell, 7 Humphr. (Tenn.) 450.

United States.— *In re* Many, 16 Fed. Cas. No. 9,054, 17 Nat. Bankr. Reg. 514.

England.— Wiffen *v.* Roberts, 1 Esp. 261, 5 Rev. Rep. 737.

See 7 Cent. Dig. tit. "Bills and Notes," § 640.

The holder can recover from an accommodation maker or indorser only the amount paid for the note, with interest and fees of protest. Cook *v.* Clark, 4 E. D. Smith (N. Y.) 213; Strathy *v.* Nicholls, 1 U. C. Q. B. 32.

The insolvent maker of an accommodation note can prove against the estate of the bankrupt payee only the amount of the dividend paid on the note by him. *In re* Sterling, 1 Fed. 167.

The purchaser of a note after due, from an indorser who has paid it, cannot recover upon the note out of a prior indorser, any more than his vendor paid upon it. Bethune *v.* McCrary, 8 Ga. 114.

10. Payee need not sell the collateral before suing on the note. Mauck *v.* Atlanta Trust, etc., Co., 113 Ga. 242, 38 S. E. 845; Sinclair *v.* Deekes, (Tex. Civ. App. 1897) 41 S. W. 107.

11. Trower Bros. Co. *v.* Hanson, 110 Fed. 611. And *compare* Fitch *v.* Kelly, 44 U. C. Q. B. 578.

12. Harland *v.* Kendricks, 19 Tex. 292; Holland *v.* Cook, 10 Tex. 244; Krueger *v.* Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087.

13. See also *infra*, XIV, G, 3.

14. Keppele *v.* Carr, 4 Dall. (Pa.) 155, 1 L. ed. 780.

holder of the bill is entitled to recover the statutory damages, although the bill is not returned to the place where it was drawn.[15] The indorser of a bill of exchange is not entitled to recover from the drawer the damages incurred by its non-acceptance unless he has been obliged to pay them or is liable to pay them.[16] The person to whom a bill is remitted for the purpose of paying a precedent debt cannot recover statutory damages against the remitter.[17] The same rule applies where the bill was given only as collateral security to an obligation of higher degree, such as a bottomry bond;[18] and where a foreign bill is transmitted to a correspondent abroad for collection, such correspondent cannot recover statutory damages against his principal, although the principal is indebted to him and is bankrupt.[19] But a person who pays a bill *supra protest* for the honor of the drawer or indorser becomes the holder of the bill and is entitled to recover statutory damages.[20]

3. PARTY LIABLE FOR DAMAGES[21] — a. In General. A bill of exchange in form, drawn on one government by another, is not, and cannot be, governed by the law merchant, and is not therefore subject to protest and consequential damages.[22]

b. Drawer. An accommodation accepter cannot recover against the drawer the costs of making a useless defense in an action against him by the holder.[23]

c. Accepter.[24] The accepter of a bill of exchange is not liable to the payee or indorsee for damages caused by non-payment, but only for the amount of the bill, with interest and costs of protest.[25] But where the drawer has been obliged to pay a bill with statutory damages, he may prove the whole amount against the estate of the accepter under a commission of bankruptcy.[26] The indorser cannot recover from the accepter the costs of an action brought against him by the indorsee.[27]

d. Maker. An indorser of a promissory note cannot recover against the maker the costs of a judgment recovered against him as indorser. His claim

15. Hazelhurst *v.* Kean, 4 Yeates (Pa.) 19.

16. Pratalongo *v.* Larco, 47 Cal. 378; Kingston *v.* Wilson, 4 Wash. (U. S.) 310, 14 Fed. Cas. No. 7,823.

17. Because in such case the bill was never taken in the usual course of trade, and the right of the party to whom the bill was remitted extends only to the receiving of the money due, or in case of non-payment, to returning the bill. Thompson *v.* Robertson, 4 Johns. (N. Y.) 27; Kenworthy *v.* Hopkins, 1 Johns. Cas. (N. Y.) 107; Hambro *v.* Casey, 110 U. S. 216, 3 S. Ct. 583, 28 L. ed. 125.

18. Hazelhurst *v.* Kean, 4 Yeates (Pa.) 19.

19. Hambro *v.* Casey, 110 U. S. 216, 3 S. Ct. 583, 28 L. ed. 125.

20. Pratalongo *v.* Larco, 47 Cal. 378. But where a bill is paid *supra protest*, for the honor of the drawer, he can recover from the drawee only the costs of protest for non-acceptance. New Orleans City Bank *v.* Girard Bank, 10 La. 562.

21. See also *supra*, XIV, G, 2.

22. U. S. *v.* U. S. Bank, 5 How. (U. S.) 382, 12 L. ed. 199. When this case was before the court the first time, the judges seemed to be of the opinion that the government was liable for statutory damages as the drawer of the bill which had been dishonored. U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 11 L. ed. 439, 453.

23. Beech *v.* Jones, 5 C. B. 696, 57 E. C. L. 696; Roach *v.* Thompson, 4 C. & P. 194, 19 E. C. L. 471.

But if he defends at the drawer's request, he may recover the costs of such defense from the drawer under a count for money paid. Garrard *v.* Cottrell, 10 Q. B. 679, 59 E. C. L. 678; Howes *v.* Martin, 1 Esp. 162; Stratton *v.* Mathews, 3 Exch. 48; Jones *v.* Brooke, 4 Taunt. 464.

24. The measure of damages for non-performance of an agreement to accept a draft for the accommodation of the drawer, which is still in his hands, is the loss occasioned by the inconvenience and not the amount of the draft. Ilsley *v.* Jones, 12 Gray (Mass.) 260.

25. Manning *v.* Kohn, 44 Ala. 343; Hanrick *v.* Farmers' Bank, 8 Port. (Ala.) 539; Fiske *v.* Foster, 10 Metc. (Mass.) 597; Bowen *v.* Stoddard, 10 Metc. (Mass.) 375.

Under an unqualified acceptance of a bill of exchange the accepter is liable only for interest, as on a promissory note, and not for statutory damages. Trammell *v.* Hudmon, 56 Ala. 235.

26. Francis *v.* Rucker, Ambl. 672, 27 Eng. Reprint 436.

27. Dawson *v.* Morgan, 9 B. & C. 618, 7 L. J. K. B. O. S. 301, 17 E. C. L. 278 (for the reason that there is no privity of contract between the indorser and accepter); Steele *v.* Sawyer, 2 McCord (S. C.) 459.

upon the maker is upon the note itself and not for money paid;[28] for it is not necessary for the indorser to stand a suit in order to fix the liability of the maker or accepter.[29]

e. Indorser. Although a bill be drawn by a citizen of a state on another citizen of the same state, an indorser in another state is liable to statutory damages upon the dishonor of the bill.[30] Where the holder of a note has been defeated in an action against the maker on the ground of some infirmity in the original contract, he may still recover on the note against the indorser, but he cannot recover the costs incurred in his action against the maker.[31]

f. Guarantor or Surety.[32] In an action against a guarantor the measure of damages is as a rule the sum promised to be paid and interest from the time it was payable;[33] and the measure of damages for breach of guaranty of the amount due on a note, there being no guaranty of payment or collectability, is what the plaintiff has lost by the breach, which is the value of the judgment if one had been recovered against the maker.[34] Although the contract of a surety is for the payment of the whole amount secured to be paid by the note, the courts will go behind the contract and limit the liability of the surety to the amount paid, with interest, where the note was purchased at a discount;[35] and the same rule applies in a suit against an accommodation indorser who is in effect a surety.[36]

4. INTEREST[37] — a. General Principles — (i) *CREATURE OF STATUTE.* Interest is purely a creature of the statute.[38] At common law interest is not due on money

28. *California.*— March *v.* Barnet, 114 Cal. 375, 46 Pac. 152.

Missouri.— Peers *v.* Kirkham, 46 Mo. 146; Fenn *v.* Dugdale, 31 Mo. 580.

New York.— Whitney *v.* Potsdam Nat. Bank. 45 N. Y. 303; Bliss *v.* Ball, 9 Johns. (N. Y.) 132.

North Carolina.— Buffalow *v.* Pipkin, 47 N. C. 130.

Pennsylvania.— Wynn *v.* Brooke, 5 Rawle (Pa.) 106.

South Carolina.— Steele *v.* Sawyer, 2 McCord (S. C.) 459.

29. Buffalow *v.* Pipkin, 47 N. C. 130.

30. Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639.

31. In Copp *v.* McDugall, 9 Mass. 1, it was held that where an action by the indorsee against the maker failed on the ground of usury, the indorser who was the original payee was liable without notice for the amount due on the note, but not for the costs of the indorsee's action against the maker.

But where the signature of the maker was a forgery, it was held that the indorser might recover from the payee the costs of an unsuccessful suit against the supposed maker. Whitney *v.* Potsdam Nat. Bank, 45 N. Y. 303.

32. See also, generally, GUARANTY; PRINCIPAL AND SURETY.

33. Cooper *v.* Page, 24 Me. 73, 41 Am. Dec. 371.

But this rule is not available to protect an usurious contract.— A sale of commercial paper at a discount with a guaranty of collection, where the real intention of the parties is a loan by the assignee to the assignor and guarantor, is subject to explanation by parol evidence, and the assignee's recovery may be limited to the consideration actually paid with lawful interest thereon. Rapelye *v.* Anderson, 4 Hill (N. Y.) 472; Mazuzan *v.* Mead, 21 Wend. (N. Y.) 285. Transactions like this have repeatedly been held usurious in England. Chapman *v.* Black, 2 B. & Ald. 588; Rex *v.* Ridge, 4 Price 50; Lowes *v.* Mazzaredo, 1 Stark. 385, 2 E. C. L. 149; Massa *v.* Dauling, 2 Str. 1243.

34. Head *v.* Green, 5 Biss. (U. S.) 311, 11 Fed. Cas. No. 6,292, 5 Chic. Leg. N. 423, 18 Int. Rev. Rec. 63, 5 Leg. Gaz. (Pa.) 247.

35. Cobb *v.* Titus, 10 N. Y. 198.

36. Bramhall *v.* Atlantic Nat. Bank, 36 N. J. L. 243; Cook *v.* Clark, 4 E. D. Smith (N. Y.) 213; Brown *v.* Mott, 7 Johns. (N. Y.) 361.

But an accommodation indorser who has been obliged to take up the note for his own protection, after its negotiation by the maker for full value, may recover the face value of the note from the maker, no matter what he may have paid for it. Fowler *v.* Strickland, 107 Mass. 552.

37. See, generally, INTEREST.

38. Pekin *v.* Reynolds, 31 Ill. 529, 83 Am. Dec. 244; New York City Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176. And see, generally, INTEREST.

By statute in England interest may be recovered on all written instruments payable at a time certain. 3 & 4 Wm. IV, c. 42, §§ 28, 29. And see Duncombe *v.* Brighton Club, etc., Co., L. R. 10 Q. B. 371, 44 L. J. Q. B. 216, 32 L. T. Rep. N. S. 863, 23 Wkly. Rep. 795 (Blackburn, J., dissenting), where it was held that this is construed to mean, not that the actual day of payment should be ascertained upon the face of the instrument, but that the basis of the calculation which is to

secured by a written instrument, unless it appears on the face of the instrument[39] that interest was intended to be paid, or unless it is implied from the usage of trade, as in the case of mercantile instruments.[40]

(II) *FAILURE TO PRESENT FOR PAYMENT.*[41] Failure to present a note for payment at the place it is made payable will relieve the maker from subsequent interest and damages, provided he had funds there at the time with which to make payment.[42]

(III) *INTEREST IN ADVANCE.* Where the interest is deducted in advance it is designated as discount.[43]

b. Parties Liable. The accepter[44] of a bill, the drawer,[45] and indorser[46] are all liable for interest.[47] A person who guarantees the due payment of a bill of exchange by the accepter is liable for interest upon it if it be not paid when due;[48] but an agreement to pay interest on a note by one not previously liable thereon raises no implied promise on his part to pay the principal of the note.[49] A joint maker of a note for the accommodation of the other maker and payee is liable for interest at the stipulated rate, although a lower rate has been recovered against his co-maker.[50]

make it certain should be found in the instrument.

39. If the interest is expressly or by necessary implication, specified on the face of the instrument, it must be governed by the terms of the contract itself. Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Page *v.* Newman, 9 B. & C. 378, 7 L. J. K. B. O. S. 267, 4 M. & R. 305, 17 E. C. L. 174; Keene *v.* Keene, 3 C. B. N. S. 144, 27 L. J. C. P. 88, 91 E. C. L. 144; Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555; Young *v.* Fluke, 15 U. C. C. P. 360; Montgomery *v.* Boucher, 14 U. C. C. P. 45; Howland *v.* Jennings, 11 U. C. C. P. 272; Crouse *v.* Park, 3 U. C. Q. B. 458.

40. 3 Randolph Comm. Pap. § 1704.

41. As to effect of failure to present generally see *supra*, X [7 Cyc. 959 *et seq.*].

42. Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568.

Rule explained.— But the fact that the maker has money in the bank where the note is payable amounts only to a tender, and does not relieve him from liability on the note, although the money may have been lost by the subsequent failure of the bank (Adams *v.* Hackensack Imp. Commission, 44 N. J. L. 638, 8 Am. Rep. 406); and where the maker of a note placed money in the hands of an agent to retire it and the agent tendered the money to the holder, but the note having been mislaid could not be delivered up, and the money was afterward lost through the bankruptcy of the agent, it was held that the maker was still liable on the note, but that interest was not recoverable after the time of the tender (Dent *v.* Dunn, 3 Campb. 296).

As to effect of tender to stop running of interest see TENDER.

43. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Pape *v.* Topeka Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; Niagara County Bank *v.* Baker, 15 Ohio St. 68.

Where a partial payment is made on a note payable at a future time without interest before its maturity, in the absence of any special agreement to that effect, the payee is not chargeable with interest on such payment. Parker *v.* Moody, 58 Me. 70; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

44. Where the accepter is entitled to have the bill presented for payment at a particular place, he is not liable for interest without proof of such presentment. Phillips *v.* Franklin, Gow 196.

45. The drawer of an inland bill of exchange is liable for interest without formal protest (Windle *v.* Andrews, 2 B. & Ald. 696, 2 Stark. 425, 3 E. C. L. 474), but only from notice of its dishonor, for he "cannot find out by inspiration who is the holder" (Mansfield, C. J., in Walker *v.* Barnes, 1 Marsh. 36, 5 Taunt. 240, 15 Rev. Rep. 655, 1 E. C. L. 131).

46. An indorser who has become liable to pay a note which bears interest payable annually is liable for the whole amount due, both principal and interest, although no demand was made for the annual interest as it became due, or if made no notice thereof was given to him. Howe *v.* Bradley, 19 Me. 31.

When the liability of an indorser has become fixed, the holder is entitled to interest as a matter of law, and the jury have no discretion but to allow it. Stumps *v.* Cooper, 3 Baxt. (Tenn.) 223.

47. Pilcher *v.* Banks, 7 B. Mon. (Ky.) 548; Windle *v.* Andrews, 2 B. & Ald. 696, 2 Stark. 425, 3 E. C. L. 474; Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444. And see Benjamin Chalm. Bills, art. 220; Chitty Bills 760; 2 Parsons Notes & B. 399.

48. Ackerman *v.* Ehrensperger, 16 L. J. Exch. 3, 16 M. & W. 99. See also, generally, GUARANTY.

49. Home Sav. Bank *v.* Mackintosh, 131 Mass. 489.

50. Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488.

c. Rate — (i) *Before Maturity.* Where one contracts to pay a principal sum at a certain future time with interest at a specified rate, the rate of interest prior to maturity is governed by the terms of the contract.[51]

(ii) *After Maturity* — (A) *Before Judgment* — (1) Where no Interest Has Been Reserved. If no interest is expressly reserved, the instrument will draw interest after maturity at the legal rate at its date.[52] But such interest is in the nature of damages for the detention of the debt, and is not recoverable by virtue of any provision in the contract.[53]

(2) Where Specified Rate Has Been Reserved — (a) Generally. According to one view, where a conventional rate of interest has been reserved before maturity, the instrument will draw merely the legal and not the conventional rate after maturity until paid, unless it provides in terms that the special rate shall continue after maturity.[54] But according to another line of decisions the instru-

51. O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64. And see, generally, Interest. And where one contracts to pay money on demand "with interest" or to pay money generally "with interest," without specifying time of payment or the rate of interest, the statutory rate then existing becomes the contract rate and must govern, at least until demand and actual default. O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64 [*citing* Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21; Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52].

52. *Connecticut.*— Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469; Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Indiana.— Godfrey *v.* Craycroft, 81 Ind. 476.

Kentucky.— Lee *v.* Davis, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746.

New Jersey.— Cox *v.* Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454.

Vermont.— Gage *v.* McSweeney, 74 Vt. 370, 52 Atl. 969.

53. *Georgia.* — Atkinson *v.* Lanier, 69 Ga. 460.

Massachusetts.— Ayer *v.* Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Eaton *v.* Mellus, 7 Gray (Mass.) 566; Barringer *v.* King, 5 Gray (Mass.) 9; Grimshaw *v.* Bender, 6 Mass. 157.

New York.—U. S. Bank *v.* Chapin, 9 Wend. (N. Y.) 471; Macomber *v.* Dunham, 8 Wend. (N. Y.) 550.

Pennsylvania.— Ludwick *v.* Huntzinger, 5 Watts & S. (Pa.) 51.

Utah.— Perry *v.* Taylor, 1 Utah 63.

United States.— Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301; Lanusse *v.* Barker, 3 Wheat. (U. S.) 147, 4 L. ed. 343.

England.— Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Higgins *v.* Sargent, 2 B. & C. 348, 3 D. & R. 613, 3 L. J. K. B. O. S. 33, 26 Rev. Rep. 379, 9 E. C. L. 158; Robinson *v.* Bland, 2 Burr. 1077; Webster *v.* British Empire Mut. L. Assur Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818; Ward *v.* Morrison, C. & M. 368, 41 E. C. L. 204; Watkins *v.* Morgan, 6 C. & P. 661, 25 E. C. L. 626; Hudson *v.* Fawcett, 2 D. & L. 81, 7 M. & G. 348, 13 L. J. C. P. 141, 8 Scott N. R. 32, 49 E. C. L. 348; Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 505; Matter of Burgess, 2 Moore C. P. 745, 8 Taunt. 660, 4 E. C. L. 323.

Canada.— Crouse *v.* Park, 3 U. C. Q. B. 458.

Interest or damages.— It has been held that judgment may be given for interest from the maturity of the note, or in damages, either mode being regular. Archer *v.* Morehouse, Hempst. (U. S.) 184, 30 Fed. Cas. No. 18,225.

54. *Alabama.*— Kitchen *v.* Mobile Branch Bank, 14 Ala. 233; Henry *v.* Thompson, Minor (Ala.) 209.

Arkansas.— Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121; Gardner *v.* Barnett, 36 Ark. 476; Woodruff *v.* Webb, 32 Ark. 612; Pettigrew *v.* Summers, 32 Ark. 571; Newton *v.* Kennerly, 31 Ark. 626, 25 Am. Rep. 592.

Connecticut.— Suffield First Ecclesiastical Soc. *v.* Loomis, 42 Conn. 570.

District of Columbia.— Sullivan *v.* Snell, 1 MacArthur (D. C.) 585.

Kansas.—Lacy *v.* Dunn, 5 Kan. 567; Searle *v.* Adams, 3 Kan. 515, 89 Am. Dec. 598; Robinson *v.* Kinney, 2 Kan. 184.

Kentucky.— White *v.* Curd, 86 Ky. 192, 9 Ky. L. Rep. 505, 5 S. W. 553; Rilling *v.* Thompson, 12 Bush (Ky.) 310; Rushing *v.* Sebree, 12 Bush (Ky.) 198; Gray *v.* Briscoe, 6 Bush (Ky.) 687; McNeil *v.* Watkins, 15 Ky. L. Rep. 780; Sinton *v.* Greer, 10 Ky. L. Rep. 1011, 11 S. W. 366.

Maine.—Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52; Duran *v.* Ayer, 67 Me. 145.

Michigan.— Sheldon *v.* Barlow, 108 Mich. 375, 66 N. W. 338.

Minnesota.— Moreland *v.* Lawrence, 23 Minn. 84; Lash *v.* Lambert, 15 Minn. 416, 2 Am. Rep. 142; Chapin *v.* Murphy, 5 Minn. 474.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Bennett *v.* Bates, 94 N. Y. 354; Ritter *v.* Phillips, 53 N. Y. 586; Bander *v.* Bander, 7 Barb. (N. Y.) 560; U. S. Bank *v.* Chapin, 9 Wend. (N. Y.) 471; Macomber *v.* Dunham, 8 Wend. (N. Y.) 550.

Pennsylvania.— Ludwick *v.* Huntzinger, 5 Watts & S. (Pa.) 51.

ment will continue to bear the conventional rate of interest after maturity, even in the absence of a direct stipulation to that effect;[55] that is to say, where the

Rhode Island.—Pierce *v.* Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

South Carolina.— Smith *v.* Smith, 33 S. C. 210, 11 S. E. 761; Bell *v.* Bell, 25 S. C. 149; Thatcher *v.* Massey, 20 S. C. 542; Maner *v.* Wilson, 16 S. C. 469; Briggs *v.* Winsmith, 10 S. C. 133, 30 Am. Rep. 46.

Utah.— Perry *v.* Taylor, 1 Utah 63.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682; Holden *v.* Freedman's Sav., etc., Co., 100 U. S. 72, 25 L. ed. 567; Bernhisel *v.* Firman, 22 Wall. (U. S.) 170, 22 L. ed. 766; Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301; Sherwood *v.* Moore, 35 Fed. 109.

Canada.— St. John *v.* Rykert, 26 Grant Ch. (U. C.) 249 [*affirmed* in 4 Ont. App. 213 (*affirmed* in 10 Can. Supreme Ct. 278)]; Dalby *v.* Humphrey, 37 U. C. Q. B. 514.

And where the conventional rate before maturity is less than the legal rate it is proper to allow the legal rate after maturity by way of damages. Moreland *v.* Lawrence, 23 Minn. 84. In Beckwith *v.* Hartford, etc., R. Co., 29 Conn. 268, 76 Am. Dec. 599, the damages for the detention of borrowed money beyond the contract period were assessed at the rate of seven per cent per annum, for the reason that the legislature had legalized in advance seven per cent as the rate of interest upon that particular loan at the request of the borrowers. In Adams *v.* Way, 33 Conn. 419, the damages were assessed at twelve per cent per annum, that being the statute rate of interest upon the loan in the state of Wisconsin where it was made. In South Carolina this rule applies if there is nothing in the contract to show a contrary intention. Briggs *v.* Winsmith, 10 S. C. 133, 30 Am. Rep. 46. But if there is any language in the contract, such as the addition of the words, "interest to be paid annually," indicating an intention to continue the conventional rate of interest, such rate will continue after maturity. Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632; Sharpe *v.* Lee, 14 S. C. 341.

In Arkansas, if a note is payable one day after date, with conventional interest from date, it will bear that interest until paid, although the words "until paid" are omitted from the interest clause. Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5. But if it is payable more than one day after date, it will bear only the legal rate of interest after maturity, unless it is otherwise expressed on its face. Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5; Woodruff *v.* Webb, 32 Ark. 613; Pettigrew *v.* Summers, 32 Ark. 571; Newton *v.* Kennerly, 31 Ark. 626, 25 Am. Rep. 592. But see Colby *v.* Bunker, 68 Me. 524, where it was held that on a note payable on demand, with the rate of interest specified therein, interest is to be computed at such rate till the rendition of verdict or default. See also Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21.

[XIV, G, 4, c, (II), (A), (2), (a)]

Reasons for this doctrine.— In other words, where one contracts to pay a principal sum at a certain future time with interest at a given rate, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract, to be computed according to the rate prescribed by law. O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Ritter *v.* Phillips, 53 N. Y. 586; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; U. S. Bank *v.* Chapin, 9 Wend. (N. Y.) 471; Macomber *v.* Dunham, 8 Wend. (N. Y.) 550; Holden *v.* Freedman's Sav., etc., Co., 100 U. S. 72, 25 L. ed. 567; Bernhisel *v.* Firman, 22 Wall. (U. S.) 170, 22 L. ed. 766; Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301. For there is no rule of law that upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied. Cook *v.* Fowler, L. R. 7 H. L. 27, 43 L. J. Ch. 855. And an agreement for a higher rate of interest in consideration of forbearance to sue stands good only for the time of forbearance stipulated. Rushing *v.* Sebree, 12 Bush (Ky.) 198; Mueller *v.* McGregor, 28 Ohio St. 265. Likewise where a note drawing interest at a certain rate is extended for a certain time, during which it is to draw another rate of interest, and such note is not paid at the expiration of such extension, it will draw interest as of the former rate thereafter. Sedgwick *v.* Sanborn, (Kan. 1901) 65 Pac. 661.

55. *California.*— Kohler *v.* Smith, 2 Cal. 597, 56 Am. Dec. 369.

Georgia.— Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118.

Illinois.— Etnyre *v.* McDaniel, 28 Ill. 210; Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Starne *v.* Farr, 17 Ill. App. 491.

Indiana.— Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362; Soice *v.* Huff, 102 Ind. 422, 26 N. E. 89; Kerr *v.* Haverstick, 94 Ind. 178; Holmes *v.* Boyd, 90 Ind. 332; Shaw *v.* Rigby, 84 Ind. 375, 43 Am. Rep. 96 [*overruling* Burns *v.* Anderson, 68 Ind. 202, 34 Am. Rep. 250; Richards *v.* McPherson, 74 Ind. 158; and *reëstablishing* rule in Kilgore *v.* Powers, 5 Blackf. (Ind.) 22].

Iowa.— Thompson *v.* Pickel, 20 Iowa 490; Hand *v.* Armstrong, 18 Iowa 324.

Louisiana.— Brownson *v.* Baker, 11 La. 409; Barbarin *v.* Daniels, 7 La. 479.

Massachusetts.— Schmidt *v.* People's Nat. Bank, 153 Mass. 550, 27 N. E. 595; Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Union Sav. Inst. *v.* Boston, 129 Mass. 82, 37 Am. Rep. 305; Brannon *v.* Hursell, 112 Mass. 63.

Mississippi.— Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137; Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496; Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414.

local law[56] allows it, the stipulated rate of interest attends the contract until it is merged in the judgment.[57] In any case if the parties have expressly stipulated for the conventional rate "until paid" the express contract is binding after maturity as well as before,[58] for the rate of interest specified in a note, to be paid after maturity, is *prima facie* the measure of damages to be recovered for the breach of the contract.[59]

(b) HIGHER RATE AFTER MATURITY. A man may charge legal interest for the use of his money if he pleases, and he may make its payment conditional, as that

Missouri.— Macon County *v.* Rodgers, 84 Mo. 66; Borders *v.* Barber, 81 Mo. 636; Broadway Sav. Bank *v.* Forbes, 79 Mo. 226 [*affirming* 9 Mo. App. 575]; Maguire *v.* Filley, 9 Mo. App. 581; Briscoe *v.* Kinealy, 8 Mo. App. 76.

Nebraska.— Allendorph *v.* Ogden, 28 Nebr. 201, 44 N. W. 220; Hager *v.* Blake, 16 Nebr. 12, 19 N. W. 780; Kellogg *v.* Lavender, 15 Nebr. 256, 18 N. W. 38, 48 Am. Rep. 339.

Nevada.— McLane *v.* Abrams, 2 Nev. 190; Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

New Jersey.— Jersey City *v.* O'Callaghan, 41 N. J. L. 349.

Ohio.— Hydraulic Co. *v.* Chatfield, 38 Ohio St. 575; Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Monnett *v.* Sturges, 25 Ohio St. 384; Findlay *v.* Hall, 12 Ohio St. 610.

Tennessee.— Overton *v.* Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367.

Texas.—Hopkins *v.* Crittenden, 10 Tex. 189; Pridgen *v.* Andrews, 7 Tex. 461.

Virginia.— Cecil *v.* Hicks, 29 Gratt. (Va.) 1, 26 Am. Rep. 391.

Wisconsin.—Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707; Pruyn *v.* Milwaukee, 18 Wis. 367; Spencer *v.* Maxfield, 16 Wis. 178.

United States.— Ohio *v.* Frank, 103 U. S. 697, 26 L. ed. 531; U. S. Mortg. Co. *v.* Sperry, 26 Fed. 727, both applying the Illinois rule.

England.— Keene *v.* Keene, 3 C. B. N. S. 144, 27 L. J. C. P. 88, 91 E. C. L. 144; Ward *v.* Morrison, C. & M. 368, 41 E. C. L. 204; Morgan *v.* Jones, 8 Exch. 620, 22 L. J. Exch. 232. 20 Eng. L. & Eq. 454.

Canada.—Montgomery *v.* Boucher, 14 U. C. C. P. 45; Howland *v.* Jennings, 11 U. C. C. P. 272.

Conventional rate less than legal rate.— The rule applies even though the stipulated rate be less than the legal rate. Schmidt *v.* People's Nat. Bank, 153 Mass. 550, 27 N. E. 595.

Reasons for this doctrine.— Where this is the case plaintiff recovers interest both before and after the maturity of the instrument, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract. Brannon *v.* Hursell, 112 Mass. 63; Ritter *v.* Phillips, 53 N. Y. 586; Van Beuren *v.* Van Gaasbeck, 4 Cow. (N. Y.) 496; Miller *v.* Burroughs, 4 Johns. Ch. (N. Y.) 436; Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707; Ward *v.* Morrison, C. & M. 368, 41 E. C. L. 204. Interest made payable by a note is part of the debt, not merely damages for detaining it. Crouse *v.* Park, 3 U. C. Q. B. 458.

Where the contract stipulated to pay an amount of money upon one contingency, without mentioning the rate of interest, but upon another contingency stipulated for ten per cent per annum, and the case proved was the happening of the first contingency, it was held that the judgment should be for simple and not conventional interest. Daniel *v.* Henry, 30 Tex. 26.

56. The question is always one of local law, which will be applied by the federal courts. Ohio *v.* Frank, 103 U. S. 697, 26 L. ed. 531; U. S. Mortg. Co. *v.* Sperry, 26 Fed. 727.

57. Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414; Cromwell *v.* Sac. County, 96 U. S. 51, 24 L. ed. 681.

And the jury have no discretion whatever to disregard the stipulated interest in their finding (Smith *v.* Keels, 15 Rich. (S. C.) 318; Young *v.* Fluke, 15 U. C. C. P. 360) for in the absence of usury laws the rate of interest may be fixed by agreement of the parties, however exorbitant they may choose to make it (Jackson *v.* Wilson, 76 Md. 567, 25 Atl. 980; Perry *v.* Taylor, 1 Utah 63; Keene *v.* Keene, 3 C. B. N. S. 144, 27 L. J. C. P. 88, 91 E. C. L. 144; Morgan *v.* Jones, 8 Exch. 620, 22 L. J. Exch. 232, 20 Eng. L. & Eq. 454; O'Connor *v.* Clarke, 18 Grant Ch. (U. C.) 422; Young *v.* Fluke, 15 U. C. C. P. 360).

58. *Arkansas.*— Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5.

Connecticut.— Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Kentucky.— White *v.* Curd, 86 Ky. 192, 9 Ky. L. Rep. 505, 5 S. W. 553; Crosthwait *v.* Misener, 13 Bush (Ky.) 543; Gordon *v.* Phelps, 7 J. J. Marsh (Ky.) 619.

Maine.— Augusta Nat. Bank *v.* Hewins, 90 Me. 255, 38 Atl. 156; Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52.

Massachusetts.— Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350.

Minnesota.— Holbrook *v.* Sims, 39 Minn. 122, 39 N. W. 74, 140.

Missouri.— North *v.* Walker, 66 Mo. 453.

Nebraska.— Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64.

South Carolina.— Bowen *v.* Barksdale, 33 S. C. 142, 11 S. E. 640; Piester *v.* Piester, 22 S. C. 139, 53 Am. Rep. 711; Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632; Sharpe *v.* Lee, 14 S. C. 341.

59. Buckingham *v.* Orr, 6 Colo. 587; Brown *v.* Steck, 2 Colo. 70.

if his money is paid to him by a given day no interest will be exacted; but if not then paid interest will be exacted at any lawful rate;[60] but where the payment of a sum of money is the act contracted to be done, no nearer approximation to the damages sustained for its omission can be arrived at than the legal rate of interest; and this is the rule of damage the law has fixed for delay in the payment of money.[61] Accordingly it has been held that where a note provides for a higher rate of interest after maturity as damages if it is not paid when due, such stipulation amounts to no more than a penalty, and should be disregarded as such;[62] and the effect is to reduce the interest after maturity to the statutory or legal rate.[63] But on the other hand it has been held that the increased rate of interest after maturity is not a penalty in a strict sense, but merely liquidated damages which may be recovered in case of default of payment at maturity, provided it would be a lawful conventional rate of interest in any case;[64] and a

60. *Illinois.*— Reeves *v.* Stipp, 91 Ill. 609.
Indiana.— Brown *v.* Maulsby, 17 Ind. 10; Hackenberry *v.* Shaw, 11 Ind. 392; Gully *v.* Remy, 1 Blackf. (Ind.) 69.
Iowa.— Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623.
Massachusetts.— Daggett *v.* Pratt, 15 Mass. 177.
Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.
Ohio.— Bowler *v.* Houston, 1 Ohio Dec. (Reprint) 389, 8 West. L. J. 506.
See also Ely *v.* Witherspoon, 2 Ala. 131.

61. Brown *v.* Maulsby, 17 Ind. 10; Mead *v.* Wheeler, 13 N. H. 351; Orr *v.* Churchill, 1 H. Bl. 227, 2 Rev. Rep. 759.

62. *Alabama.*— Henry *v.* Thompson, Minor (Ala.) 209.
Indiana.— Brown *v.* Maulsby, 17 Ind. 10.
Minnesota.—Daniels *v.* Ward, 4 Minn. 168; Bailly *v.* Weller, 2 Minn. 384; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.
Washington.— Krutz *v.* Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676.
England.— See opinion of Lord Loughborough in Orr *v.* Churchill, 1 H. Bl. 227, 2 Rev. Rep. 759. But see Wernwag *v.* Mothershead, 3 Blackf. (Ind.) 401, where it was held that such a note would draw the increased rate after, but not before, maturity.

Interest on deferred instalments of interest.—A provision embodied in a note that deferred instalments of interest shall bear interest at a higher rate than that borne by the principal is wholly illegal and void. Yudart *v.* Den, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200.

63. White *v.* Iltis, 24 Minn. 43; Newell *v.* Houlton, 22 Minn. 19; Kent *v.* Bown, 3 Minn. 347; Talcott *v.* Marston, 3 Minn. 339; Ward *v.* Cornett, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 550.

64. *Arkansas.*— Portis *v.* Merrill, 33 Ark. 416; Miller *v.* Kempner, 32 Ark. 573.
Colorado.— Eccles *v.* Herrick, 15 Colo. App. 350, 62 Pac. 1040.
Connecticut.— Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.
Illinois.— Laird *v.* Warren, 92 Ill. 204; Funk *v.* Buck, 91 Ill. 575; Walker *v.* Abt, 83 Ill. 226; Bane *v.* Gridley, 67 Ill. 388; Witherow *v.* Briggs, 67 Ill. 96; Wilday *v.* Morrison, 66 Ill. 532; Davis *v.* Rider, 53 Ill. 416.
Iowa.— Higley *v.* Newell, 28 Iowa 516; Horn *v.* Nash, 1 Iowa 204, 63 Am. Dec. 437; Wilkerson *v.* Daniels, 1 Greene (Iowa) 179.
Kansas.— Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; Hutchinson *v.* Benedict, 49 Kan. 545, 31 Pac. 147; Young *v.* Thompson, 2 Kan. 83.
Maine.— Capen *v.* Crowell, 66 Me. 282.
Montana.— Davis *v.* Hendrie, 1 Mont. 499.
North Carolina.— Pass *v.* Shine, 113 N. C. 284, 18 S. E. 251.
Oregon.— Close *v.* Riddle, 40 Oreg. 592, 67 Pac. 932.
United States.—Linton *v.* Vermont Nat. L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54, applying the Nebraska rule.

Further application of the rule.— A note providing for a lawful rate of interest from date until maturity, and for a higher but still lawful rate thereafter, is valid and will be enforced according to its terms. Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Crapo *v.* Hefner, 53 Nebr. 251, 73 N. W. 702; Omaha Home L. Ins. Co. *v.* Fitch, 52 Nebr. 88, 71 N. W. 940; Omaha L. & T. Co. *v.* Hanson, 46 Nebr. 870, 65 N. W. 1058; Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932. But a provision for a lawful rate until maturity and if the note is not then paid a higher rate from the date of the note has been denounced as a penalty, so far as it provides for the higher rate before maturity. Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101; Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Upton *v.* O'Donahue, 32 Nebr. 565, 49 N. W. 267. In California, however, a provision for a higher rate in case of default is valid both before and after maturity. Finger *v.* McCaughey, 114 Cal. 64, 45 Pac. 1004; Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81. And the same has been decided in other jurisdictions. Wilkerson *v.* Daniels, 1 Greene (Iowa) 179; Parker *v.* Plymell, 23 Kan. 402.

Waiver of reservation.— The acceptance by the payee, from time to time after maturity, of interest at the lower rate, will amount to

stipulation for an exorbitant rate of interest after maturity as liquidated damages for breach of contract has been considered valid, if the parties acted in good faith and there was no evidence of a design to evade the usury laws.[65] Again there is a difference of opinion as to the legal effect of an instrument which reserves the higher rate of interest from date until paid, with a provision for its abatement upon condition of prompt payment at maturity. According to one view the difference between the two rates is not a penalty, and the contract is to be enforced according to its literal terms.[66] But other authorities hold that the clause is the same in effect as if it had reserved the lower rate of interest, with a provision that if the indebtedness were not paid at maturity interest should run at a higher rate.[67] Again it has been held that where a note is payable at a specified time for a sum certain, which may be discharged by the payment of a less sum at any earlier date, the greater sum is not in the nature of a penalty, but is the debt actually due, and is recoverable if the less sum is not paid according to the terms of the contract.[68]

(B) *After Judgment.* After the rendition of judgment the debt bears interest at the legal rate until paid,[69] for by the judgment the express contract is merged into an obligation of record which is governed by the general law.[70]

(III) *On Interest Coupons.* Interest coupons which may be cut off and circulated independently of the bonds as negotiable promises to pay certain sums of money on certain days usually bear interest at the legal rate from their maturity until paid.[71] This, however, is upon the theory that such coupons are sepa-

a waiver of the condition in the note requiring the payment of a higher rate after maturity. Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81; Bane *v.* Gridley, 67 Ill. 388; Bradford *v.* Hoiles, 66 Ill. 517.

65. Davis *v.* Rider, 53 Ill. 416; Gould *v.* Bishop Hill Colony, 35 Ill. 324; Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186; Lawrence *v.* Cowles, 13 Ill. 577.

66. The cases holding this view rest upon the authority of Waller *v.* Long, 6 Munf. (Va.) 71; Nicholls *v.* Maynard, 3 Atk. 519, 26 Eng. Reprint 1100; Walmesley *v.* Booth, 2 Atk. 25, 26 Eng. Reprint 412, Barnard 475, 27 Eng. Reprint 726; Bonafous *v.* Rybot, 3 Burr. 1370.

67. Smith *v.* Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20. And see Stanhope *v.* Manners, 2 Eden 97, 28 Eng. Reprint 873; Brown *v.* Barkham, 1 P. Wms. 652, 24 Eng. Reprint 555; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124.

Difference regarded as a penalty.—Where this construction of the clause is adopted it is generally agreed that the difference between the two rates is to be treated as a penalty and cannot be recovered. Smith *v.* Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20; Newell *v.* Houlton, 22 Minn. 19; Talcott *v.* Marston, 3 Minn. 339; Longworth *v.* Askren, 15 Ohio St. 370; Brockway *v.* Clark, 6 Ohio 45.

68. Carter *v.* Corley, 23 Ala. 612; Jordan *v.* Lewis, 2 Stew. (Ala.) 426; Plummer *v.* McKean, 2 Stew. (Ala.) 423; Holland *v.* Vanard, 3 Greene (Iowa) 230; Waggoner *v.* Cox, 40 Ohio St. 539.

But where a note payable in a series of instalments provided that a less sum would be accepted in full payment if each instalment were paid punctually, it was held that the larger sum was in the nature of a penalty, and that the actual payment of the less sum discharged the obligation, although defaults had occurred in paying the instalments. Longworth *v.* Askren, 15 Ohio St. 370.

69. *Arkansas.*— Badgett *v.* Jordan, 32 Ark. 154.

Iowa.— Burkhart *v.* Sappington, 1 Greene (Iowa) 66.

Kentucky.— Gordon *v.* Phelps, 7 J. J. Marsh. (Ky.) 619; Marshall *v.* Green, 8 Ky. L. Rep. 346, 1 S. W. 602.

New Jersey.— Verree *v.* Hughes, 11 N. J. L. 91.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64.

70. Miller *v.* Kempner, 32 Ark. 573; Boynton *v.* Ball, 105 Ill. 627; Palmer *v.* Harris, 100 Ill. 276; Richardson *v.* Aiken, 84 Ill. 221; Runnamaker *v.* Cordray, 54 Ill. 303; Waymen *v.* Cochrane, 35 Ill. 152; White *v.* Haffaker, 27 Ill. 349; Mitchell *v.* Mayo, 16 Ill. 83; Wade *v.* Pratt, 12 Heisk. (Tenn.) 231. But in Shipman *v.* Bailey, 20 W. Va. 140, 147, Snyder, J., said: "The rendition of a judgment or decree is not a payment of the debt; nor is it such a merger of the original contract as will authorize the court to interfere with the obligation of such contract, requiring the parties to pay interest thereon at the rate agreed upon by them."

As to merger by judgment see JUDGMENTS.

So an accommodation indorser or accepter who has been obliged to pay the debt can recover only legal interest on the implied promise of indemnity. Stanley *v.* McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226; Martin *v.* Muncy, 40 La. Ann. 190, 3 So. 640.

71. *Connecticut.*— Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

rate instruments, promises to pay the bearer specified sums of money at specified times, and when severed[72] from the bonds to which they are attached possess all the essential qualities of commercial paper.[73]

(IV) *What Law Governs*—(A) *In General.* In the absence of an intention to the contrary shown by express stipulation[74] or otherwise,[75] the rate of interest is to be regulated by the law as it existed at the time and place of making the contract, and not by the law existing when the debt falls due or when the remedy

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

Indiana.— Jeffersonville *v.* Patterson, 26 Ind. 15, 89 Am. Dec. 448.

Minnesota.— Holbrook *v.* Sims, 39 Minn. 122, 39 N. W. 74, 140.

Mississippi.— Lexington *v.* Union Nat. Bank, 75 Miss. 1, 22 So. 291.

New York.— McClelland *v.* Norfolk Southern R. Co., 110 N. Y. 469, 18 N. E. 237, 18 N. Y. St. 344, 6 Am. St. Rep. 397, 1 L. R. A. 299; Evertsen *v.* Newport Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Knight, 124 Pa. St. 58, 16 Atl. 492; Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677.

South Carolina.— Langston *v.* South Carolina R. Co., 2 S. C. 248.

Wisconsin.— Mills *v.* Jefferson, 20 Wis. 50.

United States.— Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526; Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427; Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; Aurora *v.* West, 7 Wall. (U. S.) 82, 19 L. ed. 42; Murray *v.* Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Wilson *v.* Neal, 23 Fed. 129.

In Idaho the statute prohibits the recovery of interest on coupons given for the interest on the principal debt. Vermont L. T. Co. *v.* Hoffman, (Ida. 1897) 49 Pac. 314.

In Nebraska coupons may draw interest, provided the interest on both coupon and principal does not exceed the maximum legal rate of interest on the principal sum. Lewis Invest. Co. *v.* Boyd, 48 Nebr. 604, 67 N. W. 456; Rose *v.* Munford, 36 Nebr. 148, 54 N. W. 129.

A state is not liable to pay interest on the matured coupons of its bonds, unless its consent so to do has been manifested by an act of the legislature or some lawful contract of its executive officers. Molineux *v.* State, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580.

And in California a municipality is not liable to pay interest on overdue coupons. Davis *v.* Sacramento, 82 Cal. 562, 22 Pac. 1118; Bates *v.* Gerber, 82 Cal. 550, 22 Pac. 1115; Davies *v.* Porter, 66 Cal. 658, 6 Pac. 746.

72. **Attached past-due coupons.**— It has been held erroneous to allow the payee to recover interest on past-due coupons which remain attached to the bond. Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 12 N. Y. App. Div. 199, 42 N. Y. Suppl. 781.

73. Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427; Aurora *v.* West, 7 Wall. (U. S.) 82, 19 L. ed. 42; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; U. S. Mortg. Co. *v.* Sperry, 26 Fed. 727.

Each coupon a separate contract.— Each coupon attached to a bond for the payment of interest is of itself a separate contract for the payment of money at a particular time, and if it is not paid at the time appointed interest follows as an incident. Caldwell *v.* Dunklin, 65 Ala. 461.

But until negotiated or used in some way, the coupons serve no independent purpose; and while they are in the hands of the holder they remain mere incidents of the bonds and have no greater or other force or effect than the stipulation for the payment of interest contained in the bonds, and while they remain in the ownership and possession of the owner and holder of the bonds it can make no difference whether they are attached to, or detached from, the bonds, as they are then mere evidence of the indebtedness for the interest stipulated in the bonds. Bailey *v.* Buchanan County, 115 N. Y. 297, 301, 22 N. E. 155, 26 N. Y. St. 128, 6 L. R. A. 562; Carlisle *v.* Mercantile Trust Co., 109 Fed. 177, 48 C. C. A. 275.

74. **The parties may contract for the rate** in either place and the contract will govern. New England Mortg. Security Co. *v.* McLaughlin, 87 Ga. 1, 13 S. E. 81; Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442; Townsend *v.* Riley, 46 N. H. 300; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Kellogg *v.* Miller, 2 McCrary (U. S.) 395, 13 Fed. 198.

75. See *infra*, XIV, G, 4, c, (IV), (C).

But where the charter of a banking corporation fixes the amount of interest it may charge, the general law on the subject does not apply to its transactions. Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762.

is sought.[76] Where, however, the interest is not a sum due by the terms of the contract, but damages by operation of law for breach of the contract,[77] the rate of interest must be governed by the law in force within the jurisdiction where the judgment is recovered.[78]

(B) *As Affected by Place of Indorsement.* Where a bill is drawn in one country and indorsed in another, the different rates of interest may present the question as to whether the indorsement is a new drawing as in the place of the indorsement or in the place where the bill was originally drawn.[79] But where a negotiable promissory note is made in the jurisdiction where it is payable and is indorsed in another jurisdiction, the liability of the maker to the indorsee is determined by the law of the place where it was made;[80] for a contract must be governed by the law of the place where it is made and to be performed, and the rate of interest is to be determined by the law of that place;[81] and as the rate

76. *Connecticut.*— Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469; Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Kentucky.— Handley *v.* Cunningham, 12 Bush (Ky.) 401; Lee *v.* Davis, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746.

Massachusetts.—Ayer *v.* Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Von Hemert *v.* Porter, 11 Metc. (Mass.) 210; Carnegie *v.* Morrison, 2 Metc. (Mass.) 381; Winthrop *v.* Carleton, 12 Mass. 4.

Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.

United States.— Lanusse *v.* Barker. 3 Wheat. (U. S.) 101, 4 L. ed. 343; *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322, 9 Chic. Leg. N. 183, 1 Cinc. L. Bul. 21, 23 Int. Rev. Rec. 73, 15 Nat. Bankr. Reg. 495.

In the absence of proof of rate allowed in the place where the contract was made or the debt was payable the legal rate in the place where the remedy is sought will govern. Chumasero *v.* Gilbert, 24 Ill. 293, 26 Ill. 39; Forsyth *v.* Baxter, 3 Ill. 9; Ripka *v.* Pope, 5 La. Ann. 61, 63, 52 Am. Dec. 579; Patterson *v.* Garrison, 16 La. 557.

77. See *supra*, XIV, G, 4, c, (II), (A), (2).

This is put upon the ground that no interest is recoverable by the terms of the contract, and the question therefore is not affected by the law of the place of the contract. Ayer *v.* Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Eaton *v.* Mellus, 7 Gray (Mass.) 566; Barringer *v.* King, 5 Gray (Mass.) 9; Grimshaw *v.* Bender, 6 Mass. 157.

78. *Illinois.*— Hall *v.* Kimball, 58 Ill. 58.

Indiana.—Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695.

Massachusetts.— Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236; Ayer *v.* Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355; Wood *v.* Corl, 4 Metc. (Mass.) 203.

Tennessee.—Green *v.* Bond, 5 Sneed (Tenn.) 328.

Canada.—Cloyes *v.* Chapman, 27 U. C. C. P. 22; Griffin *v.* Judson, 12 U. C. C. P. 430.

And the jury should be directed, as a matter of law, to allow such rate when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment. Montgomery *v.* Boucher, 14 U. C. C. P. 45.

79. Mr. Justice Story maintains the view that the bill bears interest at the rate of the place of indorsement. Story Confl. L. § 314 [*cited* in Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555]. But Pardessus, Cours de Droit Commercial, pt. vii, tit. 7, c. 2, art. 1500 [*cited* in Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555], maintains the contrary view.

But this is largely a question of the intention of the parties, for it has been held that in the case of every negotiable instrument there are as many separate contracts as there are indorsements, each being governed by the law of the place where made, unless the intention is to negotiate the instrument elsewhere. Cook *v.* Litchfield, 9 N. Y. 279 [*reversing* 5 Sandf. (N. Y.) 330]; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Spies *v.* National City Bank, 29 N. Y. L. J. 17.

80. Woodruff *v.* Hill, 116 Mass. 310.

81. *Alabama.*— Evans *v.* Irvin, 1 Port. (Ala.) 390; Evans *v.* Clark, 1 Port. (Ala.) 388.

Kentucky.— Brown *v.* Todd, 16 Ky. L. Rep. 697, 29 S. W. 621.

Louisiana.— Hawley *v.* Sloo, 12 La. Ann. 815.

Massachusetts.— Holmes *v.* Manning, (Mass. 1888) 19 N. E. 25.

Mississippi.— Swett *v.* Dodge, 4 Sm. & M. (Miss.) 667.

Nebraska.— Joslin *v.* Miller, 14 Nebr. 91, 15 N. W. 214; Olmsted *v.* New England Mortg. Security Co., 11 Nebr. 487, 9 N. W. 650.

New Jersey.—Hopkins *v.* Miller, 17 N. J. L. 185.

New York.— Lewis *v.* Ingersoll, 3 Abb. Dec. (N. Y.) 55, 1 Keyes (N. Y.) 347; Foden *v.* Sharp, 4 Johns. (N. Y.) 183; Spies *v.* National City Bank, 29 N. Y. L. J. 17.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424.

of interest there cannot be judicially known in another jurisdiction, it becomes a matter of proof like any other material fact.[82]

(o) *As Affected by Place of Payment.* Where no place of payment is stipulated, the law of the place where the contract was made will govern as to the rate and the rule for casting interest;[83] where, however, a note made in one jurisdiction is payable in another, it bears interest according to the lawful rate in the place where it is payable, unless a different rate is specified in the contract.[84] So a bill of exchange drawn on a resident of a foreign state and accepted there is governed as to interest by the laws of such state, inasmuch as it is impliedly payable there.[85]

(D) *Questions of Law and Fact.* The question as to which rate of interest is to be adopted is purely a question of law upon which the judge should instruct

South Carolina.— Winthrop *v.* Pepoon, 1 Bay (S. C.) 468.

United States.— Lanusse *v.* Barker, 3 Wheat. (U. S.) 101, 4 L. ed. 343; *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322, 9 Chic. Leg. N. 183, 1 Cinc. L. Bul. 21, 23 Int. Rev. Rec. 73, 15 Nat. Bankr. Reg. 495; Jaffray *v.* Dennis, 2 Wash. (U. S.) 253, 13 Fed. Cas. No. 7,171; Cowqua *v.* Lauderbrun, 1 Wash. (U. S.) 521, 6 Fed. Cas. No. 3,299.

82. Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Dunn *v.* Clement, 2 Ala. 392; Pawling *v.* Sartain, 4 J. J. Marsh. (Ky.) 238; Ingraham *v.* Arnold, 1 J. J. Marsh. (Ky.) 406; Swett *v.* Dodge, 4 Sm. & M. (Miss.) 667; Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, 57 N. E. 297; Spies *v.* National City Bank, 29 N. Y. L. J. 17. And it has been held that in the absence of an allegation and proof of the rate of interest at the place of payment no interest can be allowed. Wheeler *v.* Pope, 5 Tex. 262. It is error to take judgment by default and compute the interest by the law of the forum, if the note in action was payable elsewhere. Dunn *v.* Clement, 2 Ala. 392; Peacock *v.* Banks, Minor (Ala.) 387.

83. *Massachusetts.*— Von Hemert *v.* Porter, 11 Metc. (Mass.) 210; Winthrop *v.* Carleton, 12 Mass. 4.

New Hampshire.— Chase *v.* Dow, 47 N. H. 405.

New York.— Schofield *v.* Day, 20 Johns. (N. Y.) 102; Fanning *v.* Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264 note.

Texas.— Burton *v.* Anderson, 1 Tex. 93.

United States.— Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799; De Wolf *v.* Johnson, 10 Wheat. (U. S.) 367, 6 L. ed. 343; Courtois *v.* Carpentier, 1 Wash. (U. S.) 376, 6 Fed. Cas. No. 3,286.

England.— Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555.

84. *Alabama.*— Hunt *v.* Hall, 37 Ala. 702; Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Hanrick *v.* Andrews, 9 Port. (Ala.) 9.

Arkansas.— Clarke *v.* Taylor, 69 Ark. 612, 65 S. W. 110.

Illinois.— Guignon *v.* Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

Louisiana.— Howard *v.* Branner, 23 La. Ann. 369; Hawley *v.* Sloo, 12 La. Ann. 815.

Mississippi.— Swett *v.* Dodge, 4 Sm. & M. (Miss.) 667.

New Hampshire.— Chase *v.* Dow, 47 N. H. 405.

New Jersey.— Healy *v.* Gorman, 15 N. J. L. 328.

New York.— Scofield *v.* Day, 20 Johns. (N. Y.) 102; Fanning *v.* Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442.

Tennessee.— Cooper *v.* Sandford, 4 Yerg. (Tenn.) 452, 26 Am. Dec. 239.

Texas.— Whitlock *v.* Castro, 22 Tex. 108; Summers *v.* Mills, 21 Tex. 77.

Vermont.—Austin *v.* Imus, 23 Vt. 286; Peck *v.* Mayo, 14 Vt. 33, 39 Am. Dec. 205.

United States.— Bushby *v.* Camac, 4 Wash. (U. S.) 296, 4 Fed. Cas. No. 2,226.

England.— Cooper *v.* Waldegrave, 2 Beav. 282, 17 Eng. Ch. 282; Bodily *v.* Bellamy, 2 Burr. 1094, 1 W. Bl. 267.

Compare Jones *v.* McNealy, 114 Ga. 393, 40 S. E. 248, holding that when the present value of notes maturing in the future, and including in the amounts named therein both principal and interest at a stipulated rate, is to be ascertained, such value should be arrived at by taking into account the amount of interest actually embraced in the notes and not by discounting them in accord with the legal rate of interest prevailing in the jurisdiction where the notes are payable.

The legal rate of interest where the contract was made and is payable will govern, although the remedy is sought in another jurisdiction. Lanusse *v.* Barker, 3 Wheat. (U. S.) 101, 4 L. ed. 343.

85. Mulle *v.* Morris, 2 Pa. St. 85; Able *v.* McMurray, 10 Tex. 350; Illinois Bank *v.* Brady, 3 McLean (U. S.) 268, 2 Fed. Cas. No. 888. But *compare* Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555, where it is held that if a bill of exchange, on the face of which no interest is reserved, is drawn in one country payable in another, the drawer is liable on its dishonor to pay as damages interest at the current rate in the country where the bill was drawn.

the jury.[86] But the amount of interest in each place and the question as to whether any damage has been sustained requiring the payment of interest at all are questions of fact to be determined by the jury on the evidence.[87]

d. Time and Computation — (I) *Reckoned From Date.* Where a bill or note by its terms is payable at a future day with interest, the interest runs from the date of the instrument, and in the absence of words showing a different intention of the parties should be reckoned accordingly, for the paper would bear interest from maturity, even without the words "with interest."[88] And where it is stipulated that a note shall draw interest if not paid at maturity, the interest will be reckoned from the date of the note in case of default,[89] but not if the note is paid at maturity.[90]

(II) *Reckoned From Maturity.* If by its terms a note made payable on a future day is to bear interest after maturity it is error to reckon interest from the date of the instrument;[91] and if interest be not expressly reserved and the paper matures at a time certain or at sight it will draw interest from its maturity by operation of law without prior demand,[92] unless the non-payment has been occa-

86. Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555.

87. Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555.

88. *Alabama.*— Campbell Printing-Press, etc., Co. *v.* Jones, 79 Ala. 475. But see Boddie *v.* Ely, 3 Stew. (Ala.) 182; Henry *v.* Thompson, Minor (Ala.) 209; Fugua *v.* Carriel, Minor (Ala.) 170, 12 Am. Dec. 46; Dinsmore *v.* Hand, Minor (Ala.) 126 (where it was held that interest before maturity was in the nature of a penalty and could not be recovered).

Arkansas.—Inglish *v.* Watkins, 4 Ark. 199; Dickinson *v.* Tunstall, 4 Ark. 170.

California.— Dewey *v.* Bowman, 8 Cal. 145; Kohler *v.* Smith, 2 Cal. 597, 56 Am. Dec. 326. And *compare* Garthwaite *v.* Tulare Bank, 134 Cal. 237, 66 Pac. 326, construing Cal. Civ. Code, §§ 3116, 3177.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Connecticut.— Washband *v.* Washband, 24 Conn. 500.

Illinois.— Belford *v.* Beatty, 145 Ill. 414, 34 N. E. 254; Cisne *v.* Chidester, 85 Ill. 523; Williams *v.* Baker, 67 Ill. 238.

Indiana.— Kimmell *v.* Burns, 84 Ind. 370; Hackenberry *v.* Shaw, 11 Ind. 392; Kilgore *v.* Powers, 5 Blackf. (Ind.) 22.

Iowa.— Horn *v.* Nash, 1 Iowa 204, 63 Am. Dec. 437.

Kentucky.— Miller *v.* Cavanaugh, 99 Ky. 377, 18 Ky. L. Rep. 183, 35 S. W. 920, 59 Am. St. Rep. 463; Winn *v.* Young, 1 J. J. Marsh. (Ky.) 51, 19 Am. Dec. 52.

Louisiana.— Luzenberg *v.* Cleveland, 19 La. Ann. 473; Bogan *v.* Calhoun, 19 La. Ann. 472.

Missouri.— Pittman *v.* Barret, 34 Mo. 84; Green *v.* Kennedy, 6 Mo. App. 577.

North Carolina.—Gholson *v.* King, 79 N. C. 162.

Tennessee.— Smith *v.* Goodlett, 92 Tenn. 230, 21 S. W. 106.

England.— Roffey *v.* Greenwell, 10 A. & E. 222, 37 E. C. L. 137; Richards *v.* Richards, 2 B. & Ad. 447, 9 L. J. K. B. O. S. 319, 22 E. C. L. 190; Doman *v.* Dobden, R. & M. 381, 21 E. C. L. 774; Kennerly *v.* Nash, 1 Stark. 452, 2 E. C. L. 174.

89. *California.*— Main *v.* Casserly, 67 Cal. 127, 7 Pac. 426.

Indiana.— Hackenberry *v.* Shaw, 11 Ind. 392; Horner *v.* Hunt, 1 Blackf. (Ind.) 213; Gully *v.* Remy, 1 Blackf. (Ind.) 69. But see Billingsly *v.* Cahoon, 7 Ind. 184.

Iowa.— Horn *v.* Nash, 1 Iowa 204, 63 Am. Dec. 437; Parvin *v.* Hoopes, Morr. (Iowa) 294.

Massachusetts.—Daggett *v.* Pratt, 15 Mass. 177.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

South Carolina.— Satterwhite *v.* McKie, Harp. (S. C.) 397.

90. Parker *v.* Plymell, 23 Kan. 402.

91. Stayner *v.* Knowler, 82 Ind. 157.

92. *Arkansas.*— Joyner *v.* Turner, 19 Ark. 690.

Iowa.— Butcher *v.* Brand, 6 Iowa 235.

Kentucky.—Carr *v.* Robinson, 8 Bush (Ky.) 269; Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264.

Louisiana.—Hughes *v.* Mattes, 104 La. 231, 28 So. 1009; Buckley *v.* Seymour, 30 La. Ann. 1341; Collins *v.* Sabatier, 19 La. Ann. 299; Gay *v.* Kendig, 2 Rob. (La.) 472; Consolidated Assoc. Bank *v.* Foucher, 9 La. 476.

Maine.— Swett *v.* Hooper, 62 Me. 54.

Minnesota.— Owsley *v.* Greenwood, 18 Minn. 429.

Pennsylvania.— Jacobs *v.* Adams, 1 Dall. (Pa.) 52, 1 L. ed. 33.

Texas.— Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744.

Utah.— McCauley *v.* Leavitt, 10 Utah 91, 37 Pac. 164.

Vermont.— Gage *v.* McSweeney, 74 Vt. 370, 52 Atl. 969.

United States.— *In re* Bartenbach, 2 Fed. Cas. No. 1,068, 2 Amer. L. T. Rep. N. S. 33, 11 Nat. Bankr. Reg. 61.

sioned by the negligence of the holder,[93] in which case the jury would be justified in refusing to allow interest.[94]

(III) *Suspension — War.* Where an instrument matures during a state of war, and the parties are alien enemies, it seems[95] that the running of interest after maturity is suspended during the subsequent continuance of the war, although interest is stipulated in the contract.[96] But the rule does not apply where during the war there was a known agent of the creditor appointed to receive the money and resident within the same jurisdiction with the debtor.[97]

(IV) *The Mode of Computation* — (A) *Simple Interest* — (1) No Payments Made. The proper mode is to compute from the time when the note begins to draw interest up to the time of rendering the judgment or decree.[98]

(2) Partial Payments Made. The payment is first to apply to the discharge of the interest due; if the payment exceeds the interest the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due; but if the payment be less than the interest due the surplus of interest must not be taken to augment the principal. In other words interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus of payment is to be applied to the discharge of the principal and interest is to be computed on the balance as before mentioned.[99]

(B) *Compound Interest.* Where it is consistent with the course of dealing between the parties, or they have contracted so to do, they may make periodic rests in their account and charge interest on the balance thus struck, and that

England.— Lithgow *v.* Lyon, Coop. 29, 10 Eng. Ch. 29; Laing *v.* Stone, 2 M. & R. 561; Lowndes *v.* Collens, 17 Ves. Jr. 27.

A note payable one year after the maker's death draws interest from the expiration of one year from his death, and not from the date of his death. Randall *v.* Grant, 59 N. Y. App. Div. 485, 69 N. Y. Suppl. 221.

If a note is payable at any time during a given month, but on no particular day, it will draw interest from the last day of the month. Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264.

On a promissory note payable on demand, where there is no proof of any agreement for interest, the plaintiff is entitled to interest only from the day of issuing the writ of summons. Pierce *v.* Fothergill, 2 Bing. N. Cas. 167, 1 Hodges 251, 2 Scott 334, 29 E. C. L. 485.

93. Gage *v.* McSweeney, 74 Vt. 370, 52 Atl. 969; Lithgow *v.* Lyon, Coop. 29, 10 Eng. Ch. 29; Laing *v.* Stone, 2 M. & R. 561.

But if the holder has agreed not to sue the maker as long as he considered the claim safe, interest should be computed from maturity. Rollman *v.* Baker, 5 Humphr. (Tenn.) 406.

From time of default.— It has been held, however, that if the holder of a note omits to present it for payment at maturity, and there is no stipulation in it for the payment of interest, he can recover interest only from the time when the debtor was put in default. Bradford *v.* Cooper, 1 La. Ann. 325.

Where holder has died.— If there is no one legally entitled to receive payment at maturity, as where the holder has died and no personal representative has been appointed, no interest will accrue until a lawful demand can be made. Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118.

94. Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12.

95. *Illinois.*—Yeaton *v.* Berney, 62 Ill. 61.
Iowa.— Griffith *v.* Lovell, 26 Iowa 226.
Maryland.— Paul *v.* Christie, 4 Harr. & M. (Md.) 161.
South Carolina.— Nielson *v.* Rutledge, 1 Desauss. (S. C.) 194.
Tennessee.—Gates *v.* Union Bank, 12 Heisk. (Tenn.) 325.
Texas.— Spencer *v.* Brower, 32 Tex. 663, 5 Am. Rep. 254.
United States.— Shortridge *v.* Mason, 22 Fed. Cas. No. 12,812.

96. Mayer *v.* Reed, 37 Ga. 482; Hoare *v.* Allen, 2 Dall. (Pa.) 102, 1 L. ed. 307; Brewer *v.* Hastie, 3 Call (Va.) 22; Hiatt *v.* Brown, 15 Wall. (U. S.) 177, 21 L. ed. 128; Conn *v.* Penn, Pet. C. C. (U. S.) 496, 6 Fed. Cas. No. 3,104. See, generally, Interest.

97. Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207; Denniston *v.* Imbrie, 3 Wash. (U. S.) 396, 7 Fed. Cas. No. 3,802.

98. Barker *v.* International Bank, 80 Ill. 96.

99. *Alabama.*—McQueen *v.* Whetstone, 127 Ala. 417, 30 So. 548.
Missouri.— Call *v.* Moll, 89 Mo. App. 386.
New Hampshire.— Townsend *v.* Riley, 46 N. H. 300; Folsom *v.* Plumer, 43 N. H. 469.
New York.— Connecticut *v.* Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

mode of charging interest is not unlawful on the ground of usury.[1] According to one view, where a note is made payable in a certain number of years, with interest payable annually, interest cannot be charged on the unpaid instalments of interest, unless an action to recover the interest[2] is brought before the principal falls due;[3] but on the other hand it has been held that where interest is payable annually or at other stated periods it bears simple interest from the time it falls due until paid, although in no case can the interest upon interest be made to bear interest.[4] A third view is that a valid agreement cannot be made in advance for the payment of interest on interest.[5] But a new note or other contract may be made for interest on arrears of interest without being open to the defense of

Pennsylvania.— Penrose *v.* Hart, 1 Dall. (Pa.) 378, 1 L. ed. 185; Tracy *v.* Wikoff, 1 Dall. (Pa.) 124, 1 L. ed. 65.

Utah.— Perry *v.* Taylor, 1 Utah 63.

1. Page *v.* Williams, 54 Cal. 562; Eaton *v.* Bell, 5 B. & Ald. 34, 7 E. C. L. 30; Bruce *v.* Hunter, 3 Campb. 467.

Interest may be recovered upon the arrears of interest due if there is an express promise to pay such interest. Rose *v.* Bridgeport, 17 Conn. 243.

In the case of notes due guardians, it has been said that the mode of compounding interest is to make annual rests, making the aggregate principal and interest due at the end of any particular year a capital sum bearing lawful interest thenceforward, and so on from year to year. Little *v.* Anderson, 71 N. C. 190; Ford *v.* Vandyke, 33 N. C. 227.

2. But if the action to recover the interest is brought before the principal becomes due, simple interest may then be recovered on the instalment of interest for which the action is brought. Bannister *v.* Roberts, 35 Me. 75; Greenleaf *v.* Kellogg, 2 Mass. 568.

3. *Illinois.*— Leonard *v.* Villars, 23 Ill. 377.

Maine.— Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251; Kittredge *v.* McLaughlin, 38 Me. 513; Bannister *v.* Roberts, 35 Me. 75; Doe *v.* Warren, 7 Me. 48.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. (Mass.) 92; Von Hemert *v.* Porter, 11 Metc. (Mass.) 210; Wilcox *v.* Howland, 23 Pick. (Mass.) 167; Dean *v.* Williams, 17 Mass. 417; Hastings *v.* Wiswall, 8 Mass. 455.

Nebraska.— Mathews *v.* Toogood, 23 Nebr. 536, 37 N. W. 265, 8 Am. St. Rep. 131.

New York.— Van Benschooten *v.* Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; Connecticut *v.* Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

Pennsylvania.— Stokely *v.* Thompson, 34 Pa. St. 210.

Texas.— Pridgen *v.* Bonner, 28 Tex. 799.

Virginia.— Pindall *v.* Marietta Bank, 10 Leigh (Va.) 481.

4. *Arkansas.*— Vaughan *v.* Kennan, 38 Ark. 114.

Dakota.— Hovey *v.* Edmison, 3 Dak. 449, 22 N. W. 594.

Georgia.— Neel *v.* Young, 78 Ga. 342.

Iowa.— Preston *v.* Walker, 26 Iowa 205, 96 Am. Dec. 140; Aspinwall *v.* Blake, 25 Iowa 319.

Kentucky.— Talliaferro *v.* King, 9 Dana (Ky.) 331, 35 Am. Dec. 140.

New Hampshire.— Townsend *v.* Riley, 46 N. H. 300; Little *v.* Riley, 43 N. H. 109; Peirce *v.* Rowe, 1 N. H. 179.

North Carolina.— Knight *v.* Braswell, 70 N. C. 709; Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642.

Ohio.— Cook *v.* Courtright, 40 Ohio St. 248, 48 Am. Rep. 681; Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

Rhode Island.— Wheaton *v.* Pike, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227; National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

South Carolina.— Doig *v.* Barkley, 3 Rich. (S. C.) 125, 45 Am. Dec. 762; O'Neall *v.* Sims, 1 Strobh. (S. C.) 115; Singleton *v.* Lewis, 2 Hill (S. C.) 408; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

Texas.—Angel *v.* Miller, 90 Tex. 505, 39 S. W. 916; Lewis *v.* Paschal, 37 Tex. 315.

Vermont.—Austin *v.* Imus, 23 Vt. 286; Catlin *v.* Lyman, 16 Vt. 44.

Under the Michigan statute, interest may be computed on any defaulted instalment of interest, when so provided in the written contract, at the rate therein specified, but not otherwise. Rix *v.* Strauts, 59 Mich. 364, 26 N. W. 638; Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865. But prior to the statute this could not be done, even by agreement of the parties. Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665.

In Nebraska a provision in the note that interest not paid when due shall bear interest is valid when the whole interest so reserved does not exceed ten per cent simple interest. Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Lewis Invest. Co. *v.* Boyd, 48 Nebr. 604, 67 N. W. 456; Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633; Murtagh *v.* Thompson, 28 Nebr. 358, 44 N. W. 451; Mathews *v.* Toogood, 25 Nebr. 99, 41 N. W. 130.

5. *Colorado.*— Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818.

Illinois.— Bowman *v.* Neely, 137 Ill. 443, 37 N. E. 758.

Mississippi.— Perkins *v.* Coleman, 51 Miss. 298.

Nebraska.— Mathews *v* Toogood, 23 Nebr. 536, 37 N. W. 265, 8 Am. St. Rep. 131.

New York.— Stewart *v.* Petree, 55 N. Y. 621; Forman *v.* Forman, 17 How. Pr. (N. Y.)

usury.[6] So, if, after interest has become due, an account is stated, making rests, it is lawful.[7]

(v) *The Rule as to Demand Notes.* If a note is payable on demand, with lawful interest, it will carry interest from date and not merely from maturity,[8] and if it is payable on demand after a specified date, with interest thereafter at a certain rate, it will bear interest from such date, although demand be not made until a later date.[9] But bank-notes bear interest only from the time of demand;[10] and demand notes, without express reservation of interest, bear interest from demand only,[11] or from the commencement of the action, which is demand, if no

255; Toll *v.* Hiller, 11 Paige (N. Y.) 228; Van Benschooten *v.* Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; Connecticut *v.* Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

Vermont.— Catlin *v.* Lyman, 16 Vt. 44.

England.— Thornhill *v.* Evans, 2 Atk. 330, 9 Mod. 331, 26 Eng. Reprint 601; Chambers *v.* Goldwin, 9 Ves. Jr. 254; Waring *v.* Cunliffe, 1 Ves. Jr. 99, 1 Rev. Rep. 88.

In Connecticut interest may be recovered on arrears of interest due if there is an express promise to pay such interest. Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564; Rose *v.* Bridgeport, 17 Conn. 243.

6. *Alabama.*— Stickney *v.* Moore, 108 Ala. 590, 19 So. 76; Ginn *v.* New England Mortg. Security Co., 92 Ala. 135, 8 So. 388.

Illinois.— Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573; Harper *v.* Ely, 70 Ill. 581.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. (Mass.) 92; Wilcox *v.* Howland, 23 Pick. (Mass.) 167.

Missouri.— Jasper County *v.* Tavis, 76 Mo. 13.

New York.— Stewart *v.* Petree, 55 N. Y. 621.

United States.— Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Aurora *v.* West, 7 Wall. (U. S.) 82, 19 L. ed. 42.

Reason for rule.— For where a new note is given for the interest it is thereby converted into capital and may rightfully be given with interest. Ferry *v.* Ferry, 2 Cush. (Mass.) 92; Wilcox *v.* Howland, 23 Pick. (Mass.) 167.

7. Ferry *v.* Ferry, 2 Cush. (Mass.) 92; Eaton *v.* Bell, 5 B. & Ald. 34, 7 E. C. L. 30.

8. *Arkansas.*— Causin *v.* Taylor, 4 Ark. 408; Pullen *v.* Chase, 4 Ark. 210.

Illinois.— Packer *v.* Roberts, 40 Ill. App. 613 [*affirmed* in 140 Ill. 9, 29 N. E. 668].

Kentucky.— Whitton *v.* Swope, 1 Litt. (Ky.) 160.

Maine.— Colby *v.* Bunker, 68 Me. 524; Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21.

Massachusetts.— Proctor *v.* Whitcomb, 137 Mass. 303.

New York.— Gaylord *v.* Van Loan, 15 Wend. (N. Y.) 308.

Texas.— Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806.

United States.— Pate *v.* Gray, Hempst. (U. S.) 155, 18 Fed. Cas. No. 10,794*a*.

England.— Hopper *v.* Richmond, 1 Stark. 507, 2 E. C. L. 193.

Canada.— Baxter *v.* Robinson, 2 Rev. Lég. 439.

9. Larrabee *v.* Southard, 95 Me. 385, 50 Atl. 20.

10. Ringo *v.* Biscoe, 13 Ark. 563; *In re* State Bank, 60 Pa. St. 471.

And if no demand is made before the order to wind up the banking company no interest can be recovered. *In re* Herefordshire Banking Co., L. R. 4 Eq. 250, 36 L. J. Ch. 806, 15 Wkly. Rep. 1056.

But the closing of the doors of a bank dispenses with formal demand and interest will run from that time. *In re* East of England Banking Co., L. R. 6 Eq. 368 [*affirming* L. R. 4 Ch. 14, 38 L. J. Ch. 121, 19 L. T. Rep. N. S. 299, 17 Wkly. Rep. 18].

11. *Alabama.*— Hunter *v.* Wood, 54 Ala. 71; Maxcy *v.* Knight, 18 Ala. 300.

District of Columbia.— Corcoran *v.* Chesapeake, etc., Canal Co., 1 MacArthur (D. C.) 358.

Illinois.— Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203, 39 L. R. A. 159; Wallace *v.* Wallace, 8 Ill. App. 69.

Indiana.— Goodwin *v.* Hazzard, Smith (Ind.) 320.

Kentucky.— Nelson *v.* Cartmel, 6 Dana (Ky.) 7; Gore *v.* Buck, 1 T. B. Mon. (Ky.) 209; Dillon *v.* Dudley, 1 A. K. Marsh. (Ky.) 66; Bartlett *v.* Marshall, 2 Bibb. (Ky.) 467.

Michigan.— Nye *v.* Lothrop, 94 Mich. 411, 54 N. W. 178.

New Jersey.— Adams *v.* Adams, 55 N. J. Eq. 42, 35 Atl. 827.

New York.— Bishop *v.* Sniffen, 1 Daly (N. Y.) 155; Sanford *v.* Crocheron, 8 N. Y. Civ. Proc. 146.

Pennsylvania.— Breyfogle *v.* Beckley, 16 Serg. & R. (Pa.) 264; Rayne *v.* Guthrie, Add. (Pa.) 137.

South Carolina.— Schmidt *v.* Limehouse, 2 Bailey (S. C.) 276; Cannon *v.* Beggs, 1 McCord (S. C.) 370, 10 Am. Dec. 677.

England.— Barough *v.* White, 4 B. & C. 325, 10 E. C. L. 600, 2 C. & P. 81, 12 E. C. L. 420, 6 D. & R. 379, 3 L. J. K. B. O. S. 227; Farquhar *v.* Morris, 7 T. R. 124; Upton *v.* Ferrers, 5 Ves. Jr. 801, 5 Rev. Rep. 167.

Canada.— Hard *v.* Palmer, 21 U. C. Q. B. 49.

When payments have been made.— Although interest does not usually run until demand made upon such a note, yet where payments have been made on account the

previous demand has been made;[12] and so of an order drawn upon a county treasurer[13] or a draft drawn upon the treasurer of a private corporation.[14] But a note for money without specifying the time of payment is payable presently and not on demand, and therefore bears interest from its date,[15] and by statute in some jurisdictions even a demand note will bear interest from date.[16]

e. Action For Interest — (I) *In General.* Assumpsit[17] lies for the interest due on a promissory note, by which the interest is payable annually, although the principal is not yet payable.[18] Where a note is payable in instalments, with interest, the interest on each instalment becomes due with that instalment.[19]

(II) *Splitting Actions.*[20] If the principal is due the demand for principal and interest is an entire one and cannot be split so as to allow a recovery for the interest alone.[21] And it has been held that after payment of the principal of a debt an action will not lie to recover the interest.[22]

5. Exchange and Reëxchange — a. In General. Independently of any statutory provision or immemorial usage[23] to the contrary, the amount recoverable as reëxchange[24] is the sum expressed on the face of the bill, together with interest and expenses, at the rate of exchange[25] on the day of dishonor, in the currency

jury should presume that they were made in consequence of a demand, and interest on the balance will then accrue. Hard *v.* Palmer, 21 U. C. Q. B. 49.

12. Gore *v.* Buck, 1 T. B. Mon. (Ky.) 209; Patrick *v.* Clay, 4 Bibb (Ky.) 246; Bartlett *v.* Marshall, 2 Bibb (Ky.) 467; Hunt *v.* Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; Pierce *v.* Fothergill, 2 Bing. N. Cas. 167, 1 Hodges 251, 2 Scott 334, 29 E. C. L. 485; Clervoux *v.* Pigeon, 32 L. C. Jur. 236.

The rule applies to a due-bill, or "I O U" as well as to a promissory note. Gay *v.* Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7 L. R. A. 392.

In case of default interest before suit cannot be given without a jury to find the fact of a previous demand. Patrick *v.* Clay, 4 Bibb (Ky.) 246.

13. Yellowly *v.* Pitt County, 73 N. C. 164.

14. English *v.* Indiana Asbury University, 6 Ind. 437.

15. Francis *v.* Castleman, 4 Bibb (Ky.) 282; Purdy *v.* Philips, 11 N. Y. 406; Gaylord *v.* Van Loan, 15 Wend. (N. Y.) 308; Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587; Farquhar *v.* Morris, 7 T. R. 124.

16. Walker *v.* Wills, 5 Ark. 166; Pullen *v.* Chase, 4 Ark. 210; Edgmon *v.* Ashelby, 76 Ill. 161.

17. See, generally, Assumpsit, Action of.

18. Cooley *v.* Rose, 3 Mass. 221. Upon a note for money payable at a future day, whether in an entire sum or by instalments, with interest to be paid annually, the interest which may have accrued in any year may be recovered if sued for before the pay day on the principal. Bannister *v.* Roberts, 35 Me. 75.

19. Saunders *v.* McCarthy, 8 Allen (Mass.) 42; Ewer *v.* Myrick, 1 Cush. (Mass.) 16; Bander *v.* Bander, 7 Barb. (N. Y.) 560.

20. See, generally, Joinder and Splitting of Actions.

21. Ellerbe *v.* Troy, 58 Ala. 143; Howe *v.* Bradley, 19 Me. 31; Johnson *v.* Brannan, 5 Johns. (N. Y.) 268.

22. Stevens *v.* Barringer, 13 Wend. (N. Y.) 639; Moore *v.* Fuller, 47 N. C. 205.

So also if the principal sum due on a protested bill has been recovered and the judgment satisfied damages cannot be recovered in another action. Kenner *v.* Kennedy, 4 Harr. & J. (Md.) 240.

But where, at the maturity of a bill, a new bill is given and the old one is retained expressly for the arrears of interest not covered by the new bill, an action may be brought on the original bill to recover the interest after the new bill is paid and the principal thus discharged. Lumley *v.* Musgrave, 4 Bing. N. Cas. 9, 33 E. C. L. 569.

23. See *infra*, XIV, G, 5, b.

24. "Exchange" and "reëxchange."— The term "exchange" is used to designate the market value, in one country, of money to be delivered in another; and "reëxchange" means the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed. Benjamin Chalm. Bills & N. art. 221.

25. The rate of exchange between two places is not exclusively regulated by the expense of transporting specie from one place to the other. The only correct rule is to ascertain the ordinary rate of exchange between the two places, and this is to be established by evidence the same as the value of any other thing. Balch *v.* Colman, 2 McLean (U. S.) 85, 2 Fed. Cas. No. 791. That is the sum paid for the dishonored bill, together with costs of protest and other damages, is not an indemity in the place where the bill was drawn. Those sums must be paid in the place where the bill was payable and if the holder is obliged to seek his remedy in the place where the bill was drawn or indorsed he is entitled to recover an additional sum, to be ascertained by the premium on a bill for the full amount drawn where

of the country where it is payable, and such rate of exchange is a question of fact to be proved.[26] But if the holder had no occasion to transfer money from one country to another and was not obliged to put himself in funds in the place where the bill was dishonored, it seems that he is not entitled to reëxchange;[27] and it has been held that one to whom a bill has been remitted in payment of a precedent debt cannot, in case of protest, recover damages in lieu of reëxchange from the remitter.[28] Again, if a state of war existing between the two countries has interrupted the direct course of exchange, but an indirect course through a third country exists,[29] the bill must be paid by the drawer with exchange by the indirect course.[30]

b. Rate Fixed by Statute or Commercial Usage. In the United States the rate of reëxchange recoverable is generally fixed by statute, but the rates in the different states lack uniformity;[31] and many cases construing and applying similar statutes are to be found in the Canadian reports.[32] The sum thus allowed is

the dishonored bill was payable and payable where the latter was drawn or indorsed, as the case may be, and which would sell where it is drawn for the sum claimed. U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 746, 11 L. ed. 439, 453.

26. Suse *v.* Pompe, 8 C. B. N. S. 538, 7 Jur. N. S. 166, 3 L. T. Rep. N. S. 17, 9 Wkly. Rep. 15, 98 E. C. L. 538.

Redraft by law merchant.— By the law merchant, the holder of the bill may call upon the drawer or any indorser to make good the payment of the bill by drawing a sight bill, called a "redraft," for the sum necessary to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. Benjamin Chalm. Bills & N. art. 221; Suse *v.* Pope, 8 C. B. N. S. 538, 7 Jur. N. S. 166, 3 L. T. Rep. N. S. 17, 9 Wkly. Rep. 15, 98 E. C. L. 538. The whole amount is called in law Latin "*recambium*," in Italian "*recambio*," in French "*rechange*," and in English "reëxchange." Byles, J., in Suse *v.* Pope, 8 C. B. N. S. 538, 7 Jur. N. S. 166, 3 L. T. Rep. N. S. 17, 9 Wkly. Rep. 15, 98 E. C. L. 538. And although no redraft be made, the holder of the dishonored bill is entitled to recover as damages the amount which it would have cost him to purchase a redraft for the amount of the dishonored bill, together with interest and the necessary expenses of the transaction, at the actual rate of exchange on the day of dishonor. Bangor Bank *v.* Hook, 5 Me. 174; Bryden *v.* Taylor, 2 Harr. & J. (Md.) 396, 3 Am. Dec. 554; Greene *v.* Goddard, 9 Metc. (Mass.) 212; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989; U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517; *In re* Commercial Bank, 36 Ch. D. 522, 57 L. J. Ch. 131, 57 L. T. Rep. N. S. 395, 36 Wkly. Rep. 550; Auriol *v.* Thomas, 2 T. R. 52. In Willans *v.* Ayers, 3 App. Cas. 133, 146, 47 L. J. P. C. 1, 37 L. T. Rep. N. S. 732, Sir James W. Colville, speaking for the privy council, said: "If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to 're-exchange,' which is the measure of those damages."

27. Willans *v.* Ayers, 3 App. Cas. 133, 47 L. J. P. C. 1, 37 L. T. Rep. N. S. 732.

28. Thompson *v.* Robertson, 4 Johns. (N. Y.) 27; Kenworthy *v.* Hopkins, 1 Johns. Cas. (N. Y.) 107.

29. The exchange is sometimes direct, at others circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn and where it is made payable. U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 746, 11 L. ed. 439, 453.

30. Pollard *v.* Herries, 3 B. & P. 335.

Where a country is in the enemy's hands or in a state of blockade it may be left to the jury to determine as a fact whether there is any existing rate of exchange to be allowed. De Tastet *v.* Baring, 2 Campb. 65, 11 East 265, 10 Rev. Rep. 499. But it has been held that a drawer will not be relieved from liability to pay reëxchange because the drawee was forbidden by his government to make payment to an alien enemy. Mellish *v.* Simeon, 2 H. Bl. 378, 3 Rev. Rep. 418.

31. Thus in 1700 an act was passed in Pennsylvania fixing the rate of reëxchange upon bills drawn upon any part of Europe at twenty per cent. Francis *v.* Rucker, Ambl. 672, 27 Eng. Reprint 436. See also Henderson *v.* Allen, 1 Dall. (Pa.) 149, 1 L. ed. 76. And in 1743 a similar act was passed in Rhode Island fixing the rate at ten per cent. Brown *v.* Van Braam, 3 Dall. (U. S.) 344, 1 L. ed. 629. In South Carolina also the rate was fixed at ten per cent by an early statute. Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, 3 L. ed. 419. And in Maryland at fifteen per cent. U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 746, 11 L. ed. 439, 453.

32. Stephens *v.* Berry, 15 U. C. C. P. 548; White *v.* Baker, 15 U. C. C. P. 292; Judson *v.* Griffin, 13 U. C. C. P. 350; American Exch. Bank *v.* McMicken, 8 U. C. C. P. 59; Wilson *v.* Aitkin, 5 U. C. C. P. 376; Rols *v.* Winans, 5 U. C. C. P. 185; Greatorex *v.* Score, 6 U. C. L. J. 212; Montreal Bank *v.* Harrison,

not given as a penalty for drawing without authority, but as commutation for interest, damages, and reëxchange. It is in truth a liquidation of the damages, not by the parties but by the law, fixing the compensation for the loss beforehand, to save time and litigation.[33] According to some of the American cases a fixed rate of reëxchange was established by commercial usage;[34] and in some of the English cases we find allusion made to the custom of allowing a fixed percentage by way of liquidated damages in lieu of exchange, reëxchange, and other charges, when bills are returned from the colonies dishonored; but this does not apply in the absence of an agreement, express or implied, to allow reëxchange.[35]

c. Liability of Accepters. It has been held in a number of cases that the liability for reëxchange or statutory damages in lieu thereof applies only to drawers and indorsers, and does not extend to accepters;[36] but it seems to be the better opinion that where a bill is dishonored, the drawer is entitled to recover from the accepter, or one who for sufficient consideration has agreed to accept, not only the amount of the bill and interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of reëxchange.[37]

4 Ont. Pr. 331; Foster *v.* Bowes, 2 Ont. Pr. 256; Meyer *v.* Hutchinson, 16 U. C. Q. B. 476; Royal Bank *v.* Whittemore, 16 U. C. Q. B. 429; Nichols *v.* Raynes, 6 U. C. Q. B. 273; Commercial Bank *v.* Allan, 5 U. C. Q. B. O. S. 574; O'Neil *v.* Perrin, (Mich. T.) 3 Vict. But see now Can. Rev. Stat. (1886), c. 123.

33. Gibson, C. J., in Lloyd *v.* McGarr, 3 Pa. St. 474, 482. To same effect see Bangor Bank *v.* Hook, 5 Me. 174; Lennig *v.* Ralston, 23 Pa. St. 137; Allen *v.* Union Bank, 5 Whart. (Pa.) 420.

Statutory damages in lieu of reexchange. — In U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 737, 746, 11 L. ed. 439, 453, McLean, J., said: "The bill under consideration having been protested at Paris for nonpayment, the holder under the general commercial law was entitled to a bill drawn at that place, payable in this city, for such sum as would pay the original bill at Paris, including costs of protest and other legal charges. This is reexchange, and it varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the State of Maryland, and almost all the other States of the Union, have fixed, by legislation, a certain amount of damages on protested foreign bills, in lieu of re-exchange." A bill is not affected by a statute changing the amount of damages recoverable in lieu of reëxchange passed after the drawing. Lennig *v.* Ralston, 23 Pa. St. 137.

34. In Hendricks *v.* Franklin, 4 Johns. (N. Y.) 119, 122, Spencer, J., said: "The right to recover 20 per cent. damages on the protest of a foreign bill of exchange, rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions." See also Denston *v.* Henderson, 13 Johns. (N. Y.) 322; Graves *v.* Dash, 12 Johns. (N. Y.) 17. And the same was true in Massachusetts, with the exception that there the allowance was ten per cent instead of twenty. Barclay *v.* Minchin, 6 Mass. 162, Grimshaw *v.* Bender, 6 Mass. 157. And the rule in Maine was the same as that in Massachusetts. Wood *v.* Watson, 53 Me. 300; Snow *v.* Goodrich, 14 Me. 235.

35. Willans *v.* Ayers, 3 App. Cas. 133, 47 L. J. C. P. 1, 37 L. T. Rep. N. S. 732; Auriol *v.* Thomas, 2 T. R. 52. Where a bill was drawn by defendant at Barbadoes on a mercantile firm in London and was dishonored, Lord Ellenborough left the question of damages to the special jury, to be decided upon the custom of merchants. Gantt *v.* Mackenzie, 3 Campb. 51.

36. Trammell *v.* Hudmon, 56 Ala. 235; Manning *v.* Kohn, 44 Ala. 343; Hanrick *v.* Farmers' Bank, 8 Port. (Ala.) 539; Thierry *v.* Saffon, 4 La. Ann. 347; Newman *v.* Goza, 2 La. Ann. 642; Bowen *v.* Stoddard, 10 Metc. (Mass.) 375; Watt *v.* Riddle, 8 Watts (Pa.) 545.

Notarial fees. — If, however, it becomes necessary to protest the bill, in order to charge the drawer and indorser with damages, the accepter is liable to refund the notarial fees. Ticknor *v.* Montgomery Branch Bank, 3 Ala. 135.

37. Riggs *v.* Lindsay, 7 Cranch (U. S.) 500, 3 L. ed. 419; *In re* Gillespie, 16 Q. B. D. 702 [*affirmed* in 18 Q. B. D. 286, 56 L. J. Q. B. 74, 56 L. T. Rep. N. S. 599, 35 Wkly. Rep. 128]; Prehn *v.* Royal Bank, L. R. 5 Exch. 92, 39 L. J. Exch. 41, 21 L. T. Rep. N. S. 830, 18 Wkly. Rep. 463; Francis *v.* Rucker, Ambl. 672, 27 Eng. Reprint 436; *In re* General South American Co., 7 Ch. D. 637, 47 L. J. Ch. 67, 37 L. T. Rep. N. S. 599, 26 Wkly. Rep. 232; Walker *v.* Hamilton, 1 De G. F. & J. 602, 62 Eng. Ch. 466.

The reason assigned is that the payment of reëxchange, or what is paid under the law in lieu of reëxchange, is a necessary consequence of the breach of contract on the part of the accepter of the bill. Walker *v.* Hamilton, 1 De G. F. & J. 602, 62 Eng. Ch. 466.

d. On Promissory Notes. Promissory notes are by the law merchant not subject to the rules of exchange and reëxchange, although the parties may lawfully stipulate for the rate of exchange between the place of making and the place of payment.[38] It has been held, however, that the creditor is entitled to his money at the place of payment without deduction, and if he is obliged to collect it in another place he is entitled also to recover an additional sum sufficient to make it good in the place where it ought to have been paid.[39]

e. On Interstate Bills — (I) *Rule Stated.* Inasmuch as a bill of exchange drawn in one of the United States and payable in another is a foreign bill, it follows that the dishonor of such a bill will entitle the holder to reëxchange or statutory damages in lieu of the same.[40]

(II) *Extent and Limits of Rule.* It has been held that a bill drawn by a citizen of a state upon another citizen of the same state, although payable in another state, is not a bill upon the protest of which statutory damages can be recovered by the holder.[41] But if the bill be indorsed in a state other than that of the residence of the drawer and drawee, the indorser will, upon dishonor of the bill, be liable for statutory damages.[42] In such case, however, the statutory damages cannot as a rule be recovered unless the bill has been duly protested.[43]

38. Clauser *v.* Stone, 29 Ill. 114, 81 Am. Dec. 299; Hill *v.* Todd, 29 Ill. 101; Chumasero *v.* Gilbert, 24 Ill. 651; Loud *v.* Merrill, 47 Me. 351; Grutacap *v.* Woulluise, 2 McLean (U. S.) 581, 11 Fed. Cas. No. 5,854; Pollard *v.* Herries, 3 B. & P. 335.

Meaningless provision for exchange.— On a note payable at a particular place promising to pay "thirteen hundred and fourteen 65/100 dollars with exchange, for value received, with interest," the amount payable is thirteen hundred and fourteen and sixty-five one-hundredths dollars, with interest, the provision for exchange being meaningless. Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

When a man draws a bill of exchange on himself no damages are recoverable; it is like a note of hand when he accepts it. McCandlish *v.* Cruger, 2 Bay (S. C.) 377. But in Randolph *v.* Parish, 9 Port. (Ala.) 76, it was held that where a party draws a bill on himself, payable at the same place, he is liable for damages, if the bill be dishonored.

39. Howard *v.* Central Bank, 3 Ga. 375; Wood *v.* Kelso, 27 Pa. St. 241; Lee *v.* Wilcocks, 5 Serg. & R. (Pa.) 48; Grant *v.* Healy, 3 Sumn. (U. S.) 523, 10 Fed. Cas. No. 5,696, 2 Law Rep. 113; Smith *v.* Shaw, 2 Wash. (U. S.) 167, 22 Fed. Cas. No. 13,107; Scott *v.* Bevan, 2 B. & Ad. 78, 9 L. J. K. B. O. S. 152, 22 E. C. L. 42; Cash *v.* Kennion, 11 Ves. Jr. 314.

And the rate of exchange will be determined as of the date the note falls due. Price *v.* Teal, 4 McLean (U. S.) 201, 19 Fed. Cas. No. 11,417.

Par of exchange.— But it has been held on the other hand that he is entitled to recover only the par of exchange, without any allowance for the rate of exchange. Lodge *v.* Spooner, 8 Gray (Mass.) 166; Adams *v.* Cordis, 8 Pick. (Mass.) 260; Scofield *v.* Day, 20 Johns. (N. Y.) 102; Martin *v.* Franklin, 4 Johns. (N. Y.) 124.

In Missouri damages are allowed on negotiable and negotiated notes. Broadway Sav. Bank *v.* Forbes, 79 Mo. 226 [*affirming* 9 Mo. App. 575]; Clark *v.* Schneider, 17 Mo. 295. But not if they have not been negotiated. State Bank *v.* Wright, 10 Mo. 719; Haeussler *v.* Haberstroth, 7 Mo. App. 458.

40. *Arkansas.*— Pryor *v.* Watson, 8 Ark. 111.

Idaho.— Hazard *v.* Cole, 1 Ida. 276.

Indiana.— May *v.* State Bank, 9 Ind. 233; State Bank *v.* Bowers, 8 Blackf. (Ind.) 72.

Kentucky.— Wood *v.* Farmers, etc., Bank, 7 T. B. Mon. (Ky.) 281.

Ohio.— West *v.* Valley Bank, 6 Ohio St. 168; Hubbell *v.* Ohio L. Ins., etc., Co., 3 Ohio Dec. (Reprint) 294.

United States.— U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 54, 9 L. ed. 989; Buckner *v.* Finley, 2 Pet. (U. S.) 586, 7 L. ed. 528.

In Missouri it has been held that to entitle the holder of a dishonored bill of exchange to the damages allowed by statute it must be expressed to be "for value received." Hallowell *v.* Page, 24 Mo. 590.

41. *Kentucky.*— Clay *v.* Hopkins, 3 A. K. Marsh. (Ky.) 485.

Ohio.— Farmers' Bank *v.* Brainerd, 9 Ohio 292; Sleeper *v.* Ingersoll, 2 Ohio Dec. (Reprint) 166, 1 West. L. Month. 677.

South Carolina.— Bain *v.* Ackworth, 1 Mill (S. C.) 107.

Tennessee.— Cox *v.* State Bank, 3 Sneed (Tenn.) 139.

United States.— U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989.

But in an early Indiana case a contrary construction was put upon the statute of that state. State Bank *v.* Rodgers, 3 Ind. 53.

Bill drawn on oneself.— No damages are recoverable where one draws a bill on himself. After acceptance it is like a promissory note. McCandlish *v.* Cruger, 2 Bay (S. C.) 377.

42. Case *v.* Heffner, 10 Ohio 180; Evans *v.* Gee, 11 Pet. (U. S.) 80, 9 L. ed. 639.

43. Jordan *v.* Bell, 8 Port. (Ala.) 53; McMurchey *v.* Robinson, 10 Ohio 496; Case

6. Attorney's Fees — a. Accrual of Right to Recover. Inasmuch as stipulated attorney's fees are no part of the original debt, the right to them does not accrue until the payee incurs the liability, and then only to the extent of the reasonable value of the attorney's services actually performed or to be performed, which must be proved.[44] Consequently a proper tender of the principal and interest due on the note before an action is brought will deprive the holder of his right to recover attorney's fees.[45] But it is not necessary in all cases that an action should be brought on the note in order to entitle the holder to attorney's fees. Thus the proving of a contested claim against the estate of a deceased maker[46] or a lunatic[47] will be sufficient if the services of an attorney are required.

b. Amount of Recovery. If in a promissory note the parties stipulate for attorney's fees in case suit is brought the terms of the contract will generally

v. Heffner, 10 Ohio 180; Wanzer *v.* Tupper, 8 How. (U. S.) 234, 12 L. ed. 1060; Bailey *v.* Dozier, 6 How. (U. S.) 23, 12 L. ed. 328.

Effect of necessity of protest.— It follows therefore that in a case where no protest is necessary statutory damages cannot be recovered. Noyes *v.* White, 9 Kan. 640; German *v.* Ritchie, 9 Kan. 106. But where protest is necessary notice thereof is sufficient demand of payment. May *v.* State Bank, 9 Ind. 233.

Notwithstanding a waiver of protest the holder of a bill may have it protested if he desires to claim the statutory damages for non-acceptance or non-payment. Bellinger *v.* Glenn, 80 Ala. 190, 60 Am. Rep. 980.

Under the Missouri statute damages may be recovered notwithstanding the want of protest. Phillips *v.* Evans, 64 Mo. 17.

44. *Alabama.*— Camp *v.* Randle, 81 Ala. 240, 2 So. 287.

Georgia.— Demere *v.* Germania Bank, 116 Ga. 317, 42 S. E. 488; Stoner *v.* Pickett, 115 Ga. 653, 42 S. E. 41; Patillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

Indiana.— Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704; Kennedy *v.* Richardson, 70 Ind. 524; Wyant *v.* Pottorff, 37 Ind. 512; Bowser *v.* Palmer, 33 Ind. 124; Judson *v.* Romaine, 8 Ind. App. 390, 35 N. E. 912.

Minnesota.—Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668; Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252; Pinney *v.* Jorgenson, 27 Minn. 26, 6 N. W. 376.

Missouri.— North Atchison Bank *v.* Gay, 114 Mo. 203, 21 S. W. 479.

Pennsylvania.— De Coursey *v.* Johnston, 134 Pa. St. 328, 19 Atl. 1074.

Texas.— Laning *v.* Iron City Nat. Bank, 89 Tex. 601, 35 S. W. 1048; Hall *v.* Read, (Tex. Civ. App. 1902) 66 S. W. 809; Luzenberg *v.* Bexar Bldg., etc., Assoc., 9 Tex. Civ. App. 261, 29 S. W. 237; Hamilton *v.* Clark, (Tex. Civ. App. 1894) 26 S. W. 515.

United States.— Osborne *v.* Smith, 5 McCrary (U. S.) 487, 18 Fed. 126.

After dishonor.— A note contained the following: "In case suit or other action is instituted to collect this note or any portion thereof, promises and agrees to pay two hundred dollars in like gold coin for attorney's fees in said suit or action." It was held that the two hundred dollars attorney's fees were intended by the parties to be paid but once, and not for every action that might be brought to enforce separate payments of interest. Hence they were not collectable until the note was dishonored by failure to pay the principal. Merrill *v.* Muzzy, 11 Wash. 16, 20, 39 Pac. 277.

Appearance of an attorney in a suit on a note is sufficient evidence that it was placed in an attorney's hands for collection. Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

Effect of garnishment.— Where the maker of a note agreed to pay a certain commission if the note was not paid at maturity, and was collected by an attorney, the fact that he was garnished in an action against the payee, which garnishment was pending when said note fell due, is no bar to an action for commissions accruing by reason of the note not being paid at maturity, and being collected by an attorney. Brahan *v.* Clarksville First Nat. Bank, 72 Miss. 266, 16 So. 203.

Under Iowa Code (1873), § 2894, a judgment by confession is one entered without action; hence no attorney's fee is allowable on a judgment by confession on a note providing for the payment of "a reasonable attorney's fee, if sued." Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204.

45. Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704.

It is not necessary that the maker should keep the tender good. The fact that it was properly made is sufficient to show that plaintiff had no occasion to incur liability for attorney's fees. Pinney *v.* Jorgenson, 27 Minn. 26, 6 N. W. 376.

When the maker of a judgment note pays into court, on the day of maturity, the full amount of the note, principal, interest, and costs, he is not liable on a stipulation in the note to pay five per cent "attorney's commission for collection," as he has obviated the necessity for an attorney's services. Moore's Appeal, 110 Pa. St. 433, 1 Atl. 593.

46. Davidson *v.* Vorse, 52 Iowa 384, 3 N. W. 477; Huddleston *v.* Kempner, 1 Tex. Civ. App. 211, 21 S. W. 946.

47. Morrill *v.* Hoyt, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630; Simmons *v.* Terrell, 75 Tex. 275, 12 S. W. 854.

control the amount of the recovery.[48] The stipulation includes only the attorney's fees incurred in the trial court, and not those incurred by the holder in an appellate court to which the maker has carried the case.[49] If a note stipulating for attorney's fees does not state the amount of such fees to be allowed, evidence as to the amount should be given at the trial,[50] and a reasonable allowance will be made as compensation for the services of plaintiff's attorney.[51] The amount of such fees is a question for the court in the exercise of its equity powers, and is not a proper one for submission to a jury.[52]

c. From Whom Recoverable. Such fees, it seems, can be collected only from the maker,[53] and in a suit by the assignee against the assignor the measure of

48. *Alabama.*— Cowan *v.* Campbell, 131 Ala. 211, 31 So. 429; Munn *v.* Planters, etc., Bank, 109 Ala. 215, 19 So. 55; Williams *v.* Flowers, 90 Ala. 136, 7 So. 439, 24 Am. St. Rep. 772.

Georgia.— Ray *v.* Pease, 97 Ga. 618, 25 S. E. 360.

Indiana.— Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371; Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211; Bond *v.* Orndorf, 77 Ind. 583; Davidson *v.* King, 49 Ind. 338; Smiley *v.* Meir, 47 Ind. 559; Johnson *v.* Crossland, 34 Ind. 334; Moore *v.* Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665.

Iowa.— Black *v.* De Camp, 78 Iowa 718, 43 N. W. 625; Star Wagon Co. *v.* Swezy, 63 Iowa 520, 19 N. W. 298; McIntire *v.* Cagley, 37 Iowa 676; Shugart *v.* Pattee, 37 Iowa 422.

Michigan.— Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45.

New Mexico.—Dallas Exch. Bank *v.* Tuttle, 5 N. M. 427, 23 Pac. 241, 7 L. R. A. 445.

Texas.— Jefferson Lumber Co. *v.* Williams, 68 Tex. 656, 5 S. W. 672; Carver *v.* J. S. Mayfield Lumber Co., (Tex. Civ. App. 1902) 68 S. W. 711; Williams *v.* Harrison, (Tex. Civ. App. 1901) 65 S. W. 884; Sinclair *v.* Weekes, (Tex. Civ. App. 1897) 41 S. W. 107; Smith *v.* Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565; D. A. Tompkins Co. *v.* Galveston St. R. Co., 4 Tex. Civ. App. 1, 23 S. W. 25; Bosley *v.* Pease, (Tex. Civ. App. 1893) 22 S. W. 516.

Washington.—Haywood *v.* Miller, 14 Wash. 660, 45 Pac. 307; Spokane Exch. Nat. Bank *v.* Wolverton, 11 Wash. 108, 39 Pac. 248; Hardy *v.* Hohl, 11 Wash. 1, 39 Pac. 277; Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

Wisconsin.— Vipond *v.* Townsend, 88 Wis. 285, 60 N. W. 430.

See 10 Cent. Dig. tit. "Bills and Notes," § 1946.

Recovery cannot be had under the stipulation in a note: "And it is further agreed that the undersigned shall pay all costs for collection above, not less than 10 per cent., on the failure to pay at maturity." Handley *v.* Tebbetts, 13 Ky. L. Rep. 280, 282, 16 S. W. 131, 17 S. W. 166.

What law governs.— Where suit was instituted in North Carolina on a note executed and payable in Georgia, the validity of a provision in it for attorney's fees in case of suit must be determined by the laws of North Carolina, since the provision affected only the remedy, and hence was governed by the *lex fori*. Exchange Bank *v.* Appalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

49. Strough *v.* Gear, 48 Ind. 100; McCormick *v.* Falls City Bank, 57 Fed. 107, 6 C. C. A. 683.

50. Smiley *v.* Meir, 47 Ind. 559; Wyant *v.* Pottorff, 37 Ind. 512; Muscatine First Nat. Bank *v.* Krance, 50 Iowa 235; Johnston Harvester Co. *v.* Clark, 30 Minn. 308, 15 N. W. 252.

Note itself insufficient.— If the only evidence introduced by plaintiff is the note sued on there can be no allowance for attorney's fees. Bowser *v.* Palmer, 33 Ind. 124.

51. *Alabama.*— McGhee *v.* Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734.

California.— Hildreth *v.* Williams, (Cal. 1893) 33 Pac. 1113.

Illinois.— Farmers', etc., Nat. Bank *v.* Bartin, 21 Ill. App. 403.

Indiana.— Strough *v.* Gear, 48 Ind. 100.

Minnesota.—Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668.

Washington.— Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136, holding that where a note contains a promise to pay an attorney's fee in case an action is brought on it, the holder is not restricted to the statutory attorney's fee, but may recover a reasonable amount therefor. Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67.

52. Guthrie *v.* Reid, 107 Pa. St. 251; Daly *v.* Maitland, 88 Pa. St. 384, 32 Am. Rep. 457; Salsburg *v.* Mack, 11 Pa. Co. Ct. 408; Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

A promise to pay such attorney's fees as the court may think just, in case the payee is compelled to enforce payment by action, does not give the payee the power of assessing such fees and suing for their recovery. Bowles *v.* Doble, 11 Oreg. 474, 5 Pac. 918.

53. But in Hubbard *v.* Harrison, 38 Ind. 323, it was held that the promise in a note to pay attorney's fees if suit be instituted on the note could be enforced against an indorser. And in Bank of British North America *v.* Ellis, 2 Fed. 44, it was held that an accommodation indorser is liable for the payment of a stipulated attorney's fee in case suit be instituted for the recovery of the debt evidenced by the note.

Where defendant assumes payment of a note executed by plaintiff, which provides

damages is the amount paid for the note to the assignor, with interest, and the recovery can in no case exceed the amount due on the face of the note.[54]

d. In Same or Separate Action.[55] As a rule[66] such fees may be collected in an action on the note and included in the judgment; they are not contingent on the suit resulting in the collection of the debt.[57]

7. Costs of Protest. In an action against the accepter of a bill, the proper measure of damages includes not only the face value of the bill with interest, but also necessary costs of protest,[58] for the notarial expenses consequent upon dishonor are recoverable as special damages.[59] But only such expenses as are necessary are recoverable.[60] Consequently the expenses of a protest for better security cannot be allowed as part of the damages;[61] and commissions charged by an accepter *supra protest* are not a legitimate part of the damages.[62] So also in an action against the indorser of a bill or note the fees of protest are properly included in the assessment of damages;[63] but if he has received no notice of

for the recovery of attorney's fees if its payment be enforced by the legal holder by action, defendant is not liable for attorney's fees in an action by plaintiff to compel defendant to pay the note. Galvin *v.* Mac Min., etc., Co., 14 Mont. 508, 37 Pac. 366.

54. Short *v.* Coffeen, 76 Ill. 245; Shaeffer *v.* Hodges, 54 Ill. 337.

55. See, generally, Joinder and Splitting of Actions.

56. Separate action. — It has been held, however, that they cannot be recovered in a suit on the note, but that a separate action must be brought. Easter *v.* Boyd, 79 Ill. 325; Nickerson *v.* Babcock, 29 Ill. 497; Hand *v.* Simpson, 99 Ill. App. 269. But if it is expressly stipulated in the note that a definite sum for attorney's fees shall be taxed and collected as costs a separate action for their collection should not be brought. Maxwell *v.* Buntin, 31 Ill. App. 278.

57. Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211; Shugart *v.* Pattee, 37 Iowa 422; Stanley *v.* Farmers' Bank, 17 Kan. 592.

Judgment for principal, interest, and attorney's fees.— In an action on a note which stipulates for ten per cent interest and ten per cent attorney's fees, it is proper to render judgment for principal and interest due and ten per cent of both such principal and interest as attorney's fees. Carver *v.* J. S. Mayfield Lumber Co., (Tex. Civ. App. 1902) 68 S. W. 711.

Where such fees are allowed in a suit on the note, but their collection is delayed by appeal, the court in a subsequent trial is not authorized to allow interest on them. Star Wagon Co. *v.* Swezy, 63 Iowa 520, 19 N. W. 298.

58. Bowen *v.* Stoddard, 10 Metc. (Mass.) 375; Denton Lumber Co. *v.* Fond du lac First Nat. Bank, (Tex. 1892) 18 S. W. 962; *In re* English Bank of River Plate, [1893] 2 Ch. 438, 62 L. J. Ch. 578, 69 L. T. Rep. N. S. 14, 3 Reports 518, 41 Wkly. Rep. 521.

Promissory note.— It is not error to allow costs of protest in an action on a note, where the declaration claims such costs, although it does not allege there was a protest, no question as to the form or sufficiency of the declaration being raised at the trial. Barker *v.* Loring, 177 Mass. 389, 59 N. E. 66.

Commissions, notarial, and telegraphic expenses are all legitimate charges where protest was necessary. Prehn *v.* Royal Bank, L. R. 5 Exch. 92, 39 L. J. Exch. 41, 21 L. T. Rep. N. S. 830, 18 Wkly. Rep. 463.

Plaintiff may recover for postage on a count for money paid. Dickenson *v.* Hatfield, 5 C. & P. 46, 1 M. & Rob. 141, 24 E. C. L. 446.

59. *Alabama.*— Ticknor *v.* Montgomery Branch Bank, 3 Ala. 135.

Louisiana.— Fazende *v.* Flood, 24 La. Ann. 425; Trezevant *v.* Tennessee Bank, 1 Rob. (La.) 465.

Massachusetts.— Bowen *v.* Stoddard, 10 Metc. (Mass.) 375.

Nebraska.— German Nat. Bank *v.* Beatrice Nat. Bank, 63 Nebr. 246, 88 N. W. 480.

United States.— Armstrong *v.* U. S., Gilp. (U. S.) 399, 1 Fed. Cas. No. 548; Doughty *v.* Hildt, 1 McLean (U. S.) 334, 7 Fed. Cas. No. 4,027.

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438.

See 10 Cent. Dig. tit. "Bills and Notes," § 1948.

If the instrument was payable in a sister state and protested there plaintiff cannot recover the notarial fees without proof of the notary's legal fees in such sister state. Crawford *v.* Decatur Branch Bank, 6 Ala. 574.

60. *In re* English Bank of River Plate, [1893] 2 Ch. 438, 62 L. J. Ch. 578, 69 L. T. Rep. N. S. 14, 3 Reports 518, 41 Wkly. Rep. 521.

61. *In re* English Bank of River Plate, [1893] 2 Ch. 438, 62 L. J. Ch. 578, 69 L. T. Rep. N. S. 14, 3 Reports 518, 41 Wkly. Rep. 521.

62. *In re* English Bank of River Plate, [1893] 2 Ch. 438, 62 L. J. Ch. 578, 69 L. T. Rep. N. S. 14, 3 Reports 518, 41 Wkly. Rep. 521.

63. Merritt *v.* Benton, 10 Wend. (N. Y.) 116; Doughty *v.* Hildt, 1 McLean (U. S.) 334, 7 Fed. Cas. No. 4,027.

Mass. Pub. Stat., c. 77, § 22, making the notarial protest of a note *prima facie* evi-

protest, no damages for protest can be assessed against him.[64] Where no protest was necessary in order to fix the liability of any party no fees for protest can be collected;[65] and the same is true where protest has been waived.[66]

8. Costs of Another Suit. If the holder of a bill sues two or more of the parties thereto concurrently and is paid by one of them he may nevertheless proceed against the others for his costs.[67] But it has been held that although plaintiff has the right to bring several actions for the same sum he does it at his peril as to the costs; and if he recovers judgment and satisfaction in one action he cannot have costs in another action for the same demand.[68] The indorser of a bill is not liable for the costs of a suit commenced by the holder against the accepter, or for commissions paid on the collection of a part of the money from the accepter,[69] unless he requested the holder to sue the accepter and promised to pay the costs of the suit;[70] and conversely an accepter is not liable for costs incurred in a suit against the indorser.[71] An indorser of a note for value cannot recover against the maker the costs of a judgment recovered against him as indorser,[72] although an accommodation indorser may recover from the maker the costs incurred in resisting, in good faith and upon reasonable grounds, a recovery against him on his indorsement.[73]

dence, places notes in that respect on the same footing as foreign bills and authorizes recovery of the protest fees. Legg *v.* Vinal, 165 Mass. 555, 43 N. E. 518.

64. Curtis *v.* Buckley, 14 Kan. 449; Noyes *v.* White, 9 Kan. 640.

65. *Florida.*— Wittich *v.* Pensacola First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631.

Georgia.— Johnson *v.* Fulton Bank, 29 Ga. 259.

Kansas.— Cramer *v.* Eagle Mfg. Co., 23 Kan. 399; Woolley *v.* Van Volkenburgh, 16 Kan. 20; Gorman *v.* Ritchie, 9 Kan. 106.

Maine.— Loud *v.* Merrill, 47 Me. 351.

Ohio.— Parril *v.* Wood, 2 Ohio Dec. (Reprint) 381, 2 West. L. Month. 555.

Pennsylvania.— Hall *v.* U. S. Bank, 6 Whart. (Pa.) 585; Gibb *v.* Geisz, 5 Wkly. Notes Cas. (Pa.) 148.

Texas.— Hughes *v.* McDill, 1 Tex. App. Civ. Cas. § 1267.

England.— Kendrick *v.* Lomax, 2 Cr. & J. 405, 1 L. J. Exch. 145, 2 Tyrw. 438.

66. McKay *v.* Hinman, 13 Nebr. 33, 13 N. W. 15.

67. Cook *v.* Lister, 13 C. B. N. S. 543, 9 Jur. N. S. 823, 32 L. J. C. P. 121, 7 L. T. Rep. N. S. 712, 11 Wkly. Rep. 369, 106 E. C. L. 543; Randall *v.* Moon, 12 C. B. 261, 21 L. J. C. P. 226, 74 E. C. L. 261; London, etc., Bank *v.* Walkinshaw, 25 L. T. Rep. N. S. 704. But in such case plaintiff must proceed to judgment for his costs; otherwise he will be liable to pay defendant his costs. Lewis *v.* Dalrymple, 3 Dowl. P. C. 433.

68. Gilmore *v.* Carr, 2 Mass. 171. If there be two indorsers, and the holder bring several actions against them, he will be entitled to his full costs in only one suit, and his disbursements in the others. Shuter *v.* Dee, 1 U. C. Q. B. 292.

The obvious justice of this rule has successfully appealed to legislative sanction. Thus under the New York statute if the maker and indorser of a note are separately sued plaintiff can recover but one bill of costs and disbursements (Latham *v.* Bliss, 6 Duer (N. Y.) 661, 13 How. Pr. (N. Y.) 416); but this does not apply to interlocutory costs (Ontario Bank *v.* Baxter, 6 Cow. (N. Y.) 395). And in South Carolina it was provided by statute as early as 1827 that where several suits were brought on a joint and several note, full costs should be charged on any one of the cases, and one fourth of the regular costs on the others. Arledge *v.* Ford, 2 Rich. (S. C.) 58.

69. Bangor Bank *v.* Hook, 5 Me. 174.

70. Bullock *v.* Lloyd, 2 C. & P. 119, 12 E. C. L. 482.

71. Barnwell *v.* Mitchell, 3 Conn. 101; Sawyer *v.* Steele, 2 McCord (S. C.) 459; Gillespie *v.* Cameron, 3 U. C. Q. B. 45.

72. *Louisiana.*— Newman *v.* Goza, 2 La. Ann. 642.

Missouri.— Peers *v.* Kirkham, 46 Mo. 146; Fenn *v.* Dugdale, 31 Mo. 580.

New Hampshire.— Woodman *v.* Eastman, 10 N. H. 359.

New York.— Simpson *v.* Griffin, 9 Johns. (N. Y.) 131.

South Carolina.— Sawyer *v.* Steele, 2 McCord (S. C.) 459; Richardson *v.* Presnall, 1 McCord (S. C.) 192.

Tennessee.— Overton *v.* Hardin, 6 Coldw. (Tenn.) 375.

The maker of a note, not for accommodation, is not liable for costs incurred by the payee in defending a suit brought against him by an indorsee. Buffalow *v.* Pipkin, 47 N. C. 130.

73. Overton *v.* Hardin, 6 Coldw. (Tenn.) 375. And see Cunningham *v.* Lyster, 13 Grant Ch. (U. C.) 575, where accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter. The relief prayed was granted, and the maker was ordered to pay the costs both of plaintiff and of the holder of the note.

9. Partial Dividends — a. In General.[74] If the holder of a bill has received a dividend from the drawer's estate he is entitled to prove only the balance against the bankrupt accepter.[75] In like manner dividends from the accepter's estate must be deducted before proof is made against the drawer,[76] unless they have been paid out of the drawer's funds in the accepter's hands.[77] So also if the holder of a note has received a dividend from the maker's estate he is entitled to a dividend on the balance only from the estate of a surety or indorser.[78] The holder of a partnership note made payable to one partner and indorsed by him to the holder may prove it in insolvency against the estates both of the firm and the indorsing partner before any dividend is declared on either.[79]

b. In Case of Collateral. The holder of a note, to whom the insolvent maker has indorsed another note as collateral, cannot prove both notes against the insolvent estate,[80] and it has been held that the rule in equity is the same as in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied.[81] But the great weight of authority is strongly opposed to the rule that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate,[82] and creditors of an insolvent national bank cannot be required, in proving their claims, to allow credit for collections made from collateral securities held by them.[83]

74. See also, generally, BANKRUPTCY; INSOLVENCY.

75. *In re* Oriental Commercial Bank, L. R. 6 Eq. 582, 18 L. T. Rep. N. S. 450, 16 Wkly. Rep. 784; *Ex p.* Moult, 1 Deac. & C. 44, 2 Deac. & C. 419, Mont. 321, 1 L. J. Bankr. 26, Mont. & B. 28; *Ex p.* Tayler, 1 De G. & J. 302, 58 Eng. Ch. 234; Goldsmid *v.* Cazenove, 7 H. L. Cas. 785, 5 Jur. N. S. 1230, 29 L. J. Bankr. 17, 4 Wkly. Rep. 802; *Ex p.* Leers, 6 Ves. Jr. 644.

76. *Ex p.* Ryswicke, 2 P. Wms. 89, 24 Eng. Reprint 653; *Ex p.* Royal Bank, 2 Rose 197, 19 Ves. Jr. 310.

77. *Ex p.* Ryswicke, 2 P. Wms. 89, 24 Eng. Reprint 653.

78. Lowell *v.* French, 54 Vt. 193; *In re* Howard, 12 Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571.

But if both principal and surety have become bankrupt before any dividends are paid the holder is entitled to prove the note for its full amount against the estate of each, and to receive dividends thereon until fully paid (Ragsdale *v.* Winnsboro Nat. Bank, 45 S. C. 575, 23 S. E. 947), although he cannot be allowed to receive from both sources any more than the full amount of his debt as proved (Blake *v.* Ames, 8 Allen (Mass.) 318; *In re* Howard, 12 Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571). Under like circumstances the holder of a bill may prove for the full amount against both drawer and accepter and receive dividends thereon until the full amount is paid. *Ex p.* Wildman, 1 Atk. 109, 26 Eng. Reprint 72, 2 Ves. 113, 28 Eng. Reprint 74.

79. Roger Williams Nat. Bank *v.* Hall, 160 Mass. 171, 35 N. E. 666.

80. *In re* Sherry, 101 Wis. 11, 76 N. W. 611.

81. *Iowa.*— Wurtz *v.* Hart, 13 Iowa 515.

Massachusetts.— Amory *v.* Francis, 16 Mass. 308.

South Carolina.— Wheat *v.* Dingle, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375.

Washington.— *In re* Frasch, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771.

England.— And so it was held by Sir John Leach in Greenwood *v.* Taylor, 1 Russ. & M. 185, 5 Eng. Ch. 185.

82. *Connecticut.*— Findlay *v.* Hosmer, 2 Conn. 350.

Illinois.— Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383.

Kentucky.—Citizens' Bank *v.* Patterson, 78 Ky. 291; Logan *v.* Anderson, 18 B. Mon. (Ky.) 114.

Michigan.— Detroit Third Nat. Bank *v.* Hang, 82 Mich. 607, 47 N. W. 33.

New Hampshire.— Moses *v.* Ranlet, 2 N. H. 488.

New York.— People *v.* Remington, 121 N. Y. 328, 24 N. E. 793, 31 N. Y. St. 289, 8 L. R. A. 458.

North Carolina.— Brown *v.* Merchants', etc., Nat. Bank, 79 N. C. 244.

Oregon.— Kellogg *v.* Miller, 22 Oreg. 406, 30 Pac. 229, 29 Am. St. Rep. 618.

Pennsylvania.— *In re* Miller, 82 Pa. St. 113, 22 Am. Rep. 754; Graeff's Appeal, 79 Pa. St. 146; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Miller's Appeal, 35 Pa. St. 481; Morris *v.* Olwine, 22 Pa. St. 441.

Rhode Island.— Allen *v.* Danielson, 15 R. I. 480, 8 Atl. 705 [*overruling In re* Knowles, 13 R. I. 90].

Vermont.— West *v.* Rutland Bank, 19 Vt. 403.

United States.— Lewis *v.* U. S., 92 U. S. 618, 23 L. ed. 513; Trower Bros. Co. *v.* Hanson, 110 Fed. 611.

England.— *In re* Barned's Banking Co., L. R. 3 Ch. 769; Mason *v.* Bogg, 1 Jur. 330, 2 Myl. & C. 443, 14 Eng. Ch. 443.

83. Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231 [*reversing* 50 Fed. 798].

10. On Notes Payable in Property. If a note is made payable in personal property at a valuation, the measure of damages, in case of breach, is the stipulated value of the property.[84] But the rule is not uniform and it has been held that the measure of damages is the market value of the goods at the time when they ought to have been delivered with interest,[85] while according to another view it is the highest market value of the goods from the maturity of the note until the day of trial.[86] The maker's liability is not in damages for the non-fulfilment of the contract but a mere duty to pay the money,[87] and the money may be recovered under the general counts.[88] As such a note is not negotiable it has been held that no action will lie for the money until the note is reduced to a money claim by a demand for the delivery of the property pursuant to its terms;[89] but this has been disputed.[90]

11. Where Collecting Agent Has Been Negligent. A collecting agent through whose negligence commercial paper has become worthless is *prima facie* liable for the face value of the paper, with interest;[91] but the financial circumstances of the parties liable thereon at the time when the agent should have acted may be shown in mitigation of damages, and then the recovery will be limited to the

84. Smith *v.* Dunlap, 12 Ill. 184; Finney *v.* Gleason, 5 Wend. (N. Y.) 393, 21 Am. Dec. 223; Courtois *v.* Carpentier, 1 Wash. (U. S.) 376, 6 Fed. Cas. No. 3,286.

The reason is that by the contract the maker has an election to deliver the property or pay the amount in money; and if he fails to deliver the property he is bound to pay the money. Prince Edward's Island Bank *v.* Trumbull, 53 Barb. (N. Y.) 459; Murray *v.* Harrison, 47 Barb. (N. Y.) 484.

If the promise is to deliver a certain quantity of goods at a fixed valuation, and not simply to pay a certain sum in property at a valuation, defendant may not be able to escape by paying the stipulated price of the goods in money. Thomas *v.* Murray, 32 N. Y. 605.

85. *Arkansas.*—Johnson *v.* Dooley, 67 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74; Cockrell *v.* Warner, 14 Ark. 345.

Georgia.— Bell *v.* Ober, 96 Ga. 214, 23 S. E. 7; Clark *v.* Minor, 73 Ga. 590.

North Carolina.— Whitsett *v.* Forehand, 79 N. C. 230.

Pennsylvania.— Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267.

South Carolina.— Justrobe *v.* Price, Harp. (S. C.) 111.

86. Brasher *v.* Davidson, 31 Tex. 190, 98 Am. Dec. 525.

87. Perry *v.* Smith, 22 Vt. 301.

88. Young *v.* Adams, 6 Mass. 182; Crandal *v.* Bradley, 7 Wend. (N. Y.) 311; Saxton *v.* Johnson, 10 Johns. (N. Y.) 418; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410.

89. Markley *v.* Rhodes, 59 Iowa 57, 12 N. W. 775.

90. Thus in Cockrell *v.* Warner, 14 Ark. 345, it was held that no demand is necessary to fix the liability of the maker of a property note payable at a specified time; that a failure to comply entitles the payee to receive the value of the property at the time when the note matured.

91. Armington *v.* New Orleans Gas Light, etc., Co., 15 La. 414, 35 Am. Dec. 205; Pritchard *v.* Louisiana State Bank, 2 La. 415; Durnford *v.* Patterson, 7 Mart. (La.) 460, 12 Am. Dec. 514; Knapp *v.* U. S., etc., Express Co., 55 N. H. 348; Downer *v.* Madison County Bank, 6 Hill (N. Y.) 648; McKinster *v.* Utica Bank, 9 Wend. (N. Y.) 146 [*affirmed* in 11 Wend. (N. Y.) 473]; Merchants' State Bank *v.* Phillips State Bank, 94 Wis. 444, 69 N. W. 170.

Extent of liability.— In receiving a note for collection, the agent assumes the duty of taking the proper steps to fix the liability of the indorser, and for a neglect of that duty he will be responsible to the extent of the damages occasioned thereby. If the maker be solvent so that the note can be collected from him the damages resulting from the discharge of the indorser will be merely nominal. Angell *v.* Rosenburg, 12 Mich. 241; West *v.* St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Burr *v.* Willson, 22 Minn. 206; Nininger *v.* Knox, 8 Minn. 140; State *v.* Cochran, 13 N. C. 63; Middlebury Bank *v.* Rutland, 33 Vt. 414. So also an agent receiving for collection before maturity a bill of exchange payable on a particular day after date is held to the strictest vigilance in making presentment for acceptance, and if he is chargeable with negligence he is subject to the payment of all damages thereby sustained by the owner. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555. See also Banks and Banking, 5 Cyc. 511.

Paper lost.— In an action against an express company for the loss of a promissory note which was delivered to the defendant company by plaintiff for the purpose of collection, and which was negligently lost by defendant, the amount expressed in the note is *prima facie* the measure of damages. American Express Co. *v.* Parsons, 44 Ill. 312.

actual loss sustained.[92] So too the fact that the creditor holds collateral security from which a portion of the sum due may be realized may be shown in mitigation of damages.[93]

12. Waiver of Damages. If the holder of a bill accepts payment of its face value after maturity he may afterward recover the interest reserved but no other damages.[94] If he has accepted the face value of the bill his claim is exhausted, either as a cause of action or a counter-claim.[95] If after the second part of a foreign bill of exchange has been protested the first part is presented and paid to the holder, with interest and costs of protests, the drawer is released from the payment of damages for the dishonor of the second part of the bill.[96]

13. Payable in What Currency — a. In General. Where a bill is payable in foreign money its value must be determined in the lawful currency of the forum according to the rate of exchange at the time of the trial.[97] Where the promisor agrees to pay a certain sum in bank-notes or other evidences of indebtedness which purport on their face to represent dollars and can be counted as such, the sum is expressed to indicate the number of dollars of the notes or evidences to be paid and not the amount of the debt or consideration.[98] A note payable in

92. Mitchell *v.* Shuert, 16 Mich. 444; West *v.* St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Povall *v.* Dansville Cigar Mfg. Co., 59 Hun (N. Y.) 70, 12 N. Y. Suppl. 653, 35 N. Y. St. 837; Lienau *v.* Dinsmore, 3 Daly (N. Y.) 365, 10 Abb. Pr. N. S. (N. Y.) 209; 41 How. Pr. (N. Y.) 97. See also Fox *v.* Davenport Nat. Bank, 73 Iowa 647, 35 N. W. 688.

93. Borup *v.* Nininger, 5 Minn. 523; Mott *v.* Havana Nat. Bank, 22 Hun (N. Y.) 354.

94. U. S. *v.* Gurney, 4 Cranch (U. S.) 333, 2 L. ed. 638.

But in Missouri it has been held that the holder's receipt of the principal and interest of a negotiable and negotiated promissory note is no waiver of his claim for damages (Kennerly *v.* Bragg, 1 Mo. App. 574), unless payment of the principal sum, with interest and charges of protest, be made within twenty days after demand or notice of dishonor (Farrell *v.* Fritschle, 30 Mo. 190).

Damages on a protested draft cannot be recovered against the drawer or indorser, when the principal has been paid by the levy of an execution on a judgment recovered in a suit by the holder against the accepter. Warren *v.* Coombs, 20 Me. 139.

95. Pesant *v.* Pickersgill, 56 N. Y. 650.

If he has received a part of the money it will reduce the damages *pro tanto*. Bangor Bank *v.* Hook, 5 Me. 174; Laing *v.* Barclay, 1 B. & C. 398, 8 E. C. L. 170, 2 D. & R. 530, 1 L. J. K. B. O. S. 135, 3 Stark. 38, 3 E. C. L. 585, 25 Rev. Rep. 430. But it has been held that where a foreign bill of exchange which has been accepted has been protested and returned the holder's right to damages becomes fixed and a subsequent part payment by the accepter has no influence in reducing that fixed and determinate liability. Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213.

96. Page *v.* Warner, 4 Cal. 395, holding that each part of a set of bills of exchange constitutes the whole of the bill, and the acceptance of payment of one of the set is a waiver of any claim for damages for the non-acceptance of another part, because the evidence of debt is surrendered and canceled.

97. Cary *v.* Courtenay, 103 Mass. 316, 4 Am. Rep. 559; Guiteman *v.* Davis, 45 Barb. (N. Y.) 576 note, 3 Daly (N. Y.) 120; Butt *v.* Hoge, 2 Hilt. (N. Y.) 81; De Rham *v.* Grove, 18 Abb. Pr. (N. Y.) 43; Lee *v.* Wilcocks, 5 Serg. & R. (Pa.) 48.

98. The obligation is in fact but a promise to deliver so many dollars, numerically, of the securities described, and if the debtor fails to deliver them according to the terms of the contract he is liable for only their real and not their nominal value.

Arkansas.— Dillard *v.* Evans, 4 Ark. 175.

Connecticut.—Phelps *v.* Riley, 3 Conn. 266.

Illinois.— Mix *v.* Nettleton, 29 Ill. 245; Smith *v.* Dunlap, 12 Ill. 184.

Mississippi.—Gordon *v.* Parker, 2 Sm. & M. (Miss.) 485.

Tennessee.— Hixon *v.* Hixon, 7 Humphr. (Tenn.) 33.

Designated bank-notes.— In Anderson *v.* Ewing, 3 Litt. (Ky.) 245, a note for the payment of "eight hundred dollars, on or before the first day of September, 1820, in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank," was held to be a contract to pay eight hundred paper dollars of the description mentioned.

"Internal improvement scrip."— On nonpayment of a note payable in internal improvement scrip, the holder is only entitled to recover the sum named in the cash value of that many dollars of scrip on the day it should have been delivered. McCumber *v.* Gilman, 13 Ill. 542.

"Militia certificates."— In Clay *v.* Huston, 1 Bibb (Ky.) 461, the expression in a note, "thirty pounds in militia certificates," was construed to mean that number of pounds in certificates as specified on their face and not an amount of certificates equal in value to thirty pounds in specie.

good solvent notes is after maturity, purely a money demand for the amount mentioned.[99]

b. Depreciated Currency. If a note is in terms payable in specie, the holder can recover no more than the face value of the note and interest thereon, although specie is at a premium at the maturity of the note.[1] If a bill or note is payable in currency generally it is to be presumed that lawful money was intended, and in the absence of evidence to the contrary it is proper to enter judgment accordingly;[2] but if it is expressly payable in a depreciated currency and is not so paid when due, the damages recoverable will as a rule be the legal tender value of the stipulated amount of such currency at the time of the breach with interest.[3] But the burden is on defendant to make out his position and show the extent of the failure of consideration,[4] and parol evidence is admissible for that purpose.[5]

99. Mason *v.* Toner, 6 Ind. 328; Brown *v.* Simpson, 6 Yerg. (Tenn.) 295; Gholson *v.* Brown, 4 Yerg. (Tenn.) 496; Grant *v.* Burleson, 38 Tex. 214.

"Cash notes."— A promise in a promissory note to pay in "cash notes" is not equivalent to a promise to pay the nominal amount in money. Ward *v.* Lattimer, 2 Tex. 245. The value of such "cash notes" must be taken and deemed to be the value at which they were estimated in the ordinary and general transactions of trade, and not at the value at which they could be bought in cash. Ward *v.* Latimer, 12 Tex. 438.

1. Wood *v.* Bullens, 6 Allen (Mass.) 516. The holder of a sealed promissory note "payable in gold" can recover no more than the face of the note, with interest thereon, to the date of the recovery, and is not entitled to the premium on gold at its market value at the time of the recovery. Gist *v.* Alexander, 15 Rich. (S. C.) 50. A sealed note was given, dated March 30, 1870, payable Nov. 1, 1871, for one thousand three hundred and ninety-seven dollars "in currency at its gold value on the 10th day of January last past." It was held that this was a "gold contract," meaning that the obligor would pay the obligee as much money in currency as thirteen hundred and ninety-seven dollars in gold would have sold for on January 10, 1870. McFadden *v.* Gilhert, 11 S. C. 190.

If the note is expressly payable in gold the holder may enforce specific execution whether or not treasury notes are legal tender for the payment of ordinary debts. Murray *v.* Meagher, 8 Bush (Ky.) 574.

"In gold or its equivalent."— In a suit on a note which fell due in 1867, payable "in gold or its equivalent," although gold was then at a premium and afterward at par, a recovery could only be had for the sum of gold stated. Atkinson *v.* Lanier, 69 Ga. 460.

2. Petty *v.* Fleishel, 31 Tex. 169, 98 Am. Dec. 524. See also U. S. *v.* Barker, 1 Paine (U. S.) 156, 24 Fed. Cas. No. 14,517, where it is held that the measure of damages in an action on a bill of exchange is its value at the time of notice of protest, in gold or silver, and not in a depreciated or fluctuating currency.

3. *Alabama.*— Kirtland *v.* Molton, 41 Ala. 548.

Arkansas.— Leach *v.* Smith, 25 Ark. 246; Wallace *v.* Henry, 5 Ark. 105.

Georgia.— Whitaker *v.* Dye, 56 Ga. 380.

Illinois.— Smith *v.* Dunlap, 12 Ill. 184.

Kentucky.— Roby *v.* Sharp, 6 T. B. Mon. (Ky.) 375; Anderson *v.* Ewing, 3 Litt. (Ky.) 245.

Mississippi.— Walker *v.* Meek, 12 Sm. & M. (Miss.) 495; Commercial Bank *v.* Chisholm, 6 Sm. & M. (Miss.) 457; Scott *v.* Hamblin, 3 Sm. & M. (Miss.) 285; Gordon *v.* Parker, 2 Sm. & M. (Miss.) 485.

Missouri.— Farwell *v.* Kennett, 7 Mo. 595.

Pennsylvania.— Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190; Dorrance *v.* Stewart, 1 Yeates (Pa.) 349.

Tennessee.—Jones *v.* Kincaid, 5 Lea (Tenn.) 677; Miller *v.* McKinney, 5 Lea (Tenn.) 93; Frazier *v.* Gains, 2 Baxt. (Tenn.) 92; Stroud *v.* Rankin, 2 Baxt. (Tenn.) 74; Eason *v.* Abernathy, 1 Baxt. (Tenn.) 218; Moore *v.* Gooch, 6 Heisk. (Tenn.) 104; English *v.* Turney, 2 Heisk. (Tenn.) 617; Coffin *v.* Hill, 1 Heisk. (Tenn.) 385; McDowell *v.* Keller, 4 Coldw. (Tenn.) 258; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303; Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140; Deberry *v.* Darnell, 5 Yerg. (Tenn.) 457.

Texas.— Williams *v.* Armis, 30 Tex. 37; Chevalier *v.* Buford, 1 Tex. 503; Roberts *v.* Short, 1 Tex. 373.

United States.— Robinson *v.* Noble, 8 Pet. (U. S.) 181, 8 L. ed. 910.

The holder of an acceptance payable in particular bank-notes may recover their value at the date of protest, and cannot be compelled to take their depreciated value at the date of a subsequent tender of the debt in such notes. Meeks *v.* Davis, 3 Rob. (La.) 326.

4. Walker *v.* Meek, 12 Sm. & M. (Miss.) 495; Coffin *v.* Hill, 1 Heisk. (Tenn.) 385; Baker *v.* Jordan, 5 Humphr. (Tenn.) 485. If the payee denies that the note was to be discharged in depreciated bank-notes there must be proof of fraud or mistake in the execution of the note in order to obtain relief in chancery. Downing *v.* Dean, 3 J. J. Marsh. (Ky.) 378.

5. Roberts *v.* Short, 1 Tex. 373.

If, however, the parties have fixed the rate of allowance for depreciation the terms of the contract will govern.[6]

c. Confederate Treasury Notes — Scaling Acts. When the Civil war closed, Confederate treasury notes became at once valueless and ceased to be current, but contracts made upon their purchasable quality, and in which they were designated as dollars, existed in great numbers. It was evident that great injustice would be done in many cases if the terms used were interpolated solely by reference to the coinage of the United States or their legal tender notes, instead of the standard adopted by the parties. The legal standard and the conventional standard differed, and justice to the parties could be done only by allowing extrinsic evidence of the sense in which they used the terms and enforcing the contracts as interpreted in the light of such evidence.[7] After the close of the war many of the Southern states enacted statutes,[8] commonly known as "scaling acts," defining and reducing the amount recoverable on contracts made in contemplation of the depreciated currency in circulation during the war and authorizing the introduction of parol evidence to show the real intention of the parties in that regard.[9] Inasmuch as such currency became worthless at the close of the war, it was generally held that the scale should be applied as at the date of the contract, for the value of the depreciated currency at that time was deemed to be what the parties had in contemplation in making their contract.[10] Upon this principle the holder could

6. Ledford *v.* Smith, 6 Bush (Ky.) 129.

7. *North Carolina.*— Bryan *v.* Harrison, 76 N. C. 360.

South Carolina.— Smith *v.* Prothro, 2 S. C. 371; Neely *v.* McFadden, 2 S. C. 169; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259.

Tennessee.— Stewart *v.* Smith, 3 Baxt. (Tenn.) 231; Carmichael *v.* White, 11 Heisk. (Tenn.) 262.

Texas.— Taylor *v.* Bland, 60 Tex. 29; Johnson *v.* Blount, 48 Tex. 38; Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234.

Virginia.— Stearns *v.* Mason, 24 Gratt. (Va.) 484; Sexton *v.* Windell, 23 Gratt. (Va.) 534; Meredith *v.* Salmon, 21 Gratt. (Va.) 762.

United States.— Confederate Note Case, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thornington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

"Dollars."— The term "dollars" was construed as meaning "Confederate dollars" in Cook *v.* Lillo, 103 U. S. 792, 26 L. ed. 460. But in Arkansas it was held that parol evidence was not admissible to prove that the word "dollars" in a note should be understood to mean "Confederate States money." Roane *v.* Green, 24 Ark. 210.

8. These statutes were not unconstitutional as impairing the obligation of contracts. Holt *v.* Patterson, 74 N. C. 650; Robeson *v.* Brown, 63 N. C. 554; Harmon *v.* Wallace, 2 S. C. 208; Rutland *v.* Copes, 15 Rich. (S. C.) 84. *Contra,* Leach *v.* Smith, 25 Ark. 246.

These statutes did not apply to contracts made before the war (Bone *v.* Graves, 43 Ga. 312; Love *v.* Johnston, 72 N. C. 415; Fluitt *v.* Nelson, 15 Rich. (S. C.) 9) or to notes given during the war in renewal of others made before the war (Jackson *v.* Jackson, 47 Ga. 99; Cobb *v.* Gray, 78 N. C. 94. See also Barnett *v.* Cecil, 21 Gratt. (Va.) 93), or in substitution for such other notes (Boykin *v.* Barnes, 76 N. C. 318). And it has been held that a note given after the war in renewal of one made during the war is a new contract and not subject to the scale (Smith *v.* Belk, 40 Ga. 656), but this has been denied where there was no scaling of the old note at the time of renewal (Jarrett *v.* Nickell, 9 W. Va. 345).

9. *Alabama.*—Wilson *v.* Isbell, 45 Ala. 142.

Florida.— Fife *v.* Turner, 11 Fla. 289.

Georgia.— Cherry *v.* Rawson, 49 Ga. 228; Hood *v.* Townsend, 40 Ga. 70.

Mississippi.— Mezeix *v.* McGraw, 44 Miss. 100; Cowan *v.* McCutchen, 43 Miss. 207.

North Carolina.— Palmer *v.* Love, 75 N. C. 163; Sowers *v.* Earnhart, 64 N. C. 96; Robeson *v.* Brown, 63 N. C. 554.

South Carolina.— Halfacre *v.* Whaley, 4 S. C. 173; Smith *v.* Prothro, 2 S. C. 371; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259.

Virginia.— Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

West Virginia.— Gilkeson *v.* Smith, 15 W. Va. 44.

10. That is, plaintiff was allowed to recover in lawful money of the United States the value of the Confederate dollars agreed to be paid at the time of making the contract.

Alabama.— Whitfield *v.* Riddle, 52 Ala. 467; Wyatt *v.* Evins, 52 Ala. 285.

Florida.— Barclay *v.* Russ, 14 Fla. 372; Randall *v.* Pettes, 12 Fla. 517.

Georgia.— Blow *v.* White, 41 Ga. 293; Cherry *v.* Walker, 36 Ga. 327.

Kentucky.— Rivers *v.* Moss, 6 Bush (Ky.) 600.

Mississippi.— Darcey *v.* Shotwell, 49 Miss. 631; Mezeix *v.* McGraw, 44 Miss. 100; Gray *v.* Harris, 43 Miss. 421; Cowan *v.* McCutchen, 43 Miss. 207.

recover only the value of the actual consideration at the time of the contract upon notes given in consideration of services rendered[11] or property sold and delivered.[12] But it was also held that it was a question for the jury to fix the time when the scale of depreciation should be applied to the debt.[13]

14. What Law Governs.[14] Inasmuch as an indorsement is a new and substantive contract, the indorser of a note or foreign bill of exchange is liable for damages according to the law of the place where the instrument was indorsed.[15] But the indorsement cannot change the original liability of the maker or drawer,[16] for the liabilities of the maker of a note are controlled by the law of the place where the note was made,[17] unless it be payable elsewhere,[18] and the drawer of a bill is

North Carolina.— Palmer *v.* Love, 75 N. C. 163; Davis *v.* Glenn, 72 N. C. 519; Stokes *v.* Cowles, 70 N. C. 124; Charlotte Bank *v.* Davidson, 70 N. C. 118; Summers *v.* McKay, 64 N. C. 555.

Texas.— Taylor *v.* Bland, 60 Tex. 29; Johnson *v.* Blount, 48 Tex. 38; Short *v.* Abernathy, 42 Tex. 94; Mathews *v.* Rucker, 41 Tex. 636; Shearon *v.* Henderson, 38 Tex. 245.

Virginia.— Ashby *v.* Porter, 26 Gratt. (Va.) 455; Kendrick *v.* Forney, 22 Gratt. (Va.) 748.

United States.— Rives *v.* Duke, 105 U. S. 132, 26 L. ed. 1031; Stewart *v.* Salamon, 94 U. S. 434, 24 L. ed. 275.

And especially so where the consideration for a note was a loan of Confederate money.

Alabama.— Whitfield *v.* Riddle, 52 Ala. 467.

Florida.— Forcheimer *v.* Holly, 14 Fla. 239.

Georgia.— Blow *v.* White, 41 Ga. 293.

North Carolina.— Wooten *v.* Sherrard, 68 N. C. 334, 71 N. C. 374; Terrell *v.* Walker, 66 N. C. 244.

Virginia.— Kendrick *v.* Forney, 22 Gratt. (Va.) 748.

A judgment rendered in 1864 upon a note for Confederate money lent in 1862 was subject to the same scale that the note was. Alexander *v.* Rintels, 64 N. C. 634.

11. Dowd *v.* North Carolina R. Co., 70 N. C. 468; Dancey *v.* Braswell, 64 N. C. 102; Maxwell *v.* Hipp, 64 N. C. 98.

12. Hudson *v.* Spence, 49 Ga. 479; Bryan *v.* Harrison, 69 N. C. 151; Brown *v.* Foust, 64 N. C. 672; Moye *v.* Pope, 64 N. C. 543. *Contra,* Crosby *v.* Tucker, 21 La. Ann. 512.

13. Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

In cases coming under the Georgia ordinance of 1865 the jury had a large discretion in the adjustment of the equities between the parties under the contract. Cherry *v.* Rawson, 49 Ga. 228; Cutcher *v.* Jones, 41 Ga. 675; Thomas *v.* Knowles, 40 Ga. 263; Cherry *v.* Walker, 36 Ga. 327.

14. Rate of interest, by what law governed, see *supra,* XIV, G, 4, c, (IV).

15. *Connecticut.*— Currier *v.* Lockwood, 40 Conn. 349, 16 Am. Rep. 40.

Illinois.— Bond *v.* Bragg, 17 Ill. 69; Holbrook *v.* Vibbard, 3 Ill. 465.

Indiana.— Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240.

Iowa.— Michigan Nat. Bank *v.* Green, 33 Iowa 140; Huse *v.* Hamblin, 29 Iowa 501, 4 Am. Rep. 244.

Kentucky.— Short *v.* Trabue, 4 Metc. (Ky.) 299.

Louisiana.— Trabue *v.* Short, 18 La. Ann. 257; Duncan *v.* Sparrow, 3 Rob. (La.) 167.

Massachusetts.—Williams *v.* Wade, 1 Metc. (Mass.) 82.

New York.— Cook *v.* Litchfield, 9 N. Y. 279 [*reversing* 5 Sandf. (N. Y.) 330]; Cowperthwaite *v.* Sheffield, 1 Sandf. (N. Y.) 416; Aymar *v.* Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Graves *v.* Dash, 12 Johns. (N. Y.) 17.

United States.— Musson *v.* Lake, 4 How. (U. S.) 262, 11 L. ed. 967; Slacum *v.* Pomery, 6 Cranch (U. S.) 221, 3 L. ed. 204; Lenox *v.* Wilson, 1 Cranch (U. S.) 170, 15 Fed. Cas. No. 8,247; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27.

16. Dow *v.* Rowell, 12 N. H. 49; Bailey *v.* Heald, 17 Tex. 102. But see *contra,* Peck *v.* Mayo, 14 Vt. 33, 39 Am. Dec. 205, as to rate of interest.

17. *Illinois.*— Stacy *v.* Baker, 2 Ill. 417.

Indiana.—Yeatman *v.* Cullen, 5 Blackf. (Ind.) 240.

Kentucky.—Brown *v.* Todd, 16 Ky. L. Rep. 697, 29 S. W. 621.

Louisiana.— Chartres *v.* Cairnes, 4 Mart. N. S. (La.) 1.

Pennsylvania.— Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532.

Vermont.— Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364.

Virginia.— Wilson *v.* Lazier, 11 Gratt. (Va.) 477.

United States.—Brabston *v.* Gibson, 9 How. (U. S.) 263, 13 L. ed. 131; *In re* Pulsifer, 9 Biss. (U. S.) 487, 14 Fed. 247.

Canada.— Hooker *v.* Leslie, 27 U. C. Q. B. 295.

18. *New York.*— Hyde *v.* Goodnow, 3 N. Y. 266.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424.

Virginia.— Fant *v.* Miller, 17 Gratt. (Va.) 47.

United States.— Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; *In re* Conrad, 6 Fed. Cas. No. 3,126, 6 Am. L. Rev. 385, 4 Am. L. T. 189, 3 Leg. Gaz. (Pa.) 331, 1 Leg. Gaz. Rep. (Pa.) 284, 1 Leg. Op. (Pa.)

liable according to the law of the place where the bill was drawn.[19] The drawer by his contract undertakes that the drawee shall accept, and shall afterward pay the bill, according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; and at the place appointed for payment if it be drawn and accepted at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made the contract, with such interest, damages, and costs, as the law of the country where he contracted may allow.[20] So also the damages which the drawee of a bill is to pay *ex mora* will be governed by the law of the place where the bill was drawn.[21] But ordinarily the contract of an accepter is governed by the law of the place where the acceptance was made, if the bill is payable there or if no place of payment is named in the bill.[22]

H. Appeal and Review — 1. In General. The principles applicable to appeals from actions on commercial paper are in general the same as those governing appeals in civil actions generally.[23]

201, 8 Phila. (Pa.) 147, 28 Leg. Int. (Pa.) 324.

Canada.— Daly *v.* Graham, 8 L. C. Jur. 340; McCoy *v.* Dineen, 8 L. C. Jur. 339.

19. *Alabama.*—Crawford *v.* Decatur Branch Bank, 6 Ala. 574; Crawford *v.* Mobile Branch Bank, 6 Ala. 12, 41 Am. Dec. 33.

Connecticut.— Shipman *v.* Miller, 2 Root (Conn.) 405.

Indiana.— Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79.

Louisiana.— Kuenzi *v.* Elvers, 14 La. Ann. 391, 74 Am. Dec. 434.

Mississippi.— Wood *v.* Gibbs, 35 Miss. 559.

Missouri.—Page *v.* Page, 24 Mo. 595; Price *v.* Page, 24 Mo. 65.

New Jersey.— Brownell *v.* Freese, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Foden *v.* Sharp, 4 Johns. (N. Y.) 183.

North Carolina.— Anonymous, 3 N. C. 280; Schermerhorn *v.* Pelham, 1 N. C. 510.

Ohio.— Farmers' Bank *v.* Brainerd, 8 Ohio 292.

Pennsylvania.— Lennig *v.* Ralston, 23 Pa. St. 137; Allen *v.* Union Bank, 5 Whart. (Pa.) 420; Hazelhurst *v.* Kean, 4 Yeates (Pa.) 19.

South Carolina.— Winthrop *v.* Pepoon, 1 Bay (S. C.) 468.

Texas.— Raymond *v.* Holmes, 11 Tex. 54.

United States.— U. S. Bank *v.* U. S., 2 How. (U. S.) 711, 11 L. ed. 439, 453; Boyce *v.* Edwards, 4 Pet. (U. S.) 111, 7 L. ed. 799.

England.— Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482, 20 Eng. L. & Eq. 555; Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 13 Eng. Reprint 704.

Canada.— Astor *v.* Benn, 2 Rev. Lég. 27.

See 7 Cent. Dig. tit. "Bills and Notes," § 1938.

And the extent of his liability there is the measure of his damages against the accepter. *In re* Gillespie, 18 Q. B. D. 286, 53 L. J. Q. B. 74, 56 L. T. Rep. N. S. 599, 35 Wkly. Rep. 128 [*affirming* 16 Q. B. D. 702].

But it has been held that where an accommodation accepter brings suit against the drawer his right to damages will be regulated by the law of the place of payment, provided such rate be not larger than that allowed by the law where the bill was drawn. Cooper *v.* Sandford, 4 Yerg. (Tenn.) 452, 26 Am. Dec. 239.

20. *In re* Commercial Bank, 36 Ch. D. 522, 57 L. J. Ch. 131, 57 L. T. Rep. N. S. 395, 36 Wkly. Rep. 550; Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 13 Eng. Reprint 704.

21. *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322, 9 Chic. Leg. N. 183, 1 Cinc. L. Bul. 21, 23 Int. Rev. Rec. 73, 15 Nat. Bankr. Rep. 495.

22. *Massachusetts.*— Barney *v.* Newcomb, 9 Cush. (Mass.) 46.

Mississippi.— Frazier *v.* Warfield, 9 Sm. & M. (Miss.) 220.

New York.— Everett *v.* Vendryes, 19 N. Y. 436; Bright *v.* Judson, 47 Barb. (N. Y.) 29.

United States.— Davis *v.* Clemson, 6 McLean (U. S.) 622, 7 Fed. Cas. No. 3,630.

Canada.— Copcutt *v.* McMaster, 7 L. C. Jur. 340.

See also West *v.* Valley Bank, 6 Ohio St. 168; New Orleans Bank *v.* Stagg, 1 Handy (Ohio) 382, 12 Ohio Dec. (Reprint) 195; Case *v.* Heffner, 10 Ohio 180.

23. As to appeals generally see Appeal and Error.

Findings of fact.— Where the presiding judge appears to have been satisfied, if not with the correctness, with the legality, of the finding of the jury as to the genuineness of a note sued on, the appellate court will not interfere on account of any suspicions they may have that the note has been altered in amount. Dupree *v.* Price, 37 Ga. 235. So where, in an action on a note, an issue as to payment was submitted to the jury without instructions, and the finding was for defendant, and the testimony tended to prove the alleged payment, the judgment will not be disturbed (Elliott *v.* Treadway, 83 Mo.

2. Necessity of Raising Objection in Court Below. A defense to an action on a promissory note which was not made in the court below cannot be urged in

App. 90), and the burden of proof being on the assignee of a note to show that he was an innocent holder for value, where the evidence is conflicting the finding against the holder will not be disturbed (Richardson *v.* Stone, 28 Nebr. 137, 44 N. W. 105). In an action on a bill there was no allegation as to the rate of interest, but verdict and judgment were rendered for a certain amount, as principal and interest; the amount being less than the sum for which payment was stipulated in the bill. It was held that in the absence of anything to show what interest, or that any in fact, was computed and included in the verdict, the judgment would not be disturbed on appeal. Rockmore *v.* Davenport, 14 Tex. 602, 65 Am. Dec. 132.

Harmless error, as in other cases, will not be ground for reversing judgment. Richardson *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301 (holding that where a defendant is shown to have executed a note in suit by his mark, it is not prejudicial error to allow him to state that he did not sign it, where it appears by his other testimony that he admitted the execution of the note, and merely meant that he did not write his name with his own hand); Reading Second Nat. Bank *v.* Wentzel, 151 Pa. St. 142, 31 Wkly. Notes Cas. (Pa.) 33, 24 Atl. 1087 (where an indorser on a note having been discharged by want of protest thereon, a renewal note was made, to which his name was forged, and in an action against him on such renewal, the court charged that, if his indorsement to the original note was genuine, plaintiff might recover, notwithstanding the renewal note was a forgery, the jury found in favor of the indorser, and it was held that plaintiff could not complain of the instruction, although it was erroneous); Early *v.* Preston, 1 Patt. & H. (Va.) 228 (holding that, although a count in a declaration on a protested bill of exchange is demurrable, as failing to aver presentment and demand of payment, an appellate court will not reverse a judgment for error in overruling the demurrer, if the presentment and demand of payment are sufficiently alleged in the other counts, and no injury could have resulted to defendant from the error); Smith *v.* Ehnert, 47 Wis. 479, 3 N. W. 26 (holding that, where the signature of defendant is not put in issue by denial under oath in a suit upon a promissory note, so that plaintiff is not required by law to prove the same, specific errors in the admission of evidence offered by him for that purpose cannot be alleged by defendant to reverse the judgment); Knapp *v.* Runals, 37 Wis. 135 (where defendant claimed to have paid the note in suit to one with whom it had been left by plaintiff for collection, while plaintiff claimed that this third person had obtained possession of the note without his consent, and had acted throughout as defendant's agent, declarations by this third person were admitted in evidence against defendant's objection "for the purpose of showing how the note came into his possession," but not to prove that he was defendant's agent, and it was held that the admission of the evidence was not prejudicial to defendant).

Presumptions in favor of the correctness of the proceedings below will be indulged as in other cases. Prather *v.* Zulauf, 38 Ind. 155 (holding that a revenue stamp is no part of a note, so that the fact that it does not appear that the note in suit was stamped does not prove that it was not stamped; and that, in the absence of evidence to the contrary, the presumption is that the revenue law was complied with, and the proper stamp affixed); McKinley *v.* Shank, 24 Ind. 258 (holding that where, in an action upon a promissory note, the note was described as payable to plaintiff, while the note filed with the complaint and given in evidence was payable to "A. Horace Lewis, or hearer," as the variance could have been cured by amendment in the court below the supreme court will on appeal regard the amendment as having been made); Haeussler *v.* Haberstroth, 7 Mo. App. 458 (holding under a statute allowing the recovery of damages only when the note sued on has been negotiated, that where, in an action by the payee, judgment for damages was recovered, the presumption will hold good on appeal, in the absence of a contrary showing, that to support the judgment evidence was given that the note was negotiated, although the complaint does not so allege, but is against one as maker who had indorsed his name on the back, there having been no objection taken below); Chesebrough *v.* Tompkins, 45 N. Y. 289 (an action against the maker of a note, where the holder claimed title under an indorsement of the payee's name, made by one claiming to be his agent for that purpose, and plaintiff was nonsuited on the ground of failure to show title in himself. It appeared that the only authority of such agent was in writing not produced, and a motion was made by defendant to strike out his oral testimony of authority and it was held, the case not stating what disposition was made of the motion to strike out, that it would be presumed, in support of the nonsuit, that it was granted); Kendall *v.* Page, 83 Tex. 131, 18 S. W. 333 (holding that a judgment for an attorney's fee, computed on the entire amount of the note, will not be disturbed on appeal, in the absence of a statement of facts, since the presumption is that every fact provable under the pleadings, and necessary to sustain the judgment, was proved); Wheeler *v.* Pope, 5 Tex. 262 (holding that, where the record shows that defendant was present, and withdrew his defense to an action on a note, and it does not

the appellate court.[24] Thus where advantage is not taken in the court below of the insufficiency of a notice to charge the indorsers it cannot be done on appeal.[25] An indorser cannot, for the first time on appeal, urge that the indorsement was defective in form,[26] or that he was discharged by an agreement between the payee and the maker.[27] Nor can the defense that plaintiff was not a *bona fide* holder of the note in suit be placed upon grounds not distinctly pointed out in the trial court.[28] It has been held also that an objection that because the blank indorsement of the note in suit was not filled up before the day of trial plaintiff showed no ownership of the note and hence could not recover cannot be raised for the first time on appeal.[29] When the sufficiency of a complaint is first attacked in the appellate court, the question of its sufficiency has relation solely to the time at which judgment was rendered upon it and to the form in which it is found in the record.[30] If an essential averment is omitted, it is cause for reversal on the merits, notwithstanding a statute directing that no judgment shall be reversed, but for some cause affecting the merits of the judgment.[31]

3. Whether Instrument Sued On Is Part of Record. To make a note part of the record so that the court may notice it for any purpose, defendant must crave oyer of it, and a copy filed with the declaration is no part of the record, although

appear that he objected to the judgment as entered against him, it will be inferred that he assented to the judgment, and such assent will hold him).

24. Booker *v.* Robbins, 26 Ark. 660; Trude *v.* Meyer, 82 Ill. 535; Benson *v.* Morgan, 26 Ill. App. 22; Bickford *v.* Gibbs, 8 Cush. (Mass.) 154.

Objection that the declaration alleged a negotiable instrument, whereas the note in evidence was non-negotiable, cannot be urged for the first time on appeal. Jones *v.* Fales, 4 Mass. 245.

Objection that the lower court allowed one of several joint makers of a note sued together to sever in his defense and have a separate trial is no ground for reversal when no exception was taken below. Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414.

Objection that the note was not filed with the petition will not be considered where no such objection was made in the trial court. Peake *v.* Bell, 65 Mo. 224.

Objection as to issue tried.— Where, in an action on a note, the complaint avers that the note was executed by defendant as maker, and by him delivered for value to the payee, who in turn indorsed it for value to plaintiff, and the answer admits these averments, but the case is tried on the theory that it is an open question whether the payee was the lender of the money or an accommodation indorser who acted as defendant's agent in procuring the note to be discounted by plaintiff, an objection after trial that the issue tried was different from that made by the pleadings comes too late. Union Bank *v.* Neuman, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 633, 35 N. Y. St. 422.

Objection as to effect of evidence.— In a suit on a note defendant pleaded a material and unauthorized alteration of the note, which was denied by replication. It was held that aside from the state of the pleadings the supreme court would not pass upon the legal effect of evidence showing defendant's subsequent ratification of the change, in the absence of charges of fraud directing the attention of the trial court below to that question. Capital Bank *v.* Armstrong, 62 Mo. 59.

Damages for frivolous appeal.— Where defendant, alleging the failure of consideration of a note, fails to make his defense in the lower court, the appellate court may adjudge damages against him for a frivolous appeal. Hawkins *v.* Wiel, 22 La. Ann. 579.

25. Manning *v.* Hays, 6 Md. 5. See also Little *v.* Mills, 98 Mich. 423, 57 N. W. 266, holding that where, in an action against an indorser of a note, evidence is admitted, without objection, to show protest, an objection cannot be made on appeal for the first time on the ground that the notice of protest was not under seal.

26. Graves *v.* Norfolk Nat. Bank, 45 Nebr. 840, 64 N. W. 225.

27. New Orleans Gas Light, etc., Co. *v.* Hudson, 5 Rob. (La.) 486; Frischman *v.* Zimmermann, 19 Misc. (N. Y.) 53, 42 N. Y. Suppl. 824.

28. Howry *v.* Eppinger, 34 Mich. 29.

29. Scammon *v.* Adams, 11 Ill. 575; Hansborough *v.* Towns, 1 Tex. 58.

30. Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163.

31. A statute directing that no judgment shall be reversed, but for some cause affecting the merits of the judgment, does not forbid the reversal of a judgment rendered in an action where plaintiff declared on a writing not under seal, and recovered as upon a promissory note, without averring the consideration. Such writing not being a promissory note, and no statement of the consideration being given, without which the action could not regularly be supported, is a cause for reversal upon the merits. Read *v.* Wheeler, 2 Yerg. (Tenn.) 50.

the clerk may have incorporated it into the record,[32] in the absence of a statute making the note sued on part of the record.[33]

COMMERCIAL TRAVELER. An agent who simply exhibits samples of goods kept for sale by his principal and takes orders from purchasers for such goods, where the goods are afterward to be delivered by the principal to the purchasers and payment for the goods is to be made by the purchasers to the principal on such delivery.[1] (Commercial Traveler: Generally, see HAWKERS AND PEDDLERS; PRINCIPAL AND AGENT. Liability For Loss of Samples of, see CARRIERS. License-Tax, see COMMERCE; LICENSES. Sales, see INTOXICATING LIQUORS; SALES.)

COMMERCIUM JURE GENTIUM COMMUNE ESSE DEBET, ET NON IN MONOPOLIUM ET PRIVATUM PAUCORUM QUÆSTUM CONVERTENDUM. A maxim meaning "Commerce, by the law of nations, ought to be common, and not perverted to monopoly and the private gain of a few."[2]

COMMETTANT. Employer.[3] (See, generally, MASTER AND SERVANT.)

COMMINATORIUM. A clause sometimes added at the end of writs, admonishing the sheriff to be faithful in executing the same.[4] (See, generally, WRITS.)

COMMISSARY. An officer whose principal duties are to supply an army with provisions and stores.[5] In ecclesiastical law, the deputy of the bishop.[6] (See, generally, ARMY AND NAVY.)

COMMISSION. Any written appointment of a person to an office;[7] written authority[8] or letters patent issued or granted by the government to a person appointed to an office, or conferring public authority or jurisdiction upon him;[9] also, in private affairs, the authority or instructions under which one person transacts business or negotiates for another.[10] In civil law, a species of bailment; equiva-

32. Sims *v.* Hugsby, 1 Ill. 413.

33. Womack *v.* Dunn, 9 Ind. 183.

1. Kansas City *v.* Collins, 34 Kan. 434, 436, 8 Pac. 865, distinguishing a commercial traveler from a peddler or merchant.

2. Morgan Leg. Max.

3. Serendot *v.* Saisse, 3 Moore P. C. N. S. 534, 545, 16 Eng. Reprint 202.

4. Black L. Dict. [*citing* Bracton, fol. 398].

5. Black L. Dict.

6. *Ex p.* Medwin, 1 E. & B. 609, 615, 17 Jur. 1178, 22 L. J. Q. B. 169, 72 E. C. L. 609, where it was said, distinguishing a "commissary" from a "chancellor": "The commissary is deputed specially, his powers varying according to the limits of his commission as to subject-matter, time, and place, and is purely the deputy of the bishop."

7. State *v.* Crawford, 28 Fla. 441, 497, 10 So. 118, 14 L. R. A. 253.

Compared with "license."— "They are both grants. A commission grants the right to hold and discharge the duties of a certain office. A license grants authority to do a particular thing." U. S. *v.* The Planter, Newb. Adm. 262, 27 Fed. Cas. No. 16,054.

8. **Necessity of a writing.**— The word "commission," *ex vi termini*, imports a written authority. U. S. *v.* Reyburn, 6 Pet. (U. S.) 352, 365, 8 L. ed. 424.

9. State *v.* Crawford, 28 Fla. 441, 493, 10 So. 118, 14 L. R. A. 253 [*citing* Abbott L. Dict.; Bouvier L. Dict.; Tomlin L. Dict.]. And see State *v.* Dews, R. M. Charlt. (Ga.) 397, 401 (where a commission is said to be "A delegation by warrant, of an Act of Parliament, or of common law, whereby a jurisdiction, power, or authority, is conferred to others"); Dew *v.* Judges Sweet Springs Dist. Ct., 3 Hen. & M. (Va.) 1, 43, 3 Am. Dec. 639 (where it is said: "I take a commission to mean a warrant of office, a written authority or license, granted by a person or persons, duly constituted by law for the purpose, to a public officer, empowering and authorising him to execute the duties of the office to which he may be appointed").

"Our earliest books draw a distinction between a grant of an office, and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is." State *v.* Dews, R. M. Charlt. (Ga.) 397, 401 [*citing* Brooke 145, pl. 5].

"Where there is no particular form of such commission prescribed by law, those who are constituted for the purpose, may use such form and language as to them may seem proper; so that the purport of such commission be clearly understood." Dew *v.* Judges Sweet Springs Dist. Ct., 3 Hen. & M. (Va.) 1, 43, 3 Am. Dec. 639.

10. Black L. Dict.

"The word commission is one of equivocal meaning. It is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised." Rex *v.* Dudman, 4 B. & C. 850, 854, 10 E. C. L. 828.

lent to mandate.[11] In commercial law, a compensation to a factor or other agent for services to be rendered in making a sale or otherwise;[12] a sum allowed as compensation to a servant, factor, or agent who manages the affairs of others, in recompense for his services;[13] an allowance for services, trouble, labor and responsibility in discharging the duties of the trust;[14] compensation for labor and responsibility;[15] compensation for selling;[16] an allowance or compensation made upon the sale or purchase of goods;[17] a percentage upon the amount involved in the transaction.[18] In criminal law, doing or perpetration; the performance of an act.[19] In practice, an authority or writ issued from a court, in relation to a cause before it, directing and authorizing a person or persons to do some act or exercise some special function.[20] (Commission: Day, see COMMISSION DAY. Del Credere, see FACTORS AND BROKERS. Merchant, see FACTORS AND BROKERS. Of Administrator, see EXECUTORS AND ADMINISTRATORS. Of Agent, see PRINCIPAL AND AGENT. Of Assignee — For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; In Bankruptcy, see BANKRUPTCY; In Insolvency, see INSOLVENCY. Of Broker, see FACTORS AND BROKERS. Of Clerk of Court, see CLERKS OF COURTS. Of Constables, see SHERIFFS AND CONSTABLES. Of Executor, see EXECUTORS AND ADMINISTRATORS. Of Factors, see FACTORS AND BROKERS. Of Guardian, see GUARDIAN AND WARD. Of Lunacy, see INSANE PERSONS. Of Officer, see ARMY AND NAVY; OFFICERS. Of Receiver, see RECEIVERS. Of Sheriff, see SHERIFFS and CONSTABLES. Of the Peace, see COMMISSION OF THE PEACE. Of Trustee, see MORTGAGES; TRUSTS. To Examine Witnesses, see DEPOSITIONS. To Take Depositions, see DEPOSITIONS. To Take Testimony, see DEPOSITIONS. Usurious, see USURY.)

COMMISSION DAY. The opening day of the assises.[21]

COMMISSIONER. A title of office;[22] a person to whom a COMMISSION (*q. v.*) is

"A commission, is, in a qualified sense, a legal right, like an action." *Ex p.* Wilbran, 5 Madd. 1 [*quoted* in Lucas *v.* Nockells, 4 Bing. 729, 737, 13 E. C. L. 713, 1 Cl. & F. 438, 6 Eng. Reprint 980, 1 M. & P. 783, 2 Y. & J. 304, 29 Rev. Rep. 721].

11. Black L. Dict. See also, generally, BAILMENTS.

12. Woolsey *v.* Jones, 84 Ala. 88, 92, 4 So. 190.

"A commission of fifty per cent. is no more nor less than an equal division of the profits." Dunham *v.* Rogers, 1 Pa. St. 255, 262.

As used in the revenue act of April 20, 1818, the meaning of the term "commissions" is considered in U. S. *v.* May, 3 Mason (U. S.) 98, 99, 26 Fed. Cas. No. 15,752.

13. Rogers *v.* Duff, 97 Cal. 66, 69, 31 Pac. 836; Ralston *v.* Kohl, 30 Ohio St. 92, 98 [*citing* Bouvier L. Dict.].

14. *In re* Slifer, 4 Phila. (Pa.) 225, 17 Leg. Int. (Pa.) 164, where it is also said: "That allowance is given as a compensation, and should, in every instance, be proportionate to the nature and value of that which it is designed to compensate."

15. Ziegler's Appeals, (Pa. 1886) 4 Atl. 837, 839 [*citing In re* Harland, 5 Rawle (Pa.) 323].

16. Whitaker *v.* Old Dominion Guano Co., 123 N. C. 368, 371, 31 S. E. 629.

17. Miller *v.* Livingston, 1 Cai. (N. Y.) 349, 357.

18. "The two words, 'commission' and 'discount,' are not synonymous. They are similar, but not identical. 'Commission,' in its technical as well as in its ordinary sense, generally signifies a percentage upon the amount of money involved in the transaction, as distinguished from 'discount,' which is a percentage taken from the face value of the security or property negotiated." Swift *v.* U. S., 18 Ct. Cl. 42, 57 [*citing* Bouvier L. Dict.; Ficklin Nat. Arithmetic, 2d Book Advanced, par. 356].

19. Black L. Dict.

20. Black L. Dict. And see Tracy *v.* Suydam, 30 Barb. (N. Y.) 110, 115, where it is said: "A commission is a writ or process issued by the special order of the court, and a seal is essential to its validity."

21. Black L. Dict.

22. Abbott L. Dict.

"It is nomen generale, designating an office of a public or private nature, permanent or temporary; and although the term be not used in constituting the office, they may be nevertheless commissioners, if their duties be confined to a particular case, or class of cases. Thus we may have commissioners to make partition of lands, street commissioners, or commissioners of bankruptcy; and in this case we have commissioners to make appraisements, although the term be not used; and the word 'appraisers' is used in the act, not as any official, or technical appellation, but rather as descriptive of the duties which they were commissioned to perform." State *v.* Morris Canal, etc., Co., 14 N. J. L. 411, 437.

directed by the government or a court.[23] (Commissioner: Auditor, see REFERENCES. County, see COUNTIES. Court, see COURT COMMISSIONERS. For Taking Acknowledgments, see ACKNOWLEDGMENTS. In Admiralty, see ADMIRALTY. In Bankruptcy, see BANKRUPTCY. In Chancery, see EQUITY. In Eminent Domain Proceeding, see EMINENT DOMAIN. In Highway Proceeding, see STREETS AND HIGHWAYS. In Lunacy, see INSANE PERSONS. In Proceeding to Locate Railroad, see RAILROADS. Jury, see JURIES. Of Bail, see BAIL. Of Deeds, see COMMISSIONER OF DEEDS. Of Election, see ELECTIONS. Of Highways, see STREETS AND HIGHWAYS. Of Immigration, see ALIENS. Of Land-Office, see PUBLIC LANDS. Of Patents, see PATENTS. Of United States, see UNITED STATES COMMISSIONERS. Railroad, see RAILROADS. Referee, see REFERENCES. To Assess Damages, see EMINENT DOMAIN; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. To Make Partition, see PARTITION. To Sell, see JUDICIAL SALES. To Set Out Dower, see DOWER. To Take Deposition, see DEPOSITIONS.)

COMMISSIONER OF DEEDS. An officer authorized to administer oaths in all cases where no special provision is made by law.[24] (See, generally, ACKNOWLEDGMENTS.)

COMMISSION OF THE PEACE. A COMMISSION (*q. v.*) from the crown, appointing certain persons therein named, jointly and severally, to keep the peace, etc.[25]

COMMISSIVE WASTE. See WASTE.

COMMIT. To perpetrate or enact;[26] to perpetrate — to do a fault — to be guilty of a crime;[27] to consign to custody by official warrant;[28] to send to prison — to imprison — to be put in any place to be kept safe.[29] (See COMMITMENT.)

COMMITMENT. The act of sending to prison — an order for sending to prison;[30] the warrant or mittimus by which a court or magistrate directs an officer to take a person to prison;[31] a document whereby one person is committed to the custody of another.[32] (Commitment: For Contempt, see CONTEMPT. For Costs, see COSTS. For Crime, see CRIMINAL LAW. For Fines, see FINES. On Civil Process, see ARREST; EXECUTIONS. Of Witness, see WITNESSES.)

COMMITTED. Sent to jail or other proper prison, to be there detained and held to answer for a criminal offense preferred, or to be preferred against the party in the course of procedure, until he shall be discharged according to law.[33] (See COMMIT; COMMITMENT.)

23. Black L. Dict. In Harding *v.* Handy, 11 Wheat. (U. S.) 103, 126, 6 L. ed. 429, Marshall, C. J., applied the word "commissioner" to a master. And see Dean *v.* Emerson, 102 Mass. 480, 484.

"The term 'commissioners' is a legal and appropriate designation of such persons as have a commission, letters patent, or other lawful warrant, to examine any matters, or to execute any public office," etc. State *v.* Morris Canal, etc., Co., 14 N. J. L. 411, 428 [*citing* Jacob L. Dict.].

24. Bolton *v.* Jacks, 6 Rob. (N. Y.) 166, 192.

25. 1 Bl. Comm. 351; 3 Stephen Comm. 39.

26. Worcester Dict. [*quoted* in State *v.* Murphy, 35 La. Ann. 622, 623].

27. Johnson Dict. [*quoted* in Clift *v.* Schwabe, 3 C. B. 437, 477, 54 E. C. L. 437, 2 C. & K. 134, 61 E. C. L. 134, 17 L. J. C. P. 2].

28. Century Dict.

"To 'commit' was regarded as the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution." French *v.* Bancroft, 1 Metc. (Mass.) 502, 504.

29. Skinner *v.* White, 9 N. H. 204, 208.

30. Skinner *v.* White, 9 N. H. 204, 207. And see Cummington *v.* Wareham, 9 Cush. (Mass.) 585, where it was held that the sending of a lunatic pauper to the hospital for relief and support was a "commitment," within the meaning of the statute. See also Guthman *v.* People, (Ill. 1903) 67 N. E. 821, 822 [*quoting* Anderson L. Dict.; Bouvier L. Dict.].

31. Black L. Dict.

Commitment "correctly describes the process by which a person is confined under the order of a court at any time before or after final sentence." People *v.* Rutan, 3 Mich. 42, 49.

32. Cohbett *v.* Grey, 4 Exch. 729, 741, 19 L. J. Exch. 137.

33. Thus used in a technical sense in criminal procedure. State *v.* Pearson, 100 N. C. 414, 418, 6 S. E. 387 [*citing* 4 Bl. Comm. 296; Bouvier L. Dict.; Burrill L. Dict.; Chitty Crim. L. 107].

"A person is 'committed' to jail by a proper tribunal to answer for a criminal offence; upon conviction, he is sentenced by the judgment of the court to be imprisoned in jail as a punishment, and when put in

COMMITTEE. A body of persons authorized to act in a certain manner;[34] a company of persons joined in the exercise of some duty or the charge of some trust;[35] an individual or a body to which others have committed or delegated a particular duty, or who have taken it on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for;[36] an assembly or board of persons to whom the consideration or management of any matter is committed or referred by some court.[37] In parliamentary law, a portion of a legislative body, comprising one or more members, who are charged with the duty of examining some matter specially referred to them by the house, or of deliberating upon it, and reporting to the house the result of their investigations or recommending a course of action.[38] (Committee: Of Association, see Associations. Of City Council, see Municipal Corporations. Of Congress, see United States. Of Drunkard, see Drunkards. Of Legislature, see States. Of Lunatic, see Insane Persons. Of Spendthrift, see Spendthrifts. Of Stockholders, see Corporations.)

COMMITTING TO JAIL. Receiving into the jail under Commitment,[39] *q. v.* (See Commit; Commitment; Committed.)

COMMITTITUR. An order or minute, setting forth that the person named in it is Committed (*q. v.*) to the custody of the sheriff.[40]

COMMITTITUR PIECE. An instrument in writing on paper or parchment,

jail, he is then in execution of the judgment. The word 'committed,' is used in the statute in its technical sense, certainly, in its application to prisoners charged with criminal offences." State *v.* Pearson, 100 N. C. 414, 418, 6 S. E. 387. And *compare* Smith *v.* Com., 59 Pa. St. 320, 325, where it is said: "It is admitted, if the language had been 'committed until sentence is complied with,' it would mean imprisonment. But what greater force has the word 'committed?' It seems to me it is not so great as 'custody.' Committed to what? Undoubtedly to custody; and this is the common form of sentence: 'and that you be committed to the custody of the sheriff until this sentence be complied with.'" *Compare* Mullins *v.* Treasurer, 7 App. Cas. 1, 9, 15 Cox C. C. 9, 46 J. P. 276, 51 L. J. Q. B. 145, 45 L. T. Rep. N. S. 625, 30 Wkly. Rep. 157 [*affirming* 6 Q. B. D. 156, 159 (*reversing* 5 Q. B. D. 170, 173)], where it is said: "The first question is what do the words 'committed to prison' and 'committal to prison' here mean? Lush, J. thought that they meant 'received into prison,' and on that based his judgment. But I cannot agree with him. I think that the words, both in common parlance and in legal phraseology, mean when the order is made under which the person is to be kept in prison."

"'Committed' is to be taken as having a technical meaning, and necessarily implies a warrant or order by a court or magistrate directing a ministerial officer to take a person to prison." Com. *v.* Barker, 133 Mass. 399, 400.

"If we give to the word 'committed,' found in the statute the meaning usually assigned by text-writers and lexicographers thereto, the statute is too plain for construction, and it must be held that the period of four months for which the plaintiff in error might be held without trial commenced to run from the date of his commitment by the police magistrate, and not from the date of the return of the indictment." Guthman *v.* People, (Ill. 1903) 67 N. E. 821, 822.

"The terms 'committed' and 'discharged' are words of recognized legal meaning, and refer only to the beginning and end of the term of imprisonment." Lee *v.* Ionia County, 68 Mich. 330, 331, 36 N. W. 83.

"The words 'imprisoned' and 'committed,' in the statute of 1829, are used as synonymous terms, and both mean imprisonment within the gaol house, or within the prison walls — an actual confinement within the walls of the prison, by lawful authority." Skinner *v.* White, 9 N. H. 204, 207.

34. Bouvier L. Dict. [*quoted* in *In re* Board Public Works, 12 Colo. 188, 192, 21 Pac. 481].

35. Webster Dict. [*quoted* in *In re* Board Public Works, 12 Colo. 188, 192, 21 Pac. 481].

36. Reynell *v.* Lewis, 16 L. J. Exch. 25, 30, 15 M. & W. 517, 4 R. & Can. Cas. 351.

37. Black L. Dict.

The term is especially applied to the person or persons who are invested, by order of the proper court, with the guardianship of the person and estate of one who has been adjudged a lunatic. Black L. Dict. And see Lloyd *v.* Hart, 2 Pa. St. 473, 478, 45 Am. Dec. 612, where it is said: "A committee is a bailiff whose power is limited to the mere care of the estate under the direction of the court."

38. Black L. Dict.

39. Richter *v.* St. Paul, 29 Minn. 198, 12 N. W. 532, construing these words as used in Minn. Gen. Stat. (1878), c. 70, § 12.

"'Committing any person to jail' relates to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions." Thomas *v.* St. Louis County, 61 Mo. 547, 548.

40. Black L. Dict.

which charges a person, already in prison, in execution at the suit of the person who arrested him.[41]

COMMIXTION. See CONFUSION OF GOODS.

COMMIXTURE. See CONFUSION OF GOODS.

COMMODATE. In Scotch law, a gratuitous loan for use.[42] (See, generally, BAILMENTS.)

COMMODATI ACTIO. In the civil law, an action of loan; an action for a thing lent.[43] (See, generally, BAILMENTS.)

COMMODATO. In Spanish law, the same contract as *commodatum*.[44] (See, generally, BAILMENTS.)

COMMODATUM. (See, generally, BAILMENTS.)

COMMODITY.[45] In its primary and most comprehensive sense,[46] accommodation;[47] advantage;[48] benefit;[49] commerce [convenience];[50] commodiousness;[51] convenience;[52] gain;[53] interest;[54] privilege;[55] profit;[56] the privilege and con-

41. Black L. Dict.

42. Black L. Dict. [*citing* Ersk. Inst. 3, 1, 20].

43. Black L. Dict.

44. Black L. Dict.

45. **Distinguished from "coin."**—"We have no hesitation in saying that the term, commodity, is opposed to coin, and that the two words mean the same thing which is now frequently expressed by the vulgar and popular language of money and property." Barnett *v.* Powell, Litt. Sel. Cas. (Ky.) 409, 410. See COIN.

46. "In a general sense a commodity is something of convenience, advantage, benefit or profit." Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259. "But according to Webster's International Dictionary, the use of the word in this sense is obsolete." Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

47. Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

48. Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259; Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

49. Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259; Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

50. McKeon *v.* Wolf, 77 Ill. App. 325, 334 [*quoting* Anderson L. Dict.].

51. Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

52. *Illinois.*— McKeon *v.* Wolf, 77 Ill. App. 325, 334.

Iowa.— Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

Massachusetts.— Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259; Com. *v.* Lancaster Sav. Bank, 123 Mass. 493, 495; Portland Bank *v.* Apthorp, 12 Mass. 252.

Texas.—Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

United States.— Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 640, 18 L. ed. 904; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907.

53. McKeon *v.* Wolf, 77 Ill. App. 325, 334 [*quoting* Anderson L. Dict.]; Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; Portland Bank *v.* Apthorp, 12 Mass. 252, 256; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 640, 18 L. ed. 904; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907.

54. Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

55. McKeon *v.* Wolf, 77 Ill. App. 325, 334 [*quoting* Anderson L. Dict.]; Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; Com. *v.* Lancaster Sav. Bank, 123 Mass. 493, 495; Portland Bank *v.* Apthorp, 12 Mass. 252, 256; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 640, 18 L. ed. 904; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907.

56. McKeon *v.* Wolf, 77 Ill. App. 325, 334 [*quoting* Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 640, 18 L. ed. 904]; Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259; Portland Bank *v.* Apthorp, 12 Mass. 252, 256 (where it is was said: "It must have been under this general term, commodity, which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern-keepers and retailers"); Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 640, 18 L. ed. 904 (where it is said: "If regarded as meaning goods and wares only, there would be much difficulty in the case, but if it signifies 'convenience, privilege, profit and gains,' as uniformly held by the state court, then all difficulty vanishes, and the case is clear"); Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907.

venience of transacting a particular business.[57] In its secondary and commercial sense[58] that which affords advantage or profit;[59] that which affords convenience or advantage, especially in commerce, including everything movable which is bought and sold;[60] an article of trade or commerce, a movable article of value, something that is bought and sold;[61] any movable and tangible thing that is ordinarily produced or used as the subject of barter or sale;[62] anything movable that is subject of trade or acquisition;[63] articles of trade or commerce;[64] goods, wares, and merchandise of any kind;[65] property;[66] something produced for use, and an article of trade or commerce.[67]

COMMODUM EX INJURIA SUA NEMO HABERE DEBET. A maxim meaning "No person ought to have advantage from his own wrong."[68]

COMMON. As an adjective, usual, ordinary, accustomed; shared among several; owned by several jointly;[69] belonging equally to more than one, or to many indefinitely; belonging to the public; general; universal; public;[70] fre-

57. Com. *v.* Lancaster Sav. Bank, 123 Mass. 493, 495.

"It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise." Gleason *v.* McKay, 134 Mass. 419, 424; Com. *v.* Hamilton Mfg. Co., 12 Allen (Mass.) 298, 300; Com. *v.* People's Five Cents Sav. Bank, 5 Allen (Mass.) 428, 435.

58 "In a special sense a commodity is something produced for use, and an article of trade or commerce." Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259.

"The mauling of rails" is not the commodity contemplated by the legislature, nor is it embraced by the statute, prohibiting any one from buying or selling to or receiving from any slave any "commodity whatsoever," etc. State *v.* Henke, 19 Mo. 225, 226.

59. Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

60. Webster Dict. [*quoted* in McKeon *v.* Wolf, 77 Ill. App. 325, 334; Peterson *v.* Currier, 62 Ill. App. 163, 169]. And see Best *v.* Bauder, 29 How. Pr. (N. Y.) 489, 492, where it is said: "The word includes all the movables which are the objects of commerce."

Animals are excepted by Webster in his definition. Webster Dict. [*quoted* in Peterson *v.* Currier, 62 Ill. App. 163, 169; Best *v.* Bauder, 29 How. Pr. (N. Y.) 489, 492; Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483].

61. Standard Dict. [*quoted* in McKeon *v.* Wolf, 77 Ill. App. 325, 333].

62. Queen Ins. Co. *v.* State, 86 Tex. 250, 265, 24 S. W. 397, 22 L. R. A. 483.

63. Century Dict. [*quoted* in McKeon *v.* Wolf, 77 Ill. App. 325, 333; Peterson *v.* Currier, 62 Ill. App. 163, 169]. See also Shuttleworth *v.* State, 35 Ala. 415, 417 (where it is said: "The words, article and commodity, are used in this section, mainly, in the same sense. They at least embrace most movable things, which can become the subject of commerce between white persons and slaves. A black bottle comes clearly within this definition"); Barnett *v.* Powell, Litt. Sel. Cas. (Ky.) 409, 410 (where it is said: "The term, commodity, is properly used to signify almost any description of article called moveable or personal estate, and in this sense it is here intended").

64. Black L. Dict.

65. Beechley *v.* Mulville, 102 Iowa 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479 (popular meaning); Anderson L. Dict. [*quoted* in McKeon *v.* Wolf, 77 Ill. App. 325, 334]; Black L. Dict. *Compare* Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259, where it is said: "The words, 'produce, goods, wares, merchandise . . . brought into, produced, manufactured, or being' within the Commonwealth, are words of definite meaning, but the words 'and commodities whatsoever' are of less certain signification."

Canned oysters, sold as merchandise, are a commodity within the meaning of Miss. Code (1892), § 4437, prohibiting agreements "to limit increase or reduce the price of a commodity." Barataria Canning Co. *v.* Joulian, 80 Miss. 555, 31 So. 961.

The term has been held to include cotton (State *v.* Borroum, 23 Miss. 477, 481) and wine plants (Best *v.* Bauder, 29 How. Pr. (N. Y.) 489, 491).

66. Anderson L. Dict. [*quoted* in McKeon *v.* Wolf, 77 Ill. App. 325, 334].

67. Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259.

68. Black L. Dict.

69. Black L. Dict.

"Common" denotes primarily that in which many share; and hence, that which is often met with. Koen *v.* State, 35 Nebr. 676, 678, 53 N. W. 595, 17 L. R. A. 821. And see Decker *v.* Evansville, etc., R. Co., 133 Ind. 493, 497, 33 N. E. 349, where it is said: "Injuries which result from the careful construction and operation of a railroad on the land of another are 'common' to all those whose lands are in close proximity to such road."

70. Webster Dict. [*quoted* in Aymette *v.* State, 2 Humphr. (Tenn.) 154, 158]. See also U. S. *v.* Smith, 4 Cranch C. C. (U. S.) 629, 27 Fed. Cas. No. 16,328.

The word "common" is ordinarily understood to apply to the general public when not qualified by some word or phrase of lim-

quent, usual, customary, habitual.[71] As a noun, an incorporeal hereditament.[72] (Common: Appendant, see COMMON LANDS. Appurtenant, see COMMON LANDS. Assault, see ASSAULT AND BATTERY. Assurance, see COMMON ASSURANCES. At Large, see COMMON LANDS. Bail, see BAIL. Bar, see COMMON BAR. Barrator, see BARRATRY. Barratry, see BARRATRY. Bawdy-House, see DISORDERLY HOUSES. Because of Vicinage, see COMMON LANDS. Bench, see COMMON BENCH. Betting House, see GAMING. Brawler, see COMMON SCOLD. Carrier, see CARRIERS. Chase, see COMMON CHASE. Council, see MUNICIPAL CORPORATIONS. Counts, see COMMON COUNTS. Day, see COMMON DAY. Diligence, see NEGLIGENCE. Drunkard, see DRUNKARDS. Employment, see MASTER AND SERVANT. Error, see COMMON ERROR. Fishery, see FISH AND GAME. Gambler, see GAMING. Gambling, see GAMING. Gambling House, see GAMING. Highway, see STREETS AND HIGHWAYS. Informer, see COMMON INFORMER. In Gross, see COMMON LANDS. Intendment, Intent, or Sense, see COMMON INTENDMENT, INTENT, or SENSE. Jail, see PRISONS. Jury, see JURIES. Labor, see SUNDAY. Lands, see COMMON LANDS. Law, see COMMON LAW. Lawyer, see COMMON LAWYER. Learning, see COMMON LEARNING. Mob, see COMMON MOB. Night-Walker, see COMMON NIGHT-WALKER. Nuisance, see NUISANCES. Of Digging, see COMMON LANDS. Of Estovers, see COMMON LANDS. Of Fowling, see COMMON LANDS. Of Pasture, see COMMON LANDS. Of Piscary, see COMMON LANDS. Of Shack, see COMMON LANDS. Of Turbary, see COMMON LANDS. Place, see COMMON PLACE. Pleas, see COMMON PLEAS; COURTS. Property, see COMMON PROPERTY. Prostitute, see PROSTITUTION. Railer, see COMMON SCOLD. Recovery, see ESTATES. Repute, see COMMON REPUTE. School, see SCHOOLS AND SCHOOL DISTRICTS. Scold, see COMMON SCOLD. Seal, see CORPORATIONS. Seller, see INTOXICATING LIQUORS. Sense, see COMMON SENSE. Stock, see CORPORATIONS. Thief, see LARCENY. Usage, see CUSTOMS AND USAGES. Weal, see COMMON WEAL.)

COMMONABLE. Entitled to COMMON,[73] *q. v.* (Commonable: Beasts, see COMMON LANDS.)

COMMONAGE. The right of COMMON,[74] *q. v.*

COMMONALTY. In American law, the body of the people composing a municipal corporation, excluding the corporate officers.[75] In English law, the mass of the people excluding the nobility.[76] (See, generally, MUNICIPAL CORPORATIONS.)

COMMONANCE or **COMMUNANCE.** The COMMONERS (*q. v.*) or tenants and inhabitants, who have the right of COMMON (*q. v.*) or commoning in open field.[77] (See, generally, COMMON LANDS.)

COMMON ASSURANCES. The legal evidences of the translation of property, whereby every person's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.[78] (See ASSURANCE.)

itation. Kirkendall *v.* Omaha, 39 Nebr. 1, 6, 57 N. W. 752.

71. Worcester Dict. [*quoted* in State *v.* O'Conner, 49 Me. 594, 598].

72. Abbott L. Dict. See, generally, COMMON LANDS.

73. Black L. Dict.

74. Used in old deeds. Black L. Dict.

75. Black L. Dict.

76. Black L. Dict.

What commonalty includes.—Where a charter granted to the mayor and commonalty that any alderman being wanted, the rest of the aldermen might nominate two burgesses, for the choosing of one of them as aldermen by the commonalty (*per communitatem*), it was held that commonalty included the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. Rex *v.* Osborne, 4 East 327.

77. Rapalje & L. L. Dict.

78. 2 Bl. Comm. 294 [*quoted* in State *v.* Farrand, 8 N. J. L. 333, 335]. *Compare* Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58, 59.

Synonymous with "conveyances."—"Thus Lord Coke: 'conveyances which are used for common assurances of land,' &c. 2 Co. 74, *a.* A common recovery 'is now by usage and custom become a common assurance and conveyance of lands.' 5 Co. 41. Chief Justice Willes: a common recovery 'is by consent and in nature of a common conveyance or assurance of lands.' Willes 451." State *v.* Farrand, 8 N. J. L. 333, 335.

COMMON BAR. Otherwise called BLANK BAR,[79] *q. v.*

COMMON BENCH. Formerly the name of the English court of common pleas.[80] (See, generally, COURTS.)

COMMON CHASE. A place where all alike were entitled to hunt wild animals.[81] (See, generally, ANIMALS; FISH AND GAME.)

COMMON COUNTS. Averments of a cause of action, incorporated in a declaration, not as descriptive of the particular circumstances of the plaintiff's case, as he expects to prove it, but in order that he may have a proper averment, to enable him to take advantage of the legal effect of the proof, whatever it may be, if in any respect it can warrant a recovery.[82] (Common Counts: See, generally, ACCOUNTS AND ACCOUNTING; ASSUMPSIT, ACTION OF; MONEY LENT; MONEY PAID; MONEY RECEIVED; SALES; USE AND OCCUPATION; WORK AND LABOR.)

COMMON CURRENCY IN ARKANSAS. Bank notes or paper issues, which were the general and universal CURRENCY (*q. v.*) of the state.[83]

COMMON DAY. An ordinary day in court.[84]

COMMON ERROR. An error for which there are many precedents.[85] (See COMMUNIS ERROR FACIT JUS.)

COMMONERS. Persons having a right of COMMON,[86] *q. v.* (See, generally, COMMON LANDS.)

COMMON FIELD. The term "common field" is of American invention, and adopted by congress to designate small tracts of ground of a peculiar shape usually from one to three arpents in front by forty in depth, used by the occupants of the French villages for the purposes of cultivation, and protected from the inroads of cattle by a common fence.[87]

COMMON FIELD LAND. See COMMON LANDS.

COMMON FORM. One of the two methods of obtaining probate.[88] (See, generally, WILLS.)

COMMON INFORMER. A common prosecutor;[89] a person who sues for a penalty which is given to any person who will sue for it.[90] (See, generally, CRIMINAL LAW; FORFEITURES; PENALTIES.)

COMMON INTENDMENT, INTENT, or SENSE. The natural and ordinary meaning of language.[91] (See CERTAINTY.)

79. Black L. Dict.

80. So called to distinguish it from the KING'S BENCH, *q. v.* Black L. Dict.

81. Black L. Dict.

82. Abbott L. Dict.

83. Dillard *v.* Evans, 4 Ark. 175, 178.

84. Black L. Dict. [*citing* Termes de la Ley].

85. Black L. Dict.

86. Black L. Dict. [*citing* Culley *v.* Spearman, 2 H. Bl. 386, 389, 3 Rev. Rep. 420], where Rooke, J., says: "Tenants in common have been improperly, in the argument, compared to commoners, who are so called, not from any community of interest between themselves, but because they have a right to pasture on the waste, in common with the lord."

Sometimes applied, in the United States, to cattle.— Horses are called "free commoners." Burrill L. Dict. [*citing* Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 264, 55 Am. Dec. 59].

87. Glasgow *v.* Hortiz, 1 Black (U. S.) 595, 17 L. ed. 110.

88. "**There are two methods of obtaining probate** known to the practice of the English ecclesiastical courts — one in common form, and the other in solemn form or *per testes*." Straub's Case, 49 N. J. Eq. 264, 265, 24 Atl. 569.

89. Black L. Dict.

90. 3 Bl. Comm. 161. And see *In re* Barker, 56 Vt. 14, 20.

91. Abbott L. Dict.

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CROSS-REFERENCES

For Matters Relating to:
Condemnation of Land, see EMINENT DOMAIN.
Dedication of Land, see DEDICATION.
Joint Tenancy of Land, see JOINT TENANCY.
Right of Common in Land of Another, see EASEMENTS.
Tenancy in Common of Land, see TENANCY IN COMMON.

I. DEFINITION.

Commons or common lands in a strictly legal sense may be defined to be those lands in which rights of common[1] exist.[2] But in its popular sense the word

1. **Rights of common** are defined and explained see *infra*, IV.

2. Sweet L. Dict. And see Anderson L. Dict. The term "common" by no rules of interpretation can be construed to mean a lot to be held by several as tenants in common, but as a lot in which several are to have common of some sort. Knowles *v.* Nichols, 2 R. I. 198.

Other definitions are: "A tract of ground, the use of which is not appropriated to an individual, but belongs to the public or to a number." Century Dict. [*quoted* in Goode *v.* St. Louis, 113 Mo. 257, 271, 20 S. W. 1048].

"An uninclosed tract of ground, the use of which is not appropriated to an individual, but belongs to the public or to a number." Webster Dict. [*quoted* in Goode *v.* St. Louis, 113 Mo. 257, 271, 20 S. W. 1048].

"Commons or waste lands" as used in 50 Geo. III, c. 122, § 87, was held to mean commonable lands, the ownership of the soil of which was in the lord of the manor, and not open fields over which certain persons had rights in severalty. Grand Union Canal Co. *v.* Ashby, 6 H. & N. 394, 30 L. J. Exch. 203, 3 L. T. Rep. N. S. 673.

Distinguished from "uninclosed lands."— The word "common" as used in a statute has been distinguished from the words "uninclosed lands." Ferguson *v.* Miami Powder Co., 9 Ohio Cir. Ct. 445. For the meaning of the term "commons" as used in a stat-

"common" is used to denote pieces of ground left open for common or public use for the convenience and accommodation of the inhabitants of the town or municipality.[3]

II. HISTORY AND EXISTENCE.

Common lands are of ancient feudal origin,[4] but have not generally survived in the United States,[5] although formerly most common in England and other European countries.[6] Rights of common have been sustained in some of the states of the Union[7] and denied in others.[8] So too various specific lands have been declared to be common,[9] while the right of common has been denied as to

ute see also State *v.* McReynolds, 61 Mo. 203.

Common field lot or out lot defined as used in the act of congress of June 13, 1812, confirming titles to common lands in Missouri see *infra*, VI, D, 2.

3. Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452 [*quoted* in Goode *v.* St. Louis, 113 Mo. 257, 272, 20 S. W. 1048]. The word "common" also denotes "an uninclosed piece of land set apart for public or municipal purposes in many cities and villages of the United States." Black L. Dict. [*quoted* in Goode *v.* St. Louis, 113 Mo. 257, 271, 20 S. W. 1048]. In most of the cities and towns in the United States there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants. Bouvier L. Dict. The word "commons," as used in Wagner's Stat. Mo. p. 1314, § 1, relating to the incorporation of towns, means lands included in or belonging to a town which are set apart for public use. State *v.* McReynolds, 61 Mo. 203.

4. For a discussion of the ancient origin of rights of common, expounding the legal and historical theories of the matter see 3 Law Quart. Rev. 373.

5. Although the right of common, with many of its old common-law incidents, was formerly recognized in this country, particularly in the middle and eastern states (Anderson L. Dict.), it has been said that it probably does not exist in any of the northern or western parts of the United States which have been settled since the Revolution (3 Kent Comm. 404. But see Ill. Const. (1818), art. 8, § 8). See also Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 649, 25 Am. Dec. 582, where it was said: "These common rights which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country such rights are uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil. In our state, however, we have the manors of Livingston and of Rensselaerwyck, in which these rights have existed, and to some extent do still exist."

6. England.— See 2 Bl. Comm. 33; Origin Rights Common, 3 Law Quart. Rev. 373.

France.— For a scanty statement of French communal rights see 5 Chic. Leg. N. 522, 527.

Sweden.— Concerning rights of common in Sweden see Stiernh. de jure Sueonom, lib. 2, c. 6.

Switzerland.— See 19 Jour. Jur. 369.

7. *Connecticut.*— Stiles *v.* Curtis, 4 Day (Conn.) 328.

Illinois.— Where certain rights in common were confirmed by the legislature. Haps *v.* Hewitt, 97 Ill. 498; Hebert *v.* Lavalle, 27 Ill. 448.

Iowa.—See Miner *v.* Bennett, 45 Iowa 635.

Maine.— Brackett *v.* Persons Unknown, 53 Me. 228.

Massachusetts.— Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239; Green *v.* Putnam, 8 Cush. (Mass.) 21.

Missouri.—Where certain French and Spanish rights in common were confirmed by congress. Page *v.* Scheibel, 11 Mo. 167.

New Hampshire.— Goulding *v.* Clark, 34 N. H. 148.

New York.— Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

Pennsylvania.— Carr *v.* Wallace, 7 Watts (Pa.) 394; Western University *v.* Robinson, 12 Serg. & R. (Pa.) 29.

Rhode Island.— Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

Vermont.— Beach *v.* Fay, 46 Vt. 337; Hart *v.* Gage, 6 Vt. 170.

See 10 Cent. Dig. tit. "Common Lands," § 1.

8. Common lands practically do not exist in Georgia, the court denying the right when founded on prescription, although saying that "it could be created by grant." Harrell *v.* Hannum, 56 Ga. 508; Davis *v.* Gurley, 51 Ga. 74, 44, Ga. 582. Commons may, however, be created by statute. Crawford *v.* Mobile, etc., R. Co., 67 Ga. 405.

9. Rights of common have been allowed in lands under the waters of Mecox bay, Long Island, New York (Southampton *v.* Mecox Bay Oyster Co., 12 N. Y. St. 514); Epping forest (Sewers Com'rs *v.* Glasse, L. R. 19 Eq. 134, 44 L. J. Ch. 129, 31 L. T. Rep. N. S. 495, 23 Wkly. Rep. 102). See also Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582 (town of Guilderland); Leyman *v.* Abeel, 16 Johns. (N. Y.) 30 (Catskill patent); Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287 (town of Liv-

others.[10] And it has been held that the public has no right of common in highways.[11]

III. CREATION.

Common lands may be created by government grant, either in general terms to the inhabitants[12] or by appropriation specifically for certain common purposes,[13] of lands only which the government owns,[14] or by appropriate words in a deed by a private party where it must clearly appear that the creation of right of common was intended.[15] A right of common, being a species of profit *a prendre*, can be created by prescription but not by custom, except in the ancient case of copyhold tenants who might claim under a custom.[16]

ingston); Watts *v.* Coffin, 11 Johns. (N. Y.) 495 (lands in the city of Hudson).

10. New forest.— Mill *v.* New Forest Com'r, 18 C. B. 60, 2 Jur. N. S. 520, 25 L. J. C. P. 213, 86 E. C. L. 60.

11. Harrison *v.* Brown, 5 Wis. 27.

12. Southampton *v.* Mecox Bay Oyster Co., 12 N. Y. St. 514, where it appeared that the lands under the waters of Mecox bay, Long Island, were granted by charter, in 1676, to a body corporate, "by the name of the trustees of the freeholders and commonalty of the town of Southampton, or their successors." Such trustees were clothed by the charter with power to possess all the lands unappropriated to individuals before it was granted. It was held that such lands are common lands, and that the title thereto is in the town of Southampton.

Created by government grant only in "inhabitants."—A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by crown grant or act of parliament. Chilton *v.* London Corp., 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474; Rivers *v.* Adams, 3 Ex. D. 361, 48 L. J. Exch. 47, 39 L. T. Rep. N. S. 39, 27 Wkly. Rep. 381.

French grants in Illinois are discussed in Hebert *v.* Lavalle, 27 Ill. 448.

13. Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687, where it appeared that the state, having laid out a town into lots, appropriated a tract out of the borders of the town for a common pasture, for the benefit of the owners of the lots, and afterward sold the lots. It was held that the tract so appropriated was common appurtenant.

14. State *v.* Taff, 37 Conn. 392, where a vote of a town that certain lands should "lie common, and shall not be used for any other purpose without the consent of every individual proprietor" was held to be inoperative, if at the time the land belonged to the proprietors in common and not to the town.

15. Grant of land with common appurtenant insufficient.— After a right of common has been extinguished by unity of possession a new right is not created by a grant of a messuage and land with common appurtenant, although those who have occupied the tenement since the extinguishment have always used common therewith. Clements *v.* Lambert, 1 Taunt. 205, 9 Rev. Rep. 749. Otherwise if it had been a grant of all commons used therewith. Hall *v.* Byron, 4 Ch. D. 667, 46 L. J. Ch. 297, 36 L. T. Rep. N. S. 367, 25 Wkly. Rep. 317; Clements *v.* Lambert, 1 Taunt. 205, 9 Rev. Rep. 749.

16. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Post *v.* Pearsall, 22 Wend. (N. Y.) 425 [*affirming* 20 Wend. (N. Y.) 111]; Blewett *v.* Tregonning, 3 A. & E. 554, 1 Hurl. & W. 432, 4 L. J. K. B. 234, 5 N. & M. 308, 30 E. C. L. 260; Hardy *v.* Hollyday [*cited* in Grimstead *v.* Marlowe, 4 T. R. 717, 2 Rev. Rep. 512]; Gateward's Case, 6 Coke 59*b* [*cited* in Grimstead *v.* Marlowe, 4 T. R. 717, 2 Rev. Rep. 512]. *Contra*, holding that rights in common cannot arise by prescription and probably not at all see Harrell *v.* Hannum, 56 Ga. 508; Davis *v.* Gurley, 51 Ga. 74, 44 Ga. 582. See also Tubbs *v.* Lynch, 4 Harr. (Del.) 521, where it was held that the uninterrupted possession and enjoyment for forty years of vacant land, the title to which stood in the state, gave no rights of common, but afforded ground for a presumption of a grant by the state to the occupant and those under whom he claimed.

In Iowa the statute does not prohibit one who incloses land adjoining the close of another, and does not own any part of the division fence, from throwing any portion of such land open to common. Miner *v.* Bennett, 45 Iowa 635.

Government lands.— Concerning rights in a royal forest claimed by prescription, where, however, the claimant was defeated by proof that he took originally by virtue of an allotment made by royal commissioners of the land as appurtenant to which he claimed common see Mill *v.* New Forest Com'r, 18 C. B. 60, 2 Jur. N. S. 520, 25 L. J. C. P. 213, 86 E. C. L. 60.

Called corporeal hereditaments.— "So cattle-gates or stints, the rights of pasture of the inhabitants of a parish or other similar class over lammas-lands, &c., are not rights of common, though frequently so called, but shares in the vesture of land, and therefore corporeal hereditaments." Sweet L. Dict.

IV. NATURE AND SUBJECT-MATTER OF RIGHTS OF COMMON.

A. In General. A right of common is in nature an incorporeal hereditament of the kind called a profit,[17] running with the land to which it is annexed[18] and possibly divisible,[19] and cannot include a right to take the whole of the profits from the land.[20] A right of common is a right or privilege which several persons have to the produce of the lands or waters of another.[21] A grant in general terms of rights in common is held to give such rights accompanied by their usual limitations.[22] So rights in common may be limited by conflicting rights.[23]

17. Western University *v.* Robinson, 12 Serg. & R. (Pa.) 29; Abbott L. Dict.

"**Common,** or **right of common,** appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another." 2 Bl. Comm. 32.

18. Western University *v.* Robinson, 12 Serg. & R. (Pa.) 29.

19. Nicholls *v.* Chapman, 5 H. & N. 643, 29 L. J. Exch. 461, 2 L. T. Rep. N. S. 568, 8 Wkly. Rep. 664, holding that whether or not there could be a right to common of pasture for a fraction of one animal need not be decided, but an allegation in a pleading of a right to three fourths of a right of common was unintelligible.

20. **In the technical sense** of the words a common (or right of common) is the right of taking some part of any natural product of the land or water belonging to another man in common with him. Therefore the right to take the whole of the product, or to exclude the owner from taking it, is not a common — although sometimes called a sole common — but an estate in land; "for it is against the nature of this word common, and it was implyed in the first grant, that the owner of the soyle should take his reasonable profit there." Coke Litt. 122*a* [*cited* in Sweet L. Dict.]; Rapalje & L. L. Dict.

21. "**As a noun,** [the word common] signifies the right of one person to take or use the product of lands the property of another. It is an incorporeal hereditament." Abbott L. Dict.; Anderson L. Dict.

"**A profit which a man hath in the land of another;** as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like is a common." Burrill L. Dict. [*citing* 2 Bl. Comm. 32; 2 Stephen Comm. 3].

"**In English law,** [a common] is an incorporeal right which lies in grant, originally commencing on some agreement between lords and tenants, which by time has been formed into prescription, and continues good, although there be no deed or instrument to prove the original contract. . . . It is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers. 'The ancient books,' it has been said, 'are more explicit on rights of common than the modern; probably on account of the great increase of inclosures.'" Burrill L. Dict. [*citing* Tyrringham's Case, 4 Coke 36*b*; Atkinson *v.* Teasdale, 2 W. Bl. 817, 3 Wils. C. P. 278]; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 649, 25 Am. Dec. 582, where it is said: "Common or a right of common, is a right or privilege which several persons have to the produce of the lands or waters of another. Thus, common of pasture is a right of feeding the beasts of one person on the lands of another; common of estovers is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, &c.; common of turbary and piscary are in like manner rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are in general either appendant or appurtenant to houses and lands."

Kinds of rights in common.— The right usually meant is common of pasture: the right of feeding beasts on another's land. There was also common of estovers: the liberty of taking necessary wood, for use of house or farm — house-bote, fire-bote, hay-bote, hedge-bote, etc.; common of piscary: the liberty of fishing in another's water; common of turbary: a right to dig turf; common in the soil: a right to dig for minerals, etc. All the species result from the same necessity — the maintenance and carrying on of husbandry. Anderson L. Dict. And see *infra,* IV, B *et seq.*

Rights not strictly common.— "Common is sometimes used to denote certain rights which resemble rights of common in the strict sense . . . , in giving a person the right of taking the profits of land in common with others, but nevertheless differ from rights of common in some essential point. Thus, the right of the lord of a manor to take profits from the waste of the manor, in common with the tenants, is not strictly a right of common, because the waste is vested in him, and no one can have common in his own land." Rapalje & L. L. Dict.

22. Benson *v.* Chester, 8 T. R. 396, 4 Rev. Rep. 708, holding that an ancient deed of feoffment granting the wastes of a manor to feoffees in trust to permit the tenants and inhabitants to use and enjoy the same, as they had formerly done, or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common restricted by levancy and couchancy.

23. **The right of commoners in a common may be subservient** to the right of the lord

B. Pasture — 1. In General. Common of pasture is a right in common with others to feed beasts on lands of another.[24] It is of four sorts, appendant,[25] appurtenant,[26] because of vicinage,[27] and in gross,[28] and is distinguishable from other rights of common in that it extends to the whole common and not merely to those parts where the product is found,[29] although it may be controlled by custom and may be held subservient to other rights of the owner of the common lands.[30]

2. Common Appendant. Distinguishing features of common appendant are that it is dependent on land only and must have existed from time immemorial,[31] and is confined to commonable beasts.[32]

3. Common Appurtenant. Common appurtenant as distinguished from other kinds of common of pasture is a landowner's right of pasturage independent of the propinquity of the lands, founded on a grant or prescription,[33] and is

in the soil; so that the lord may dig claypits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. Bateson *v.* Green, 5 T. R. 411. And see Place *v.* Jackson, 4 D. & R. 318, 2 L. J. K. B. O. S. 156, 16 E. C. L. 204; Clarkson *v.* Woodhouse, 5 T. R. 412 note.

A custom for one commoner to inclose against another is good. Barber *v.* Dixon, 1 Wils. C. P. 44.

24. 2 Bl. Comm. 32; 2 Stephen Comm, 4; Coke Litt. 122*a*; Bell Dict.; Burrill L. Dict. And see Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 647, 25 Am. Dec. 582.

"Certainty — Common appendant, appurtenant, and in gross, are either certain by number, i. e. for a certain number of beasts, or certain by levancy and couchancy or *sans nombre*." Rapalje & L. L. Dict. [*citing* Coke Litt. 122*a*].

25. As to common appendant see *infra*, IV, B, 2.

26. As to common appurtenant see *infra*, IV, B, 3.

27. As to common of vicinage see *infra*, IV, B, 4.

28. As to common in gross see *infra*, IV, B, 5.

29. Rights of common other than pasture differ from common of pasture in being limited to those parts of the land where the product is found, while common of pasture extends to every place across which the cattle may wander in search of food, although there may be no pasture there. Sweet L. Dict.

30. Bateson *v.* Green, 5 T. R. 411 (right of the lord of the manor founded on ancient custom, to dig without leaving sufficient pasturage for the commoners). See also Duberly *v.* Page, 2 T. R. 392; and *supra*, note 23.

31. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; 2 Bl. Comm. 33; 3 Kent Comm. 404.

Common appendant is a right annexed to the possession of arable land by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to common are a part, and can be claimed by prescription only. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. "This kind of common arises from the connexion of tenure, and is of common right; it must have existed from time immemorial and cannot now be created; it is regularly appendant to arable land only, and can be claimed for no beasts but such as are commonable, that is, beasts of the plough, such as horses or oxen, or such as manure the ground, as kine or sheep." Burrill L. Dict.

Common appendant and appurtenant distinguished.— "The estate here granted . . . [is] of that species which are denominated appurtenant, and not appendant, between which there are many essential differences. The former does not arise from any connection of tenure, and may be created by grant, or claimed by prescription; whereas the latter can only arise from prescription." Watts *v.* Coffin, 11 Johns. (N. Y.) 495, 498.

The origin of common appendant is stated to be as follows: "This [common appendant] . . . was originally permitted, not only for the encouragement of agriculture, but from the necessity of the thing. For, when lords of manors granted out parcels of lands to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the unenclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands." 2 Bl. Comm. 33. For a learned treatise on the ancient origin of rights of common, suggesting *inter alia* that the distinction between common appendant and common appurtenant was caused by the statute of *quia emptores* see Origin Rights Common, 3 Law Quart. Rev. 373.

32. 2 Bl. Comm. 33; Burrill L. Dict.; Coke Litt. 122*a*; Crabbe Real Prop. 258, 264; 3 Kent Comm. 404.

Commonable beasts are either beasts of the plough, or such as manure the ground. 2 Bl. Comm. 33.

33. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687;

confined to beasts having some relation to the lands to which the right is appurtenant,[34] although it may extend to beasts not commonable.[35]

4. Of Vicinage. Common *per causa de vicinage* is a right of the inhabitants of adjoining towns to have their beasts stray interchangeably in the waste lands of each,[36] and can only be for cattle levant and couchant on the lands of such towns,[37] and is not confined to commonable beasts.[38]

5. In Gross. Common in gross is personal, unconnected with any ownership in land, and may arise by deed or by prescription.[39]

6. Without Stint. Common without stint is a right of common without limit to the number of cattle grazed,[40] which may probably exist as a species of common in gross granted to an individual only,[41] although the possibility of its existence has been denied.[42]

Tyrringham's Case, 4 Coke 36*b*; Sacheverill *v.* Porter, Cro. Car. 482; Burrill L. Dict.; Coke Litt. 121*b*, 122*a*; 3 Kent Comm. 404. Blackstone says: "This [common appurtenant] not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription." 2 Bl. Comm. 33. See also *supra*, note 31.

Common appurtenant may be created by grant, and may be annexed to any kind of land, whether arable or not. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

34. Cheesman *v.* Hardham, 1 B. & Ald. 706, 19 Rev. Rep. 432 (holding that an averment in a declaration for disturbing the plaintiff's right of common that the plaintiff was entitled to common of pasture for all his cattle levant and couchant upon his land is well supported by evidence that the plaintiff was a part owner with the defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field; although such cattle were not maintained upon such land during the winter; and although the custom proved was to turn out in proportion to the extent and not to the produce of the land, in respect of which the right was claimed); Baylis *v.* Tyssen-Amhurst, 6 Ch. D. 500, 46 L. J. Ch. 718, 37 L. T. Rep. N. S. 493.

35. 2 Bl. Comm. 33.

36. Corbet's Case, 7 Coke 5*a*; Bracton 222; Burrill L. Dict.; Coke Litt. 122*a*. See also Clarke *v.* Tinker, 10 Q. B. 604, 617, 59 E. C. L. 604. In Smith *v.* Floyd, 18 Barb. (N. Y.) 522, 527, it is said: "There can be no intercommonage or common because of vicinage, unless there are contiguous townships, the inhabitants of which, seeking to excuse a trespass for that cause, have common rights of pasturage appendant, appurtenant, or in gross, in the towns where they reside. . . . The fact that cattle are suffered without objection to run at large over the uninclosed woodlands of a new country, affords no ground from which to imply a grant."

"Common because of vicinage, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind." 2 Bl. Comm. 33.

37. Corbet's Case, 7 Coke 5*a*. But see Bunn *v.* Channen, 5 Taunt. 244, 1 E. C. L. 133.

38. 2 Bl. Comm. 33.

39. Burrill L. Dict.; 2 Stephen Comm. 6.

Common in gross, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. 2 Bl. Comm. 34. Common in gross has no relation to the tenure of lands, but is annexed by deed or prescription to a man's person. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. "Common . . . in gross, or at large, is neither appurtenant nor appendant, but is annexed to the person, and is granted by deed or claimed by prescriptive right." Smith *v.* Floyd, 18 Barb. (N. Y.) 522, 527.

40. How *v.* Strode, 2 Wils. C. P. 269; 3 Bl. Comm. 238, 239; 2 Bl. Comm. 34; Bracton 53*b*; 2 Stephen Comm. 6, 7.

Common sans nombre is a common without number, that is, without limit as to the number of cattle which may be turned on; otherwise called "common without stint." Black L. Dict. [*citing* 2 Bl. Comm. 34; Bracton 53*b*, 222*b*; 2 Stephen Comm. 6, 7].

41. Weekly *v.* Wildman, 1 Ld. Raym. 405; 3 Bl. Comm. 239; 2 Stephen Comm. 7, note *b*.

42. Mellor *v.* Spateman, 1 Saund. 343; Benson *v.* Chester, 8 T. R. 396, 4 Rev. Rep. 708; Bennett *v.* Reeve, Willes 227. "However, even where a man is said to have common without stint, still there must be left

C. Rights Other Than Pasture — 1. Digging. A common of digging is the right to take soil or minerals,[43] and carries with it, as a necessary incident, the right to enter upon the land and there do all that is necessary and usual for the full enjoyment of the right.[44]

2. Estovers. Common of estovers is a right to take necessary wood for the use of a house or farm from off another's estate.[45] Common of estovers cannot be divided and is extinguished by an attempt to divide it.[46]

3. Fowling. A common of fowling is a right to take wild animals from the land of another.[47]

4. Piscary. Common of piscary is the right of fishing in waters belonging to another.[48]

5. Seaweed. There may be a right of common, ordinarily denominated as a common to seaweed,[49] which right of common, although appurtenant to the estate, is probably not confined to the use of the dominant tenement.[50] Where

sufficient for the lord's own beasts; for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself." 3 Bl. Comm. 238.

43. 2 Bl. Comm. 34; Black L. Dict. See also Duberly *v.* Page, 2 T. R. 392.

"**Common of digging or common in the soil** is the right to take for one's own use part of the soil or minerals in another's land; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary." Sweet L. Dict.

Use of building stone.— In Green *v.* Putnam, 8 Cush. (Mass.) 21, it is held that a grant of common in "building stones" includes all purposes "for which such material, in the progress of time and the arts, may be made useful. In this sense, it would not be a violation of the right, to appropriate the stone to the building of fences, bridges, arches, culverts, drains, curb-stones, monuments in cemeteries, and to the various ornamental uses to which it is usually applied." And see Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287.

44. Green *v.* Putnam, 8 Cush. (Mass.) 21, 29 ("hewing the stone and preparing it for use"); Cardigan *v.* Armitage, 2 B. & C. 197, 3 D. & R. 414, 26 Rev. Rep. 313, 9 E. C. L. 93.

45. "**Common of estovers** or *estouviers*, that is, necessaries (from *estoffer*, to furnish,) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word bote is used by us as synonymous to the French estovers: and therefore house bote is a sufficient allowance of wood, to repair, or to burn in the house: which latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary." 2 Bl. Comm. 35; Coke Litt. 41. Common of estovers may be either appendant or appurtenant. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

Rushes.— The occupier of a messuage and lands, who has common in the lord's waste, may prove a right to cut rushes, as annexed to his right of common. Bean *v.* Bloom, 2 W. Bl. 926.

Given by lease.— For a case where "reasonable estovers" were given by lease see Watts *v.* Coffin, 11 Johns. (N. Y.) 495.

46. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Coke Litt. 164*b*. And see *infra*, VII, F.

47. Sweet L. Dict. And see Black L. Dict.

48. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; 2 Bl. Comm. 34; 3 Kent Comm. 409, 418. And see Queen *v.* Robertson, 6 Can. S. Ct. 52, 67, 2 Cas. B. N. A. Act 65.

Concerning fishing rights generally see Fish and Game.

49. *Connecticut.*— Mather *v.* Chapman, 40 Conn. 382, 16 Am. Rep. 46; Church *v.* Meeker, 34 Conn. 421; Peck *v.* Lockwood, 5 Day (Conn.) 22.

Maine.— Hill *v.* Lord, 48 Me. 83.

Massachusetts.—Phillips *v.* Rhodes, 7 Metc. (Mass.) 322; Barker *v.* Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678.

New York.—Southampton *v.* Betts, 21 N. Y. App. Div. 435, 47 N. Y. Suppl. 697; Emans *v.* Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427.

United States.—Knowles *v.* Nichols, 2 Curt. (U. S.) 571, 14 Fed. Cas. No. 7,897.

50. Phillips *v.* Rhodes, 7 Metc. (Mass.) 322, 324, where it is said: "Though the privilege is appurtenant to the estate, . . . Having taken the manure from the beach, by virtue of the privilege, she may use it on other lands of her own, or dispose of it to others." See also Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715, discussing a grant of a right to take seaweed from a beach.

an easement to take seaweed from a beach exists the right of common to seaweed follows changes of position of the beach.[51]

6. SHACK. Common of shack is the right to turn cattle loose in lands after harvest.[52]

7. TURBARY. Common of turbary is the liberty of digging turf upon another's ground.[53]

V. PROPRIETARY OF COMMON LANDS.

A. Who Constitute. Those constituting the proprietary must be certain and not general in number. Thus those inhabiting a certain neighborhood or village cannot acquire a right in common, either by grant[54] or by prescription;[55] and neither can the inhabitants of a nation.[56] But this object can be effected by a grant to a governmental division in its corporate capacity of rights in common in trust for the use of the inhabitants,[57] or to certain persons named, with their associates, for common purposes.[58] The personnel of the proprietary cannot be disputed after the lapse of a considerable period of time.[59] A statute

51. Phillips *v.* Rhodes, 7 Metc. (Mass.) 322, 325, where it is said: "As the privilege was to take the sea dressing on the beach below the home field, the right cannot be affected by the gradual and imperceptible changes taking place on the sea-shore. Wherever the beach exist in front of or below the field, there the right of taking the sea dressing extends."

52. A species of common by vicinage, prevailing in the counties of Norfolk, Lincoln, and Yorkshire, in England; being the right of persons occupying lands lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field. Burrill L. Dict. And see Cheesman *v.* Hardham, 1 B. & A. 706, 19 Rev. Rep. 432; Corbet's Case, 7 Coke 5*a*.

53. 2 Bl. Comm. 34; Coke Litt. 122. And see Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

54. Thomas *v.* Marshfield, 10 Pick. (Mass.) 364 (where a grant to "that neighbourhood of the town from Duxbury-ward on the south side of the South river to the mouth of Green's Harbour" was held to be void on two grounds: first, that the "neighborhood" is not defined with sufficient certainty; and secondly, that some of the intended grantees were not capable of taking, not being in existence at the time of the grant. On this latter point it was said that the grant gave only an estate to those living in the neighborhood at the time of the grant, if it had any effect); Worcester *v.* Green, 2 Pick. (Mass.) 425.

"Inhabitants" construed.—It seems that a grant to the "inhabitants" of a parish lying within a manor of a profit *a prendre* out of the manorial waste means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed. Chilton *v.* London Corp., 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474.

Inhabitants claim through freeholders.— If rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the court will presume that the inhabitants claimed through the freehold tenants. Warrick *v.* Queen's College, L. R. 6 Ch. 716, 40 L. J. Ch. 780, 25 L. T. Rep. N. S. 254, 19 Wkly. Rep. 1098.

55. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Post *v.* Pearsall, 22 Wend. (N. Y.) 425 [*affirming* 20 Wend. (N. Y.) 111]; Gateward's Case, 6 Coke 59*b*.

56. Pearsall *v.* Post, 20 Wend. (N. Y.) 111, 125, where it is said by Cowen, J.: "None of the English cases, that I find, have ever allowed a custom permanently to enjoy the soil of another, to the inhabitants of a whole nation. On the contrary, they hold that the English law denies such a right."

57. Green *v.* Putnam, 8 Cush. (Mass.) 21, 28, where it is said: "The use could not be executed in the inhabitants of the town as individuals, because, being constantly changing and fluctuating, they could not take and hold the legal estate in succession; but the town in its corporate capacity could take the grant and hold it in trust, the beneficial use being in those who, from time to time, should become inhabitants of the town." See also Beadsworth *v.* Torkington, 1 Q. B. 782, 1 G. & D. 482, 6 Jur. 339, 10 L. J. Q. B. 254, 41 E. C. L. 775, where it was held that an ancient grant of a right of common of pasture to a corporation, for the benefit of the resident freemen paying scot and lot, does not inure to the freemen resident within a new parish added to the borough by 2 & 3 Wm. IV, c. 61, and 5 & 6 Wm. IV, c. 76.

58. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320.

59. Sufficient lapse of time.— It has been held that the fact of membership in the proprietary, although such fact appears on the records of the proprietary, may be controverted where the matter in dispute is nine (Stevens *v.* Taft, 3 Gray (Mass.) 487) or

defining the proprietary will govern[60] and must supersede any by-laws of the proprietors.[61]

B. Incorporation — 1. Manner of. Incorporation of proprietors of common lands may take place by the provincial statutes,[62] by acts of congress relating to Indians,[63] or without statutory authority in the case of "the proprietors of townships," especially where subsequent statutes recognize such townships as corporations.[64] And it has been held that incorporation for the purpose of holding common lands may take place merely by a grant to the inhabitants,[65] or even to specific persons with their associates.[66]

2. Proof of. The validity of the organization of the proprietors should be proved by extrinsic evidence of all vital facts, except in case of an ancient proprietary whose doings have been long acquiesced in, when proof of the existence of a *de facto* organization is sufficient.[67]

C. Meetings and Proceedings — 1. In General. Where proprietors are by statute incorporated, the statute must govern their proceedings.[68] It has been said that where the meeting was called and held and no objection as to the regularity of the proceedings was made at the time, any anterior irregularity, provable only by parol, cannot vitiate the proceedings.[69] So action taken at a meeting

twelve (Kilborn *v.* Kewee, 8 Gray (Mass.) 415) years old, but not after a lapse of fifty (Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239) or thirty (Brackett *v.* Persons Unknown, 53 Me. 228; Copp *v.* Lamb, 12 Me. 312) years.

60. The inhabitants of the village of Cahokia, under the national grant and confirmation of commons, became the owners in fee, as a distinct community, and the various individuals who happened to be residents of the village at the time of such grant do not become joint tenants or tenants in common, but, as individuals, took no title whatever, acquiring merely such rights as would extend to other residents in the village. Haps *v.* Hewitt, 97 Ill. 498. See also Hebert *v.* Lavalle, 27 Ill. 448, construing the congressional grant to the inhabitants of the village of Cahokia.

Out lots in Pennsylvania.— The Pennsylvania act of Sept. 11, 1787, empowered the supreme executive council to lay out and survey a town in lots, with a suitable number of out lots for the accommodation thereof, and to reserve out of the lots of the town so much as they should deem necessary for a court-house, jail, places of public worship, and burial grounds, and without the town, one hundred acres for a common pasture. The patent described the common as the common ground belonging to the town. It was held that the owners of "out lots" were not entitled to a right of common on the one hundred acres reserved. Carr *v.* Wallace, 7 Watts (Pa.) 394. See also Western University *v.* Robinson, 12 Serg. & R. (Pa.) 29, expressly avoiding decision on above question.

61. Purves *v.* Wimbledon Common Conservators, 62 L. T. Rep. N. S. 529.

62. Chamberlain *v.* Bussey, 5 Me. 164.

63. Haps *v.* Hewitt, 97 Ill. 498 (by virtue of the acts of congress, the inhabitants of Cahokia village, as a community, constitute, by implication, a corporation for the purpose of receiving and holding the common lands for the benefit of the community); Lavelle *v.* Strobel, 89 Ill. 370.

64. Atkinson *v.* Bemis, 11 N. H. 44, 46; Coburn *v.* Ellenwood, 4 N. H. 99. See also North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109, where it was said that towns, although not expressly created as corporations, are such in a certain degree and so far as corporate powers are granted.

65. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320, 10 Coke, 27, 28, 30. And see Chilton *v.* London Corp., 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474, where it was said that a grant by the crown of a profit *a prendre* out of crown lands to the inhabitants of a parish constitutes the inhabitants a corporation *quoad* the grant.

66. North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320. In the latter case it was said that the undivided common lands in the town of Hempstead, which were included in the tract granted in 1644 by the Dutch governor, and afterward, in 1685, by the English governor, belong to the town in its collective or corporate capacity, as common property, and not to individuals or the heirs of the surviving patentee. The Dutch grant was to six persons by name, with their associates, their heirs and successors, to build a town, and to erect a body politic or civil combination among themselves.

67. Brackett *v.* Persons Unknown, 53 Me. 228; Dolloff *v.* Hardy, 26 Me. 545; Copp *v.* Lamb, 12 Me. 312; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239. See also on the general doctrine as to *de facto* corporations Manchester Bank *v.* Allen, 11 Vt. 302.

68. Woodbridge *v.* Addison, 6 Vt. 204.

69. Dolloff *v.* Hardy, 26 Me. 545 (where it was held that it was not open to show that those who called a meeting nineteen years

not properly warned may be ratified at a subsequent legal meeting.[70] Partial action taken on a subject enumerated in the notice does not preclude further action on the same subject at adjournments of the same meeting.[71] There seems to be no reason why meetings of proprietors should necessarily be held in the state where the lands lie.[72]

2. NOTICE OF — a. In General. Legal notice of meetings of proprietors must be given, otherwise any action taken at such meetings is illegal,[73] although the fact of notice need not necessarily appear by the records themselves.[74] After the lapse of a long period of time, and a long exercise of proprietary rights, due notice will be presumed to have been given.[75]

b. Form of Notice. The notice calling a meeting of the proprietors should ordinarily set forth sufficiently all matters which it is proposed to bring before the meeting,[76] and should be given exactly according to the statute[77] or the vote

previously were not proprietors or that the return was defective); Thayer *v.* Stearns, 1 Pick. (Mass.) 109 [*distinguished* in Perry *v.* Dover, 12 Pick. (Mass.) 206].

70. If a sale of land be made by proprietors of common lands through a committee, and their doings are accepted at a meeting of the proprietors, although the meetings at which the committee was chosen and at which their report was accepted were not legally called, yet if those proceedings at such meetings are ratified at a subsequent meeting, legally called, the ratification will relate back to the time of such transactions, and give them validity, no rights of third persons having intervened. Dolloff *v.* Hardy, 26 Me. 545.

71. A vote to raise a certain sum, under an article in the warrant for a meeting of proprietors, does not "exhaust the efficacy of the article." Further sums may be lawfully raised at adjournments of the same meeting, until the objects of the proprietors are effected. Farrar *v.* Perley, 7 Me. 404.

72. Copp *v.* Lamb, 12 Me. 312.

73. Goulding *v.* Clark, 34 N. H. 148 (holding that where notice is required to be published, the meeting cannot be held legal without proof of such publication); Woodbridge *v.* Addison, 6 Vt. 204 (as to commencing suit or appointing an agent to commence and prosecute suits).

74. Stedman *v.* Putney, N. Chipm. (Vt.) 11.

75. Copp *v.* Lamb, 12 Me. 312; Pitts *v.* Temple, 2 Mass. 538. The warrant of a justice for calling a proprietors' first meeting seventy years ago need not be proved in a suit brought by the proprietors. *Aliter*, where a meeting was called only twenty years since for the purpose of reorganizing the proprietors. Monumoi Great Beach *v.* Rogers, 1 Mass. 159.

76. Where proprietors, authorized by statute to direct the mode of calling meetings, vote that the petition for the warrant and the warrant shall contain each article to be acted upon at the meeting, no legal partition of the proprietors' lands can be made under a general article "to transact any other business said proprietors may think proper when met." Evans *v.* Osgood, 18 Me. 213.

The questions to be considered at a meeting of the proprietors of land who were organized into a proprietary, under Me. Acts (1821), c. 43, may be enumerated in the application to a justice of the peace for the calling of the meeting, and, if the application is annexed to the warrant, the enumeration will be as effective as if it had been particularly set out in the warrant itself. Williams College *v.* Mallett, 12 Me. 398.

What business is covered by notice.—Where a call for a meeting of the proprietors of the common and undivided lands of Nantucket, Massachusetts, notified the proprietors that the purpose of the meeting was to act upon the petition of one C "for land to be set off to him near Siasconset" (which was a part of the island of Nantucket, but having no legal, defined boundary), and the proprietors, at the meeting thus called, voted that the petion of C "for land near Siasconset be granted," and the lot layers laid out or set off certain lands as shown upon a map, which layout was accepted by the proprietors, it was held that the grant to C, which the meeting made, was fairly within the scope of the business of which the proprietors were notified by the warrant or call. Coffin *v.* Lawrence, 143 Mass. 110, 9 N. E. 6.

Substantial notice sufficient.— Since proprietors of common and undivided lands are quasi-corporations or bodies politic, the calls for meetings are analogous to warrants for town meetings, are to be governed by the same rules, and should be construed liberally; and a meeting may legally act upon any subject of which the warrant gives substantial and intelligent notice to the voters. Coffin *v.* Lawrence, 143 Mass. 110, 9 N. E. 6.

77. Evans *v.* Osgood, 18 Me. 213, holding that where the statute required that a proprietors' meeting shall be called "by a petition signed by twelve of them at least," a less number, although owning twelve shares, cannot legally call a meeting.

The statutory mode is not exclusive where the statute provides simply how the meetings may be called and is not superseded by a different mode established by a vote of the proprietors at a meeting regularly called; but a meeting may, in such case, be called in either mode. Dolloff *v.* Hardy, 26 Me. 545.

authorizing the calling of the meeting of such proprietors[78] and the warrant for the notice of the meeting.[79]

D. Records.[80] The records of the proprietors are presumed to be correct and statements therein contained cannot be controverted when they are, properly speaking, ancient;[81] but otherwise the records themselves are not competent to prove the validity of the proceedings therein set forth.[82] The records must show that the proceedings taken conformed to the statute.[83] Proprietors' records of deeds are not, as records, competent to prove the deeds.[84] The records may be legally made up by a clerk coming into office from minutes made by his predecessor,[85] and parol evidence is admissible to explain[86] but not to contradict them.[87]

E. Delegation of Authority. Unless acting under authority obtained at a legal meeting of the proprietary, individual proprietors or trustees cannot in any way bind all[88] or their successors,[89] although ratification by acquiescence may bind the proprietary.[90]

78. Where a proprietary vote authorized a meeting to be called by publishing a notice in a newspaper published in Hanover, if any; otherwise, in one published at Concord, a warrant requiring a notice to be published at Concord will be insufficient, unless there is evidence that no newspaper was published at Hanover. Goulding *v.* Clark, 34 N. H. 148.

79. If a justice, by his warrant, require notice to be published in a newspaper, and by posting in town, a notice by posting will be insufficient, although, by a vote of the proprietors, it would ordinarily be sufficient. Goulding *v.* Clark, 34 N. H. 148.

Construction of return of notice.— A return stating that notice of meeting had been given "by posting a copy in two public places," and "by inserting the same in . . . more than fourteen days previous" to the time of meeting "as the law directs," will be construed to mean that "posting" and "inserting" were both done fourteen days before the time of the meeting. Brackett *v.* Persons Unknown, 53 Me. 228.

80. Proprietary records as proving title to lands see *infra*, VI, C.

81. Brackett *v.* Persons Unknown, 53 Me. 228 (holding that it will be presumed, after the lapse of nearly forty years, that the voting at a proprietary meeting was done in the manner provided by law, where the record states that "it was voted," etc.); Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239 (record over fifty years old); Beach *v.* Fay, 46 Vt. 337. *Contra*, Goulding *v.* Clark, 34 N. H. 148, to the effect that records forty years old are not evidence against a stranger to the proceedings.

Provable only by the records.— It has been said that a proprietary division under a statute can be proved by the records only. Stedman *v.* Putney, N. Chipm. (Vt.) 11.

82. Kilborn *v.* Rewee, 8 Gray (Mass.) 415 (record twelve years old); Stevens *v.* Taft, 3 Gray (Mass.) 487 (record nine years old).

Conclusiveness of vote on individuals.— A vote of a parish twenty-five years previously, inclosing certain common lands, is not evidence that every freeholder in the parish assented to the inclosure. Emerson *v.* Wiley, 10 Pick. (Mass.) 310.

83. Doe *v.* Lawrence, 1 D. Chipm. (Vt.) 103.

84. Hart *v.* Gage, 6 Vt. 170, holding that records of the proprietors' clerk of deeds made and recorded prior to the statute of February, 1783, authorizing such clerk to record deeds, are not admissible evidence of title to the lands described in such deeds where the records were not proved copies of the originals.

85. Dolloff *v.* Hardy, 26 Me. 545.

86. Williams *v.* Ingell, 21 Pick. (Mass.) 288.

87. Garland *v.* Rollins, 36 N. H. 349.

88. Allen *v.* Woodward, 22 N. H. 544, holding that one proprietor of common lands cannot compromise claims for injury to the land as a whole.

Trustees were held incapable of making contracts of agistment binding on the proprietary, although they had superintendence with power to make rules for managing, using, and improving the lands. Appley *v.* Montauk, 38 Barb. (N. Y.) 275.

Agreement for stinting.—Where the greater part of the landholders entitled to right of common agree to a stint, this will not bind the rest. Bruges *v.* Curwin, 2 Vern. 575. An agreement for stinting a common, between lord and tenants, shall be performed, although opposed by one or two tenants; such an agreement being more favored than an agreement for inclosing a common. Delabeere *v.* Beddingfield, 2 Vern. 103.

89. Perry *v.* Fitzhowe, 8 Q. B. 757, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757, holding that a parol license, given by a commoner to build a house upon the common, does not bind a subsequent owner of the same right of common.

90. Woodbridge *v.* Addison, 6 Vt. 204. The several owners of lands in the parish of C enter into an agreement that a particular common should be enjoyed as a cow pasture for ninety-nine years, and this agreement is signed by the bailiff of one of the owners, so far as he had power. Although no particular authority could be shown, yet after an acquiescence of above thirty years on the part of the owner, an authority shall be presumed, and he shall be bound by the act of his serv-

F. Regulation of Proprietary. Proprietaries may be regulated by statute which is conclusive upon them.[91]

VI. TITLE TO COMMON LANDS.

A. In General. Title to common lands, although inchoate, is real property.[92] The word "title" includes the right of a commoner.[93] In New England when lands were held by proprietors title in fee was in the proprietary when incorporated,[94] on proper confirmation of the locations by it.[95] Title in common is taken subject to its authorized use.[96] Under a legislative grant the proprietors take only what is expressly granted.[97] Title may be divested by statutory process instituted by the state.[98] Property conveyed to proprietors cannot be regranted by the grantor, after disseisin, before the proprietors were capable of taking, without the consent of the proprietors.[99]

B. By Incorporation. The mere incorporation of proprietors of common lands, without any corporate act done, gives title to the common lands.[1]

C. Transfer of Title — 1. By the Proprietary — a. In General. The proprietors of common lands had authority in early times to alienate their lands by vote which, if duly recorded on the books of the proprietary, passed the title and constituted competent evidence of the transfer,[2] especially when accompanied

ant. Tufton *v.* Wentworth, 1 Bro. P. C. 165, 1 Eng. Reprint 489.

91. Folger *v.* Field, 3 Cush. (Mass.) 336 (Mass. Acts (1847), c. 218, "concerning the unenclosed lands in the island of Nantucket," refers to lands divided off and held by classes of proprietors, severed from the lands held in common by the general proprietary, and confers upon the former the powers of proprietors of general fields, according to the provisions of Mass. Rev. Stat. c. 43); Appley *v.* Montauk, 38 Barb. (N. Y.) 275 (holding that a proprietary had only such powers as were expressly granted by statute). See also Nash *v.* Manning, 58 J. P. 718, as to conservators of commons.

92. Doe *v.* Jauncey, 8 C. & P. 99, 34 E. C. L. 631.

93. Thomas *v.* Marshfield, 10 Pick. (Mass.) 364, 366, where it appeared that a statute provided for compensation to any person who "has a legal title in or to said beach." It was held that one who had a right of common of pasture in the beach was entitled to compensation under the statute.

94. Copp *v.* Lamb, 12 Me. 312; Codman *v.* Winslow, 10 Mass. 146.

95. Where the proprietors of common lands in a township at a regular meeting voted a general acceptance and confirmation of the locations reported by their committee, without designating each location in particular, one so accepted and confirmed was good, this being the general course of proceedings in making locations. Codman *v.* Winslow, 10 Mass. 146.

96. Crawford *v.* Mobile, etc., R. Co., 67 Ga. 405.

97. The charter of the town of A, in Vermont, was granted to sixty-four proprietors, each to take one-seventieth part of the township, which, with the six public rights, were to make up the whole township. It was held that this vested in the proprietors one-seventieth part each, and did not vest in them the title to the other six parts, to hold in trust, but that these six parts remained ungranted and still at the disposal of the legislature. Caledonia County Grammar School *v.* Burt, 11 Vt. 632 [*quoting* Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735].

98. A judgment was rendered upon an inquest of office in behalf of the commonwealth against the proprietors of a township granted by the government of the late province of Massachusetts Bay, assigning certain limits to the township, with a proviso that the proprietors should release their rights to such lands, within said limits, as were actually settled upon before a certain time, to the settlers thereon. It was held that an owner who had settled before the date designated on lands which had been assigned to individual proprietors prior to such judgment was within the proviso. Cushing *v.* Hackett, 11 Mass. 202.

99. Shapleigh *v.* Pilsbury, 1 Me. 271.

1. Chamberlain *v.* Bussey, 5 Me. 164; Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239; North Bridgewater Second Cong. Soc. *v.* Waring, 24 Pick. (Mass.) 304; Rogers *v.* Goodwin, 2 Mass. 475; Monumoi Great Beach *v.* Rogers, 1 Mass. 159, 165, where it is said the proprietors "are, by such an incorporation, seized as a corporation, and that without any corporate act done." See, however, Holland *v.* Cruft, 3 Gray (Mass.) 162; Leffingwell *v.* Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343; Mitchell *v.* Starbuck, 10 Mass. 5.

Title in trustees.— An act incorporating proprietors and providing for control of the lands by trustees does not give title to the trustees. Appley *v.* Montauk, 38 Barb. (N. Y.) 275.

2. Kidder *v.* Blaisdell, 45 Me. 461; Dolloff *v.* Hardy, 26 Me. 545; Thorndike *v.* Barrett, 3 Me. 380; Easton *v.* Drake, (Mass. 1902)

by possession by the grantee.[3] If the grant was definite as to the boundaries of the tract granted then no further act was necessary to perfect title, but if the grant was in general terms then a return of the locating committee was necessary, specifying the boundaries of the premises,[4] which grant of title cannot be revoked, even at the same meeting.[5]

b. How Regulated. The right of proprietors of common lands in this country to sell or lease the lands is subject to government regulation,[6] and the power has been sometimes expressly granted[7] and again expressly prohibited.[8]

c. Sale Through Committee. Proprietors might by vote authorize a sale by a committee,[9] which vote was not itself effective to pass title,[10] but implied authority to give a deed,[11] which need not contain a recital of authority,[12] and on which one seal has been held sufficient, even where the committee consisted of more than one person.[13] The committee could delegate the execution of the deed.[14]

65 N. E. 393; Gloucester *v.* Gaffney, 8 Allen (Mass.) 11 (holding a vote *prima facie* evidence of title); Green *v.* Putnam, 8 Cush. (Mass.) 21, 25; Williams *v.* Ingell, 21 Pick. (Mass.) 288; Baker *v.* Fales, 16 Mass. 488; Springfield *v.* Miller, 12 Mass. 415; Codman *v.* Winslow, 10 Mass. 146; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Atkinson *v.* Bemis, 11 N. H. 44 (*semble*); Cornish *v.* Kenrick, Smith (N. H.) 270; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320; 4 Dane Abr. 77, 121.

3. An entry in the books of the proprietors of common lands was thus: "August 13, 1742. At the request of Samuel Williams, Esq., granted to the rights originally William Phillips' half an acre of land on the ten acre division . . . between the said Williams' dwellinghouse and Thomas Gilbert's orchard." A subsequent entry in said books, dated Nov. 6, 1752, was thus: "Took an account of the lands that Major Samuel Williams had granted and laid out on the purchased rights he owns, and what land he bought by deed." At the close of this entry, after a description of other lands, was added: "Ten acre division, Aug't 13, 1742. On Phillips' right between his house and Gilbert's orchard, 80 rods." By a vote of the same proprietors, passed in 1736, a committee was empowered to allot the ten-acre division to the several grantees. It was held that the entry of Nov. 6, 1752, furnished evidence that the original grant was to Williams in his own right. Williams *v.* Ingell, 2 Metc. (Mass.) 83, 85, 86.

4. Williams *v.* Ingell, 2 Metc. (Mass.) 83, 21 Pick. (Mass.) 288.

5. Pike *v.* Dyke, 2 Me. 213.

6. The creation of the inhabitants of Cahokia village into a corporation for the taking and holding of title to common lands, which took place by implication, under the acts of congress, does not necessarily give to such corporation the power to convey or otherwise dispose of the lands, but the legislature could authorize such sale or conveyance, and provide the necessary agency therefor. Haps *v.* Hewitt, 97 Ill. 498.

Lands in Missouri.— The common lands adjoining St. Charles, and granted to the inhabitants by the lieutenant-governors of upper Louisiana, in 1797 and 1801, are not inalienable, but may be aliened by the inhabitants in such manner as the laws of Missouri may prescribe, all dominion retained by the Spanish government having passed to the United States, and from them to the state of Missouri, by the statute of 1812. Bird *v.* Montgomery, 6 Mo. 510.

7. Rogers *v.* Goodwin, 2 Mass. 475 (in this case it appears that by a law of the colony of Massachusetts (1636), authority was given to freemen of every town to dispose of their lands, etc. In the preamble of the provincial statute of 12 Anne, c. 2, passed in 1753, it is recited that the law has empowered proprietors of lands lying in common to manage, improve, dispose, and divide the same, etc. The early practical construction of these statutes was that the power to dispose of such lands included the power to sell and convey them. It was held, in 1807, that the long-continued usage furnished a contemporaneous construction, which must prevail over the mere technical import of the words); Southampton *v.* Betts, 21 N. Y. App. Div. 435, 47 N. Y. Suppl. 697 (construing N. Y. Laws (1818), c. 155. The statute gave trustees power to sell undivided lands provided the rights of the inhabitants to carry away seaweed from the beach were not affected, and it was held that the power to sell included the beach).

8. Ill. Const. (1818), art. 8, § 8, securing to the inhabitants of villages grants of common, and prohibiting the sale, lease, or division of the same, does not apply to the villages of Cahokia or Prairie du Pont, but leaves them to be governed and controlled by the general laws regulating alienation and partitions. Lavelle *v.* Strobel, 89 Ill. 370.

9. Dolloff *v.* Hardy, 26 Me. 545.

10. Thorndike *v.* Richards, 13 Me. 430, where the vote authorized a sale and the giving of a deed by the committee.

11. Thorndyke *v.* Barrett, 3 Me. 380; Decker *v.* Freeman, 3 Me. 338.

12. Innman *v.* Jackson, 4 Me. 237.

13. Decker *v.* Freeman, 3 Me. 338.

14. Thorndike *v.* Barrett, 3 Me. 380.

2. By Individuals.[15] A right of common may be acquired by lease.[16]

D. Confirmation by Government — 1. In General. The legislature may confirm in commoners their title,[17] which confirmation may be conditional,[18] or to individuals.[19]

2. The Federal Statute of 1812 — a. In General. In 1812 congress confirmed title to rights in common lands in the territory of Missouri which were in fact used in 1803[20] or claimed[21] as common lands, field lots and out lots,[22] although not immediately adjoining the village claiming the commons[23] and having at that date ascertained or ascertainable boundaries.[24] This act, intended to quiet titles which could not be proved by deed,[25] is construed to apply only to existing rights

15. See also *infra*, VII, F.

16. Doidge *v.* Carpenter, 6 M. & S. 47, 18 Rev. Rep. 299.

17. Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320.

An act of the legislature, in North Carolina, after reciting that a certain tract of land, adjacent to Bath town, "was granted and surveyed for a common for the use of the said town, but the title thereof hath never been fully confirmed," declared "that the said land shall be, and hereby is appointed a common, to lie perpetually for the use and benefit of the inhabitants of Bath town, under such restrictions and regulations as are or shall be appointed for town commons; and that the inspection and immediate care of looking after the said common be in the commissioners of the said town for the time being." It was held that the tract of land itself, and not a mere right of common in it, was thereby granted to the inhabitants of Bath town, to be held for a town common; and this especially, where it appeared that a subsequent act provided "for fencing the town of Bath, and resurveying the common belonging to said town." Bath *v.* Boyd, 23 N. C. 194.

The village of Cahokia in Illinois had its title confirmed by national grant and by various state confirmatory statutes. See Haps *v.* Hewitt, 97 Ill. 498; Hebert *v.* Lavalle, 27 Ill. 448.

The Pejepscot proprietors' title was confirmed by the Massachusetts resolve of March 5, 1801, "in the event only of an award to them, as their right and property, of such territories and boundaries as shall comprise the improvements and occupations of the settlers." Little *v.* Frost, 3 Mass. 106, 118.

18. Cushing *v.* Hackett, 11 Mass. 202, 10 Mass. 164; Little *v.* Frost, 3 Mass. 106.

19. Papin *v.* Ryan, 32 Mo. 21.

20. 2 U. S. Stat. at L. p. 748, declaring "that the rights, titles and claims, to town or village lots, out lots, common field lots and commons in, adjoining, and belonging to the several towns or villages [named in the act], in the territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the twentieth of December, eighteen hundred and three, shall be, and they are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." And see Page *v.* Scheibel, 11 Mo. 167, holding that under this statute confirming titles to common field lots, the recorder has no power to confirm any title on a concession; he was merely authorized to act in case there was habitation, cultivation, and possession.

The commons of St. Louis, as defined in the survey of 1806, are embraced in this act. Mackay *v.* Dillon, 7 Mo. 7.

21. St. Louis *v.* Toney, 21 Mo. 243.

Evidence that the land had been "cultivated and possessed" is sufficient to show that the possessor had "claimed" the land, within the meaning of the act. Glasgow *v.* Lindell, 50 Mo. 60.

22. **Lots beyond town limits.**— The act extends to common field lots and out lots, which were without the survey of the out boundary of the town of St. Louis, as well as to those within the survey. Schultz *v.* Lindell, 24 Mo. 567; Tayon *v.* Hardman, 23 Mo. 539; Milburn *v.* Hortiz, 23 Mo. 532. The act contemplates a continuous out boundary of the towns, to be so run as to include the out lots, common field lots, and commons of the towns, and the design of the act was to dispose of all the property included within the out boundaries. Kissell *v.* St. Louis Public Schools, 16 Mo. 553. See also Papin *v.* Ryan, 32 Mo. 21, holding that a confirmation under the act of congress of July 4, 1836, to land within the out boundary survey of the town of St. Louis, is a title, notwithstanding the reservation to the use of schools under the acts of June 13, 1812, and Jan. 27, 1831, and a mere trespasser cannot defend against it. The act of congress of July 4, 1836, was a confirmation to Joseph Brazeau or his legal representatives.

23. Tayon *v.* Ladew, 33 Mo. 205.

24. Baird *v.* St. Louis Hospital Assoc., 116 Mo. 419, 22 S. W. 726, 21 S. W. 11; Vasquez *v.* Ewing, 42 Mo. 247; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 14 L. ed. 1030.

25. **"The great object of the act** was to quiet the villagers in their titles to property (so far as the government was concerned) which had been acquired, in many instances, by possession merely, under an express or impartial permission to settle, and which had passed from hand to hand without any formal conveyance. In such cases, possession was the only thing to which they could look, and taking it for granted that those who

of the United States,[26] which rights depend only on actual occupation at that date,[27] and do not need to be settled by a government survey or patent made either before[28] or after the confirmation,[29] or of the exercise of authority over it by the Spanish village authorities;[30] but are open in all cases to judicial proof,[31] the elements of which may be a government survey,[32] or certificate of confirmation, which are only *prima facie* evidence unless accepted,[33] or proof of user before Dec. 20, 1803.[34] The statute of 1812, if accompanied by an approved official survey, is equivalent to a patent,[35] which must, however, give way before

were found in possession at the time the country was ceded, or who had been last in possession prior thereto, were the rightful owners, the confirmation was intended for their benefit." Lajoye *v.* Primm, 3 Mo. 529, 535.

26. The construction of the act of congress adopted is "that the Act of 1812 is a present operative grant of all the interest of the United States in the property described in the Act; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish government. That the Act makes no requisition for a concession, survey, or permission to settle, cultivate, or possess, or for any location by public authority, as the basis of the right, title, or claim upon which its confirmatory provisions operate. No Board was appointed to receive evidence, or authenticate titles, or adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals." Glasgow *v.* Hortiz, 1 Black (U. S.) 595, 17 L. ed. 110 [*reviewing* Guitard *v.* Stoddard, 16 How. (U. S.) 494, 509, 14 L. ed. 1030, where it is said to be settled that "the Act of 1812 is a present operative grant of all the interest of the United States, in the property comprised in the Act"]. And see Barry *v.* Blumenthal, 32 Mo. 29 (to the effect that private claims to common are not confirmed by the statute, although included within a government survey); Vasseur *v.* Benton, 1 Mo. 296.

27. A prior Spanish concession confirmed by congress subsequent to 1812 is inferior to the title of a village to the locus obtained by a concession, a formal survey by Spanish authority, and use as common, as the latter title was confirmed by the act of 1812. Chouteau *v.* Eckhart, 2 How. (U. S.) 344, 11 L. ed. 293.

28. Page *v.* Scheibel, 11 Mo. 167; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 509, 14 L. ed. 1030, where it is said to be settled "that the right of the grantee was not dependent upon the factum of a survey under the Spanish government."

29. Glasgow *v.* Lindell, 50 Mo. 60; McCune *v.* O'Fallon, 32 Mo. 13; Funkhouser *v.* Langkopf, 26 Mo. 453; Carondelet *v.* St. Louis, 25 Mo. 448; Glasgow *v.* Hortiz, 1 Black (U. S.) 595, 17 L. ed. 110; Savignac *v.* Garrison, 18 How. (U. S.) 136, 15 L. ed. 290.

The act of 1824 (4 U. S. Stat. at L. p. 65) makes it the duty of the claimants of town and village lots "to proceed, within eighteen months after the passage of this act, to designate their said lots, by proving, . . . the fact of inhabitation . . . and the boundaries and extent of each claim, so as to enable the surveyor general to distinguish the private from the vacant lots." It was held that action under the statute of 1824 was not a necessary prerequisite to a claim of title by occupancy under the statute of 1812, which occupancy could be proved by parol. Glasgow *v.* Baker, 85 Mo. 559; St. Louis *v.* Toney, 21 Mo. 243; Page *v.* Scheibel, 11 Mo. 167; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 14 L. ed. 1030.

A certificate of confirmation granted by the recorder under the act of May 26, 1824, is *prima facie* evidence of title, under the act of June 13, 1812, as against the government, and persons claiming by a title subsequent to the latter act, but it is not sufficient to establish title to land lying within the approved United States survey of St. Louis common, as against one claiming title under the city of St. Louis, since in such case there must be actual proof of habitation, cultivation, and possession prior to Dec. 20, 1803. Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694.

Unauthorized entry.— An entry in 1847 in the office of the register and receiver of land embraced within Brown's survey of the commons of Carondelet was unauthorized by law, and would confer no title, even as against the United States. Funkhouser *v.* Hantz, 29 Mo. 540.

30. Harrison *v.* Page, 16 Mo. 182.

31. Guitard *v.* Stoddard, 16 How. (U. S.) 494, 510, 14 L. ed. 1030; Mackay *v.* Dillon, 4 How. (U. S.) 421, 11 L. ed. 1038.

32. St. Louis *v.* Toney, 21 Mo. 243. *Quære*, whether the Spanish surveys of common fields, unaccompanied by an order directing the surveys to be made, are any evidence that a lot, not embraced therein, is not a common field lot. Harrison *v.* Page, 16 Mo. 182.

33. McGill *v.* Somers, 15 Mo. 80.

The certificate must be authorized.— Since the recorder of land titles was not authorized, by the act of May 26, 1824, to take proof relating to the extent and boundaries of a common confirmed to a village by the act of June 13, 1812, a certificate of confirmation of common issued by him is not evidence of title. Primm *v.* Haren, 27 Mo. 205.

34. Carondelet *v.* McPherson, 20 Mo. 192.

35. Glasgow *v.* Baker, 85 Mo. 559 [*reversing* 14 Mo. App. 201]; Vasquez *v.* Ewing, 42 Mo. 247; Fine *v.* St. Louis Public Schools, 39 Mo. 59; Robbins *v.* Eckler, 36 Mo. 494.

title by actual habitation, cultivation, or possession prior to Dec. 20, 1803.[36] In the absence of an official survey or other documentary title, title may be proved by proof of user of a definite tract prior to Dec. 20, 1803,[37] if it is also shown by whom the user was made[38] and that he had not abandoned his claim,[39] the statute of 1812 not confirming rights obtained after Dec. 20, 1803.[40] The effect of the act was to reserve from entry and sale all lands covered by it.[41] A government survey is binding on the government as to the location of the common lands included in the statute of 1812, and if the survey is agreed to, it is also binding on the occupier.[42] Failure to prove claims under the act of 1824 does not forfeit title confirmed under the act of 1812.[43]

b. Common Field Lots. What constitutes a common field lot or an out lot within the meaning of the statute is a question of fact for the jury;[44] but in general a "common field lot" is a tract of ground of a peculiar shape, usually from one to three arpents in front by forty in depth, used in common by the villagers for cultivation and protected from the inroads of stock by a fence which inclosed the commons and the village.[45]

3. PRIORITIES. A statutory confirmation of title takes precedence over all subsequent titles[46] and over subsequent confirmations of title[47] or a town location,[48]

36. Vasquez *v.* Ewing, 42 Mo. 247 (saying that an approved survey and list of lots under it may be defeated by proof of actual habitation, etc., as set forth in the statute); Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694.

37. Robbins *v.* Eckler, 36 Mo. 494.

38. Glasgow *v.* Baker, 85 Mo. 559.

39. Page *v.* Scheibel, 11 Mo. 167.

40. Robbins *v.* Eckler, 36 Mo. 494.

41. Shepley *v.* Cowan, 52 Mo. 559.

42. Carondelet *v.* McPherson, 20 Mo. 192, 204, where it was said: "A survey regularly made and approved is conclusive upon the government that the land within the boundaries is the land granted, and the acceptance of the survey by the grantee is conclusive that all the land granted is within the boundaries." See also the same principles laid down as to the confirmatory act of April 29, 1816. McGill *v.* Somers, 15 Mo. 80.

"No formal act is necessary to constitute an acceptance [of a survey] but it may be inferred from a variety of acts and circumstances" and is a question for the jury. Carondelet *v.* St. Louis, 25 Mo. 448, 464, 29 Mo. 527; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 14 L. ed. 1030; Menard *v.* Massey, 8 How. (U. S.) 293, 12 L. ed. 1085.

The acceptance of a survey estops the occupier from claiming common rights to any land outside the survey (Carondelet *v.* St. Louis, 29 Mo. 527; Carondelet *v.* McPherson, 20 Mo. 192), and the existence of valid private claims within the limits of the survey would not be inconsistent with such estoppel (Carondelet *v.* St. Louis, 29 Mo. 527).

A survey must be accepted as an entirety, if at all, it cannot be accepted in part and rejected in part. Carondelet *v.* St. Louis, 29 Mo. 527.

43. Baird *v.* St. Louis Hospital Assoc., 116 Mo. 419, 22 S. W. 726; Baird *v.* St. Louis Hospital Assoc., 116 Mo. 419, 21 S. W. 11; Glasgow *v.* Baker, 85 Mo. 559.

44. Vasquez *v.* Ewing, 42 Mo. 247; Barry *v.* Blumenthal, 32 Mo. 29; St. Louis *v.* Toney, 21 Mo. 243. But see Page *v.* Scheibel, 11 Mo. 167, holding that on the facts found the question of what constitutes a common field lot is a question of law for the determination of the court.

45. Fine *v.* St. Louis Public Schools, 39 Mo. 59; Harrison *v.* Page, 16 Mo. 182; Page *v.* Scheibel, 11 Mo. 167; Glasgow *v.* Hortiz, 1 Black (U. S.) 595, 17 L. ed. 110.

As to town lot see Baird *v.* St. Louis Hospital Assoc., (Mo. 1893) 21 S. W. 11, 116 Mo. 419, 22 S. W. 726.

46. Funkhouser *v.* Hantz, 29 Mo. 540 (holding that the title of Carondelet to the land embraced within the United States survey of the commons of Carondelet, made by Brown in 1834, is superior to, and must prevail over, an entry with the register and receiver, in 1847, of a portion thereof); McGill *v.* Somers, 15 Mo. 80.

47. Barry *v.* Blumenthal, 32 Mo. 29; Dent *v.* Sigerson, 29 Mo. 489; McGill *v.* Somers, 15 Mo. 80; Swartz *v.* Page, 13 Mo. 603; Mackay *v.* Dillon, 7 Mo. 7; Dent *v.* Emmeger, 14 Wall. (U. S.) 308, 20 L. ed. 838 (holding that the title of the village of Carondelet to lots 90 and 91 of the commons tract of that town, which lots the village claimed under a confirmation by the act of June 13, 1812, by a vote in 1816 and a resurvey in 1817 and a relinquishment of right by congress in 1831, was a better title than that derived by Gabriel Cerre from a concession to him in 1789 by the lieutenant-governor of upper Louisiana, and a confirmation by the act of 1836, in which the right to all adverse claimants was saved, a survey of 1838, and another act of congress in 1869, which confirmed his claim, "subject to any valid adverse rights," and a patent in 1869); Chouteau *v.* Eckart, 2 How. (U. S.) 344, 11 L. ed. 293.

48. McGill *v.* Somers, 15 Mo. 80.

although it has been held that a confirmation with an official survey is superior to one without a survey.[49] It has also been held that a confirmation of the title does not relate back but takes effect from its passage.[50]

VII. CONTROL, MANAGEMENT, AND USE OF COMMON LANDS.

A. Inclosure and Fencing.[51] Commons may be inclosed or "approved"[52] under the sanction of statute or custom, leaving sufficient for the use of the commoners,[53] by the lord[54] or any other owner of waste land[55] or the commoners themselves,[56] both in cases of common by grant as well as common appendant.[57] The statute may provide for the allotting to the commoners of inclosed lands in lieu of their rights of common,[58] or may regulate the fencing of such common field.[59] The commoner's view of the common may be entirely cut off by fences or hedges if only his cattle are still left free to enjoy the common as before.[60]

B. Misuser — 1. What Constitutes — a. In General. The common may be misused by a placing on it of cattle not commonable[61] or by the placing on it of cattle belonging to one who has no right of common;[62] by surcharging it;[63]

49. Carondelet *v.* Dent, 18 Mo. 284.

50. Dent *v.* Sigerson, 29 Mo. 489, as to the act of congress of July 4, 1836.

51. Inclosure of common lands as affecting title by adverse possession see Adverse Possession, 1 Cyc. 988, note 46.

52. Approving.— "By the statute . . . the lord of a manor may enclose so much of the waste as he pleases for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law 'approving,'— an ancient expression signifying the same as improving." 2 Bl. Comm. 34.

53. The burden of proof to show that sufficient waste is left for the commoners lies upon him who approves. Betts *v.* Thompson, L. R. 6 Ch. 732, 25 L. T. Rep. N. S. 363, 19 Wkly. Rep. 1100.

54. 2 Bl. Comm. 34; 3 Bl. Comm. 240; 41 Geo. III, c. 109; 31 Geo. II, c. 41; 29 Geo. II, c. 36; Statute of Merton, 20 Hen. III, c. 4; Statute of Westminster II, 13 Edw. I. See also Duberly *v.* Page, 2 T. R. 392, holding that the lord has no right to inclose wastes of a manor, where the tenants of the manor have a right to dig gravel on the wastes. See also for a short statement of the work of the statutory commissioners on the inclosure of common lands in 1869 Brown *v.* Great Western R. Co., 47 L. T. Rep. N. S. 216.

The reason for allowing inclosures is stated as follows: "It would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor; provided such advantage and improvement be no way derogatory from the former grants." 3 Bl. Comm. 241.

Rights of strangers to a manor.— The lords of manors within a forest contended that they had customs to inclose the wastes within their manors with the consent of the homages of their respective manors. Other persons, strangers to the manors, had rights of common over the lands claimed to be inclosed. Held that the inclosures were bad as against the commoners. Sewers Com'rs *v.* Glasse, L. R. 7 Ch. 456, 41 L. J. Ch. 129, 26 L. T. Rep. N. S. 647, 20 Wkly. Rep. 515.

Prescription against the crown.— As to rights acquired in waste lands belonging to the crown by the adverse possession of inclosures see Doe *v.* Morris, 2 Bing. N. Cas. 189, 1 Hodges 215, 4 L. J. C. P. 285, 2 Scott 276, 29 E. C. L. 495.

55. Glover *v.* Lane, 3 T. R. 445, 1 Rev. Rep. 737.

56. Barber *v.* Dixon, 1 Wils. C. P. 44, holding good a custom for one commoner to inclose against another.

57. Glover *v.* Lane, 3 T. R. 445, 1 Rev. Rep. 737, declining to follow a statement by Lord Coke to the effect that "approvement" was confined to common appendant.

58. 41 Geo. III, c. 109.

59. Hollister *v.* Hollister, 35 Conn. 241; Scott *v.* Dickinson, 14 Pick. (Mass.) 276.

A fence must be sufficient to turn stock in order to effect a partition of lands held in common, and hence a row of hedge-plants six inches in height is insufficient as a division. Miner *v.* Bennett, 45 Iowa 635.

60. Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687; Cooper *v.* Marshall, 1 Burr. 259, 2 Ld. Ken. 1, 2 Wils. C. P. 51; Mason *v.* Cæsar, 2 Mod. 65; 3 Cruise Dig. 95; 5 Viner Abr. 7.

61. 3 Bl. Comm. 237 (but by prescription for common appurtenant, cattle that are not commonable may be put into the common); Coke Litt. 122.

62. 3 Bl. Comm. 237 ("but the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common"); 1 Rolle Abr. 396.

63. 3 Bl. Comm. 237, where surcharging a common is described as "putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to."

In an action for a surcharge of common the plaintiff need not show that he turned

by plowing it;[64] by inclosing it without right;[65] or by taking manure from it.[66] It is not a misuse of the common for the owner to put in rabbit burrows, unless the common itself is destroyed.[67]

b. Structures. Structures, however, may be erected on a common consistent with its purpose,[68] as habitations for cattle-men on common of pasture,[69] or, it has been held, railroad structures on a village common.[70]

2. Effect of. Misuser of land dedicated in common causes a reversion to the donors,[71] unless the misuser does not render impossible the use of the land as contemplated,[72] or unless the donors are estopped to claim a reversion.[73]

C. Disposal of Income. The income from common lands may be disposed of by the proprietors[74] or by the court in accordance with statute.[75]

on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he ought. Wells *v.* Watling, 2 W. Bl. 1233. In such an action the plaintiff may declare generally for the injury, without stating the defendant's right of common. Atkinson *v.* Teasdale, 2 W. Bl. 817, 3 Wils. C. P. 278. And see Cheesman *v.* Hardham, 1 B. & Ald. 706, 19 Rev. Rep. 432.

One commoner who has surcharged may nevertheless maintain an action against another for surcharging the common. Hobson *v.* Todd, 4 T. R. 71, 2 Rev. Rep. 335.

For actions generally see *infra*, X.

64. Leverett *v.* Townsend, Cro. Eliz. 198; 3 Bl. Comm. 240.

65. 3 Bl. Comm. 240. And see *supra*, VII, A.

Where a tenant encroaches on a common the encroachment accrues to the landlord. Doe *v.* Murrell, 8 C. & P. 134, 34 E. C. L. 651.

66. Pindar *v.* Wadsworth, 2 East 154, 6 Rev. Rep. 412, holding that taking sheep droppings from a common is a misuse of it, as they are useful to fertilize the common.

67. Bellew *v.* Langdon, Cro. Eliz. 876; Hadesden *v.* Gryssel, Cro. Jac. 195; Stanton *v.* James, Lutw. 108; 3 Bl. Comm. 237, 240.

68. Abatement of nuisance.— The commoner may destroy a building wrongfully erected on the common (Perry *v.* Fitzhowe, 8 Q. B. 757, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757), even though persons are in it at the time provided proper notice is given (Davies *v.* Williams, 16 Q. B. 546, 15 Jur. 752, 20 L. J. Q. B. 330, 71 E. C. L. 546 [*modifying* Perry *v.* Fitzhowe, 8 Q. B. 757, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757]).

69. Patrick *v.* Stubbs, 11 L. J. Exch. 281, 9 M. & W. 830.

70. Under the act of 1828, incorporating the town of Columbus, and dedicating a certain tract as common, it was held that the common was not simply for pasture, but for the advancement of the town, and that the town might grant to a railroad the right of way across it, with the power to erect necessary depot buildings thereon, as the prohibition against erecting buildings must have been intended to apply only to temporary buildings for leasing. Crawford *v.* Mobile, etc., R. Co., 67 Ga. 405. The applicability of this decision to common lands may well be doubted in view of the fact that the doctrine of common lands has been virtually repudiated in Georgia. See Harrell *v.* Hannum, 56 Ga. 508; Davis *v.* Gurley, 51 Ga. 74. See also Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048. In this case it appears that in platting land, the proprietors designated a strip which was "to be and remain a common forever." In an action against the city to recover the strip because of misuser, the evidence showed that the only permanent structure thereon was a transfer railway track unauthorized by defendant, that the ground was used by the public for the exchange of merchandise, and that all obstruction thereon could be removed within ten days. It was held that defendant had not appropriated the land to purposes other than those implied by the term "common."

But see contra, People *v.* Park, etc., R. Co., 76 Cal. 156, 18 Pac. 141, where a railroad constructed in a park was held unlawful and a purprestur.

71. Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048.

72. Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048.

73. Where the donors of land abutting on a river as a common for nearly forty years, without objection, allow the city to expend nearly one million dollars in constructing wharves, etc., they are estopped in equity to obtain a reversion because of a misuser. Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048.

74. Rehoboth *v.* Hunt, 1 Pick. (Mass.) 224, holding that a vote by the proprietors of the income to a school was a grant which could not be rescinded.

75. Every resident freeman of Bedford was entitled to turn out one head of stock annually upon certain commonable land. This right was transferable. A railway company took part of the land under the Lands Clauses Act, § 102; the compensation money for the extinction of commonable rights was paid into court. In a suit to ascertain the rights of all parties to the money it was held that the money ought to be reinvested in land to be held in trust for the freemen from time to time resident within the borough, and that in the meantime the money

D. Taxation. Proprietors of common lands could lay taxes on the lands[76] and only by statute bring a civil suit for their recovery,[77] or they might authorize the sale of the rights of individual proprietors for non-payment,[78] which sale must be in accordance with the vote of the proprietors[79] and must follow the statutory requirements,[80] as must appear in evidence to prove the sale.[81]

E. The Rights of Abutting Owners. Owners of lands abutting on commons have no right of way over them[82] except as expressly granted;[83] but they may have a right to have the common preserved as such,[84] although they may be by statute relieved of any duty to fence,[85] and are not responsible for allowing others to cross their lands to the common and there misuse it.[86]

F. Apportionment. Whenever the common is admeasurable it is apportionable,[87] but otherwise it cannot be apportioned among several so as to increase the burden upon the common lands,[88] and so where by operation of law a right in common devolves upon several, one cannot convey his right to an outside party, but all may jointly convey.[89]

VIII. PARTITION.

A. In General — 1. Right to. It seems that a proprietor on withdrawing

ought to be invested and the dividends paid to such resident freemen at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common. Nash *v.* Coombs, L. R. 6 Eq. 51, 37 L. J. Ch. 600, 16 Wkly. Rep. 663.

76. Bott *v.* Perley, 11 Mass. 169.

After dissolution of the common lands, as by the establishment of a turnpike road over them, the proprietors cannot levy a tax on such lands. Mansfield *v.* Hawkes, 14 Mass. 440.

77. Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80.

78. Bott *v.* Perley, 11 Mass. 169; Coburn *v.* Ellenwood, 4 N. H. 99.

Lots already severed and conveyed cannot be sold by the proprietors for the payment of taxes. Bott *v.* Perley, 11 Mass. 169.

79. A vote of the proprietors of a township, "that the collector be empowered to give deeds of the land sold for taxes," empowers him to sell the lands of delinquent proprietors in the mode provided by law. Farrar *v.* Eastman, 5 Me. 345.

80. Farrar *v.* Eastman, 10 Me. 191 (holding that the tax sale in question passed no title, as the statutory notice was not given under 26 Geo. II); Farrar *v.* Perley, 7 Me. 404; Innman *v.* Jackson, 4 Me. 237 (construing 26 Geo. II, 2 Geo. III); Wentworth *v.* Allen, 1 Tyler (Vt.) 226 (holding that the collector of a proprietors' tax need not, in his advertisement for sale, annex to the name of each delinquent proprietor the sum assessed on his right or share, but may mention the amount of the tax on each right generally and then insert a list of delinquents).

81. Powell *v.* Brown, 1 Tyler (Vt.) 285, holding that the deed of a collector of a proprietors' tax is not *prima facie* evidence of a legal sale, but all previous proceedings in relation to the levy and assessment must be proved to be regular.

82. Sheffield, etc., R. Co. *v.* Moore, 83 Ala. 294, 3 So. 686.

83. Hartshorn *v.* South Reading, 3 Allen (Mass.) 501; Emerson *v.* Wiley, 10 Pick. (Mass.) 310.

84. See Anderson L. Dict.

85. Scott *v.* Dickinson, 14 Pick. (Mass.) 276, construing Mass. Stat. (1785), c. 52.

86. George *v.* Lysaght, 47 J. P. 696, 49 L. T. Rep. N. S. 49. See also Rogers *v.* Wynne, 7 D. & R. 521, 4 L. J. K. B. O. S. 75, 16 E. C. L. 293.

87. Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715; Tyrringham's Case, 4 Coke 36*b*.

Common appurtenant for seaweed, gravel, etc., is apportionable, belonging equally to every acre of dominant estate. Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

88. Leyman *v.* Abeel, 16 Johns. (N. Y.) 30; Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Mountjoy *v.* Huntington, Godb. 17; Coke Litt. 164*b*; 3 Kent Comm. 408; Sweet L. Dict.

Estovers.— A partition of the premises to which a right of common is appurtenant, without reserving the right to one, extinguishes a common of estovers. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Leyman *v.* Abeel, 16 Johns. (N. Y.) 30. See also *supra*, IV, C, 2; *infra*, IX.

As to coparceners taking by descent see Coke Litt. 165*a*.

89. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582 (estovers); Leyman *v.* Abeel, 16 Johns. (N. Y.) 30; Mountjoy *v.* Huntington, Godb. 17; Coke Litt. 164*b*.

Where a common of estovers descends upon several, although they cannot enjoy it severally they may convey to one who might enjoy it in severalty as an entirety. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

from the proprietary is entitled to have partition of the share belonging to him.[90]

2. CONCLUSIVENESS AND EFFECT OF. A stranger to the proprietary cannot object to informalities in a partition acquiesced in by the proprietors,[91] and a mortgagee of a proprietor is bound by a proper partition.[92] A partition of premises to which a right of estovers is appurtenant destroys that right.[93]

B. By Vote of Proprietors — 1. IN GENERAL. Formerly proprietors of common lands could make partition passing title by vote without deed[94] or seal,[95] which partition was sufficient if clear as to parties[96] and boundaries,[97] although informal, and could set off certain tracts to certain proprietors as tenants in common.[98] It was necessary that the partition take place in accordance with the vote of the proprietors.[99]

2. THROUGH A COMMITTEE. Partition may be made through a committee, and the vote creating the committee may authorize it or other agents to make the partition themselves; and such partition when made in accordance with the vote is binding.[1] Where the work of drafting a plan of partition is intrusted to a com-

90. Williams College *v.* Mallett, 12 Me. 398, holding that the proprietary need not, however, suspend its proceedings in order to give opportunity for the exercise of this right.

91. Davis *v.* Mason, 4 Pick. (Mass.) 156; Sawyer *v.* Newland, 9 Vt. 383; Wells *v.* Brewster, 1 D. Chipm. (Vt.) 147.

92. Williams College *v.* Mallett, 12 Me. 398.

93. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592. See also Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Leyman *v.* Abeel, 16 Johns. (N. Y.) 30.

94. *Connecticut.*—Lyman *v.* Humphrey, 28 Conn. 322.

Maine.— Porter *v.* Griswold, 6 Me. 430.

Massachusetts.— Williams *v.* Ingell, 21 Pick. (Mass.) 288; Folger *v.* Mitchell, 3 Pick. (Mass.) 396; Springfield *v.* Miller, 12 Mass. 415; Codman *v.* Winslow, 10 Mass. 146; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

New Hampshire.— Little *v.* Downing, 37 N. H. 355; Corbett *v.* Norcross, 35 N. H. 99; Atkinson *v.* Bemis, 11 N. H. 44; Coburn *v.* Ellenwood, 4 N. H. 99.

Vermont.— Woodbridge *v.* Addison, 6 Vt. 204; Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

See 10 Cent. Dig. tit. "Common Lands," § 28.

Title will not pass by vote without deed, when the proprietors in their vote intended a deed should be given. Coburn *v.* Ellenwood, 4 N. H. 99.

Prior to the adoption of the statute of frauds, a partition of common lands by a verbal agreement was binding if followed by livery of seizin, and an agreement in writing to make both had the same effect as an actual partition. Lavelle *v.* Strobel, 89 Ill. 370.

Curing illegalities.— It has been held that an illegal partition cannot be legalized by a vote at a subsequent meeting. Pomeroy *v.* Taylor, Brayt. (Vt.) 169.

Where title invalid.— In the New Hampshire grants of townships to proprietors in common, "the governor's lot," so called, is reserved to him, in severalty, by the charter, and located thereby. If his title prove invalid, by reason of a prior grant of the same lot, those claiming under him are not entitled to compensation from the lands of the other proprietors. Strong *v.* Paine, 1 D. Chipm. (Vt.) 201.

95. Folger *v.* Mitchell, 3 Pick. (Mass.) 396.

96. Folger *v.* Mitchell, 3 Pick. (Mass.) 396. And see Williams *v.* Ingell, 21 Pick. (Mass.) 288, 290, where it appeared that a record in the book of the proprietors of common lands, granting to one of their number a parcel of land, recited, "At the request of Samuel Williams Esq. is granted to the right of William Phillips, half an acre." It was there held that the grant did not inure to the benefit of Williams, without proof that he derived some title under Phillips, as the words of the grant show that it was probably intended to leave open the question of Phillips' right.

97. Folger *v.* Mitchell, 3 Pick. (Mass.) 396.

A plan used at the time by the proprietors in making partition may be used in evidence to explain the partition by vote. Corbett *v.* Norcross, 35 N. H. 99.

98. Dall *v.* Brown, 5 Cush. (Mass.) 289 (under Mass. Stat. (1785), c. 73; Mass. Rev. Stat. c. 43, §§ 20–43); Folger *v.* Mitchell, 3 Pick. (Mass.) 396 (based in part on Mass. Stat. (1783), c. 39); Mitchell *v.* Starbuck, 10 Mass. 5.

99. In 1795 the proprietors of the town of A voted, at a regular meeting, to give B, one of its proprietors, the privilege of "pitching" four hundred acres, as a compensation for building the first two mills in the town. It was held that a "pitch" made in 1839, not expressly purporting to have been made in pursuance of said vote, gave to B no right in severalty to the land contained in the survey. House *v.* Fuller, 12 Vt. 172.

1. Lavelle *v.* Strobel, 89 Ill. 370, 381 (where the agents of the proprietary made a map with the boundaries of each proprietor's lot

mittee, a subsequent vote of the proprietors acting on the committee's report will cure any informalities in the report[2] or the proprietors may effectively act ignoring the proceedings of the committee.[3]

C. By Judicial Proceeding — 1. In General. Common lands may be by statute liable to partition upon judicial proceeding.[4]

2. Effect of. The mere pendency of a partition suit does not nullify partition by the proprietors,[5] but judgment in a partition suit nullifies any partition by proprietors made during the pendency of the suit.[6]

3. Proof of.[7] A division without deed could be proved only by the records,[8] which must show action taken in accordance with the statute,[9] and which are presumptive evidence of title.[10]

D. Effect of Acquiescence — Estoppel. Acquiescence by proprietors for a considerable time in a partition made will estop such parties from objecting to its validity,[11] even in the case of infants or married women while under disability;[12] but only where there was a division in fact of the land, either by visible lines and monuments, or by possession under a claim of distinct and clearly defined parcels.[13]

IX. Extinguishment.[14]

A. In General. The closing of a common for a long period absolutely extinguishes it so it may not be thrown open again.[15] Where land appropriated to the public as common has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated under the expectation excited by its proprietors that it should so remain the proprietors cannot resume their exclusive ownership.[16]

and his name platted upon it, which map was held to be sufficient passing of title); Coburn *v.* Ellenwood, 4 N. H. 99 (where proprietors voted that A should have certain land, and that their clerk should give him a deed in the name of the proprietors, and he executed a deed in his own name as clerk, it was held that A acquired no title, as the deed given was not in pursuance of the vote).

2. Folger *v.* Mitchell, 3 Pick. (Mass.) 396, where only two of a committee of three signed the report.

3. Folger *v.* Mitchell, 3 Pick. (Mass.) 396.

4. Mitchell *v.* Starbuck, 10 Mass. 5, holding the common lands in Nantucket liable to partition upon petition, notwithstanding any custom or prescription to the contrary and notwithstanding the death of one of the tenants without appearing in the suit. It was said to be one of the characteristics of tenancy in common that it was always subject to partition.

5. Folger *v.* Mitchell, 3 Pick. (Mass.) 396, 402.

6. Folger *v.* Mitchell, 3 Pick. (Mass.) 396.

7. See also *supra*, V, D.

8. Garland *v.* Rollins, 36 N. H. 349 (where a committee's locating plan showed a tract belonging to two proprietors but without indicating the boundary lines, and it was held that parol evidence was inadmissible to vary the plan by showing that a pond within the tract was not intended to be included in it); Stedman *v.* Putney, N. Chipm. (Vt.) 11.

9. Doe *v.* Lawrence, 1 D. Chipm. (Vt.) 103.

10. Beach *v.* Fay, 46 Vt. 337. *Contra*, Smith *v.* Meacham, 1 D. Chipm. (Vt.) 424.

11. Lavelle *v.* Strobel, 89 Ill. 370; Dall *v.* Brown, 5 Cush. (Mass.) 289 (conveyance affirming invalid partition); Corbett *v.* Norcross, 35 N. H. 99; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109; Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680 (acquiescence for fifteen years); Hubbard *v.* Austin, 11 Vt. 129; Stevens *v.* Griffith, 3 Vt. 448 (acquiescence for fifteen years); Wells *v.* Brewster, 1 D. Chipm. (Vt.) 147.

The Vermont rule has been said to be that fifteen years' acquiescence in a partition, however informal, was equivalent to a legal division. Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680.

In case of conflicting surveys of common lands, where the persons claiming one of the parcels made partition of it among themselves according to metes and bounds, as fixed by one of the surveys, their action does not amount to such an acceptance of that survey as will preclude them from asserting the correctness of the other survey as against a stranger. Glasgow *v.* Baker, 72 Mo. 441.

12. Townsend *v.* Downer, 32 Vt. 183.

13. Booth *v.* Adams, 11 Vt. 156, 34 Am. Dec. 680.

14. For apportionment operating as an extinguishment see *supra*, VII, F.

15. Silway *v.* Compton, 1 Vern. 32, thirty years.

16. Bouvier L. Dict. And see the following cases:

Connecticut.— Stiles *v.* Curtis, 4 Day (Conn.) 328.

Massachusetts.— Emerson *v.* Wiley, 10 Pick. (Mass.) 310.

Michigan.— White *v.* Smith, 37 Mich. 291.

B. Abandonment. A right of common may be extinguished by abandonment, to constitute which there must be a removal from or cessation of use of the common, with an intention to abandon,[17] as by devoting the land to the use of a highway;[18] but the yielding of some of the commoners to an inclosure of the common is not of itself an abandonment.[19] Abandonment is a question of fact for the jury.[20]

C. Unity of Possession. Common appendant remains unaffected by a purchase or lease of any part of the common lands by the commoner, but common appurtenant is extinguished by such purchase and suspended by such lease.[21]

X. ACTIONS.[22]

Action concerning common lands lies at common law both by the owner and by the commoner, against a stranger[23] or against one another[24] except where the

Pennsylvania.— Carr *v.* Wallace, 7 Watts (Pa.) 394.

Vermont.—Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

See 10 Cent. Dig. tit. "Common Lands," § 16.

17. Hebert *v.* Lavalle, 27 Ill. 448 (holding that commoners lost their rights by removing from town lots to out lots); Tayon *v.* Ladew, 33 Mo. 205 (holding that to constitute an abandonment it must affirmatively appear that the property was left with the intention of no longer claiming it); Page *v.* Scheibel, 11 Mo. 167 (holding that removal and a cessation of cultivation alone do not amount to an abandonment); Lawrence *v.* Hempstead, 155 N. Y. 297, 49 N. E. 868 (holding that certain ancient orders to fence and allotments had extinguished the right of the town to an ancient common, *overruling* 76 Hun (N. Y.) 609, 29 N. Y. Suppl. 1146, 62 N. Y. St. 868).

18. Chatham *v.* Brainerd, 11 Conn. 60; Stiles *v.* Curtis, 4 Day (Conn.) 328; Mansfield *v.* Hawkes, 14 Mass. 440.

19. Warrick *v.* Queen's College, L. R. 6 Ch. 716, 40 L. J. Ch. 780, 25 L. T. Rep. N. S. 254, 19 Wkly. Rep. 1098, as to the Prescription Act, 2 & 3 Wm. IV, c. 71.

20. Russell *v.* Davis, 38 Conn. 562; Tine *v.* St. Louis Public Schools, 39 Mo. 59.

21. Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687; Carr *v.* Wallace, 7 Watts (Pa.) 394; Wild's Case, 8 Coke 78*b*; Tyrringham's Case, 4 Coke 36*b*; Kimpton *v.* Bellamy, 1 Leon. 43.

"There is a distinction between common appendant and common appurtenant in this important particular, that, if he who has common appurtenant purchases parcel of the land subject to the easement, all his right of common is extinct; or, if he takes a lease of part of the land, all the common is suspended; because it is the folly of the commoner to intermeddle with the land; his common appurtenant was against common right, and he cannot common in his own land which he has purchased." Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 181, 64 Am. Dec. 687.

22. Actions for injuries to rights of common see ACTIONS, 1 Cyc. 61, note 50.

23. Kenyon *v.* Nichols, 1 R. I. 106; House *v.* Fuller, 12 Vt. 172 (suit for possession by one proprietor against a stranger); Hobson *v.* Todd, 4 T. R. 71, 2 Rev. Rep. 335; Marys' Case, 9 Coke 111*b*; 2 Bl. Comm. 34; 3 Bl. Comm. 238. See also as to manors Smith *v.* Brownlow, L. R. 9 Eq. 241, 21 L. T. Rep. N. S. 739, 18 Wkly. Rep. 271, holding that one who is a freeholder and copyhold tenant of a manor can maintain a suit on behalf of himself and all other the freehold and copyhold tenants, notwithstanding the rights of each freeholder are separate and distinct from those of the copyholders.

An adverse occupation for twenty years of inclosures on waste lands belonging to the crown forces the crown, in order to regain possession, to bring an information of intrusion. Hence a party buying the rights of the crown cannot bring an ejectment. Doe *v.* Morris, 2 Bing. N. Cas. 189, 1 Hodges 215, 4 L. J. C. P. 285, 2 Scott 276, 29 E. C. L. 495.

Suit for compensation for extinction of commonable rights.— When the right in the soil of land subject to rights of common has been conveyed to the promoters of an undertaking by the lord under the Lands Clauses Act (8 Vict. c. 18, § 100), but the compensation payable to the commoners has not been ascertained in the manner provided by the act, any such commoner whose rights of common have been disturbed by the works of the promoters may maintain an action against them, and is not confined to proceedings for compensation under the Lands Clauses Act. Stoneham *v.* London, etc., R. Co., L. R. 7 Q. B. 1, 41 L. J. Q. B. 1, 25 L. T. Rep. N. S. 788, 20 Wkly. Rep. 77.

24. Marys' Case, 9 Coke 111*b*; 2 Bl. Comm. 34; 3 Bl. Comm. 238.

Trespass will lie by one tenant in common against another, and also against his licensee for making holes in the common and digging turves and taking them away, when those acts are not done in the exercise of a right of common. Wilkinson *v.* Haygarth, 12 Q. B. 837, 11 Jur. 104, 16 L. J. Q. B. 103, 64 E. C. L. 837. Trespass lies for digging

commoner has estopped himself,[25] and, in the case of the lord, even for a trivial damage;[26] but where the proprietary is incorporated, action as to property may be enforced only in the corporate name.[27] A stranger may not question the authority of those having rights in common.[28] Rights in common could be enforced by the usual actions, by ancient writs,[29] or by statutory process at the suit of the government.[30] In a suit in the corporate name, possession may be shown by acts of individual proprietors,[31] and in general evidence of long usage is of the greatest weight.[32]

up coney-burrows in a common. Cooper *v.* Marshall, 1 Burr. 259, 268, 2 Ld. Ken. 1, 2 Wils. C. P. 51.

25. Harvey *v.* Reynolds, 1 C. & P. 141, 12 Price 724, 12 E. C. L. 92.

26. Pindar *v.* Wadsworth, 2 East 154, 6 Rev. Rep. 412; 3 Bl. Comm. 237.

27. Chamberlain *v.* Bussey, 5 Me. 164; Allen *v.* Woodward, 22 N. H. 544; Atkinson *v.* Bemis, 11 N. H. 44. But see Southold *v.* Horton, 6 Hill (N. Y.) 501, holding that the act of April 9, 1796, relating to common lands, etc., does not give the proprietors the right to sue as a corporation, as the act contains no words of incorporation but provides merely for the management of the proprietary.

28. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582, landlord's right to inclose.

29. "Admeasurement of pasture" and its corollary, the writ of second surcharge, the former being simply to determine the right of common, and the latter to punish any infringement of the right thus established, are described in 3 Bl. Comm. 238. See also Fitzherbert Nat. Brev. 126; 2 Inst. 370.

An information of intrusion, a proceeding by the crown to regain possession is described in Doe *v.* Morris, 2 Bing. N. Cas. 189, 1 Hodges 215, 4 L. J. C. P. 285, 2 Scott 276, 29 E. C. L. 495.

Distraining beasts.— "In general, in case the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may distrain them damage-feasant: or the commoner may bring an action on the case to recover damages, provided the injury done be anything considerable. . . . But for a trivial trespass the commoner has no action, but the lord of the soil only." 3 Bl. Comm. 237.

30. Cushing *v.* Hackett, 11 Mass. 202 (an inquest of office against the proprietors of a township); Cushing *v.* Hacket, 10 Mass. 164.

31. Monumoi Great Beach *v.* Rogers, 1 Mass. 159.

32. Drury *v.* Moore, 1 Stark. 102, 18 Rev. Rep. 751, 2 E. C. L. 48, holding that evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant — the lord of the manor — by deed, that the confirmation of the commoners was essential to an alienation of part of such common.

[X]

COMMON LAW

By Wm. Lawrence Clark*

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I. DEFINITION AND NATURE.

A. Definition — 1. English Common Law. The term "common law" has been used in different senses.[1] In one sense it signifies that particular portion of the municipal law of England, which was formerly administered exclusively by the common-law tribunals, and is now administered by them concurrently with, and as modified by, equitable doctrines;[2] and in this sense the English common law includes the *lex scripta* or statute law as well as the unwritten law or *lex non scripta*.[3] Generally, however, when we speak of the English common law we mean the *lex non scripta* or unwritten law as defined by Blackstone — that portion of the law of England which is based, not upon legislative enactment, but upon immemorial usage and the general consent of the people.[4]

2. American Common Law. The common law in the United States[5] consists of the common or unwritten law of England as it existed in 1607, when the colonists from England settled in America, or in some states at a later date,[6] in so far as that law is applicable to the new surroundings and conditions[7] and has not been abrogated by statute;[8] also in most states of such English statutes enacted before their emigration or afterward and before the Revolution as were applicable and were adopted;[9] and of some local usages originating in, and coming down from, colonial times.[10]

1. See 1 Bl. Comm. 67–73; Black L. Dict.; Bouvier L. Dict.; Burrill L. Dict.

2. Broome Com. L. (9th ed.) 2; Indermaur Com. L. 1–3; Black L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Sweet L. Dict.

3. Broome Com. L. (9th ed.) 2; Indermaur Com. L. 1; Sweet L. Dict.

Courts having "common-law jurisdiction." — In a California case, speaking of the act of congress of April 14, 1802, establishing a uniform rule of naturalization and conferring jurisdiction to issue naturalization papers upon state courts of record having "common-law jurisdiction," it was said: "The term 'common law jurisdiction' is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the Courts of law, under what is known as the common law of England. Our judicial system having been modeled chiefly after that of England, we have adopted the nomenclature which prevailed in her Courts. Hence, when we speak through our statutes and Courts of common law actions, proceedings at common law and common law jurisdiction, we mean such actions, proceedings and jurisdiction as appertained to the common law of England, as administered through her Courts." *In re* Connor, 39 Cal. 98, 100, 2 Am. Rep. 427.

4. 1 Bl. Comm. 67–73, where it is said: "The authority of these maxims [and rules of the common law] rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it." See Ill. Rev. Stat. (1899), c. 28, § 1; Ind. Rev. Stat. (1897), § 236; Kent Comm. 492; Smith Stud. Jurid. L. 92; Levy *v.* McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334 (holding that the statute of descents of New York of Feb. 23, 1786, providing that in all cases of descents not particularly provided for by the act "the common law" should govern, used the term common law in its appropriate sense, as the unwritten law, independent of statutory enactments, and that the term did not include alterations and amendments made in the unwritten law by British statutes prior to the American revolution); Jacob *v.* State, 3 Humphr. (Tenn.) 492; Forbes *v.* Scannell, 13 Cal. 242.

Chancellor Kent defined the common law as "those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declarations of the will of the legislature." 1 Kent Comm. 469.

5. The individual states as distinguished from the United States regarded as an independent sovereignty see *infra*, IV, B.

6. See *infra*, III, A.

7. See *infra*, IV, A, 1, a, b.

8. See *infra*, III, B; IV, A, 1, a.

9. See *infra*, II, B; III, A; IV, A, 2.

10. *Alabama.*— State *v.* Cawood, 2 Stew. (Ala.) 360.

California.— Reed *v.* Eldredge, 27 Cal. 346; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561; Johnson *v.* Fall, 6 Cal. 359, 65 Am. Dec. 518.

Connecticut.— State *v.* Danforth, 3 Conn. 112.

Delaware.— Clawson *v.* Primrose, 4 Del. Ch. 643, 653, where it was said speaking of the constitutional provision of Delaware adopting the common law of England and early English statutes: "The object of this clause was to secure to the people in their transition from a colonial to an independent political state, a jurisprudence already complete, and adequate immediately to define

3. SEVENTH AMENDMENT OF UNITED STATES CONSTITUTION. In the provision of the seventh amendment of the constitution of the United States, that "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," the term "common law" does not mean the common law of any particular state, but the common law of England, and in contradistinction to equity, admiralty, and maritime jurisprudence.[11]

4. SIMILAR PROVISIONS OF STATE CONSTITUTIONS. A like construction has been placed upon a similar provision in a state constitution.[12]

5. FEDERAL JUDICIARY ACT OF 1887. The same construction has been placed upon the act of congress of 1887, giving the circuit courts of the United States original jurisdiction concurrent with the state courts "in all suits of a civil nature at common law," etc.[13]

B. Nature of the Common Law. The unwritten or common law, as distinguished from the written or statute law, is the embodiment of principles and rules inspired by natural reason, an innate sense of justice, and the dictates of convenience, and voluntarily adopted by men for their government in social

and to protect their rights of person and property, and of citizenship generally, without awaiting the slow growth of a new system to be thereafter matured by legislation and judicial decision. They had already in their colonial state as subjects of Great Britain, an established jurisprudence in the common law of England. It was a system of jurisprudence to which our ancestors of that day were deeply attached. They had esteemed it throughout their colonial condition, to be their birth-right as English subjects, and their safest rule of conduct, so declaring it in several legislative acts."

Georgia.— Robert *v.* West, 15 Ga. 122.

Kentucky.— Ætna Ins. Co. *v.* Com., 106 Ky. 864, 51 S. W. 624, 45 L. R. A. 355; Hunt *v.* Warnicke, Hard. (Ky.) 61.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; Coomes *v.* Clements, 4 Harr. & J. (Md.) 480.

Massachusetts.— Com. *v.* Knowlton, 2 Mass. 530; Com. *v.* Leach, 1 Mass. 59.

Missouri.— State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469.

New Hampshire.— State *v.* Rollins, 8 N. H. 550.

New Mexico.— Browning *v.* Browning, 3 N. M. 371, 377, 9 Pac. 677, where it was said: "From the authorities cited it is clear that there are three classes of 'common law as recognized in the United States of America;' First, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a particular date, the unwritten law, and such general British statutes, applicable to their condition, as were in force at the time of the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; second, in those states which have adopted the common law, and the British statutes passed and in force prior to the date fixed in the act of adoption, and were of a general nature, and suitable to their situation, such common law and statutes constitute their common law; and, third, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed or were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people, are the common law of such states and territories."

Ohio.— State *v.* Lafferty, Tapp. (Ohio) 81.

Pennsylvania.— Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632.

South Carolina.— See Jaggers *v.* Estes, 2 Strobh. Eq. (S. C.) 343, 49 Am. Dec. 674.

Tennessee.— Jacob *v.* State, 3 Humphr. (Tenn.) 493; Porter *v.* State, Mart. & Y. (Tenn.) 226.

Virginia.— Com. *v.* Callaghan, 2 Va. Cas. 460.

Wyoming.— Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608.

United States.—Doe *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108; Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732.

11. Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732; Klever *v.* Seawall, 65 Fed. 393, 22 U. S. App. 715, 12 C. C. A. 661; United States *v.* Wonson, 1 Gall. (U. S.) 5, 28 Fed. Cas. No. 16,750; Scott *v.* Billgerry, 40 Miss. 119, 143; Creighton *v.* Hershfield, 1 Mont. 639, 644. See also, generally, JURIES.

12. Barlow *v.* Daniels, 25 W. Va. 512.

13. Brisenden *v.* Chamberlain, 53 Fed. 307. See, generally, COURTS.

relations.[14] The common law is not fixed and immutable except by positive enactment, like the statute law, but is flexible, so that it is always adapted to meet new and unexpected conditions,[15] and so that its principles will cease to apply when the reason on which they are founded ceases.[16]

II. SOURCES OF AMERICAN COMMON LAW.

A. English Common Law.[17] The greater part of the common law in the United States is derived from the common or unwritten law of England. This portion of the English law has either been expressly adopted[18] in most states by the constitution or by statute, or recognized by the courts as in force, except in so far as conditions render it inapplicable or it has been changed by statute.[19]

14. Smith Jurid. L. 92. See Jacob *v.* State, 3 Humphr. (Tenn.) 493, 514, where it is said: "The common law has been aptly called the '*lex non scripta*,' because it is a rule prescribed by the common consent and agreement of the community as one applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits, manners, and customs of a people. Its seat in the breast of the judges who are its expositors and expounders." See also Kerner *v.* McDonald. 60 Nebr. 663, 84 N. W. 92, 83 Am. St. Rep. 550; Morgan *v.* King, 30 Barb. (N. Y.) 9; People *v.* Randolph, 2 Park. Crim. (N. Y.) 174.

15. See Jacob *v.* State, 3 Humphr. (Tenn.) 493, 514, where it is said: "Every nation must of necessity have its common law, let it be called by what name it may, and it will be simple or complicated in its details, as society is simple or complicated in its relations. A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce and arts and agriculture enriched, a nation. The common law of a country will, therefore, never be entirely stationary, but will be modified, and extended by analogy, construction and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society. The present common law of England is as dissimilar from that of Edward III. as is the present state of society. And we apprehend that no one could be found to contend that hundreds of principles, which have in more modern times been examined, argued, and determined by the judges, are not principles of the common law, because not found in the books of that period. They are held to be great and immutable principles, which have slumbered in their repositories, because the occasion which called for their exposition had not arisen. The common law, then, is not like the statute law, fixed, and immutable but by positive enactment, except where a principle has been adjudged as the rule of action." See also Woodman *v.* Pitman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342; Morgan *v.* King, 30 Barb. (N. Y.) 9.

16. See Kreitz *v.* Behrensmeyer, 149 Ill. 496, 502, 36 N. E. 983, 24 L. R. A. 59, where it is said: "The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country." See also Beardsley *v.* Hartford, 50 Conn. 529, 541, 47 Am. Rep. 677, where it is said: "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim '*cessante ratione, cessat ipsa lex.*' This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstance, must cease to apply as a controlling principle to the new circumstances." And see Kerner *v.* McDonald. 60 Nebr. 663, 84 N. W. 92, 83 Am. St. Rep. 550; Morgan *v.* King, 30 Barb. (N. Y.) 9; People *v.* Randolph, 2 Park. Crim. (N. Y.) 174; Jaggers *v.* Estes, 2 Strobh. Eq. (S. C.) 343, 49 Am. Dec. 674.

The flexibility of the common law consists, "not in the change of great and essential principles, but in the application of old principles to new cases, and in the modification of the rules flowing from them, to such cases as they arise: so as to preserve the reason of the rules, and the spirit of the law." Spencer, S., in Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587, 628.

17. Criminal law see *infra*, IV, A, 5.

18. See *infra*, III, A.

19. *Alabama.*—Nelson *v.* McCrary, 60 Ala. 301; Matthews *v.* Ansley, 31 Ala. 20; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Pierson *v.* State, 12 Ala. 149; State *v.* Cawood, 2 Stew. (Ala.) 360.

Arkansas.— Hardage *v.* Stroope, 58 Ark. 303, 24 S. W. 490; Horsley *v.* Hilburn, 44 Ark. 458. And see Grande *v.* Foy, Hempst. (U. S.) 105, 10 Fed. Cas. No. 5,682*a*.

B. English Statutes. The common law of most of the states also embraces English statutes amendatory of the common law, which were of a general nature and suitable to their conditions, and which were enacted prior to times specified in the constitutional or statutory provisions adopting the same,[20] or, in the absence

California.— Reed *v.* Eldredge, 27 Cal. 346; Van Maren *v.* Johnson, 15 Cal. 308; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561; Johnson *v.* Fall, 6 Cal. 359, 65 Am. Dec. 518.

Colorado.— Chilcott *v.* Hart, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41.

Connecticut.—Baldwin *v.* Walker, 21 Conn. 168; Card *v.* Grinman, 5 Conn. 164; State *v.* Danforth, 3 Conn. 112.

Delaware.—Clawson *v.* Primrose, 4 Del. Ch. 643. *Compare* Starr *v.* Lewis, 3 Harr. (Del.) 40.

Georgia.— Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois.— Keitz *v.* Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; Lavalle *v.* Strobel, 89 Ill. 370; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780; Stuart *v.* People, 4 Ill. 395.

Indiana.— Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92.

Iowa.— Catton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556; Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90; Estes *v.* Carter, 10 Iowa 400; State *v.* Twogood, 7 Iowa 252; O'Ferrall *v.* Simplott, 4 Iowa 381; Wagner *v.* Bissell, 3 Iowa 396.

Kansas.— Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592; State *v.* Clayton, 27 Kan. 442, 41 Am. Rep. 418; Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 252, 12 Am. Rep. 494; State *v.* Hillyer, 2 Kan. 17; Sattig *v.* Small, 1 Kan. 170.

Kentucky.— Ætna Ins. Co. *v.* Com., 106 Ky. 864, 51 S. W. 624, 45 L. R. A. 355; Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388.

Maryland.— Coomes *v.* Clements, 4 Harr. & J. (Md.) 482. And see State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Chapman, 13 Metc. (Mass.) 68; Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 393; Com. *v.* Churchill, 2 Metc. (Mass.) 118; Com. *v.* Knowlton, 2 Mass. 530; Com. *v.* Leach, 1 Mass. 59.

Michigan.— Lormon *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435; Stout *v.* Keyes, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465.

Minnesota.— State *v.* Pulle, 12 Minn. 164.

Mississippi.— Hollman *v.* Bennett, 44 Miss. 322; Hemingway *v.* Scales, 42 Miss. 1, 93 Am. Dec. 425, 2 Am. Rep. 586; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Powell *v.* Brandon, 24 Miss. 343.

Missouri.— State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469; Reaume *v.* Chambers, 22 Mo. 36.

Nevada.— Clark *v.* Clark, 17 Nev. 124, 28 Pac. 238; Hamilton *v.* Kneeland, 1 Nev. 40.

New Hampshire.—State *v.* Moore, 26 N. H. 448, 59 Am. Dec. 354; State *v.* Rollins, 8 N. H. 550.

New Mexico.— Browning *v.* Browning, 3 N. M. 371, 9 Pac. 677.

New York.— Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Morgan *v.* King, 30 Barb. (N. Y.) 9; Lowber *v.* Wells, 13 How. Pr. (N. Y.) 454; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 177; People *v.* Onondaga County, 4 N. Y. Crim. 102.

Ohio.— Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201; Bloom *v.* Richards, 2 Ohio St. 387; Carey *v.* Montgomery County Com'rs, 19 Ohio 245; Lindsley *v.* Coats, 1 Ohio 243; State *v.* Lafferty, Tapp. (Ohio) 81.

Oklahoma.— McKennon *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501.

Pennsylvania.— Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322; Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; Guardians of Poor *v.* Green, 5 Binn. (Pa.) 554; McDill *v.* McDill, 1 Dall. (Pa.) 63, 1 L. ed. 38.

Tennessee.— McCorry *v.* King, 3 Humphr. (Tenn.) 267, 39 Am. Dec. 165; Simpson *v.* State, 5 Yerg. (Tenn.) 356; Grisham *v.* State, 2 Yerg. (Tenn.) 589; Fields *v.* State, 1 Yerg. (Tenn.) 156; Porter *v.* State, Mart. & Y. (Tenn.) 226.

Texas.— Diamond *v.* Harris, 33 Tex. 634.

Utah.— Thomas *v.* Union Pac. R. Co., 1 Utah 232; Utah First Nat. Bank *v.* Kinner, 1 Utah 100.

Virginia.— Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Dykes *v.* Woodhouse, 3 Rand. (Va.) 287; Com. *v.* Callaghan, 2 Va. Cas. 460.

Washington.— Cass *v.* Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

West Virginia.— Cunningham *v.* Dorsey, 3 W. Va. 293.

Wisconsin.— Coburn *v.* Harvey, 18 Wis. 147.

Wyoming.— Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608.

United States.— Wheaton *v.* Peters, 8 Pet. (U. S.) 59, 8 L. ed. 1055; Scott *v.* Lunt, 7 Pet. (U. S.) 596, 8 L. ed. 797; Doe *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

See 10 Cent. Dig. tit. "Common Law," § 9.

20. See *infra*, III, A.

of such provision, prior to the settlement of the colonies, or in some states after such settlement and prior to the Revolution, where the statute was recognized as in force.[21]

C. English Decisions. It has sometimes been said that English decisions prior to the separation of the American colonies from England are a part of our common law, but this is not true. They are merely evidence more or less conclusive of what the common law was.[22]

D. Christianity. It has been said that Christianity is part and parcel of the common law.[23] But this is true in the United States only in the sense that the institutions and essential truths of the Christian religion are entitled to profound respect and are protected by the common law against public reviling and blasphemy, and this is as far as the decisions go.[24]

21. As to adoption of English statutes see the following cases:

Alabama.—Nelson *v.* McCrary, 60 Ala. 301; Clark *v.* Goddard, 39 Ala. 164, 84 Am. Dec. 777; Matthews *v.* Ansley, 31 Ala. 20; Horton *v.* Sledge, 29 Ala. 478; Carter *v.* Balfour, 19 Ala. 814.

Arkansas.— Horsley *v.* Hilburn, 44 Ark. 458.

Colorado.— People *v.* Goddard, 8 Colo. 432, 7 Pac. 301.

Connecticut. — State *v.* Ward, 43 Conn. 489, 21 Am. Rep. 665.

Georgia.— State *v.* Campbell, T. U. P. Charlt. (Ga.) 166. And see Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois.— Lavalle *v.* Strobel, 89 Ill. 370; Plumleigh *v.* Cook, 13 Ill. 669; Sans *v.* People, 8 Ill. 327.

Kansas.— Sattig *v.* Small, 1 Kan. 170.

Maine.— Colley *v.* Merrill, 6 Me. 50.

Maryland.— Sibley *v.* Williams, 3 Gill & J. (Md.) 52.

Massachusetts.— Boynton *v.* Rees, 9 Pick. (Mass.) 528; Sackett *v.* Sackett, 8 Pick. (Mass.) 309; Pearce *v.* Atwood, 13 Mass. 324; Com. *v.* Knowlton, 2 Mass. 531; Com. *v.* Leach, 1 Mass. 59.

Missouri.— Baker *v.* Crandall, 78 Mo. 584, 47 Am. Rep. 126.

Nevada.— Evans *v.* Cook, 11 Nev. 69; *Ex p.* Blanchard, 9 Nev. 101; Hamilton *v.* Kneeland, 1 Nev. 40.

New Hampshire.— State *v.* Moore, 26 N. H. 448, 59 Am. Dec. 354; State *v.* Rollins, 8 N. H. 550.

New Jersey— See State *v.* Mairs, 1 N. J. L. 385.

New Mexico.— Browning *v.* Browning, 3 N. M. 371, 9 Pac. 677.

New York.— Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278; Cahill Iron Works *v.* Pemberton, 27 N. Y. Suppl. 927, 931, 30 Abb. N. Cas. (N. Y.) 450; Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178 [*affirmed* in 15 Wend. (N. Y.) 111].

Pennsylvania. — Shewel *v.* Fell, 3 Yeates (Pa.) 17; Respublica *v.* Mesca, 1 Dall. (Pa.) 73, 1 L. ed. 42; McDill *v.* McDill, 1 Dall. (Pa.) 63, 1 L. ed. 38; Biddle *v.* Shippen, 1 Dall. (Pa.) 19, 1 L. ed. 19. *Compare* Morris *v.* Vanderen, 1 Dall. (Pa.) 64, 1 L. ed. 38.

South Carolina.— Pemble *v.* Clifford, 2 McCord (S. C.) 31.

Virginia.— Dykes *v.* Woodhouse, 3 Rand. (Va.) 287.

Wisconsin.— Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110, 11 Am. Rep. 550; Coburn *v.* Harvey, 18 Wis. 147.

Wyoming. — Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608.

United States.— Scott *v.* Lunt, 7 Pet. (U. S.) 596, 8 L. ed. 797; Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120; Doe *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108.

Contra, Boarman *v.* Catlett, 13 Sm. & M. (Miss.) 149; Paul *v.* Ball, 31 Tex. 10.

See 10 Cent. Dig. tit. "Common Law," § 7.

Provisions adopting statutes see *infra,* III, A.

22. See *infra,* V, A, 1.

23. *Arkansas.*— Shover *v.* State, 10 Ark. 259.

Delaware.— State *v.* Chandler, 2 Harr. (Del.) 553.

New York.— Lindenmuller *v.* People, 33 Barb. (N. Y.) 548; Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335.

Ohio.— Bloom *v.* Richards, 2 Ohio St. 387.

Pennsylvania.— Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Mahoney *v.* Cook, 26 Pa. St. 342; Updegraff *v.* Com., 11 Serg. & R. (Pa.) 394, 67 Am. Dec. 419; Granger *v.* Grubb, 7 Phila. (Pa.) 350; Com. *v.* Sigman, 2 Pa. L. J. Rep. 36, 3 Pa. L. J. 252.

South Carolina.—Charleston *v.* Benjamin, 2 Strobh. (S. C.) 508, 49 Am. Dec. 606.

Tennessee.—Bell *v.* State, 1 Swan (Tenn.) 42, 44.

United States.— Vidal *v.* Girard, 2 How. (U. S.) 127, 11 L. ed. 205.

England.— Cowan *v.* Milbourn, L. R. 2 Exch. 230, 36 L. J. Exch. 124, 16 L. T. Rep. N. S. 290, 15 Wkly. Rep. 750; Rex *v.* Woolston, 2 Str. 834; Taylor's Case, Vent. 293.

See 10 Cent. Dig. tit. "Common Law," § 4.

24. See the cases cited in the preceding note.

E. Ecclesiastical Law. Some of the courts have declared the ecclesiastical law to have been a part of the common law of England, and as such to have been adopted, so far as applicable, as a part of the common law in the United States,[25] while others have held the contrary.[26] The true view seems to be that while those principles of ecclesiastical law based upon the union of church and state have no place in our jurisprudence, certain portions of the common law which, under statutes, were administered by ecclesiastical courts have been adopted by us.[27]

F. Law Merchant. So much of the law merchant as was of general application was adopted as a part of the English common law, and so much thereof as is suited to our conditions, and is not repugnant to our constitutions and laws is a part of our common law.[28]

Blasphemy is punishable at common law in this country, not on the ground that it is an offense against the christian religion, but because its tendency is to shock the moral sense of the community and provoke breaches of the peace. See State *v.* Chandler, 2 Harr. (Del.) 553; People *v.* Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph *v.* Com., 11 Serg. & R. (Pa.) 394. And see BLASPHEMY, 5 Cyc. 710.

A contract to lease premises for a blasphemous lecture is illegal. Cowan *v.* Milbourn, L. R. 2 Exch. 230, 36 L. J. Exch. 124, 16 L. T. Rep. N. S. 290, 15 Wkly. Rep. 750.

"The maxim that Christianity is part and parcel of the common law has been frequently repeated by judges and text writers, but few have chosen to examine its truth or attempt to explain its meaning. We have, however, the high authority of Lord Mansfield and of his successor, the present chief justice of the Queen's Bench, Lord Campbell, (Campbell's Lives of Chief Justices, Vol. 2, p. 513,) for stating as its true and only sense, that the law will not permit the essential truths of revealed religion to be ridiculed and reviled. In other words, that blasphemy is an indictable offense at common law. The truth of the maxim in this very partial and limited sense may be admitted. But if we attempt to extend its application, we shall find ourselves obliged to confess that it is unmeaning or untrue. If Christianity is a municipal law, in the proper sense of the term, as it must be if a part of the common law, every person is liable to be punished by the civil power who refuses to embrace its doctrines and follow its precepts; and if it must be conceded that in this sense the maxim is untrue, it ceases to be intelligible, since a law without a sanction is an absurdity in logic and a nullity in fact." Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156, 182.

That christianity is not a part of the common law in the United States see Board of Education *v.* Minor, 23 Ohio St. 211, 246, 13 Am. Rep. 233, where it is said by Judge Welch: "We are told that this word 'religion' must mean 'Christian religion,' because 'Christianity is a part of the common law of this country,' lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a law of the state, like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation — rather, the only excuse — for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people." See also Melvin *v.* Easley, 52 N. C. 356; Bloom *v.* Richards, 2 Ohio St. 387; Specht *v.* Com., 8 Pa. St. 312, 49 Am. Dec. 518.

25. Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886; Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447; Le Barron *v.* Le Barron, 35 Vt. 365. And see Reg. *v.* Millis, 10 Cl. & F. 534, 671, 8 Eng. Reprint 844, where Tindal, C. J., said that the ecclesiastical law formed a part of the common law of England.

26. Burtis *v.* Burtis, Hopk. (N. Y.) 557, 14 Am. Dec. 563, holding that the law of England concerning divorces and matrimonial causes did not form a part of the law of the colony, and was not adopted by the state constitution.

27. Short *v.* Stotts, 58 Ind. 29, holding that an action would lie for breach of promise to marry, because the common law of England authorized such an action long before the time when ecclesiastical courts were given jurisdiction of matters concerning marriage. See also Le Barron *v.* Le Barron, 35 Vt. 365.

28. *Alabama.*— Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Mims *v.* Central Bank, 2 Ala. 294.

Georgia.— Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

Illinois.— Cook *v.* Renick, 19 Ill. 598; Crouch *v.* Hall, 15 Ill. 263.

Indiana.— Patterson *v.* Carrell, 60 Ind. 128; Bartholomew County *v.* Bright, 18 Ind. 93; Piatt *v.* Eads, 1 Blackf. (Ind.) 81.

Iowa.— Woodbury *v.* Roberts, 59 Iowa 348, 13 N. W. 312, 44 Am. Rep. 685.

Louisiana.— Robertson *v.* Nott, 2 Mart.

G. Equity. Equitable principles and rules, as administered in the English court of chancery, in so far as applicable to our conditions, have been adopted as a part of our common or unwritten law.[29]

H. Local Usages. In addition to the unwritten law and early statutes of England, our common law also includes some usages growing out of the peculiar situation and exigencies of the colonies.[30]

III. ADOPTION, REPEAL, AND REVIVAL.

A. Adoption. In some of the states of the Union the common law of England and English statutes enacted prior to a specified time have been expressly adopted by a constitutional provision.[31] In others they have been adopted by

N. S. (La.) 122; Barry *v.* Louisiana Ins. Co., 12 Mart. (La.) 493.

Missouri.— Stagg *v.* Linnenfelser, 59 Mo. 336.

North Carolina.— Weith *v.* Wilmington, 68 N. C. 24.

Pennsylvania.— Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508.

Vermont.— Nash *v.* Harrington, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

United States.— Mercer County *v.* Hacket, 1 Wall. (U. S.) 83, 17 L. ed. 548.

England.— Edie *v.* East India Co., 2 Burr. 1216, 1226.

And see COMMERCIAL PAPER, 7 Cyc. 495.

See 10 Cent. Dig. tit. "Common Law," § 6.

"The law merchant first originated in custom among commercial men, who by common consent adopted such rules and regulations as they found the wants and necessities of commerce required; and as commerce was extended, it spread itself over the kingdom, till it became as universal as any principle of the common law. At first, the courts did not take judicial notice of it, but required proof to show what it was, when they would recognize and enforce it. Soon, however, it began to insinuate itself into the common law, by the courts taking judicial notice of it, till its fibres became so intimately interwoven with the body of the common law itself, that no one could draw the line of demarcation between the two; and the common law, ever improving and adapting itself to the requirements of commerce and the wants of the subject, finally, by progressive judicial decisions, the law merchant, or at least, that portion of it which was of universal application throughout the realm, was recognized by the courts without proof of its existence, and from that time forth, it became absorbed by and really constituted a part of the common law." Cook *v.* Renick, 19 Ill. 598, 601.

29. *Colorado.*—Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248.

Georgia.— Robert *v.* West, 15 Ga. 122.

Maryland.— Koontz *v.* Nabh, 16 Md. 549.

Pennsylvania.— *In re* Pennock, 20 Pa. St. 268, 274, 59 Am. Dec. 718.

Virginia.— Marks *v.* Morris, 4 Hen. & M. (Va.) 463.

And see *infra*, IV, A, 1, c.

30. Com. *v.* Chapman, 13 Metc. (Mass.) 68; Com. *v.* Knowlton, 2 Mass. 530; Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554.

31. *Delaware.*— Del. Const. art. 25, declaring that "the common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force unless they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this Constitution and the declaration of rights, etc., agreed to by this convention." See Clawson *v.* Primrose, 4 Del. Ch. 643, 652.

Kentucky.— Const. Ky. § 233, repeating the provision of the earlier constitutions, adopted all laws in force in Virginia, June 1, 1792, of a general nature and not local to that state nor repugnant to the constitution of Kentucky. And the Virginia act of 1776 (Code, Va. 1889, §§ 2, 3) adopted the common law of England of a general nature, and not local to that kingdom, in force prior to the fourth year of the reign of James I, when Virginia was settled, and certain English statutes enacted prior to that time. See Ætna Ins. Co. *v.* Com., 106 Ky. 864, 51 S. W. 624, 45 L. R. A. 355; Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388.

Maryland.— Md. Const. art. 5, declaring: "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity." See Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572; Coomes *v.* Clements, 4 Harr. & J. (Md.) 482.

Massachusetts.— Mass. Const. c. 6, art. 6, declaring: "All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." See Com. *v.*

statute.[32] And in others they have been adopted or recognized by the courts as in

Chapman, 13 Metc. (Mass.) 68; Com. *v.* Knowlton, 2 Mass. 530.

Minnesota.— Const. Minn. § 2, declaring: "All laws now in force in the Territory of Minnesota not repugnant to this Constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature."

New York.— N. Y. Const. art. 1, § 16, declaring: "Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated." See Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Burtis *v.* Burtis, Hopk. (N. Y.) 628, 14 Am. Dec. 563.

West Virginia.—W. Va. Const. art. 13, § 5 (declaring that "the common law of England, so far as it is not repugnant to the principles of the constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, one thousand eight hundred and sixty-three, or has been, or shall be altered by the legislature of this State"), and § 6 (declaring that "the right and benefit of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to the fourth year of the reign of James the First of a general nature, not local to England, shall still be saved so far as the same may be consistent with the constitution . . . before the twentieth day of June, one thousand eight hundred and sixty-three, and the acts of the legislature of this State").

And see other cases from these states cited *supra*, II, A, B.

32. *Arkansas.*— Sandel & H. Dig. (Ark.) § 600, providing: "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state." See Hardage *v.* Stroope, 58 Ark. 303, 307, 24 S. W. 490.

California.— Cal. Pol. Code, § 4468, declaring: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the Courts of this State." See Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Reed *v.* Eldredge, 27 Cal. 346.

Colorado.— Mill's Anno. Stat. (Colo.) § 4184, declaring: "The common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and ninth chapter of thirty-seventh Henry Eighth,) and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." See Chilcott *v.* Hart, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; Herr *v.* Johnson, 11 Colo. 393, 18 Pac. 342.

Florida.— Fla. Rev. Stat. (1892), § 59, declaring: "The common and statute laws of England which are of a general and not of a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, be, and the same are hereby declared to be of force in this State: Provided, The said statutes and common law be not inconsistent with the Constitution and laws of the United States, and the acts of the legislature of this State."

Illinois.— Ill. Rev. Stat. (1899), c. 28, § 1, containing a provision similar to that in Colorado. See *supra*, this note. See Kreitz *v.* Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59.

Indiana.— Ind. Rev. Stat. (1897), § 236, containing the same provision as in Colorado (*supra*, this note), except that it expressly excludes the common law and English statutes which may be inconsistent with the United States and state constitutions, the state statutes, and valid acts of congress relating to subjects over which congress has the power to legislate — an exclusion which would be implied if not expressed. See Holloway *v.* Porter, 46 Ind. 62; Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92.

Kansas.— Kan. Gen. Stat. (1899), § 7656, declaring: "The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall

force on the ground that they were brought by our ancestors from England, and were in force in the colonies so far as applicable to the new conditions and surroundings.[33]

be liberally construed to promote their object." See Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592; Sattig *v.* Small, 1 Kan. 170.

Missouri.— Mo. Rev. Stat. (1899), § 4151, declaring substantially the same as the Arkansas statute (*supra*, this note). See State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469.

Montana.— Mont. Pol. Code, § 5152, declaring: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state." And see Mont. Code Civ. Proc. § 3452, declaring: "In this state there is no common law in any case where the law is declared by the Code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision." See Thorp *v.* Freed, 1 Mont. 651.

Nebraska.— Nebr. Comp. Stat. (1901), § 1675 (declaring: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory"); and Nebr. Const. art. 16, § 1 (continuing territorial laws in force).

Nevada.— Nev. Comp. Laws (1900), § 3095, providing substantially the same as in California (*supra*, this note). See Vansickle *v.* Haines, 7 Nev. 249.

North Dakota.— N. D. Rev. Codes (1899), § 2691, subd. 4 (adopting the common law); § 2693 (declaring that "the evidence of the common law is found in the decisions of the tribunals"); § 2694 (declaring that there is no common law in any case where the law is declared by the codes).

Pennsylvania.— 1 Pepper & L. Dig. p. 106 (act of Jan. 28, 1777, § 2), adopting with specified exceptions the common law and such of the statute laws of England as had theretofore been in force in the province. See Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554; McDill *v.* McDill, 1 Dall. (Pa.) 63, 1 L. ed. 38.

Rhode Island.— R. I. Gen. Stat. (1896), c. 297, § 3, declaring that "in all cases in which provision is not made herein, such English statutes, introduced before the Declaration of Independence, which have continued to be practised under as in force in this state, shall be deemed and taken as a part of the common law thereof, and remain in force until otherwise specially provided."

South Dakota.— S. D. Anno. Stat. (1901), § 3401 (adopting the laws in force in the territory of Dakota); § 3401*a* (adopting the common law in any and all cases not controlled thereby); § 3404 (declaring that there is no common law in any case where the law is declared by the codes).

Texas.— Sayles Civ. Stat. Tex. art. 3258, declaring that "the common law of England (so far as it is not inconsistent with the constitution and laws of this state) shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature."

Vermont.— Vt. Stat. (1894), § 898, declaring that "so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws, shall be law in this state, and courts shall take notice thereof and govern themselves accordingly."

Virginia.— Va. Code (1887), § 2 (declaring that "the common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly"), and § 3 (declaring that "the right and benefit of all writs, remedial and judicial, given by any statute or act of parliament, made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, so far as the same may consist with the bill of rights and constitution of this state and the acts of Assembly").

Washington.— Ballinger's Anno. Code & Stat. (Wash.) § 4783, declaring that "the common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

Wisconsin.— Wis. Stat. (1898), § 13, declaring that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

And see cases in these states *supra*, II, A, B.

33. *Alabama.*— Matthews *v.* Ansley, 31 Ala. 20; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Carter *v.* Balfour, 19 Ala. 814; State *v.* Cawood, 2 Stew. (Ala.) 360.

Connecticut.— Baldwin *v.* Walker, 21 Conn. 168; Card *v.* Grinman, 5 Conn. 164.

Georgia.— Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Robert *v.* West, 15 Ga. 122; State *v.* Campbell, T. U. P. Charlt. (Ga.) 166.

Iowa.— State *v.* Twogood, 7 Iowa 252.

B. Repeal. The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject-matter.[34] The common law is not repealed, however, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject.[35] Statutes in derogation of the common

Michigan.— Lormon *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435.

Mississippi.— Hemingway *v.* Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586.

New Hampshire.— State *v.* Moore, 26 N. H. 448, 59 Am. Dec. 354.

Ohio.— State *v.* Lafferty, Tapp. (Ohio) 113.

Utah.— Utah First Nat. Bank *v.* Kinner, 1 Utah 100.

And see other cases in these states *supra*, II, A, B.

34. *Colorado.*— People *v.* Goddard, 8 Colo. 432, 7 Pac. 301.

Delaware.— *In re* Lord, etc., Co., 7 Del. Ch. 248, 44 Atl. 775, holding that, where the statute and common law differ, the statute prevails, and where the statute undertakes to regulate the conduct of a matter covered by the common law and omits parts of it the omission will be taken as an intention to repeal or abrogate it.

Iowa.— Hamilton *v.* Schoenberger, 47 Iowa 385; State *v.* McGrew, 11 Iowa 112; Estes *v.* Carter, 10 Iowa 400.

Maine.— Colley *v.* Merrill, 6 Me. 50.

Massachusetts.— Com. *v.* Dennis, 105 Mass. 162; Com. *v.* Cooley, 10 Pick. (Mass.) 37; Pearce *v.* Atwood, 13 Mass. 324.

Missouri.— State *v.* Boogher, 71 Mo. 631.

New Hampshire.— State *v.* Wilson, 43 N. H. 415, 82 Am. Dec. 163.

New Jersey.— State *v.* Norton, 23 N. J. L. 33.

New York.— People *v.* Cleary, 35 N. Y. Suppl. 588, 70 N. Y. St. 209.

Ohio.— Drake *v.* Rogers, 13 Ohio St. 21; Carey *v.* Montgomery County Com'rs, 19 Ohio 245, 281.

See, generally, STATUTES.

Wager of law, if it ever existed in the United States, has been abolished. Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

35. *Arkansas.*—Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766; State *v.* Pierson, 44 Ark. 265; Wilks *v.* Cotter, 28 Ark. 519; Gray *v.* Nations, 1 Ark. 557.

California.— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Van Maren *v.* Johnson, 15 Cal. 308.

Illinois.— Smith *v.* Laacsch, 114 Ill. 271, 2 N. E. 59; Cadwallader *v.* Harris, 76 Ill. 370.

Iowa.— Goodwin *v.* Thompson, 2 Greene (Iowa) 329.

Maryland.— Greenwood *v.* Greenwood, 28 Md. 369; Keech *v.* Baltimore, etc., R. Co., 17 Md. 32; Hooper *v.* Baltimore, 12 Md. 464.

Massachusetts.— Chadbourn *v.* Chadbourn, 9 Allen (Mass.) 173, where it is said: "Repeals are not to be favored by implication, and courts of law are scrupulously careful not to sanction such repeals, unless the intention of the legislature to abrogate the previously existing law is clearly manifest. Whenever it is apparent that a different purpose may be attained without essentially impairing the effect of the operative words of a statute, that construction is to be adopted which will leave the common law or an earlier enactment in force." See also Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

Michigan.— Brown *v.* Fifield, 4 Mich. 322.

Minnesota.— State *v.* Pulle, 12 Minn. 164, where it is said: "It is well settled that where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when and so far as directly and irreconcilably opposed in terms."

Missouri.— Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

New Hampshire.—State *v.* Wilson, 43 N. H. 415, 82 Am. Dec. 163, holding that a statute imposing a penalty for occupying a building in the compact part of a town as a slaughter-house, without license, does not repeal the common law in relation to nuisances.

New Jersey.— State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; State *v.* Norton, 23 N. J. L. 33.

New York.— Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184; Fairchild *v.* Gwynne, 14 Abb. Pr. (N. Y.) 121; Almy *v.* Harris, 5 Johns. (N. Y.) 175.

Pennsylvania.—Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554.

United States.— Sutton *v.* Mandeville, 1 Cranch C. C. (U. S.) 115, 23 Fed. Cas. No. 13,650; Stoddard *v.* Gibbs, 1 Sumn. (U. S.) 263, 23 Fed. Cas. No. 13,468.

See 10 Cent. Dig. tit. "Common Law," § 12; and, generally, STATUTES.

A constitutional provision in derogation of the common law will be strictly construed. Brown *v.* Fifield, 4 Mich. 322. See, generally, CONSTITUTIONAL LAW.

It will be presumed that the legislature, in enacting a statute, did not intend to make any alteration in the common law other than that specifically stated. Cadwallader *v.* Harris, 76 Ill. 370; Hooper *v.* Baltimore, 12 Md. 464.

The statute of limitations is not inconsistent with and does not repeal the common-law doctrine as to presumption of payment from lapse of time. Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592. See, generally, PAYMENT.

Repeal of a statute affirming a rule of the common law does not necessarily effect an abolition of the common-law rule. Smith *v.*

law are to be strictly construed,[36] unless as in some states there is a statutory provision to the contrary.[37]

C. Revival. When a statute abrogating a rule or principle of the common law is repealed, the common-law principle or rule is *ipso facto* revived,[38] unless there is something to show a contrary intent on the part of the legislature.[39]

IV. EXTENT OF ADOPTION AND APPLICATION.

A. In the States — 1. The Unwritten Law — a. In General. The entire body of the English common or unwritten law has been adopted and is in force in most of the states, so far as applicable to their conditions and surroundings and not changed by statute,[40] but no farther. Those rules and principles of the common law which were only of local application in England, or which, although of general application, are not suited to our new conditions and surroundings, or which

Laatsch, 114 Ill. 271, 2 N. E. 59; Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184.

Construction of statutes in light of common law see *infra*, IV, A, 4.

Effect of statute on common-law remedy see *infra*, IV, A, 3.

36. *Alabama.*— Cook *v.* Meyer, 73 Ala. 580.

Arkansas.— Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766; Gray *v.* Nations, 1 Ark. 557, 568 (where it was said: "It is a rule of sound, legal construction, fortified by authority and reason, that a Statute shall not be taken in derogation of the common law, unless the act itself shows such to have been the intention and object of the Legislature").

California.— Pina *v.* Peck, 31 Cal. 359; Turner *v.* Tuolumne County Water Co., 25 Cal. 397; People *v.* Buster, 11 Cal. 215; Hotaling *v.* Cronise, 2 Cal. 60.

Georgia.— Sugar *v.* Sackett, 13 Ga. 462; Macon *v.* Macon, etc., R. Co., 7 Ga. 221; Young *v.* McKenzie, 3 Ga. 31.

Illinois.— Harvey *v.* Aurora, etc., Co., 174 Ill. 295, 51 N. E. 163; Smith *v.* Laatsch, 114 Ill. 271, 2 N. E. 59.

Iowa.— Kramer *v.* Rebman, 9 Iowa 114.

Maine.— Dwelly *v.* Dwelly, 46 Me. 377.

Massachusetts.— Chadbourn *v.* Chadbourn, 9 Allen (Mass.) 173.

Michigan.— Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611; Detroit *v.* Putnam, 45 Mich. 263, 7 N. W. 815; James *v.* Howard, 4 Mich. 486; Sibley *v.* Smith, 2 Mich. 486.

Minnesota.— Sullivan *v.* La Crosse, etc., Steam Packet Co., 10 Minn. 386.

Mississippi.— Hollman *v.* Bennett, 44 Miss. 322.

New York.— Burnside *v.* Whitney, 21 N. Y. 148; Dewey *v.* Goodenough, 56 Barb. (N. Y.) 54; Smith *v.* Moffat, 1 Barb. (N. Y.) 65; Briggs *v.* Todd, 28 Misc. (N. Y.) 208, 59 N. Y. Suppl. 23; Sharp *v.* Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259. And see Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184.

North Carolina.— Bailey *v.* Bryan, 48 N. C. 357, 67 Am. Dec. 246.

Pennsylvania.— Esterley's Appeal, 54 Pa. St. 192.

Tennessee.— Hearn *v.* Ewin, 3 Coldw. (Tenn.) 399.

United States.— Brown *v.* Barry, 3 Dall. (U. S.) 365, 1 L. ed. 638.

And see the other cases cited in the preceding note. See also STATUTES; and 10 Cent. Dig. tit. "Common Law," § 12.

37. In some states there is a statutory provision that the common-law rule, that statutes in derogation of the common law are to be strictly construed shall not apply, but that they shall be liberally construed so as to effect their object and to promote justice.

California.— Cal. Pol. Code, § 4; Cal. Civ. Code, § 4.

Idaho.— Ida. Code Civ. Proc. § 3; Darby *v.* Heagerty, 2 Ida. 260, 13 Pac. 85.

Kansas.— Kan. Gen. Stat. (1899), § 7656.

Montana.— Mont. Civ. Code, § 4652; Mont. Code Civ. Proc. § 3453.

New York.— N. Y. Code Civ. Proc. § 3345.

Ohio.— Bates' Anno. Stat. (Ohio, 1900), § 4948.

And see, generally, STATUTES.

38. Com. *v.* Churchill, 2 Metc. (Mass.) 118; Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; State *v.* Rollins, 8 N. H. 550; Nickels *v.* Kane, 82 Va. 309; Moseley *v.* Brown, 76 Va. 419; Booth *v.* Com., 16 Gratt. (Va.) 519; Virginia Valley Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363 (holding also that the rule is not changed by a statute providing that when a law which may have repealed another shall itself be repealed the previous law shall not be revived without express words to that effect unless the law repealing it be passed the same session); Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281. See, generally, STATUTES.

Acts done prior to repeal.— The preëxisting law is not revived, however, so as to apply to acts committed prior to the repeal and when it was not in force. Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377.

39. Com. *v.* Churchill, 2 Metc. (Mass.) 118; Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; State *v.* Slaughter, 70 Mo. 484. See, generally, STATUTES.

40. See constitutional and statutory provisions and cases referred to *supra*, III, A. And see cases cited *supra*, II, A.

are inconsistent with our constitutions or statutes are not in force.[41] It is obvious that a common-law doctrine which is recognized as in force in one state may be inapplicable and not in force in another.[42]

b. Particular Principles and Rules — (1) *Held in Force.* Among the common-law rules and principles which have been held applicable and in force in some states are those as to rights of action and forms of remedy;[43] mode of procedure in actions at common law;[44] form of judgment and power of the court to annex directions and conditions;[45] interest on judgments;[46] rules of evidence;[47] as to nuisances;[48] that judicial proceedings cannot be had on Sunday,

41. *California.*—Reed *v.* Eldredge, 27 Cal. 346; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561.

Colorado.— Morris *v.* Fraker, 5 Colo. 425.

Delaware.— Clawson *v.* Primrose, 4 Del. Ch. 643.

Florida.— McKinny *v.* State, 29 Fla. 565, 10 So. 732, 30 Am. St. Rep. 140.

Georgia.— Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497; State *v.* Campbell, T. U. P. Charlt. (Ga.) 166.

Illinois.— People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492; Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Baker *v.* Scott, 62 Ill. 86; Fisher *v.* Deering, 60 Ill. 114; Gerber *v.* Grabel, 16 Ill. 217; Stuart *v.* People, 4 Ill. 395; Boyer *v.* Sweet, 4 Ill. 120.

Indiana.— Dawson *v.* Coffman, 28 Ind. 220; Titus *v.* Scantling, 4 Blackf. (Ind.) 89.

Kansas.— Whitaker *v.* Hawley, 25 Kan. 674, 37 Am. Rep. 277; Tousley *v.* Galena Mining, etc., Co., 24 Kan. 328; Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355.

Kentucky.— Heilman *v.* Com., 84 Ky. 457, 8 Ky. L. Rep. 451, 1 S. W. 731, 4 Am. St. Rep. 207; Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388.

Louisiana.— State *v.* Jones, 39 La. Ann. 935, 3 So. 57.

Maine.— Colley *v.* Merrill, 6 Me. 50.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Knowlton, 2 Mass. 530.

Mississippi.— Green *v.* Weller, 32 Miss. 650, 705; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Noonan *v.* State, 1 Sm. & M. (Miss.) 562.

Montana.— Thorp *v.* Freed, 1 Mont. 651.

Nevada.— Reno Smelting, Milling, etc., Works *v.* Stevenson, 20 Nev. 269, 21 Pac. 317, 19 Am. St. Rep. 364, 4 L. R. A. 60. See also Clark *v.* Clark, 17 Nev. 124, 28 Pac. 238.

New Hampshire.— Pierce *v.* State, 13 N. H. 536; State *v.* Rollins, 8 N. H. 550.

New Mexico.— Bent *v.* Thompson, 5 N. M. 408, 23 Pac. 234.

New York.— Morgan *v.* King, 30 Barb. (N. Y.) 9; Myers *v.* Gemmel, 10 Barb. (N. Y.) 537; Parker *v.* Foote, 19 Wend. (N. Y.) 309; People *v.* Randolph, 2 Park. Crim. (N. Y.) 174.

Ohio.—Carey *v.* Montgomery County Com'rs, 19 Ohio 245, 281; Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536; Lindsley *v.* Coats, 1 Ohio 243.

Pennsylvania.— Flanagan *v.* Philadelphia, 42 Pa. St. 219.

South Carolina.—Jaggers *v.* Estes, 2 Strobh. Eq. (S. C.) 343, 49 Am. Dec. 674.

Tennessee.—Wagoner *v.* State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36.

Vermont.— *In re* Hackett, 53 Vt. 354; Martin *v.* Bigelow, 2 Aik. (Vt.) 184, 16 Am. Dec. 696.

West Virginia.— Northwestern Bank *v.* Machir, 18 W. Va. 271; State *v.* Allen, 8 W. Va. 680; Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629.

United States.— Luhrs *v.* Hancock, 181 U. S. 567, 21 S. Ct. 567, 45 L. ed. 1005 [*affirming* (Ariz. 1899) 57 Pac. 605], holding that the adoption of the common law by Laws Ariz. (1885), No. 68, so far as not repugnant to or inconsistent with the constitution of the United States, bill of rights, or laws and customs of the territory, does not include an adoption of the common-law rule precluding a husband from making a conveyance directly to his wife without the intervention of a trustee, since the preëxisting laws of the territory provide for community property of husband and wife, allowing the wife to have separate property and the absolute disposition thereof. See also Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374.

Power to disregard common-law rule.— When a case arises for the first time in a state, the common law will not be disregarded and a new rule created merely because the English judges have frequently regretted the adoption of the common-law rule. Johnson *v.* Fall, 6 Cal. 359, 65 Am. Dec. 518.

42. See the conflicting cases cited *infra*, IV, A, 1, b, (II) notes.

43. Sattig *v.* Small, 1 Kan. 170. See *infra*, IV, A, 3.

44. Reed *v.* Eldredge, 27 Cal. 346.

45. Reed *v.* Eldredge, 27 Cal. 346. See, generally, Judgments.

46. Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387. See, generally, Interest.

47. Doe *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108, holding that the rule that exemplification of a copy of a grant of land or patent by the state under the great seal of the state is admissible in evidence without producing or accounting for failure to produce the original was in force.

48. State *v.* Wilson, 43 N. H. 415, 82 Am. Dec. 163. See, generally, Nuisances.

but that ministerial acts may be performed;[49] as to right of a *de jure* officer to recover from a *de facto* officer fees collected by the latter;[50] that the resignation of a public officer is not complete until the proper authority accepts it or does something equivalent thereto;[51] the law of charitable uses as modified by statute;[52] rules as to the duties and liabilities of common carriers;[53] as to a master's liability for injury to his servant by reason of defective machinery;[54] the rule preventing recovery from a master for an injury occasioned by the negligence of a fellow-servant;[55] the law of marriage and divorce;[56] the doctrine that a married woman's contracts are void;[57] the rules as to property rights of married women and a husband's rights in his wife's property;[58] the doctrine as to curtesy;[59] that a widow is entitled to a portion of her deceased husband's goods;[60] the rule in Shelley's case;[61] that a deed conveying land is valid between the parties, although unacknowledged and without a subscribing witness;[62] that a bailee has a lien for labor and skill bestowed on a chattel;[63] that an action will not lie for causing the death of a human being;[64] illegality of contracts;[65] champerty and maintenance;[66] distress for rent;[67] that conveyance of a lot bounded on a highway conveys, not merely the grantor's interest in the lot, but also his interest in the highway on which it abuts;[68] right to recover wagers;[69] that aliens cannot take by descent or inherit lands;[70] as to presumption of payment from lapse of time;[71] that protest of a note is not necessary;[72] that a general assignment for the benefit of creditors with preferences, by a natural person or corporation, is valid;[73] that the flow of surface water from premises of an upper

49. Matthews *v.* Ansley, 31 Ala. 20. See, generally, SUNDAY.

50. Kreitz *v.* Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59. See, generally, OFFICERS.

51. State *v.* Clayton, 27 Kan. 442, 41 Am. Rep. 418. See, generally, OFFICERS.

52. Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Bascom *v.* Albertson, 34 N. Y. 584; Williams *v.* Williams, 8 N. Y. 525. See, generally, CHARITIES, 6 Cyc. 900.

53. Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 252, 12 Am. Rep. 494. See, generally, CARRIERS, 6 Cyc. 352.

54. Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338. See, generally, MASTER AND SERVANT.

55. Baltimore, etc., R. Co. *v.* Jones, 158 Ind. 87, 62 N. E. 994. See, generally, MASTER AND SERVANT.

56. Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886. See, generally, DIVORCE; HUSBAND AND WIFE; MARRIAGE.

57. Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663. See, generally, HUSBAND AND WIFE.

58. Robert *v.* West, 15 Ga. 122; Hanchett *v.* Rice, 22 Ill. App. 442; Schurman *v.* Marley, 29 Ind. 458; Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353. See, generally, HUSBAND AND WIFE.

59. McCorry *v.* King, 3 Humphr. (Tenn.) 267, 39 Am. Dec. 165. See, generally, CURTESY.

60. Coomes *v.* Clements, 4 Harr. & J. (Md.) 480; Griffith *v.* Griffith, 4 Harr. & M. (Md.) 101; Clark *v.* Clark, 17 Nev. 124, 28 Pac. 238. See, generally, DESCENT AND DISTRIBUTION.

61. Hardage *v.* Stroope, 58 Ark. 303, 24 S. W. 490; Baker *v.* Scott, 62 Ill. 86. See DEEDS; WILLS.

62. Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92. See, generally, ACKNOWLEDGMENTS, 1 Cyc. 506; DEEDS.

63. Drummond Carriage Co. *v.* Mills, 54 Nebr. 417, 74 N. W. 966, 69 Am. St. Rep. 719, 40 L. R. A. 671. See geenrally, BAILMENTS, 5 Cyc. 193; LIENS.

64. Wilson *v.* Bumstead, 12 Nebr. 1, 10 N. W. 411. See, generally, DEATH.

65. Thurston *v.* Percival, 1 Pick. (Mass.) 415. See, generally, CONTRACTS.

66. Lynn *v.* Moss, 23 Ky. L. Rep. 214, 62 S. W. 712; Thurston *v.* Percival, 1 Pick. (Mass.) 415. See, generally, CHAMPERTY AND MAINTENANCE, 6 Cyc. 847.

67. Dutcher *v.* Culver, 24 Minn. 584. And see St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334. *Compare* Herr *v.* Johnson, 11 Colo. 393, 18 Pac. 342. See, generally, LANDLORD AND TENANT.

68. Tousley *v.* Galena Min., etc., Co., 24 Kan. 328. See, generally, STREETS AND HIGHWAYS.

69. Johnson *v.* Fall, 6 Cal. 359, 65 Am. Dec. 518; Evans *v.* Cook, 11 Nev. 69 (as altered by the statute of 9 Anne, c. 14). See, generally, GAMING.

70. Hunt *v.* Warnicke, Hard. (Ky.) 61. See, generally, ALIENS, 2 Cyc. 94.

71. Courtney *v.* Standenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592. See, generally, PAYMENT.

72. Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876. See, generally, COMMERCIAL PAPER, 7 Cyc. 1052.

73. Matter of Hulbert, 38 N. Y. App. Div. 323, 57 N. Y. Suppl. 38. See, generally, AS-

proprietor to those of a lower cannot be obstructed or diverted to his damage;[74] that a clergyman is not required to serve as constable, overseer of the poor or of highways, or as a juror, etc.;[75] the rule entitling a person accused of crime to counsel.[76]

(11) *HELD NOT IN FORCE.* Among the doctrines which have in some states been held inapplicable to conditions and not in force are the doctrines that cutting a standing tree is waste;[77] that a dog is not the subject of larceny;[78] that a boy under fourteen years of age is conclusively presumed to be physically incapable of committing rape;[79] that a general hiring shall be taken to be a hiring for a year;[80] that, upon a covenant to pay rent in a lease of land and buildings for a term of years, the rent may be recovered notwithstanding total destruction of the building by accidental fire, etc.;[81] as to contempt of court by publications in newspapers;[82] definition of navigable streams as those only in which the tide ebbs and flows;[83] as to the right by prescription to an easement of light and air over another's land;[84] as to the rights of riparian proprietors in the waters of running streams;[85] as to shifting inheritances;[86] as to easements in party walls by prescription;[87] as to cattle trespassing on the uninclosed and uncultivated lands of another;[88] the common-law modes of transferring real estate by parol;[89] the doctrine of estate by the entireties;[90] the rule forbidding a tenant to remove agricultural fixtures.[91]

c. **Equitable Principles.** Equitable principles, so far as applicable to our

SIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 163; CORPORATIONS.

74. Cass *v.* Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859. See, generally, WATERS.

75. Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554.

76. People *v.* Onondaga County, 4 N. Y. Crim. 102. And see, generally, CRIMINAL LAW.

77. Dawson *v.* Coffman, 28 Ind. 220. See, generally, WASTE.

78. Harrington *v.* Miles, 11 Kan. 480, 15 Am. St. Rep. 355. *Contra,* Ward *v.* State, 48 Ala. 161, 17 Am. Rep. 31. See, generally, LARCENY.

79. Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; State *v.* Jones, 39 La. Ann. 935, 3 So. 57; People *v.* Randolph, 2 Park. Crim. (N. Y.) 174; Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536. And see, generally, RAPE.

80. Kansas Pac. R. Co. *v.* Roberson, 3 Colo. 142. See, generally, MASTER AND SERVANT.

81. Whitaker *v.* Hawley, 25 Kan. 674, 37 Am. Rep. 277 (per Brewer, J.); Wattles *v.* South Omaha Ice, etc., Co., 50 Nebr. 251, 69 N. W. 785, 61 Am. St. Rep. 554, 36 L. R. A. 424. See, generally, LANDLORD AND TENANT.

82. Stuart *v.* People, 4 Ill. 395. See, generally, CONTEMPT.

83. Fulmer *v.* Williams, 122 Pa. St. 191, 15 Atl. 726, 9 Am. St. Rep. 88, 1 L. R. A. 603; Flanagan *v.* Philadelphia, 42 Pa. St. 219; Morgan *v.* King, 30 Barb. (N. Y.) 9. See, generally, NAVIGABLE WATERS.

84. Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497; Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388; Myers *v.* Gemmel, 10 Barb. (N. Y.) 537; Parker *v.* Foote, 19 Wend. (N. Y.) 309. *Contra,* Clawson *v.* Primrose, 4 Del. Ch. 643; Gerber *v.* Grabel, 16 Ill. 217. And see, generally, EASEMENTS.

85. Reno Smelting, etc., Works *v.* Stevenson, 20 Nev. 269, 21 Pac. 317, 19 Am. St. Rep. 364, 4 L. R. A. 60; Vansickle *v.* Haines, 7 Nev. 249; Martin *v.* Bigelow, 2 Aik. (Vt.) 184, 16 Am. Dec. 696. *Contra,* Thorp *v.* Freed, 1 Mont. 651; Slattery *v.* Harley, 58 Nebr. 575, 79 N. W. 151; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Morgan *v.* King, 30 Barb. (N. Y.) 9. And see Hill *v.* Smith, 27 Cal. 476. See also WATERS.

Riparian rights in lakes.— The common-law rule that the proprietor of land on the bank of a river above tide water takes to the middle of the stream does not apply to our Great Lakes. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484. And see Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

86. Cox *v.* Matthews, 17 Ind. 367; Drake *v.* Rogers, 13 Ohio St. 21.

87. Hicatt *v.* Morris, 10 Ohio St. 523, 78 Am. Dec. 280. See, generally, PARTY WALLS.

88. Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561; Morris *v.* Fraker, 5 Colo. 425; Lorance *v.* Hillyer, 57 Nebr. 266, 77 N. W. 755; Delaney *v.* Errickson, 10 Nebr. 492, 6 N. W. 600, 35 Am. Rep. 487, 11 Nebr. 533, 10 N. W. 451. *Contra,* Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229. And *contra,* as to cultivated lands, Lorance *v.* Hillyer, 57 Nebr. 266, 77 N. W. 755. See, generally, ANIMALS, 2 Cyc. 288.

89. Lindsley *v.* Coats, 1 Ohio 243. See, generally, DEEDS.

90. Kerner *v.* McDonald, 60 Nebr. 663, 84 N. W. 92, 83 Am. Dec. 550. See, generally, HUSBAND AND WIFE.

91. See Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374. And see, generally, FIXTURES.

conditions and not changed by statute, have been adopted as a part of our common law,[92] as for example principles in relation to the property rights of married women,[93] liability of her separate estate for debts contracted by her,[94] and relief in equity against usury.[95] It has been held that whenever a right claimed under the rules of the common law is denied, governed, or controlled by the principles administered by courts of equity the latter will prevail over the former and it is the duty of the courts in administering justice to decide and render judgment accordingly.[96]

d. Time of Existence of Common Law. In some jurisdictions, but not in others, those common-law rules only which were in force prior to the fourth year of the reign of James I, when Virginia was settled, were adopted.[97]

2. English Statutes. In some states the constitution or statute adopted those English statutes only which were enacted prior to the fourth year of the reign of James I when the colony of Virginia was settled.[98] Other states adopted those enacted prior to July 4, 1776, or a date near that time, and which had been found applicable to local conditions and used and practised upon by the courts.[99] Others fixed no date, but adopted those which had been adopted and recognized as in force prior to the adoption of the constitution.[1] In the absence of express adoption the courts have recognized as in force statutes of a general nature enacted prior to the emigration of the colonists, and some which were enacted afterward and which had been recognized and acted upon.[2] In all states only those statutes which were of a general nature and applicable to our new conditions and surroundings have been adopted.[3]

92. *Supra*, II, G. See, generally, EQUITY, and other specific titles.

93. Robert *v.* West, 15 Ga. 122. See, generally, HUSBAND AND WIFE.

94. Koontz *v.* Nabb, 16 Md. 549. See, generally, HUSBAND AND WIFE.

95. Marks *v.* Morris, 4 Hen. & M. (Va.) 463. See, generally, USURY.

96. Willis *v.* Wozencraft, 22 Cal. 607.

97. See *supra*, II, A. See Herr *v.* Johnson, 11 Colo. 393, 18 Pac. 342 (holding the remedy by distress for rent was not in force in England prior to the fourth year of James I, and was therefore not in force in Colorado); Ray *v.* Sweeney, 14 Bush (Ky.) 1, 29 Am. Rep. 388 (holding that the English common-law doctrine as to ancient lights was established after that time, and was therefore not in force in Kentucky).

98. Mill's Anno. Stat. Colo. § 4184; Sandel & H. Dig. Ark. § 600. See Halloway *v.* Porter, 46 Ind. 62, holding that the statute of Anne relating to the negotiability of promissory notes, as it was enacted after the fourth year of James I, was never in force in Indiana. And see *supra*, III, A.

99. Fla. Rev. Stat. (1892), § 59; Md. Const. art. 5. And see Evans *v.* Cook, 11 Nev. 69; *Ex p.* Blanchard, 9 Nev. 101; Hamilton *v.* Kneeland, 1 Nev. 40. See also *supra*, III, A.

1. Del. Const. art. 25; Mass. Const. c. 6, art. 6. See *supra*, III, A.

2. Matthews *v.* Ansley, 31 Ala. 20; Respublica *v.* Mesca, 1 Dall. (Pa.) 73, 1 L. ed. 42; McDill *v.* McDill, 1 Dall. (Pa.) 63, 1 L. ed. 38. See *supra*, II, B; III, A.

3. *Alabama.*— Clark *v.* Goddard, 39 Ala. 164, 84 Am. Dec. 777.

Georgia.— State *v.* Campbell, T. U. P. Charlt. (Ga.) 166.

Maine.— Colley *v.* Merrill, 6 Me. 50.

New York.— Williams *v.* Williams, 8 N. Y. 525.

Pennsylvania.— McDill *v.* McDill, 1 Dall. (Pa.) 63, 1 L. ed. 38. And see *infra*, this note.

Tennessee.— Simpson *v.* State, 5 Yerg. (Tenn.) 356.

See also *supra*, II, B; III, A.

English statutes held to have been adopted. — Statutes of Limitations, 32 Hen. VIII, c. 2 (Morris *v.* Vanderen, 1 Dall. (Pa.) 64 1 L. ed. 38); 21 Jac. I (Browning *v.* Browning, 3 N. M. 371, 9 Pac. 677). See LIMITATION OF ACTIONS.

Statute of Frauds, 29 Car. II, c. 3. Cahill Iron Works *v.* Pemberton, 27 N. Y. Suppl. 927, 931, 30 Abb. N. Cas. (N. Y.) 450. See FRAUDS, STATUTE OF.

Statute of Uses, 27 Hen. VIII, c. 10. Horton *v.* Sledge, 29 Ala. 478. *Contra*, Farmers', etc., Ins. Co. *v.* Jensen, 58 Nebr. 522, 78 N. W. 1054, 44 L. R. A. 861. See, generally, TRUSTS.

Statute against lotteries, 10 & 11 Wm. III, c. 17. *Ex p.* Blanchard, 9 Nev. 101. See, generally, LOTTERIES.

Statutes giving creditors the right to recover their debts from executors and administrators of executors, 30 Car. II, c. 7, and part of 4 & 5 Wm. & M. c. 24. Sibley *v.* Williams, 3 Gill & J. (Md.) 52. See, generally, EXECUTORS AND ADMINISTRATORS.

Statutes concerning escapes, 13 Edw. I, c. 11, and 1 Rich. II, c. 12. Shewell *v.* Fell, 3 Yeates (Pa.) 17. See, generally, ESCAPE.

Statute giving judgment creditor a writ

3. Common-Law Remedies. The common law is in force in the various states of the Union, except in so far as it has been abolished by statute, as to the remedies for enforcing rights and redressing wrongs.[4] And the general rule is that an affirmative statute giving a remedy not known to the common law does not take away the common-law remedy.[5] When a statute gives a right without providing a remedy, the common-law remedy may be resorted to, if applicable.[6] Accordingly when a statute gives the power to issue a common-law writ, as a

of elegit, 13 Edw. I, c. 18. Nelson *v.* McCrary, 60 Ala. 301. See, generally, Elegit.

Statute relating to twenty years' possession, 21 Jac. I, c. 16. Biddle *v.* Shippen, 1 Dall. (Pa.) 19, 1 L. ed. 19.

Statute disqualifying a person from holding office who has used corrupt means to obtain it, 5 & 6 Edw. VI, c. 16. People *v.* Goddard, 8 Colo. 432, 7 Pac. 301. See, generally, Officers.

Statute of additions, requiring place to be stated in which defendant was conversant, in personal actions, appeals, and indictments, 1 Hen. V, c. 5. State *v.* Moore, 14 N. H. 451.

Statutes as to fraudulent conveyances, 13 Eliz. and 27 Eliz. c. 4. Hildreth *v.* Sands, 2 Johns. Ch. (N. Y.) 35 [*affirmed* in 14 Johns. (N. Y.) 493]; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784. See, generally, Fraudulent Conveyances.

Statute as to scire facias, Westminster II, c. 45. Dykes *v.* Woodhouse, 3 Rand. (Va.) 287. See, generally, Scire Facias.

Statute of *quia emptores*, 18 Edw. I, c. 1. Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278. See, generally, Estates.

Statutes as to forcible entry and detainer, 5 Rich. II, c. 7; 8 Hen. VI, c. 9; and 31 Eliz. c. 11. U. S. *v.* Griffin, 6 D. C. 53; Harding's Case, 1 Me. 22; State *v.* Speirin, 1 Brev. (S. C.) 119. See, generally, Forcible Entry and Detainer.

Statute allowing avowant in replevin, on breach of the condition in the bond, to take an assignment of it, and bring debt, 11 Geo. II. Pemble *v.* Clifford, 2 McCord (S. C.) 31. See, generally, Replevin.

Statute entitling the assignee of the reversion to maintain an action against the lessee on covenant in lease to pay rent, 32 Hen. VIII, c. 34. Bradley *v.* Peabody Coal Co., 99 Ill. App. 427. *Contra*, Crawford *v.* Chapman, 17 Ohio 449. See Landlord and Tenant.

Statute as to wagers, 9 Anne, c. 14. Evans *v.* Cook, 11 Nev. 69. See Gaming.

Statutes held not in force. — Statute against embracery, 32 Hen. VIII, c. 9. Morris *v.* Vanderen, 1 Dall. (Pa.) 64, 1 L. ed. 38. See Embracery.

Statute in relation to charitable uses, 43 Eliz. c. 4. Williams *v.* Williams, 8 N. Y. 525; Garden City Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572. *Compare* Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278. See also Charities, 6 Cyc. 901.

Statute as to partition walls, 5 Wm. & M. c. 13, § 2. Wilkins *v.* Jewett, 139 Mass. 29, 29 N. E. 214. See Party Walls.

Statute containing divers orders for artificers, laborers, servants of husbandry, and apprentices, 5 Eliz. c. 4. Clark *v.* Goddard, 39 Ala. 164, 84 Am. Dec. 777.

Statutes relating to the ecclesiastical courts founded by William I. Short *v.* Stotts, 58 Ind. 29.

Statute of Anne, as to negotiability of promissory notes. Holloway *v.* Porter, 46 Ind. 62. See Commercial Paper, 7 Cyc. 533.

Statute as to perjury, 23 Geo. II. Com. *v.* Lodge, 2 Gratt. (Va.) 579. See Perjury.

Statute *de donis*, as to estates tail, 13 Edw. I. Pierson *v.* Lane, 60 Iowa 60, 14 N. W. 90; Jewell *v.* Warner, 35 N. H. 176. See Estates Tail.

The "Black Act," 9 Geo. I, for the protection of game parks. State *v.* Campbell, T. U. P. Charlt. (Ga.) 166. See Fish and Game.

Statutes in force in Pennsylvania have been enumerated by the judges. See Report of Judges, 3 Binn. (Pa.) 595. The omission of an English statute from this report raises a strong presumption that it is not in force, Gardner *v.* Keihl, 182 Pa. St. 194, 37 Atl. 829.

4. Sattig *v.* Small, 1 Kan. 170. See Actions, 1 Cyc. 634; Assumpsit, Action of, 4 Cyc. 317; Trespass; and other special titles.

5. Ward *v.* Severance, 7 Cal. 126; People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Candee *v.* Hayward, 37 N. Y. 653; Fairchild *v.* Gwynne, 14 Abb. Pr. (N. Y.) 121; Almy *v.* Harris, 5 Johns. (N. Y.) 175. See Actions, 1 Cyc. 706 *et seq.*

But where a new right is created by statute, and a special remedy is given by the statute, such remedy is exclusive. Ward *v.* Severance, 7 Cal. 126. See Actions, 1 Cyc. 707.

6. Hightower *v.* Fitzpatrick, 42 Ala. 597; Kneass *v.* Schuylkill Bank, 4 Wash. (U. S.) 106, 14 Fed. Cas. No. 7,876, 1 Fish. Pat. Rep. 1; Ross *v.* Rugge-Price, 1 Ex. D. 269, 273, 45 L. J. Exch. 777, 34 L. T. Rep. N. S. 535, 24 Wkly. Rep. 786, where it was said: "Unless you find some remedy given in the statute where a benefit is given to an individual, or find in the statute clearly that it was not intended to give him any such remedy, the law there implies that he may have

writ of mandamus, the common law determines when and under what circumstances such writ should be issued.[7]

4. Effect in Construction of Constitutions and Statutes. Constitutions and statutes are to be construed with reference to the principles of the common law.[8] And whenever a constitution or statute uses a word which has a well-known and definite meaning at common law, it is to be given the same sense in which it was understood at common law.[9]

5. Criminal Law. In most states the common law in relation to crimes and criminal procedure has been adopted or recognized by the courts as in force, except in so far as it has been abrogated or repealed, expressly or impliedly, by statute.[10] But it is in force only in so far as it is applicable to our conditions,

his common-law remedy." See Actions, 1 Cyc. 706.

7. Fitch *v.* McDiarmid, 26 Ark. 482; Kentucky *v.* Denison, 24 How. (U. S.) 66, 16 L. ed. 717. See, generally, Mandamus.

8. *Arkansas.*— State *v.* Pierson, 44 Ark. 265.

California.— Van Maren *v.* Johnson, 15 Cal. 308; Baker *v.* Baker, 13 Cal. 87.

Colorado.— Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Connecticut.—Leavenworth *v.* Marshall, 19 Conn. 1, 4 [*citing* Nares *v.* Rowles, 14 East 510; Stowel *v.* Zouch, Plowd. 353*a*; Miles *v.* Williams, 1 P. Wms. 249, 24 Eng. Reprint 375, Coke Litt. 148, § 301; Thursby *v.* Plant, 1 Saund. 237], where it was said: "Statutes also are to be construed with reference to the principles of the common law. The expositors of a statute are also to approach as near as they can to the reason of the common law. . . . And the best interpretation of a statute, is, to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases."

Maryland.— Keech *v.* Baltimore, etc., R. Co., 17 Md. 32, holding that the well-settled principle of the common law that the plaintiff is not entitled to recover for injuries to which his own fault or negligence has directly contributed, was not abrogated by the several statutes regulating the liability of railroad companies for stock killed or injured by their trains.

Massachusetts.— Wilbur *v.* Crane, 13 Pick. (Mass.) 284.

Mississippi.— Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

Missouri.— Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

Pennsylvania.—Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554, where a statute providing for the election of guardians of the poor, and in terms exempting no one from liability to serve, was construed in the light of the common-law rule exempting clergymen from liability to serve as constable, overseer of highways or of the poor, or as jurors, etc., and was held to impliedly exempt them.

United States.—Murray *v.* Chicago, etc., R. Co., 62 Fed. 24.

See, generally, Constitutional Law; Statutes.

As to repeal of the common law by a statute see *supra*, III, B.

A statute in affirmance of the common law is to be construed as was the rule by that law. Baker *v.* Baker, 13 Cal. 87.

Damages.— Where a statute gives an action in a new case and no rule for estimating the damages is given, those ordinarily applicable in like cases at the common law must be held to govern. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

9. Leavenworth *v.* Marshall, 19 Conn. 1 [*citing* Smith *v.* Harmon, 6 Mod. 142, 2 Coke Litt. § 735]; Hillhouse *v.* Chester, 3 Day (Conn.) 166, 3 Am. Dec. 265; Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116; U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* McGill, 4 Dall. (U. S.) 426, 11 Wash. (U. S.) 463, 26 Fed. Cas. No. 15,676, 1 L. ed. 894; U. S. *v.* Wilson, Baldw. (U. S.) 78, 28 Fed. Cas. No. 16,730; U. S. *v.* Coppersmith, 2 Flipp. (U. S.) 546, 4 Fed. 198; U. S. *v.* Outerbridge, 5 Sawy. (U. S.) 620, 27 Fed. Cas. No. 15,978. And see Constitutional Law; Statutes.

Construction of penal statutes see *infra*, IV, A, 5.

10. *Alabama.*— Pierson *v.* State, 12 Ala. 149 (homicide); State *v.* Cawood, 2 Stew. (Ala.) 360 (conspiracy).

Connecticut.— State *v.* Doud, 7 Conn. 384 (escape); State *v.* Danforth, 3 Conn. 112.

Illinois.— Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569 (solicitation of bribe by public officer); Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780 (conspiracy to seduce female).

Maine.— State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, homicide.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534, conspiracy.

Massachusetts.—Com. *v.* Chapman, 13 Metc. (Mass.) 68 (libel); Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; Com. *v.* Knowlton, 2 Mass. 530 (jurisdiction of courts over criminal prosecutions).

Michigan.— Mich. Comp. Laws (1897), § 11,795; Ware *v.* Branch Cir. Judge, 75 Mich. 488, 42 N. W. 997; *In re* Lamphere, 61 Mich. 105, 27 N. W. 882; Backus *v.* Byron, 4 Mich. 535 (champerty).

Minnesota.— State *v.* Pulle, 12 Minn. 164, conspiracy.

Mississippi.— Miss. Anno. Code (1892), § 1452.

surroundings, and institutions, and in so far as it has not been abrogated by statute.[11] In some states the common law as to crimes has been so far abolished that no act is punishable as a crime unless it is made so by statute.[12] But in those states, as well as in others, when a statute punishes an act giving it a name known to the common law, such as murder, rape, assault, etc., without otherwise defining it, the statute is construed according to the common-law definition.[13] And when

Missouri.— State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469, public utterance of obscene words.

Nevada.— Nevada Comp. Laws (1900), § 4788.

New Hampshire.—State *v.* Wilson, 43 N. H. 415, 82 Am. Dec. 163 (nuisances); State *v.* Rollins, 8 N. H. 550 (kidnapping).

New Jersey.— 1 N. J. Gen. Stat. (1895), § 192.

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71, conspiracy.

Pennsylvania.— Com. *v.* McHale, 97 Pa. St. 397, 39 Am. Rep. 808 (fraud in election of public officers); Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632 (exhibition of obscene picture).

Rhode Island.— R. I. Gen. Laws (1896), c. 284, § 1.

Tennessee.— Simpson *v.* State, 5 Yerg. (Tenn.) 356; Grisham *v.* State, 2 Yerg. (Tenn.) 589 (openly and notoriously living in fornication or adultery); Fields *v.* State, 1 Yerg. (Tenn.) 156 (murder and manslaughter); Porter *v.* State, Mart. & Y. (Tenn.) 226 (larceny).

Vermont— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710, conspiracy.

Virginia.—Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776 (offenses *contra bonos mores*); Com. *v.* Callaghan, 2 Va. Cas. 460 (misconduct in office, as corrupt buying and selling of public office).

Washington.— Ballinger's Anno. Code & Stat. Wash. § 6774; State *v.* Place, 5 Wash. 773, 32 Pac. 736 (sodomy); Bradshaw *v.* Territory, 3 Wash. Terr. 265, 14 Pac. 594 (conspiracy).

And see, generally, CRIMINAL LAW, and the various specific criminal titles.

Statutes in some states expressly adopt the common law as to the conduct of criminal trials and rules of evidence. Mill's Anno. Stat. Colo. § 1467; La. Rev. Stat. (1897), § 976.

The Louisiana statute of 1805, adopting the common law of England as the basis of criminal jurisprudence, did not adopt subsquent English enactments. State *v.* Davis, 22 La. Ann. 77.

11. *Georgia.*— Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189.

Illinois.— Stuart *v.* People, 4 Ill. 395.

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355, holding inapplicable the common-law rule that a dog is not the subject of larceny. As to this see LARCENY.

Louisiana.— State *v.* Jones, 39 La. Ann. 935, 3 So. 57.

New York.— People *v.* Randolph, 2 Park. Crim. (N. Y.) 174.

Ohio.— Williams *v.* State, 14 Ohio 222, 45 Am. Dec. 536.

Tennessee.— Simpson *v.* State, 5 Yerg. (Tenn.) 356.

Capacity to commit rape.— In a number of states the common-law doctrine that a boy under fourteen years of age is conclusively presumed to be incapable of committing rape has been held inapplicable. See *supra*, IV, A, 1, b, (II), note 79.

12. *Indiana.*— Thornton Ind. Stat. (1897), § 237; Stephens *v.* State, 107 Ind. 185, 8 N. E. 94; Jones *v.* State, 59 Ind. 229.

Iowa.— Estes *v.* Carter, 10 Iowa 400.

Louisiana.— In this state the statute (La. Rev. Laws (1897), § 976) providing that "all crimes, offenses and misdemeanors shall be taken intended and construed, according to and in conformity with the common law of statutes, and does not adopt the common law definition of offenses which were declared to be crimes by the early act of 1805 and later statutes, and does not adopt the commou law of crimes *in toto*, so as to render punishable acts punishable at common law, but which have not been declared by statute to be crimes. State *v.* Gaster, 45 La. Ann. 636, 12 So. 739; State *v.* Depass, 31 La. Ann. 487; State *v.* Smith, 30 La. Ann. 846.

New York.— N. Y. Pen. Code, § 2.

Ohio.— Mitchell *v.* State, 42 Ohio St. 383; Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 355 [*overruling* in effect State *v.* Lafferty, Tapp. (Ohio) 113].

Texas.— Tex. Pen. Code, art. 3; Wolff *v.* State, 6 Tex. App. 195; Prindle *v.* State, 31 Tex. Crim. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

As to repeal of the common law and revival see *supra*, III, B, C.

13. *Indiana.*— Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

Iowa.— State *v.* Twogood, 7 Iowa 252.

Louisiana.— La. Rev. Laws (1897), § 976.

Minnesota.— Benson *v.* State, 5 Minn. 19.

Ohio.— Baker *v.* State, 12 Ohio St. 214.

Texas.— Prindle *v.* State, 31 Tex. Crim. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Cross *v.* State, 17 Tex. App. 476; *Ex p.* Bergen, 14 Tex. App. 52; Robinson *v.* State, 11 Tex. App. 309; Smith *v.* State, 7 Tex. App. 286. *Contra*, under former statute, Frazier *v.* State, 39 Tex. 390; Fennell *v.* State, 32 Tex. 378; State *v.* Foster, 31 Tex. 578; Wolff *v.* State, 6 Tex. App. 195.

Vermont.— State *v.* Camley, 67 Vt. 322, 31 Atl. 840.

Virginia.— Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

United States.— U. S. *v.* Palmer, 3 Wheat.

a statute in defining a crime uses terms known to the common law, as "break" or "dwelling-house" in reference to burglary, etc., the terms are to be given their common-law meaning unless a contrary intention appears.[14] If a statute makes an act criminal, without prescribing any mode of prosecution or punishment, the common law prescribes prosecution by indictment and punishment by fine and imprisonment.[15]

B. In the Federal Courts — 1. In General. There is no common law of the United States as distinguished from the individual states.[16] A federal court, however, when it has jurisdiction of a cause under the constitution and laws of the United States, enforces the common law of the state in which it is sitting, and in determining causes the federal courts may and do resort to the common law and apply its principles in cases where it is applicable.[17] And the common law is resorted to in construing the constitution of the United States and acts of congress.[18] The code of constitutional and statutory construction which is gradually formed by the federal courts in the application of the constitution, and the laws and treaties made in pursuance thereof, has for its basis the common law, and constitutes a common law resting on national authority.[19]

2. Criminal Law. The federal courts have no common-law jurisdiction in criminal cases, for they can exercise such powers only as are conferred upon them by act of congress. No act can be punished as a crime against the United States,

(U. S.) 610, 4 L. ed. 471; U. S. *v.* McGill, 4 Dall. (U. S.) 426, 1 Wash. (U. S.) 462, 26 Fed. Cas. No. 15,676, 1 L. ed. 894; *In re* Greene, 52 Fed. 104; U. S. *v.* Wilson, Baldw. (U. S.) 78, 28 Fed. Cas. No. 16,730; U. S. *v.* Coppersmith, 2 Flipp. (U. S.) 546, 4 Fed. 198; U. S. *v.* Jones, 3 Wash. (U. S.) 209, 26 Fed. Cas. No. 15,494.

14. *Alabama.*— *Ex p.* Vincent, 26 Ala. 145, Am. Dec. 60.

Arkansas.— Mary *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

Georgia.— Long *v.* State, 12 Ga. 293.

Illinois.— Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Iowa.— State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252.

Massachusetts.— Com. *v.* Humphries, 7 Mass. 242.

Michigan.— Pitcher *v.* People, 16 Mich. 142.

New York.— Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; People *v.* Gates, 15 Wend. (N. Y.) 159.

Virginia.— Finch *v.* Com., 14 Gratt. (Va.) 643.

Wisconsin.— Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

15. Com. *v.* Chapman, 13 Metc. (Mass.) 68.

16. People *v.* Folsom, 5 Cal. 373, 379 (where it is said: "There is no common law of the United States, as contradistinguished from the individual States"); Dawson *v.* Shaver, 1 Blackf. (Ind.) 204, 205 (where it is said: "The common law of England is not in force in the United States as a federal government"); Gatton *v.* Chicago, etc., R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556 (where it is further held that the common law was not made a part of the federal law by the constitutional provision (U. S. Const. art. 1, § 8) that the judicial power shall extend to all cases in law and in equity arising under the constitution, laws, and treaties of the United States; nor by the provision (U. S. Const. amend. 7) that in suits at common law the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined by any court of the United States than according to the rules of common law); Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; Swift *v.* Philadelphia, etc., R. Co., 64 Fed. 59; Bains *v.* The James and Catherine, Baldw. (U. S.) 544, 2 Fed. Cas. No. 756; U. S. *v.* Garlinghouse, 4 Ben. (U. S.) 194, 25 Fed. Cas. No. 15,189, 2 Chic. Leg. N. 131, 139, 11 Int. Rev. Rec. 11; Lorman *v.* Clarke, 2 McLean (U. S.) 568, 15 Fed. Cas. No. 8,516; U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867, 10 Law Rep. 127.

17. People *v.* Folsom, 5 Cal. 373; Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; Doe *v.* Winn, 5 Pet. (U. S.) 233, 8 L. ed. 108; Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62 [*affirming* 62 Fed. 24].

Rules of evidence.— Where no special provision to the contrary is made by act of congress, and no special reason requires a different rule, the common-law rules of evidence govern the action of the federal courts, including the court of claims. Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346.

18. U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508; Minor *v.* Happersitt, 21 Wall. (U. S.) 167, 22 L. ed. 627.

19. Smith *v.* Alabama, 124 U. S. 465, 478, 8 S. Ct. 564, 31 L. ed. 508.

unless an act of congress has declared it a crime, and prescribed the punishment and the court which shall have jurisdiction of the offense.[20] But where an act of congress punishes an offense without defining it otherwise than by giving it a common-law designation, such as murder, larceny, robbery, etc., the courts look to the common law for the definition and elements of the offense.[21]

C. In the Territories. As a general rule by express adoption, the common law is the rule of decision in the courts of the territories of the United States, except in so far as it is inapplicable or inconsistent with acts of congress or of the territorial legislature.[22]

D. In the District of Columbia. The common law and early English statutes which were adopted by the constitution of Maryland[23] are in force in the District of Columbia, except in so far as they have been expressly or impliedly abrogated by act of congress.[24]

V. EVIDENCE AND PRESUMPTIONS.

A. Evidence of Common Law — 1. In General. In determining what the common law is the courts will consider as evidence, although not as conclusive, Blackstone's and Kent's Commentaries and other standard works on the subject;[25] and will examine and weigh the reasoning of the decisions of the state and federal courts down to the present time.[26] English decisions rendered prior to July 4, 1776, if they are clear and consistent, while they do not constitute a part of the common law, are usually considered conclusive evidence of what the common law is;[27] but those rendered after that date, while entitled to great

20. U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259, holding that in the absence of an act of congress conferring jurisdiction the circuit court of the United States for the district of Connecticut had no jurisdiction of an indictment for libel of the president and congress of the United States in charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain. See also U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591; Manchester *v.* Massachusetts, 139 U. S. 240, 11 S. Ct. 599, 35 L. ed. 159; U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 536, 27 L. ed. 698; U. S. *v.* Coolidge, 1 Wheat. (U. S.) 415, 4 L. ed. 124; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

21. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; U. S. *v.* McGill, 4 Dall. (U. S.) 426, 1 Wash. (U. S.) 463, 26 Fed. Cas. No. 15,676, 1 L. ed. 894; *In re* Greene, 52 Fed. 104; U. S. *v.* Wilson, Baldw. (U. S.) 78, 28 Fed. Cas. No. 16,730; U. S. *v.* Coppersmith, 2 Flipp. (U. S.) 546, 4 Fed. 198; U. S. *v.* Outerbridge, 5 Sawy. (U. S.) 620, 27 Fed. Cas. No. 15,978.

22. Bent *v.* Thompson, 5 N. M. 408, 23 Pac. 234; Browning *v.* Browning, 3 N. M. 371, 9 Pac. 677; Leitensdorfer *v.* Webb, 1 N. M. 34; McKennar *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501; Utah First Nat. Bank *v.* Kinner, 1 Utah 100; People *v.* Green, 1 Utah 11; Luhrs *v.* Hancock, 181 U. S. 567, 21 S. Ct. 567, 45 L. ed. 1005; Pyeatt *v.* Powell, 51 Fed. 551, 10 U. S. App. 200, 2 C. C. A. 367.

23. See *supra*, III, A, note 31.

24. State *v.* Cummings, 33 Conn. 260, 89 Am. Dec. 208; De Forrest *v.* U. S., 11 App. Cas. (D. C.) 458; U. S. *v.* Griffin, 6 D. C. 53 (holding the statute of 5 Rich II, c. 7, as to forcible entry and detainer, to be in force); U. S. *v.* Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 614, 9 L. ed. 1181.

25. Forbes *v.* Scannell, 13 Cal. 242, 285; Rouse *v.* State, 4 Ga. 136, 145; Copley *v.* Sanford, 2 La. Ann. 335, 46 Am. Dec. 548.

The civil law may be referred to in order to illustrate and explain the common law, but not as authority. Fable *v.* Brown, 2 Hill Eq. (S. C.) 378.

26. Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Forbes *v.* Scannell, 13 Cal. 242, 285; State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

27. *California.*— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Forbes *v.* Scannell, 16 Cal. 242, 285.

Georgia.— Robert *v.* West, 15 Ga. 122.

Illinois.— Kreitz *v.* Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59.

Maryland.— Koontz *v.* Nabb, 16 Md. 549; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175; State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

South Carolina.— Jaggers *v.* Estes, 2 Strobh. Eq. (S. C.) 343, 358, 49 Am. Dec. 674.

Virginia.— Marks *v.* Morris, 4 Hen. & M. (Va.) 463.

Washington.—Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

Wyoming.— Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608.

United States.— Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120; Livingston *v.*

respect, are not binding upon us.[28] The courts will also, in ascertaining the principles of the common law, consider English statutes amendatory or declaratory of the common law.[29] English decisions construing English statutes adopted in the United States, made prior to their adoption, or prior to the Revolution, but not afterward, will generally be followed.[30]

2. Common Law of Another State or Country. The common law of another state or country may be proved by the oral testimony of persons who are shown to be familiar with its jurisprudence,[31] or by the books of reports of cases adjudicated in its courts.[32] There are now express statutory provisions to such effect in some states.[33]

B. Presumption as to Existence. It is well settled in most jurisdictions that, in the absence of proof to the contrary, the common law is presumed to be in force, and to be the same as the common law of the forum, in those states which were originally colonies of England, or carved out of such colonies.[34] But

Jefferson, 1 Brock. (U. S.) 203, 4 Hughes (U. S.) 606, 15 Fed. Cas. No. 8,411, 4 Hall L. J. 78, 11 Myers' Fed. Dec. 721; Murdock *v.* Hunter, 1 Brock. (U. S.) 135, 17 Fed. Cas. No. 9,941.

See 10 Cent. Dig. tit. "Common Law," § 8.

28. *California.*— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674.

Illinois.— Kallenbach *v.* Dickinson, 100 Ill. 427, 39 Am. Rep. 47.

Maryland.— Greenwood *v.* Greenwood, 28 Md. 369; Koontz *v.* McNabb, 16 Md. 549; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Massachusetts.— Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373.

United States.— Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120.

29. Bull *v.* Loveland, 10 Pick. (Mass.) 9, 13, where it was said by Shaw, C. J., speaking of an English statute passed subsequent to the impeachment against Lord Melville in 1807: "This act, as a statute, of course has no authority here, but as strictly declaratory law it is entitled to weight."

30. Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 280, 8 L. ed. 120, where it was said by Chief Justice Marshall: "The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose Legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these States. By adopting them they become our own as entirely as if they had been enacted by the Legislature of the State. The received construction in England at the time they are admitted to operate in this country — indeed, to the time of our separation from the British empire — may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them." See also Baltimore *v.* Williams, 6 Md. 235; Bowie *v.* Duvall, 1 Gill & J. (Md.) 175; Livingston *v.* Jefferson, 1 Brock. (U. S.) 203, 4 Hughes (U. S.) 606, 15 Fed. Cas. No. 8,411, 4 Hall L. J. 78, 11 Myers' Fed. Dec. 721. And see, generally, Statutes.

31. *Illinois.*— McDeed *v.* McDeed, 67 Ill. 545; Merritt *v.* Merritt, 20 Ill. 65.

Iowa.— Greasons *v.* Davis, 9 Iowa 219.

Massachusetts.— McRae *v.* Mattoon, 13 Pick. (Mass.) 53.

Michigan.— Morrissey *v.* People, 11 Mich. 327; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

New York.— Kenny *v.* Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336.

Vermont.— Woodbridge *v.* Austin, 2 Tyler (Vt.) 364, 4 Am. Dec. 740.

32. Ames *v.* McCamber, 124 Mass. 85; Cragin *v.* Lamkin, 7 Allen (Mass.) 395.

33. See Mass. Rev. Laws (1902), c. 175, § 76; Mich. Comp. Laws (1897), c. 10,174; Minn. Stat. (1894), § 5716; Nebr. Comp. Laws (1901), § 5954; N. Y. Code Civ. Proc. § 942; N. D. Rev. Codes (1899), § 5690; Bates Anno. Stat. (Ohio, 1900), § 5244; Wis. Stat. (1898), § 4138.

Judicial notice.— In West Virginia the courts take judicial notice of the law of another state or country, and may consult books and consider testimony. W. Va. Const. art. 13, § 4. *Contra*, in Minnesota, Crandall *v.* Great Northern R. Co., 83 Minn. 196, 86 N. W. 10, 83 Am. St. Rep. 466.

34. *Alabama.*— Wilkinson *v.* Buster, 124 Ala. 574, 26 So. 940; Birmingham Water Works Co. *v.* Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43; Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Gluck *v.* Cox, 75 Ala. 310; Bradley *v.* Harden, 73 Ala. 70; Irwin *v.* Bailey, 72 Ala. 467; Evans *v.* Covington, 70 Ala. 440; Cahalan *v.* Monroe, 70 Ala. 271; Danner *v.* Brewer, 69 Ala. 191; Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Hawley *v.* Bibb, 69 Ala. 52; McAnally *v.* O'Neal, 56 Ala. 299; Haden *v.* Ivey, 51 Ala. 381; Walker *v.* Walker, 41 Ala. 353; Howard *v.* Gilbert, 39 Ala. 726; Rutledge *v.* Townsend, 38 Ala. 706; McDougald *v.* Carey, 38 Ala. 320; Borum *v.*

the presumption does not apply to those states which, prior to becoming members of the Union, were, like Florida, Louisiana, and Texas, not subject to the laws

King, 37 Ala. 606; Connor *v.* Trawick, 37 Ala. 289, 79 Am. Dec. 58; Foster *v.* Glazener, 27 Ala. 391; Ruse *v.* Harris, 27 Ala. 301; Ellis *v.* White, 25 Ala. 540; Hinson *v.* Wall, 20 Ala. 298; Averett *v.* Thompson, 15 Ala. 678; Beall *v.* Williamson, 14 Ala. 55; Inge *v.* Murphy, 10 Ala. 885; Miller *v.* McIntyre, 9 Ala. 638; Shepherd *v.* Nabors, 6 Ala. 631; Mims *v.* Georgia Bank, 2 Ala. 294; Dunn *v.* Adams, 1 Ala. 527, 35 Am. Dec. 42; Goodman *v.* Griffin, 3 Stew. (Ala.) 160.

Arkansas.— St. Louis I. M., etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865; Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; Thorn *v.* Weatherly, 50 Ark. 237, 7 S. W. 33; Peel *v.* January, 35 Ark. 331, 37 Am. Rep. 27; Hydrick *v.* Burke, 30 Ark. 124; Newton *v.* Cocke, 10 Ark. 169.

California.— Hickman *v.* Alpaugh, 21 Cal. 225; Norris *v.* Harris, 15 Cal. 226; Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318. But see Marsters *v.* Lash, 61 Cal. 622.

Georgia.— Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338; Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616; Woodruff *v.* Saul, 70 Ga. 271; Selma R., etc., R. Co. *v.* Lacy, 43 Ga. 461; Eubanks *v.* Banks, 34 Ga. 407.

Illinois.— Julliard *v.* May, 130 Ill. 87, 22 N. E. 477; Tinkler *v.* Cox, 68 Ill. 119; Crouch *v.* Hall, 15 Ill. 263; Sealing *v.* Knollin, 94 Ill. App. 443; Selz *v.* Guthman, 62 Ill. App. 624; Lipe *v.* McClevy, 41 Ill. App. 59; Miller *v.* MacVeagh, 40 Ill. App. 532; Van Ingen *v.* Brabrook, 27 Ill. App. 401; Hanchett *v.* Rice, 22 Ill. App. 442.

Indiana.— Baltimore, etc., R. Co. *v.* Jones, 158 Ind. 87, 62 N. E. 994; Buchanan *v.* Hubbard, 119 Ind. 187, 21 N. E. 538; Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Rogers *v.* Zook, 86 Ind. 237; Robards *v.* Marley, 80 Ind. 185; Smith *v.* Peterson, 63 Ind. 243; Patterson *v.* Carrell, 60 Ind. 128; Lichtenberger *v.* Graham, 50 Ind. 288; Schurman *v.* Marley, 29 Ind. 458; Smith *v.* Muncie Nat. Bank, 29 Ind. 158; Buckinghouse *v.* Gregg, 19 Ind. 401; Crake *v.* Crake, 18 Ind. 156; Mendenhall *v.* Gateley, 18 Ind. 149; Johnson *v.* Chambers, 12 Ind. 102; Blystone *v.* Burgett, 10 Ind. 28, 68 Am. Dec. 658; Trimble *v.* Trimble, 2 Ind. 76; Titus *v.* Scantling, 4 Blackf. (Ind.) 89; Stout *v.* Wood, 1 Blackf. (Ind.) 71. *Compare* Blystone *v.* Burgett, 10 Ind. 28, 68 Am. Dec. 658.

Iowa.— Holmes *v.* Mallett, Morr. (Iowa) 82.

Kansas.— St. Louis, etc., R. Co. Weaver, 35 Kan. 412, 11 Pac. 408, 54 Am. Rep. 176.

Kentucky.— Miles *v.* Collins, 1 Metc. (Ky.) 308; Cope *v.* Daniel, 9 Dana (Ky.) 415; Chesapeake, etc., R. Co. *v.* Hanwer, 23 Ky. L. Rep. 1846, 66 S. W. 375.

Louisiana.— Rush *v.* Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

Maine.— Carpenter *v.* Grand Trunk R. Co., 72 Me. 388, 39 Am. Rep. 340. But see Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Maryland.— State *v.* Pittsburgh, etc., R. Co., 45 Md. 41.

Massachusetts.— Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200; Thurston *v.* Percival, 1 Pick. (Mass.) 415. And see Legg *v.* Legg, 8 Mass. 99.

Michigan.— Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387; Ellis *v.* Maxsom, 19 Mich. 186, 2 Am. Rep. 81; Crane *v.* Hardy, 1 Mich. 56.

Minnesota.— Engstrand *v.* Kleffman, 86 Minn. 403, 90 N. W. 1054; Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862; Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Cooper *v.* Reaney, 4 Minn. 528.

Missouri.— Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516, 61 S. W. 617; Meyer *v.* McCabe, 73 Mo. 236; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Lucas *v.* Ladew, 28 Mo. 342; Houghtaling *v.* Ball, 19 Mo. 84, 59 Am. Dec. 331; Warren *v.* Lusk, 16 Mo. 102; Wilson *v.* Cockrill, 8 Mo. 1; Gaylord *v.* Duryea, 95 Mo. App. 574, 69 S. W. 607; Davis *v.* Cohn, 85 Mo. App. 530; American Oak Leather Co. *v.* Wyeth Hardware, etc., Co., 57 Mo. App. 297; Roll *v.* St. Louis, etc., Smelting, etc., Co., 52 Mo. App. 60; White *v.* Chaney, 20 Mo. App. 389. *Compare* Bain *v.* Arnold, 33 Mo. App. 631.

Nevada.—Matter of Clark, 17 Nev. 124, 28 Pac. 238.

New York.— Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; People *v.* Brady, 56 N. Y. 182; Bradley *v.* Mutual Ben. L. Ins. Co., 3 Lans. (N. Y.) 341; White *v.* Knapp, 47 Barb. (N. Y.) 549; Wright *v.* Delafield, 23 Barb. (N. Y.) 498; Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118; Wiehle *v.* Schwarz, 54 N. Y. Super. Ct. 169; Graves *v.* Cameron, 9 Daly (N. Y.) 152; Cahill Iron Works *v.* Pemberton, 27 N. Y. Suppl. 927, 30 Abb. N. Cas. (N. Y.) 450; Waldron *v.* Ritchings, 3 Daly (N. Y.) 288, 9 Abb. Pr. N. S. (N. Y.) 359; Throop *v.* Hatch, 3 Abb. Pr. (N. Y.) 23; Abell *v.* Douglass, 4 Den. (N. Y.) 305; Holmes *v.* Broughton, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536; Sherrill *v.* Hopkins, 1 Cow. (N. Y.) 103.

North Carolina.— Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876; Terry *v.* Robbins, 128 N. C. 140, 38 S. E. 470, 83 Am. St. Rep. 663; Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Brown *v.* Pratt, 56 N. C. 202; Griffin *v.* Carter, 40 N. C. 413.

of England, but to a different system of law;[35] nor in the Creek Nation or the Indian Territory.[36] It is also presumed in the absence of proof to the contrary that the common law prevails in Canada and other British colonies.[37] The presumption has also been extended to foreign countries not colonies of England,[38] but the better opinion is to the contrary.[39]

COMMON-LAW CHEAT. A fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of any pecuniary interest;[1] the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.[2] (See CHEAT; FALSE PERSONATION.)

COMMON-LAW JURISDICTION. Jurisdiction as appertained to the common law of England, as administered through her Courts;[3] jurisdiction to try and

Oregon.— Cressey *v.* Tatom, 9 Oreg. 541; Goodwin *v.* Morris, 9 Oreg. 322.

Pennsylvania.— Brown *v.* Camden, etc., R. Co., 83 Pa. St. 316.

Vermont.— State *v.* Shattuck, 69 Vt. 403, 38 Atl. 81, 60 Am. St. Rep. 936, 40 L. R. A. 428.

Wisconsin.— Walsh *v.* Dart, 12 Wis. 635; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

See 10 Cent. Dig. tit. "Common Law," § 14.

Law merchant.— This presumption exists as to the law merchant, which is a part of the common law. Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Hudson *v.* Matthews, Morr. (Iowa) 94; Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68. *Compare*, however, Alford *v.* Baker, 53 Ind. 279; Smith *v.* Muncie Nat. Bank, 29 Ind. 158.

Scotland.— It was held in Massachusetts that it would be presumed, in the absence of proof to the contrary, that the commercial law of Scotland was the same as that of Massachusetts. Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

35. *Alabama.*— Castleman *v.* Jeffries, 60 Ala. 380.

Arkansas.— Brown *v.* Wright, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715.

California.— Marsters *v.* Lash, 61 Cal. 622; Norris *v.* Harris, 15 Cal. 226.

Missouri.— Sloan *v.* Torry, 78 Mo. 623; Flato *v.* Mulhall, 72 Mo. 522; Clark *v.* Barnes, 58 Mo. App. 667.

New York.— Whitford *v.* Panama R. Co., 23 N. Y. 465.

United States.— Davison *v.* Gibson, 56 Fed. 443, 12 U. S. App. 362, 5 C. C. A. 543.

36. Johnson *v.* State, 60 Ark. 308, 30 S. W. 31; Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; Du Val *v.* Marshall, 30 Ark. 230; James *v.* James, 81 Tex. 373, 16 S. W. 1087; Davison *v.* Gibson, 56 Fed. 443, 12 U. S. App. 362, 5 C. C. A. 543. *Compare* Pyeatt *v.* Powell, 51 Fed. 551, 10 U. S. App. 200, 2 C. C. A. 367.

37. Dempster *v.* Stephen, 63 Ill. App. 126. *Contra*, Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

38. *In re* High, 2 Dougl. (Mich.) 515; Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

39. Savage *v.* O'Neil, 44 N. Y. 298 [*reversing* 42 Barb. (N. Y.) 374]; Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406 (holding that the court would take judicial notice that the common law was not, and never had been, in force in France, so as to render valid a common-law marriage entered into there).

1. 1 Bishop Crim. L. § 571; 2 Wharton Crim. L. § 1116 [*quoted* in State *v.* Renick, 33 Oreg. 584, 586, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266].

2. 2 Russell Crimes 613 [*quoted* in State *v.* Renick, 33 Oreg. 584, 586, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266].

Absence of symbol or token.— Under this definition, the cheat need not necessarily be accomplished through the use of a symbol or token. State *v.* Renick, 33 Oreg. 584, 586, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266.

Distinguished from other cheats.— "But, whatever may be the rule and definition touching the common-law cheat, the statutes of England early began to distinguish between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely personating another. Such an offense has been widely adopted in the American states. . . . The crime known to our statute is much the same as that constituted by 33 Hen. VIII, which extended the common-law cheat so as to include one accomplished through the use of a false privy token or counterfeit letter. The two offenses are defined, however, and made separate and distinct, by statute, so that there need be no longer a question, as under the common law, as to whether, in the false personation of another, the person engaging in the deceit is himself a false token." State *v.* Renick, 33 Oreg. 584, 588, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266 [*quoting* Hill's Annot. Laws (1892), §§ 1372, 1776, 1777].

3. Matter of Conner, 39 Cal. 98, 100, 2 Am. Rep. 427.

decide causes which were cognizable by the Courts of law, under what is known as the common law of England.[4] (See ALIENS; COURTS.)

COMMON-LAW OFFENSE. Any practice which has a tendency to injure the public morals.[5] (See, generally, CRIMINAL LAW.)

COMMON-LAW PROCEDURE ACTS. Three acts of parliament, passed in the years 1852, 1854, and 1860, respectively, for the amendment of the procedure in the common-law courts.[6]

COMMON LAWYER. A lawyer learned in the common law.[7] (See, generally, ATTORNEY AND CLIENT.)

COMMON LEARNING. Familiar law or doctrine.[8]

COMMON LODGING HOUSE. A lodging house kept by somebody for the purpose of profit, and open to all comers whether of a certain class or not.[9] (See, generally, INNKEEPERS.)

COMMONLY SAID. It is commonly the legal opinion.[10]

COMMON MOB. A riot.[11] (See, generally, RIOT.)

COMMON NECESSITY AND INTEREST. An inherent political right, enjoyed by the state and pertaining to sovereignty, to appropriate the property of individuals to the great necessities of the whole community where suitable provision is made for compensation.[12] (See, generally, EMINENT DOMAIN.)

COMMON NIGHT-WALKERS.[13] Such persons as are in the habit of being out at night for some wicked purpose;[14] those who are abroad during the night and sleep by day, and of suspicious appearance and demeanor;[15] those who eavedrop men's houses, cast men's gates, carts and the like into ponds or commit other outrages or misdemeanors in the night, or shall be suspected of pilfering or otherwise like to disturb the peace, or that be persons of ill-behavior or

4. Matter of Conner, 39 Cal. 98, 100, 2 Am. Rep. 427 [*quoted* in Dean, Petitioner, 83 Me. 489, 496, 22 Atl. 385, 13 L. R. A. 229].

The third section of the act of congress of April 14, 1802, confers power upon "every Court of Record in any individual State having common law jurisdiction, and a seal and clerk or prothonotary." Matter of Conner, 39 Cal. 98, 100, 2 Am. Rep. 427, where it is said that in a "large class of cases the County Court exercises 'common law jurisdiction,' as effectually for the purposes of the trial, as if the action had been originally brought in that Court. It has not 'common law jurisdiction' in all cases; that is to say, it has not jurisdiction over all classes of common law actions or proceedings."

5. Jenks *v.* Turpin, 13 Q. B. D. 505, 515, 15 Cox C. C. 486, 49 J. P. 20, 53 L. J. M. C. 161, 50 L. T. Rep. N. S. 808 [*quoting* Rex *v.* Rogier, 1 B. & C. 272, 2 D. & R. 431, 25 Rev. Rep. 393, 8 E. C. L. 117].

Also defined as "offences which especially affect the Commonwealth are those against the public policy or economy." 4 Bl. Comm. 162 [*quoted* in Com. *v.* McHale, 97 Pa. St. 407, 408].

6. The common-law procedure act of 1852 is 15 & 16 Vict. c. 76; that of 1854, 17 & 18 Vict. c. 125; and that of 1860, 23 & 24 Vict. c. 126. Black L. Dict.

7. Burrill L. Dict.

Illustrations of use of term.— "Doubtless a good common lawyer is the best expositor of such clauses." Burrill L. Dict. [*citing* Hale Hist. Com. L. 91]. And see 1 Pollock & M. Hist. Eng. L. 157, where it is said: "It is long before the lawyers of the temporal courts will bear the title common lawyers, or oppose 'the common law' to the law of holy church."

8. Black L. Dict.

9. Booth *v.* Ferrett, 25 Q. B. D. 87, 89, 55 J. P. 7, 59 L. J. M. C. 136, 63 L. T. Rep. N. S. 346, 38 Wkly. Rep. 718.

10. O'Donnell *v.* Glenn, 9 Mont. 452, 461, 23 Pac. 1018, 8 L. R. A. 629.

11. "**The difference between a rebellious mob and a common mob** is, that the first is high treason, the latter a riot; the mob wants a universality of purpose to make it a rebellious mob, or treason." Harris *v.* York Mut. Ins. Co., 50 Pa. St. 341, 350 [*quoting* Angell Ins. § 136].

12. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 536, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

13. Words having a technical meaning in the law. State *v.* Russell, 14 R. I. 506.

14. Watson *v.* Carr, 1 Lewin C. C. 6 [*quoted* in State *v.* Dowers, 45 N. H. 543, 544].

It is a common-law offense as well as an offense under the statute to be a common night-walker. State *v.* Dowers, 45 N. H. 543, 544; State *v.* Russell, 14 R. I. 506.

15. Bouvier L. Dict.; 2 Hawkins P. C. c. 8, § 38, c. 10, §§ 34, 58, c. 12, § 20 [*quoted* in State *v.* Dowers, 45 N. H. 543, 544].

of evil fame or report generally, or that shall keep company with any such, or with other suspicious persons in the night.[16] (See, generally, LEWDNESS; PROSTITUTION.)

COMMON PLACE. COMMON PLEAS,[17] *q. v.*

COMMON PLEAS. The name of a court of record having general original jurisdiction in civil suits;[18] such pleas or actions as are brought by private persons against private persons, or by the government where the cause of action is of a civil nature.[19] (See COMMON PLACE; COURTS.)

COMMON PROPERTY. A community of interest which, in earlier times, the people enjoyed in the ground, or its fruits, until the same was appropriated to individual use or ownership.[20] (See COMMON LANDS; HUSBAND AND WIFE; JOINT TENANCY; PARTNERSHIP; TENANCY IN COMMON.)

COMMON REPUTE. The prevailing belief in a certain community.[21]

COMMON RULE EX PARTE. Words sometimes added to the word "referred," by the clerk when entering an agreement to refer upon the docket.[22] (See, generally, REFERENCES.)

COMMONS. See COMMON LANDS.

16. State *v.* Dowers, 45 N. H. 543, 544 [*quoting* 1 Burns Justice 765].

17. The English court of common pleas is sometimes so called in the old books. Black L. Dict.

18. Black L. Dict.

19. Dallett *v.* Feltus, 7 Phila. (Pa.) 627. So called to distinguish them from pleas of the crown in England. Bouvier L. Dict. [*quoted* in Dallett *v.* Feltus, 7 Phila. (Pa.) 627, 628, where it is said: "It is true, 'Common Pleas' is a descriptive name, or designation of a distinctive court with us, and has jurisdiction of common law pleas, and several things not belonging to, or within the jurisdiction of other courts with other designations or names. But these are generally not of the nature of Common Pleas, but special matters of jurisdiction"].

20. 2 Bl. Comm. 3.

21. Sexton *v.* Hollis, 26 S. C. 231, 1 S. E. 893 [*quoted* in Brown *v.* Foster, 41 S. C. 118, 121, 19 S. E. 299].

22. Billington *v.* Sprague, 22 Me. 34, 44, where it is said: "This addition would be unintelligible to all such as were not conversant with such entries. A common rule was one in which it was agreed, that a majority should decide in case of necessity; and *ex parte* meant, that the referees should proceed, if one of the parties, upon being duly notified, should not appear."

COMMON SCOLD

By Frank E. Jennings

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CROSS-REFERENCES

For Abusive or Insulting Language Generally, see Disorderly Conduct.

General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

I. Nature and Elements of the Offense.

A. Definition. A common scold is a quarrelsome woman whose conduct is a public nuisance to her neighborhood.[1]

B. As Regarded by Courts. The rigor of the common-law punishment for this offense met with much disfavor by the courts at an early day, and its recognition as a public offense has been so limited that it has been argued that it is now obsolete;[2] but the courts have usually held it to be indictable as a common nuisance.[3]

C. Necessity of Continuity. This offense being but a species of nuisance, the element of continuity is essential. It is therefore necessary to prove the habit or practice of scolding.[4]

1. 4 Bl. Comm. 168; Jacob L. Dict.

Other definitions are: "A person addicted to the habit or practice of abusive language or vituperation, in places and modes rendering it a disturbance to the neighborhood, and a public annoyance." Abbott L. Dict.

"One who, by the practice of frequent scolding, disturbs the neighborhood." Black L. Dict. [*citing* Bishop Crim. L. § 147].

"A quarrelsome, brawling, vituperative person." Black L. Dict.

By statute.— In very few states of the United States has this common-law offense been recognized or modified by statute. Com. *v.* Foley, 99 Mass. 497, construing Mass. Gen. Stat. (1868), c. 165, § 28; and cases cited *infra*, note 2 *et seq.*

2. James *v.* Com., 12 Serg. & R. (Pa.) 220.

3. Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858; State *v.* Ellar, 12 N. C. 267; Com. *v.* Mohn, 52 Pa. St. 243, 91 Am. Dec. 153; James *v.* Com., 12 Serg. & R. (Pa.) 220; U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202, in which case the court, per Cranch, C. J., said: "The offence is not obsolete, and cannot become obsolete so long as a common scold is a common nuisance." *Contra*, Com. *v.* Hutchison, 5 Pa. L. J. Rep. 321, 3 Am. L. Reg. 114 [*overruled* in Com. *v.* Mohn, 52 Pa. St. 243, 91 Am. Dec. 153] which denied the indictability, principally on the ground of the uncertainty of the punishment.

**As to the unreasonableness of holding women liable to punishment for a too free use of their tongues the court, per Woodward, C. J., in Com. *v.* Mohn, 52 Pa. St. 243, 246, 91 Am. Dec. 153, say: "It is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable. . . . The argument drawn from the indelicacy and unreasonableness of such a prosecution of a female should be addressed, therefore, to the legislature rather than to the courts, for courts of justice who declare rather than make law, are insensible to all considerations of gallantry."

4. Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858. To the same effect see Com. *v.* Foley,

D. Anger as an Element. To constitute this offense it is not necessary that the scolding be done in anger or turbulence.[5]

II. PROSECUTION FOR THE OFFENSE.

A. Indictment.[6] Inasmuch as the offense does not consist of a single act, but in a habitual course of conduct,[7] it is sufficient that the indictment charge one generally as a "common scold";[8] and the technical words "common scold" are usually held to be necessary.[9] It is usual[10] and in some instances held to be necessary[11] that the indictment conclude "to the common nuisance," etc.

B. Evidence — 1. ADMISSIBILITY. Upon the trial of one charged with being a common scold evidence of particular instances of scolding is admissible,[12] and in a trial for the analogous offense of "common brawling" such evidence was held to be admissible, although the words were used in defendant's own house and addressed to certain persons only.[13] Evidence of defendant's good reputation is admissible in defense of such action.[14]

2. SUFFICIENCY. In an action of this character it is sufficient to prove generally that defendant is always scolding[15] or using such language so publicly as to become a nuisance.[16]

C. Punishment. The punishment for a common scold is by fine and imprisonment at the discretion of the court, the old common-law punishment by the

99 Mass. 497, which case was, however, upon an analogous statutory offense.

Question for jury.— As to whether the scoldings of defendant have been of such frequency as to constitute a habit, and whether the habit has been exercised in such a manner as to disturb the public peace, are questions for the jury alone. Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858.

5. U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202.

6. See, generally, INDICTMENTS AND INFORMATIONS.

Forms of indictment for this offense may be found set out in whole, in part, or in substance in Com. *v.* Mohn, 52 Pa. St. 243, 91 Am. Dec. 153; U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 618, 27 Fed. Cas. No. 16,201; Rex *v.* Foxby, 6 Mod. 11; Rex *v.* Cooper, 2 Str. 1246; Rex *v.* Taylor, 2 Str. 849; Hawkins P. C. bk. 1, c. 75, § 5.

7. Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858 [*citing* Hawkins P. C. bk. 2, c. 25, § 61].

8. Com. *v.* Pray, 13 Pick. (Mass.) 359; Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858; U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 618, 27 Fed. Cas. No. 16,201; Rex *v.* Urlyn, 2 Saund. 308; J'Anson *v.* Stuart, 1 T. R. 748.

Reason for rule.—As it is the general practice and not the particular acts which constitute the offense, the acts go to make up the evidence of the crime itself, and it is never necessary in pleading to set forth the evidence. Com. *v.* Pray, 13 Pick. (Mass.) 359. And see Hawkins P. C. bk. 2, c. 25, § 61, where it is said: "It is an Offence of a complicated Nature, consisting in the Repetition of divers Acts in Disturbance of the common Peace, all of which it would be too prolix to enumerate in the Indictment."

9. Com. *v.* Pray, 13 Pick. (Mass.) 359; U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 618, 27 Fed. Cas. No. 16,201; Rex *v.* Foxby, 6 Mod. 11; Rex *v.* Cooper, 2 Str. 1246 (where judgment was arrested after verdict because of their omission); Rex *v.* Taylor, 2 Str. 849. *Contra*, Com. *v.* Mohn, 52 Pa. St. 243, 244, 91 Am. Dec. 153, where the indictment charged defendant with "intending the morals . . . of . . . citizens of this Commonwealth to debauch and corrupt, openly and publicly . . . , in the public highways, wicked, scandalous and infamous words did utter, in the hearing of the citizens, of the said Commonwealth and to their manifest corruption and subversion, and to the common nuisance," etc.

Two cannot be jointly indicted as common scolds. Reg. *v.* Hodson, (Trin. T.) 6 Ann. [*cited* in Rex *v.* Philips, 2 Str. 921].

10. Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858; Com. *v.* Mohn, 52 Pa. St. 243, 91 Am. Dec. 143.

11. Rex *v.* Cooper, 2 Str. 1246; Hawkins P. C. bk. 1, c. 75, § 5.

12. U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202.

13. Com. *v.* Foley, 99 Mass. 497.

14. Baker *v.* State, 53 N. J. L. 45, 47, 20 Atl. 858, where it is said: "In cases like the present, where guilt implies the notorious practice of a vicious habit, a general reputation of a contrary disposition seems to be direct evidence of innocence, and therefore entitled to the greater weight."

15. J'Anson *v.* Stuart, 1 T. R. 748.

16. Com. *v.* Foley, 99 Mass. 497.

ducking stool being obsolete,[17] and the court may also require a bond to keep the peace.[18]

COMMON SENSE. Sound practical judgment; that degree of intelligence and reason, as exercised upon the relations of persons and things and the ordinary affairs of life, which is possessed by the generality of mankind, and which would suffice to direct the conduct and actions of the individual in a manner to agree with the behavior of ordinary persons.[1]

COMMON SERJEANT. A judicial officer attached to the corporation of the city of London.[2]

COMMON TOOL. Some simple instrument used by the hand.[3]

COMMON WEAL. The common good; the public welfare.[4]

COMMONWEALTH. See STATES.

COMMONWEALTH'S ATTORNEY. See PROSECUTING ATTORNEYS.

COMMORANCY. See DOMICILE.

COMMORANT. See DOMICILE.

COMMORIENTES. Persons dying together or simultaneously;[5] persons dying together in the same place, or from the same cause.[6] (See, generally, DEATH.)

COMMOTE. Half a cantred or hundred in Wales, containing fifty villages; also a great seignory or lordship, and may include one or divers manors.[7]

COMMOTUM. In old English law, a COMMOTE,[8] *q. v.*

COMMUNANCE. See COMMONANCE.

COMMUNARE. In old English law, to common; to enjoy the right of common.[9] (See, generally, COMMON LANDS.)

COMMUNAUTE. In old English law, COMMONALTY,[10] *q. v.*

COMMUNE. A self-governing town or village. In old French law, it signified any municipal corporation; and in old English law, the COMMONALTY, *q. v.*, or common people.[11]

COMMUNE CONCILIUM REGNI. The common council of the realm.[12]

COMMUNE FORUM. The common place of justice; the seat of the principal courts, especially those that are fixed.[13]

17. Com. *v.* Mohn, 52 Pa. St. 243, 91 Am. Dec. 153; James *v.* Com., 12 Serg. & R. (Pa.) 220; U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202.

18. U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202.

As to sureties to keep the peace see BREACH OF THE PEACE, 5 Cyc. 1028.

1. Black L. Dict.

"Common sense is an important element in the administration of justice, and perhaps an indispensable element in its successful administration." Wright *v.* State, 69 Ind. 163, 165, 35 Am. Rep. 212.

2. Brown L. Dict.

3. Lenoir *v.* Weeks, 20 Ga. 596, 597, where it was said: "And we are entirely satisfied that a lawyer's library are not common tools of trade."

4. Burrill L. Dict.

The law favoureth things for the common weal. Burrill L. Dict. [*quoting* Finch Law, bk. 1, c. 3, num. 53].

5. Sweet L. Dict.

The term is applied to persons who perish by a common calamity (shipwreck, massacre, etc.), so that it cannot be ascertained which died first. Sweet L. Dict.

6. Adams Gloss.

7. Black L. Dict. [*citing* Coke Litt. 5].

8. Burrill L. Dict.

9. Burrill L. Dict.

10. Burrill L. Dict.

11. Black L. Dict. See also Coke Inst. 540 [*quoted* in Bernard's Tp. *v.* Allen, 61 N. J. L. 228, 234, 39 Atl. 716], where it is said: "Here '*commune*' is taken for 'people' so as '*tout le commune*' is taken here for 'all the people,' and this is proved by the sense of the words, for Magna Charta was not granted to the commons of the realm, but generally to all the subjects of the realm, to those of the clergy and those of the nobility and to the commons also, and that '*commune*' in this place signifieth 'people.' . . . So, '*a la commune*' here signifieth not to the commons of the realm, but to the people of the whole realm."

Commune was the name given to the committee of the people in the French revolution of 1793; and again, in the revolutionary uprising of 1871, it signified the attempt to establish absolute self-government in Paris, or the mass of those concerned in the attempt. Black L. Dict.

12. One of the names of parliament. Burrill L. Dict. [*citing* 1 Bl. Comm. 148].

13. Burrill L. Dict.

COMMUNE VINCULUM. A common or mutual bond.[14]

COMMUNIA. In old English law, common things, *res communes*, such as running water, the air, the sea, and sea shores.[15] (See COMMON LANDS.)

COMMUNIA PLACITA. In old English law, COMMON PLEAS,[16] *q. v.*

COMMUNIBUS ANNIS. In ordinary years; one year with another; on the annual average.[17]

COMMUNICARE. In old English law, to common.[18] (See, generally, COMMON LANDS.)

COMMUNICATION. Information given; the sharing of knowledge by one with another; conference; consultation or bargaining preparatory to making a contract; also intercourse; connection.[19] (Communication: Of Buildings, see FIRE INSURANCE; FIRES. Privileged, see LIBEL AND SLANDER; WITNESSES. With Persons Subsequently Deceased or Incompetent, see WITNESSES. See also ADJOINING.)

COMMUNI DIVIDUNDO. In the civil law, an action which lies for those who have property in common, to procure a division.[20]

COMMUNINGS. In Scotch law, the negotiations preliminary to the entering into a contract.[21]

COMMUNIO BONORUM. In the civil law, a term signifying a community of goods.[22]

COMMUNION OF GOODS. In Scotch law, the right enjoyed by married persons in the moveable goods belonging to them.[23]

COMMUNIS ERROR. A COMMON ERROR, *q. v.*; an opinion or practice which has commonly been held or observed, though originally perhaps without adequate foundation in law.[24]

COMMUNIS ERROR FACIT JUS. A maxim meaning "Common error makes law."[25] (See COMMON ERROR; COMMUNIS ERROR; CUSTOMS AND USAGES; STARE DECISIS.)

14. Applied to the common stock of consanguinity, and to the feodal bond of fealty, as the common bond of union between lord and tenant. Black L. Dict. [*citing* 2 Bl. Comm. 250].

15. Black L. Dict.

What it signifies.— Although technically the word "*communia*" signifies the right only, and not the place of commoning, and, being incorporeal, is not the subject of inclosure, yet in common parlance it signifies the common itself. Jackson *v.* Laveright, 10 Mod. 185.

16. Black L. Dict.

17. Burrill L. Dict. [*citing* 2 Bl. Comm. 322]. See also Rex *v.* Mirfield, 10 East 219.

18. Burrill L. Dict.

19. Black L. Dict.

"Communicated," as where a fire was communicated by an engine directly to one building, and then by natural and ordinary means to others. See Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719 [*cited* in Safford *v.* Boston, etc., R. Co., 103 Mass. 583, 585; Perley *v.* Eastern R. Co., 98 Mass. 414, 417, 96 Am. Dec. 645, where it is said that the escape of fire "was none the less 'communicated' from the engine, because the intermediate land belonged to other persons, nor because the distance was half a mile"].

"'Communicating' alone does not convey a definite meaning. There are many senses in which communication may be said to exist, as by telegraph, telephone, or conversation, between individuals, or by physical contact, or apparent uses, between inanimate objects. The context, purposes, and circumstances in view of which it is used must be resorted to to determine its significance in a particular case." Marsh *v.* Concord Mut. F. Ins. Co., 71 N. H. 253, 255, 51 Atl. 898 [*citing* Kendall *v.* Green, 67 N. H. 557, 562, 563, 42 Atl. 178].

"'Communicating' describes the dry-house and the engine-house, for they communicate with the main building by means of the movable bridge." Marsh *v.* New Hampshire F. Ins. Co., 70 N. H. 590, 49 Atl. 88.

20. Black L. Dict.

It lies where parties hold land in common but not in partnership. Black L. Dict.

21. Black L. Dict.

22. Black L. Dict.

23. Burrill L. Dict.

24. Burrill L. Dict. And see Tyler *v.* Flanders, 58 N. H. 371, 373, where it is said: "If the established practical construction is theoretically wrong, the case is one of a class in which it is proper to act upon the maxim that common opinion and common practice may be accepted as conclusive evidence of what the law is."

25. Black L. Dict.

Applied or explained in the following cases:

Massachusetts.— Packard *v.* Richardson, 17 Mass. 122, 131, 143, 9 Am. Dec. 123; Kent *v.* Kent, 2 Mass. 338, 357.

COMMUNIS OPINIO. See CUSTOMS AND USAGES.

Michigan.— Malonny *v.* Mahar, 1 Mich. 26, 30.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519, 538; Flint-Walling Mfg. Co. *v.* Ball, 43 Mo. App. 504, 509; Cole *v.* Skrainka, 37 Mo. App. 427, 444.

Montana.— O'Donnell *v.* Glenn, 9 Mont. 452, 461, 23 Pac. 1018, 8 L. R. A. 629.

New Jersey.— Sterling *v.* Van Cleve, 12 N. J. L. 285, 292. And see Booraem *v.* North Hudson County R. Co., 44 N. J. Eq. 70, 78, 14 Atl. 106; Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438, 448.

Ohio.— Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Meader *v.* Root, 11 Ohio Cir. Ct. 81, 86. And see Dutoit *v.* Doyle, 16 Ohio St. 400, 407; Leavitt *v.* Morrow, 6 Ohio St. 71, 78, 67 Am. Dec. 334. But see Kain *v.* State, 8 Ohio St. 306, 307, 320, in homicide cases.

Pennsylvania.— Clark *v.* Dotter, 54 Pa. St. 215; Turk *v.* McCoy, 14 Serg. & R. (Pa.) 349, 351. And see Watson *v.* Bailey, 1 Binn. (Pa.) 470, 478, 2 Am. Dec. 462.

United States.— Pease *v.* Peck, 18 How. (U. S.) 595, 601, 15 L. ed. 518 [*citing* 4 Inst. 240; Noy Max. 37]; Manchester *v.* Hough, 5 Mason (U. S.) 67, 68, 16 Fed. Cas. No. 9,005. And see McKeen *v.* Delancy, 5 Cranch (U. S.) 22, 33, 3 L. ed. 25 [*quoted* in Craig *v.* Fox, 16 Ohio 563, 569]; U. S. *v.* The Recorder, 1 Blatchf. (U. S.) 218, 223, 27 Fed. Cas. No. 16,129, 17 Hunt. Mer. Mag. 394, 5 N. Y. Leg. Obs. 286.

England.— Gorham *v.* Exeter, 15 Q. B. 52, 69, 69 E. C. L. 52, 10 C. B. 102, 70 E. C. L. 102, 5 Exch. 630, 14 Jur. 480, 522, 876, 19 L. J. C. P. 200, 19 L. J. Exch. 376, 19 L. J. Q. B. 279; Davidson *v.* Sinclair, 3 App. Cas. 765, 788; Reg. *v.* Cutbush, L. R. 2 Q. B. 379, 10 Cox C. C. 489, 36 L. J. M. C. 70, 16 L. T. Rep. N. S. 282, 15 Wkly. Rep. 742; Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 72, 111, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 54; Fernoys Peerage Claim, 5 H. L. Cas. 716, 729, 785; Isherwood *v.* Oldknow, 3 M. & S. 382, 396 [*cited* in Baker *v.* Jordan, 3 Ohio St. 438, 442]; Devaynes *v.* Noble, 2 Russ. & M. 495, 505, 11 Eng. Ch. 495. And see Renshaw *v.* Bean, 18 Q. B. 112, 83 E. C. L. 112; Jones *v.* Tapling, 12 C. B. N. S. 826, 104 E. C. L. 826; Garland *v.* Carlisle, 2 Cr. & M. 31, 95; Atty.-Gen. *v.* Bristol, 2 Jac. & W. 294, 321, 22 Rev. Rep. 136; Coke Litt. 186*a*.

Canada.— See Niagara Falls Park *v.* Howard, 23 Ont. 1, 27 [*quoting* The Charlotta, 1 Dods. Adm. 387, 393].

It is a legal maxim.—Com. *v.* Butler County, 2 Pearson (Pa.) 421, 424.

Peculiarly applicable to conveyancing questions. Caldwell *v.* McLaren, 9 App. Cas. 392, 409, 53 L. J. P. C. 33, 51 L. T. Rep. N. S. 370. And see cases first cited in this note.

Seldom applied in the administration of justice, and never without the exercise of the utmost caution. Booraem *v.* North Hudson County R. Co., 44 N. J. Eq. 70, 78, 14 Atl. 106 [*quoted* in Cole *v.* Skrainka, 37 Mo. App. 427, 445, per Thompson, J., in dissenting opinion]; Leavitt *v.* Morrow, 6 Ohio St. 71, 78, 67 Am. Dec. 334. And see O'Connell *v.* Reg., 11 Cl. & F. 155, 373, 9 Jur. 25, 8 Eng. Reprint 1061 [*quoted* in Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438, 449; Moss *v.* Witteman, 4 Misc. (N. Y.) 81, 82, 23 N. Y. Suppl. 854, 53 N. Y. St. 71]. Even *communis error,* and a long course of local irregularity, have been found to afford no protection to one *qui spondet peritiam artis.* Broom Leg. Max. 139, 140 [*quoting* Lord Ellenborough in Hart *v.* Frame, 6 Cl. & F. 193, 199, 3 Jur. 547, Macl. & R. 595, 7 Eng. Reprint 670].

Opinion of English jurists.— "It has been sometimes said," observed Lord Ellenborough, "*communis error facit jus;* but I say *communis opinio* is evidence of what the law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground-work and substratum of practice." Isherwood *v.* Oldknow, 3 M. & S. 382, 396 [*quoted* in Baker *v.* Jordan, 3 Ohio St. 438, 442]. And Lord Brougham in Devaynes *v.* Noble, 2 Russ. & M. 495, 506, 11 Eng. Ch. 495 [*quoted* in Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438, 449], said: "Common or universal error may be said to make the law, especially if the opinion of lawyers and the decisions of judges have been ruled by it." See also Garland *v.* Carlisle, 2 Cr. & M. 31, 95; Coke Litt. 186*a*. "It has been said, that, right or wrong, the case of Renshaw *v.* Bean, 18 Q. B. 112, 83 E. C. L. 112, has been decided, and that we should not unsettle the law. I think, if we acted on this principle, we should be abandoning the proper functions of a Court of error. There are cases in which a decision originally erroneous has been so long acquiesced in and acted on that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. There, the maxim applies '*Communis error facit jus.*' But, when we find a modern decision which has been questioned at once, and has led to much litigation, we ought, as it seems to me, in a Court of error, to inquire whether it is consistent with principle, and, if we think it wrong, to overrule it. It has been forcibly observed by an American author of repute,— 1 Phillipps Ins. 393, n. 1,— that, to do otherwise, 'tends to reduce jurisprudence from a science to an aggregation of dogmas.'" Jones *v.* Tapling, 12 C. B. N. S. 826, 846, 104 E. C. L. 826. "The error approved in Morecock *v.* Dickins, Ambl. 678, 27 Eng. Reprint 440, was one that had been sanctioned by a prior adjudication. So, too, in D'Arcy *v.* Blake, 2 Sch. & Lef. 387, the error approved by Lord Redesdale was one which prior decisions had made law. He said: 'The decisions to the full extent are so old, so strong and so numerous, so adopted in every book on the subject, and so considered as

COMMUNIS PARIES. In the civil law, a common or party wall.[26]

COMMUNIS RIXATRIX. In old English law, a common scold.[27] (See, generally, COMMON SCOLD.)

COMMUNIS SCRIPTURA. In old English law, a common writing; a writing common to both parties; a CHIROGRAPH,[28] *q. v.*

COMMUNIS STIPES. In old English law, a common stock; the common stock or root of descent; a common ancestor.[29] (See, generally, DESCENT AND DISTRIBUTION.)

COMMUNIS STRATA. In old English law, a, or the common street or road.[30] (See, generally, STREETS AND HIGHWAYS.)

COMMUNITAS. A COMMUNITY,[31] *q. v.*

COMMUNITER UNUM OFFICIUM EST EXCUSATIO ALTERIUS. A maxim meaning "The performance of one duty is commonly the excuse for the non-performance of another."[32]

COMMUNITY. A society of people living in the same place, under the same laws and regulations, and who have common rights and privileges.[33] In the civil law, a corporation or body politic.[34] In French law, common or joint possession or enjoyment; common or joint interest or participation; a species of partnership

settled law, that it would be very wrong to attempt, at this time, to alter them.'" Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438, 449. And see Devaynes *v.* Noble, 2 Russ. & M. 495, 506, 11 Eng. Ch. 495, where it is said: "It is not upon slight grounds, certainly, that any court, either of law or equity, ought to loosen and unsettle that which has stood for so long a period as nineteen years. If it be true that even a prevailing error — what has been called a common or universal error — may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that, unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially, if the opinion of lawyers and the decisions of judges have been ruled by it, and if, upon the analogies of that case, the same principle has been recognized and adopted in other cases connected with and relating to it."

Question for jury. — In the application of the maxim *communis error facit jus*, the inquiry is whether "the law is made." If the fact of the existence of a common error is to be submitted to the jury, and the jury finds its existence, then the court has no province but to complete the maxim and say *facit jus*. O'Donnell *v.* Glenn, 9 Mont. 452, 461, 23 Pac. 1018, 8 L. R. A. 629.

26. Burrill L. Dict.

27. Burrill L. Dict. [*citing* 4 Bl. Comm. 168].

28. Burrill L. Dict.

29. Burrill L. Dict.

30. Burrill L. Dict.

31. Burrill L. Dict.

32. Morgan Leg. Max. 35.

33. Black L. Dict.

It has a broader significance than the word "neighborhood" or "locality." Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 221, 45 S. W. 1119.

Includes inhabitants of village and vicinity. — Construing an agreement by a physician to transfer his practice to another and covenanting against competition unless the purchaser "should commit some act, which shall forfeit to him the confidence of the community," it was said: "The 'community,' by forfeiting whose confidence the plaintiff was to lose his right to recover against the plaintiff, interpreted according to the subject matter, would probably be held to be the population residing in the village and its vicinity, among which the defendant practised his profession at the time of his contract with the plaintiff." Gilman *v.* Dwight, 13 Gray (Mass.) 356, 359, 74 Am. Dec. 634.

34. Black L. Dict. See *In re* Huss, 126 N. Y. 537, 543, 27 N. E. 784, 37 N. Y. St. 789, 12 L. R. A. 620, where it is said: "We have, then, in this legatee a collective body of individuals, which has existed for past hundreds of years as a municipality, under the description of a 'community.' It had acquired and by the unwritten or common law it possessed and exercised certain rights of self-government and powers to acquire and to manage property for itself. By enactments of the Grand Ducal government its franchises and powers were recognized and confirmed to it. The public statutes, in providing that all the property of a community is the property of its citizens, as a corporation, or as a body, in fact, thereby invested the existing municipal body aggregate with an essential attribute of a corporation. This legislation would seem to have amounted to an incorporation by sovereign recognition and grant of powers and franchises. But whether chartered, or incorporated by statute or not, we are bound to consider the community as an artificial legal person. In Germany, in the eye of the law, it is a 'judicial person,' according to the evidence of the witness in this case, as under the Roman law, in the

which a man and woman contract where they are lawfully married to each other.[35] (Community: Property, see HUSBAND AND WIFE.)

COMMUTATION. Alteration;[36] change; substitution;[37] a substitution of a less thing for a greater, especially a substitution of one form of payment for another, or one payment for many, or a specific sum of money for conditional payments or allowances, etc.[38] (Commutation: Of Fare, see COMMUTATION OF FARES. Of Fuel, Rations, and Quarters, see ARMY AND NAVY. Of Punishment, see PARDONS; PRISONS. Ticket, see COMMUTATION TICKET.)

COMMUTATION OF FARES. Selling a ticket for a term at a less price than the aggregate of daily fares for the term.[39] (See, generally, CARRIERS.)

COMMUTATION TICKET. A ticket, as for transportation, which is the evidence of a contract for service at a reduced rate;[40] a ticket for one passenger, good for more than one ride, or for more than one passenger for one ride, sold at reduced rate;[41] a ticket issued at reduced rate by a carrier of passengers, entitling the holder to be carried over a given route a limited number of times, or an unlimited number of times during a certain period;[42] the purchase of a right to go upon a certain route during a specified period for a less amount than would be paid in the aggregate for separate trips.[43] (See, generally, CARRIERS.)

COMMUTATIVE. Relating to exchange; interchangeable; mutual.[44] (Commutative: Contracts, see CONTRACTS. Justice, see COMMUTATIVE JUSTICE.)

COMMUTATIVE JUSTICE. That virtue whose object is to render to every one what belongs to him, as nearly as may be, or that which governs contracts.[45] (See, generally, DISTRIBUTIVE JUSTICE.)

COMMUTE. A payment of a designated sum for the privilege of exemption or the selection, in advance, of a specific sum in lieu of an *ad valorem* tax.[46] (See COMMUTATION.)

COMPACT. As an adjective, closely and firmly united, as the parts or particles of solid bodies; having the parts or particles pressed or packed together; close;

classification of the writer Savigny, it was a 'juristical person.'"

35. Burrill L. Dict. And see Smalley *v.* Lawrence, 9 Rob. (La.) 210 [*quoted* in Meyer *v.* Kinzer, 12 Cal. 247, 248, 73 Am. Dec. 538]; Mitchell *v.* Mitchell, 80 Tex. 101, 111, 15 S. W. 705; 2 Kent Comm. 183–187 notes.

"Community of profits" means a proprietorship in them. Moore *v.* Williams, 26 Tex. Civ. App. 142, 146, 62 S. W. 977.

36. Century Dict.

37. Burrill L. Dict.

38. Webster Dict. [*quoted* in Crotty *v.* Eagle, 35 W. Va. 143, 151, 13 S. E. 59].

In reference to commutation of money in lieu of land, under an Indian treaty, loosely drawn, the court said: "But suppose the word 'commutation' to have been appropriately used according to its ordinary signification, yet that signification is satisfied, whether the thing given for another is given to the one from whom that other is received, or to a third person." Cook *v.* Biddle, 2 Mich. 269, 273.

Commutation of tithes signifies the conversion of tithes into a fixed payment in money. Black L. Dict. And see Trimmer *v.* Walsh, 4 B. & S. 40, 116 E. C. L. 40.

39. Abbott L. Dict.

40. Webster Dict. (ed. of 1891) [*quoted* in Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 284, 12 S. Ct. 844, 36 L. ed. 699 (*affirming* 43 Fed. 37)], where it is said: "These are technically known as party rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a 'mileage' nor an 'excursion' ticket within the exception of section 22 [Interstate Commerce Act]; and upon the testimony in this case it may be doubtful whether it falls within the definition of 'commutation tickets,' as those words are commonly understood among railway officials. The words 'commutation ticket' seem to have no definite meaning." See also Pittsburgh, etc., R. Co. *v.* Baltimore, etc., R. Co., 2 Int. Com. Rep. 729.

41. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37, 43 [*affirmed* in 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699].

42. Century Dict. [*quoted* in Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37, 56].

43. Webster Dict. [*quoted* in Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37, 56 (*affirmed* in 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699)].

44. Century Dict.

45. Bouvier L. Dict. [*quoted* in Bowman *v.* McLaughlin, 45 Miss. 461, 495, where it is said: "To render 'commutative justice' the judge must make an equality between the parties, that no one may be a gainer by another's loss"].

46. Louisiana Cotton Mfg. Co. *v.* New Orleans, 31 La. Ann. 440, 447.

solid; dense; as a compact mass of people;[47] joined or held together.[48] As a noun, an agreement or contract, usually of the more formal or solemn kind; a contract or engagement between nations, or states, or the individuals of a community.[49] (Compact: Between — Individuals, see CONTRACTS; States, see STATES; Nations, see TREATIES.)

COMPANIES CLAUSES CONSOLIDATION ACT. An English statute, (8 Vict. c. 16) passed in 1845, which consolidated the clauses of previous laws still remaining in force on the subject of public companies.[50] (See, generally, CORPORATIONS.)

COMPANIONS. In French law, a general term, comprehending all persons who compose the crew of a ship or vessel.[51] (See, generally, SEAMEN; SHIPPING.)

COMPANY. An association of a number of individuals for the purpose of carrying on a legitimate business;[52] a number of persons united for the same purpose, or in a joint concern;[53] as a company of merchants. The word is appli-

47. People *v.* Thompson, 155 Ill. 451, 478, 40 N. E. 307.

48. State *v.* Jacobi, 52 Ohio St. 66, 77, 39 N. E. 317.

49. Burrill L. Dict.

Synonymous with "contract."—Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 130; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 92, 5 L. ed. 547. And see, generally, CONTRACTS.

The terms "agreement" or "compact," taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects. Wharton *v.* Wise, 153 U. S. 155, 169, 14 S. Ct. 783, 38 L. ed. 669. "We do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'— covering all stipulations affecting the conduct or claims of the parties." Virginia *v.* Tennessee, 148 U. S. 503, 520, 13 S. Ct. 728, 37 L. ed. 537 [*quoted* in Stearns *v.* Minnesota, 179 U. S. 223, 245, 21 S. Ct. 73, 45 L. ed. 162; Wharton *v.* Wise, 153 U. S. 155, 168, 14 S. Ct. 783, 38 L. ed. 669].

Word as used in the constitution.— U. S. Const. art. 1, § 10, among other limitations of state power, declares that "no State shall enter into any Treaty, Alliance, or Confederation;" the second clause of the same section, among other things, declares that no state, without the consent of congress, shall "enter into any Agreement or Compact with another State, or with a foreign power." When, therefore, the second clause declares that no state shall enter into "any agreement or compact" with a foreign power without the assent of congress, the words "agreement" and "compact" cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word "treaty" in the preceding clause, into which the states are positively and unconditionally forbidden to enter, and which even the consent of congress could not authorize. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 571, 614, 10 L. ed. 579, 618. And see Virginia *v.* Tennessee, 148 U. S. 503, 520, 13 S. Ct. 728, 37 L. ed. 537 [*quoted* in Stearns *v.* Minnesota, 179 U. S. 223, 245, 21 S. Ct. 73, 45 L. ed. 162; Wharton *v.* Wise, 153 U. S. 155, 168, 14 S. Ct. 783, 38 L. ed. 669].

Distinguished from law.— Law "is also called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, 'I will, or will not, do this;' that of a law is, 'thou shalt, or shalt not, do it.' It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all." 1 Bl. Comm. 45.

50. Black L. Dict.

51. Black L. Dict. [*citing* Pothier Mar. Cont. No. 163].

52. Bouvier L. Dict. [*quoted* in Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 176, 23 N. Y. Suppl. 675, 53 N. Y. St. 214].

53. Webster Dict. [*quoted* in Kansas City *v.* Vineyard, 128 Mo. 75, 81, 30 S. W. 326].

Agent may be included within the meaning of the term. Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

Assignee may be included within the meaning of the term. Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

Association is included within the meaning of the term; in fact "company" and "association" are frequently considered as synonymous.

California.— Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

Mississippi.— Lee Mut. F. Ins. Co. *v.* State, 60 Miss. 395, 398.

New Jersey.— State Bd. Assessors *v.* Central R. Co., 48 N. J. L. 146, 312, 4 Atl. 578.

Texas.— Mills *v.* State, 23 Tex. 295, 303.

Vermont.— State *v.* Mead, 27 Vt. 722.

Individuals may be included within the meaning of the term.

California.— Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

cable to private partnerships, or incorporated bodies of men; hence it may signify a firm, house, or partnership;[54] or a corporation, as the "East India Company."[55] (See, generally, Associations; Corporations; Joint-Stock Companies; Partnership.)

COMPANY'S PAPER. Any and all obligations for the payment of money made by the corporation for its use and benefit.[56] (See, generally, Corporations.)

Georgia.— Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 120, 25 S. E. 249, 35 L. R. A. 497.

Illinois.— Chicago, Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 164, 3 N. E. 448 [*citing* Perry County *v.* Jefferson County, 94 Ill. 214; St. Louis, etc., R. Co. *v.* Trustees Illinois Inst., etc., 43 Ill. 303].

Missouri.— State *v.* Stone, 118 Mo. 388, 397, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243 [*citing* Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448].

New Jersey.—State Bd. Assessors *v.* Central R. Co., 48 N. J. L. 146, 312, 4 Atl. 578; Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13.

United States.— Singer Mfg. Co. *v.* Wright, 33 Fed. 121, 127.

England.— Construing an insurance policy so as to give effect to a certain provision contained therein, it was said: "I think we can do this by construing the term 'Company' to denote the funds of the Company, which alone are to pay, or by holding that it means not the whole body collectively, so as to make the whole body joint contractors, but each individual of the company, so as to make each of them to contract to bear the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter." Hallett *v.* Dowdall, 18 Q. B. 2, 91, 16 Jur. 462, 21 L. J. Q. B. 98, 83 E. C. L. 2.

Joint-stock company may be included within the meaning of the term. Singer Mfg. Co. *v.* Wright, 33 Fed. 121, 127.

Trustee may be included within the meaning of the term. Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

A club is not a company within the meaning of the Joint-Stock Companies Winding-up Acts. *Re* St. James Club, 2 De G. M. & G. 383, 16 Jur. 1075, 51 Eng. Ch. 300.

54. Partnership may be included within the meaning of the term. Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547; Palmer *v.* Pinkham, 33 Me. 32; Singer Mfg. Co. *v.* Wright, 33 Fed. 121, 127; Imperial Dict. [*quoted* in Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 176, 23 N. Y. Suppl. 675, 53 N. Y. St. 214]. But see Smith *v.* Anderson, 15 Ch. D. 247, 273, 50 L. J. Ch. 39, 43 L. T. Rep. N. S. 329, 29 Wkly. Rep. 21 [*quoted* in Morrison *v.* Earls, 5 Ont. 434, 474], where a distinction is made between a company and a partnership as follows: "An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in." *Compare* Bouvier L. Dict. [*quoted* in Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 176, 23 N. Y. Suppl. 675, 53 N. Y. St. 214].

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. Bouvier L. Dict. [*citing* 12 Toullier 97]. *Compare* Zimmerman *v.* Erhard, 83 N. Y. 74, 77, 38 Am. Rep. 396. And see Gay *v.* Seibold, 97 N. Y. 472, 49 Am. Rep. 535.

55. Corporation may be included within the meaning of the term.

Arkansas.—Van Horne *v.* State, 5 Ark. 349, 352.

California.— Moran *v.* Ross, 79 Cal. 159, 164, 21 Pac. 547.

Georgia.— Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 120, 25 S. E. 249, 35 L. R. A. 497 [*quoting* Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448].

Illinois.— Goddard *v.* Chicago, etc., R. Co., (Ill. 1903) 66 N. E. 1066; Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 164, 3 N. E. 448 [*citing* Perry County *v.* Jefferson County, 94 Ill. 214]; St. Louis, etc., R. Co. *v.* Trustees Illinois Inst., etc., 43 Ill. 303.

Missouri.—State *v.* Stone, 118 Mo. 388, 397, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243 [*citing* Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448].

Nevada.— Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247.

New Jersey.—State Bd. Assessors *v.* Central R. Co., 48 N. J. L. 146, 312, 4 Atl. 578.

New York.— Bradley Fertilizer Co. *v.* South Pub. Co., 4 Misc. (N. Y.) 172, 176, 23 N. Y. Suppl. 675, 53 N. Y. St. 214 [*quoting* Imperial Dict.], where it is said, however, that "while the word 'company' is frequently used to denote an incorporated association, it does not necessarily involve that idea either in common speech or at law."

Pennsylvania.— Com. *v.* Reinoehl, 163 Pa. St. 287, 291, 29 Atl. 896, 25 L. R. A. 247.

Vermont.— State *v.* Mead, 27 Vt. 722.

Wisconsin.— Smith *v.* Janesville, 52 Wis. 680, 682, 9 N. W. 789. See also Taylor *v.* Coon, 79 Wis. 76, 83, 48 N. W. 123.

United States.— Singer Mfg. Co. *v.* Wright, 33 Fed. 121, 127.

England.— See Reg. *v.* Whitmarsh, 14 Q. B. 803, 813, 68 E. C. L. 803.

56. Taylor *v.* Coon, 79 Wis. 76, 83, 48 N. W. 123, where the terms "company's

COMPARATIO LITERARUM. In the civil law, comparison of writings, or handwritings. A mode of proof allowed in certain cases.[57] (See, generally, EVIDENCE.)

COMPARATIVE NEGLIGENCE. See NEGLIGENCE.

COMPARISON OF HANDS or **HANDWRITING.** See EVIDENCE.

COMPASCUUM. Belonging to commonage.[58]

COMPATERNITAS. In the canon law, a kind of spiritual relationship contracted by baptism.[59]

COMPATERNITY. Spiritual affinity, contracted by sponsorship in baptism.[60]

COMPATIBILITY. Capability of harmony or accord.[61] (Compatibility: Of Offices, see OFFICERS.)

COMPEARANCE. In Scotch practice, appearance.[62] (See, generally, APPEARANCES.)

COMPEL. To drive or urge with force or irresistibly.[63]

COMPELLATIVUM. An ADVERSARY (*q. v.*) or ACCUSER,[64] *q. v.*

COMPELLED. Forced,[65] ordered, or directed.[66] (Compelled: Defilement, see ABDUCTION. Marriage, see ABDUCTION. Payment, see PAYMENT. See COMPEL.)

COMPENDIUM. An ABRIDGMENT, *q. v.*, SYNOPSIS, *q. v.*, or DIGEST,[67] *q. v.* (See COMPILATION.)

COMPENSACION. In Spanish law, COMPENSATION, *q. v.*; set-off; the extinction of a debt by another debt of equal dignity.[68] (See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.)

COMPENSATE. To pay a person its value in money for an article or property obtained from him.[69] (See COMPENSATION.)

COMPENSATIO. In civil law, COMPENSATION,[70] *q. v.*

COMPENSATIO CRIMINUM. The doctrine of recrimination, originally borrowed from the canon law, by which the defendant is permitted to contest the plaintiff's application on the ground of his own violation of the marriage contract — to set off, the equal guilt of the plaintiff.[71]

COMPENSATION.[72] An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or

paper" and "corporate paper" were used synonymously in an agreement.

57. Burrill L. Dict.

58. Jus compascuum, the right of common of pasture. Black L. Dict.

59. Black L. Dict.

60. Black L. Dict.

61. Cyclopedic L. Dict.

62. Black L. Dict.

63. Century Dict.

In its ordinary signification "compel" implies force or violence, and has in it the element of irresistibility. Webster Dict. [*quoted* in St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76, 86].

64. Jacob L. Dict.

65. St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76, 86, where it is said: "As employed in the instruction, it is not conceivable that it could have conveyed any other impression to the mind of the jury than that the two words ["forced" and "compelled"] were used interchangeably and meant about one and the same thing."

"Compelled to pay." — The words "called upon to pay," as employed in an agreement, were construed as the equivalent of "compelled or required to pay." Taylor *v.* Coon, 79 Wis. 76, 85, 48 N. W. 123. Whatever he shall be legally "compelled" to pay, means whatever by legal process he shall be "obliged" to pay, without reference to the laws of any particular state. Parker *v.* Thompson, 3 Pick. (Mass.) 429, 432.

66. Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 776, 51 N. W. 68, 62 N. W. 325.

67. Black L. Dict.

68. Black L. Dict.

69. Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140, 155.

70. Black L. Dict.

71. Conant *v.* Conant, 10 Cal. 249, 255, 70 Am. Dec. 717.

72. As compared with "consideration" and "damages," "compensation," in its most careful use, seems to be between them. "Consideration" is amends for something given by consent, or by the owner's choice. "Damages" are amends exacted from a wrong-doer for a tort. "Compensation" is amends for something which was taken without the owner's choice, yet without commission of a tort. Thus, one should say, "consideration" for land sold; "compensation" for land taken for a railway; "damages" for a trespass. But such distinctions are not uniform. Abbott L. Dict. But *compare* Hays *v.* Briggs, 3 Pittsb. (Pa.) 504, 517, 22 Pittsb. Leg. J. 141, where it is said that the words "damage" and "compensation," as

injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury;[73] the consideration or price of a privilege purchased;[74] equivalence;[75] something given or obtained as an equivalent;[76] the rendering of an equivalent in value or amount;[77] an equivalent given for property taken or for an injury done to another;[78] the giving back an equivalent in either money, which is but the measure of value, or in actual value otherwise conferred;[79] a recompense in value;[80] a recompense given for a thing received;[81] recompense for the whole injury suffered;[82] remuneration or satisfaction for injury or damage of every description;[83] remuneration for

applied respectively to the lateral railroad and to the wharf or landing in the Lateral Railroad Law, mean practically the same thing. The word "damage" in this connection is a relative term with reference to possible advantages to the party otherwise damaged. The word "compensation" is absolute, and implies *ex vi termini* that the owner must be paid in money for what is taken from him. See also, generally, CONTRACTS; DAMAGES.

Compared with "salvage."— Compensation, larger or smaller, in the nature of salvage, is allowed by the court for services to property on the high seas, when such property is not in imminent peril, or perhaps in very little peril, of total loss. Whether this compensation is called "salvage," or simply "compensation," is really of no practical importance. The Mt. Washington, 17 Fed. Cas. No. 9,887, 4 Adm. Rec. 523. See also, generally, SALVAGE.

"Compensation" is a term of larger scope than "cost," and especially that "actual cost." *In re* Newton, 172 Mass. 5, 10, 51 N. E. 183, 185.

"Compensation" substituted for "value." — In Grand Rapids *v.* Grand Rapids, etc., R. Co., 58 Mich. 641, 648, 26 N. W. 159, the court said: "The statute in question has rightly discarded the term 'value,' sometimes used in similar statutes, for the term 'compensation,' which is the constitutional word, and means much more."

Distinguished from "profit."— Under the act of 1874, that no member of a life-insurance company shall recover any money as profit or otherwise, the court said: "Compensation for labor can not be regarded as profit, within the meaning of the law. The word 'profit,' as ordinarily used, means the gain made upon any business or investment — a different thing altogether from mere compensation for labor." Commercial League Assoc. *v.* People, 90 Ill. 166, 173.

May include "indemnity."—Although "compensation," in the popular sense, may be broad enough to include "indemnity," still, if the terms are used by the parties entering into the contract in a special or technical sense, they are to be so understood. Bayley *v.* Employers' Liability Assur. Corp., 125 Cal. 345, 351, 58 Pac. 7.

73. Black L. Dict.

74. Gilmore *v.* Pittsburg, etc., R. Co., 104 Pa. St. 275, 281.

75. Winona, etc., R. Co. *v.* Denman, 10 Minn. 267, the primary signification.

76. Winona, etc., R. Co. *v.* Denman, 10 Minn. 267, the secondary and more common meaning.

77. Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140, 155.

78. Louisiana, etc., Plankroad Co. *v.* Pickett, 25 Mo. 535, 539; Greenville, etc., R. Co. *v.* Partlow, 5 Rich. (S. C.) 428, 437.

Thus the term includes that equivalent in money which is paid to the owners and occupiers of lands taken or injuriously affected by the operations of companies exercising the power of eminent domain (Black L. Dict.); an equivalent for the value of land (New Jersey R., etc., Transp. Co. *v.* Suydam, 17 N. J. L. 25, 47, where the court said: "Anything beyond that, is more than compensation; anything short of it, is less. So their power is expressly confined to an equivalent"). Compensation includes not only the value of the portion taken, but the diminution of the value of that from which it is severed also. Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. (N. Y.) 467, 469 [*quoted* in Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413, 420; Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478, 487; Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433, 445].

79. Long *v.* Harrisburg, etc., R. Co., 126 Pa. St. 143, 146, 19 Atl. 39.

80. Symonds *v.* Cincinnati, 14 Ohio 147, 177, 45 Am. Dec. 529 (where it is said: "Compensation must be made in money"); Vanhorne *v.* Dorrance, 2 Dall. (Pa.) 304, 315, 28 Fed. Cas. No. 16,857, 1 L. ed. 391 (where it is said: "No just compensation can be made except in money"). But see Harper *v.* Com., 93 Ky. 290, 292, 14 Ky. L. Rep. 163, 19 S. W. 737, where it is said: "The language 'compensation, reward or commission' means 'in any form whatever.'"

81. James River, etc., Co. *v.* Turner, 9 Leigh (Va.) 313, 340.

82. Cowen *v.* Winters, 96 Fed. 929, 932, 37 C. C. A. 628.

The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price, or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury. Schenkel *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 182, 186, 44 Atl. 1072; Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 15, 35 Atl. 191, 55 Am. St. Rep. 705.

83. Jubb *v.* Kingston upon Hull Dock Co., 9 Q. B. 443, 455, 11 Jur. 15, 15 L. J. Q. B.

loss of time, necessary expenditures, and for permanent disability, if such be the result;[84] remuneration for the injury directly and proximately caused by a breach of contract or duty;[85] remuneration or wages given to an employee or officer.[86] In equity, something to be done for, or money to be paid to, a person, equal in value or amount to the right or thing of which he has been deprived.[87] In regard to railway rates, it means enough to pay costs of service, fixed charges of interest, and a dividend, however small.[88] In civil, French, and Scotch law, recoupment; set-off;[89] a mode of extinguishing a debt, which takes place, by mere operation of

403, 3 R. & Can. Cas. 795, 58 E. C. L. 443.

84. Parker *v.* Jenkins, 3 Bush (Ky.) 587, 591.

85. Swain *v.* Schieffelin, 134 N. Y. 471, 473, 31 N. E. 1025, 47 N. Y. St. 910, 18 L. R. A. 385.

In all cases of civil injury or breach of contract, with certain specified exceptions, "the declared object is to give compensation to the party injured for the actual loss sustained; and the amount of this compensation is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of either judge or jury." Sedgwick Dam. (3d ed.) 26 [*quoted* in Parker *v.* Jenkins, 3 Bush (Ky.) 587, 590].

86. Black L. Dict. See also, generally, MASTER AND SERVANT; OFFICERS; PRINCIPAL AND AGENT.

"Compensation" and "salary" are sometimes used synonymously. Kirkwood *v.* Soto, 87 Cal. 394, 396, 25 Pac. 488; Crawford County *v.* Lindsay, 11 Ill. App. 261, 263. But where no salary was allowed the treasurer but "compensation" merely, it is error to use the term "salary." Kilgore *v.* People, 76 Ill. 548.

The word applies not only to salaries, but to compensation by fees for specific services.

California.— Searcy *v.* Grow, 15 Cal. 117, 123.

Kentucky.— Com. *v.* Carter, 21 Ky. L. Rep. 1509, 1510, 55 S. W. 701.

New York.— Culley *v.* Hardenbergh, 1 Den. (N. Y.) 508, 510. And see Erie County *v.* Jones, 119 N. Y. 339, 342, 23 N. E. 742, 29 N. Y. St. 508.

South Carolina.—Alexander *v.* McKenzie, 2 S. C. 81, 93.

Wisconsin.— Milwaukee County *v.* Hackett, 21 Wis. 613 [*quoted* in State *v.* Kalb, 50 Wis. 178, 184, 6 N. W. 557].

The word "compensation," in N. Y. Const. art. 6, § 13, means the sum of money the judicial officer was in receipt of from the state when his term of office was abridged. People *v.* Wemple, 115 N. Y. 302, 22 N. E. 272, 26 N. Y. St. 330, per Andrews, J., in dissenting opinion.

87. Anderson L. Dict. See also Hearne *v.* Tenant, 13 Ves. Jr. 287, 289; Horniblow *v.* Shirley, 13 Ves. Jr. 81; Halsey *v.* Grant, 13 Ves. Jr. 73, 77 (where it is said: "Equity does not permit the forms of law to be made instruments of injustice; and will interpose against parties, attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where therefore advantage is taken of a circumstance, that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. . . . Thus was introduced the principle of compensation; now so well established: a principle, which I have no disposition to shake"); Smith *v.* Muirhead, 3 Grant Ch. (U. C.) 610, 613. And *compare* Howland *v.* Norris, 1 Cox Ch. 59, 61 (where it is said: "It is now settled that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter, he must be satisfied with such compensation"); Dyer *v.* Hargrave, 10 Ves. Jr. 505, 508, 8 Rev. Rep. 36 (where it was said: "Whether compensation is to be made is a different consideration. Upon the same ground, that the Defendant cannot get rid of the contract on account of the difference in the description of the farm, he cannot be entitled to compensation, for it was an object of sense. He could not be deceived").

"Compensation, and not forfeiture, is a favorite maxim with courts of equity." Knott *v.* Stephens, 5 Oreg. 235, 239 [*citing* Moore *v.* Anders, 14 Ark. 628, 634, 60 Am. Dec. 551; Smith *v.* Robinson, 13 Ark. 533; Gouldin *v.* Buckelew, 4 Cal. 107; 1 Story Eq. Jur. §§ 788, 789]. See also Frink *v.* Thomas, 20 Oreg. 265, 269, 25 Pac. 717, 12 L. R. A. 239.

Where the specific relief prayed for cannot be granted, equity may decree compensation. Allison's Appeal, 77 Pa. St. 221, 227; Fessler's Appeal, 75 Pa. St. 483; Masson's Appeal, 70 Pa. St. 26.

88. Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436, 440 [*quoting* Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 879, 1 L. R. A. 744].

Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping of the road-bed and the cars and machinery and other appliances in perfect order and repair. Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 879, 1 L. R. A. 744 [*quoted* in Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436, 440].

Distinguished from "fare."—While "fare," in common acceptation, relates to the passenger, "compensation," as a general term, embraces both. Degrauw *v.* Long Island Electric R. Co., 43 N. Y. App. Div. 502, 508, 60 N. Y. Suppl. 163.

89. Black L. Dict. And see Stewart *v.* Harper, 16 La. Ann. 181, where it is said that under the civil code of Louisiana the term implies remuneration of three kinds,

law, where debts equally liquidated and demandable are reciprocally due;[90] a reciprocal acquittal of debts between two persons who are indebted the one to the other;[91] the extinction of debts of which two persons are reciprocally debtors by the credits of which they are reciprocally creditors.[92] (Compensation: For Performance of Contracts, see CONTRACTS. For Property Taken for Public Use, see EMINENT DOMAIN. For Services — in General, see MASTER AND SERVANT; Agricultural Lien For Services, see AGRICULTURE; Salvage Services, see SALVAGE. For Towage, see TOWAGE. For Transportation of Mail, see POST-OFFICE. In Damages, see DAMAGES. In Equity, see EQUITY. Of Administrator, see EXECUTORS AND ADMINISTRATORS. Of Agent, see PRINCIPAL AND AGENT. Of Agister, see ANIMALS. Of Ambassador, see AMBASSADORS AND CONSULS. Of Arbiters, see ARBITRATION AND AWARD. Of Army Officer, see ARMY AND NAVY. Of Assignee — For Benefit of Creditors, see ASSIGNMENT FOR BENEFIT OF CREDITORS; In Bankruptcy, see BANKRUPTCY; In Insolvency, see INSOLVENCY. Of Attorney, see ATTORNEY AND CLIENT. Of Attorney-General, see ATTORNEY-GENERAL. Of Bailee and Bailor, see BAILMENTS. Of Broker, see FACTORS AND BROKERS. Of Clerk, see CLERKS. Of Commissioner in Chancery, see EQUITY. Of Constable, see SHERIFFS AND CONSTABLES. Of Consul, see AMBASSADORS AND CONSULS. Of Coroner, see CORONERS. Of Corporate Officer, see CORPORATIONS. Of County Officer, see COUNTIES. Of Court Commissioner, see COURT COMMISSIONERS. Of Customs Officer, see CUSTOMS DUTIES. Of District Attorney, see PROSECUTING ATTORNEYS. Of Employee, see MASTER AND SERVANT. Of Executor, see EXECUTORS AND ADMINISTRATORS. Of Factor, see FACTORS AND BROKERS. Of Guardian, see GUARDIAN AND WARD. Of Insurance Agent, see INSURANCE. Of Judge, see JUDGES. Of Juror, see JURIES. Of Justice of the Peace, see JUSTICES OF THE PEACE. Of Master in Chancery, see EQUITY. Of Municipal Officer, see MUNICIPAL CORPORATIONS. Of Naval Officer, see ARMY AND NAVY. Of Officer Generally, see OFFICERS. Of Partner, see PARTNERSHIP. Of Physician, see PHYSICIANS AND SURGEONS. Of Pilot, see PILOTS. Of Prosecuting Attorney, see PROSECUTING ATTORNEYS. Of Receiver, see RECEIVERS. Of Referee, see REFERENCES. Of Sailor, see ARMY AND NAVY. Of Servant, see MASTER AND SERVANT. Of Sheriff, see SHERIFFS AND CONSTABLES. Of Soldier, see ARMY AND NAVY. Of Surgeon, see PHYSICIANS AND SURGEONS. Of Tax Officer, see TAXATION. Of Town Officer, see TOWNS. Of Trustee, see TRUSTS. Of United States Commissioner, see UNITED STATES COMMISSIONERS. Of United States Marshal see UNITED STATES MARSHALS. Of Witness, see WITNESSES.)

legal or by operation of law; compensation by way of exception; and by reconvention. But see Campbell *v.* Park, 11 Tex. Civ. App. 455, 456, 33 S. W. 754, construing Texas statute.

As to recoupment and set-off generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

Set-off answers very nearly to the "*compensatio*" or stoppage of the civil law. 3 Bl. Comm. 305.

90. Dorvin *v.* Wiltz, 11 La. Ann. 514, 520, per Buchanan, J., in dissenting opinion.

91. Campbell *v.* Park, 11 Tex. Civ. App. 455, 458, 33 S. W. 754, where it is said: "It is not enough to make compensation that there be a debt on the one side and the other, but it is moreover necessary that both the debts be clear and liquid — that is, certain and not liable to dispute."

92. 1 Pothier Obl. 587 [*quoted* in Smith *v.* Muirhead, 3 Grant Ch. (U. C.) 610, 613, where it is said: "The civil law doctrines of compensation differ essentially from the right of set-off, but are regulated throughout, as I venture to think, upon principles of strict reason. Compensation is not, as with us, a right of set-off, to be exercised at the option of the parties; but, in the language of Pothier, it is the extinction of debts, of which two persons are reciprocally debtors, by the credits of which they are reciprocally creditors. This extinction takes place by operation of law, quite irrespective of the acts of the parties; and so complete is the extinction that one who pays a debt under such circumstances, notwithstanding the compensation which, *pleno jure*, had extinguished the cross demands, is obliged to proceed by an action termed '*conditio indebiti*,' because the law regards him as seeking to recover a sum paid when nothing was due"]. See also Howard *v.* Randolph, 73 Tex. 454, 459, 11 S. W. 495 [*citing* Domat Civ. L. 2289, 2296], where it is said: "It is not enough to make compensation that there be a debt on the one side and the other, but it is moreover necessary that both the debts be clear and liquid — that is, certain and not liable to dispute. Thus one can not compensate with a clear and liquid

COMPENSATORY DAMAGES. See DAMAGES.

COMPERTORIUM. In the civil law, a judicial inquest made by delegates or commissioners to find out and relate the truth of a cause.[93]

COMPERUERUNT AD DIEM. They appeared at the day.[94]

COMPETENCY. Intelligence of one sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty.[95] The term also means a competency in respect of interest, and not in respect of the person.[96] (See COMPETENT.)

COMPETENT.[97] Answering to all requirements; adequate; sufficient;[98] suitable;[99] capable; legally qualified; fit;[1] fitness or capability of performing the duties of the office;[2] reliable.[3] In respect to real property, under a statute, the word "competent," when used in connection with the words "continuing interest," means competent to dispose of a continuing interest.[4] (Competent: Administrator, see EXECUTORS AND ADMINISTRATORS. Arbitrator, see ARBITRATION AND AWARD. Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. Court, see COMPETENT COURT; COURTS. Evidence, see CRIMINAL LAW; EVIDENCE. Executor, see EXECUTORS AND ADMINISTRATORS. Guardian, see GUARDIAN AND WARD. Jurisdiction, see COMPETENT JURISDICTION. Juror, see JURIES. Receiver, see RECEIVERS. Tribunal, see COMPETENT TRIBUNAL. Witness, see WITNESSES.)

COMPETENT AND OMITTED. In Scotch practice, a term applied to a plea which might have been urged by a party during the dependence of a cause, but which had been omitted.[5]

COMPETENT COURT. A court having lawful jurisdiction;[6] a court within the

debt a debt that is litigious nor a pretension that is not settled."

93. Black L. Dict.

94. Adams Gloss.

If bail above, who are excepted to and have not justified, afterward procure their recognizance to be put on the roll, the court will, at the instance of a plaintiff suing on the bail-bond, cause it to be taken off, that the defendants may not prove by that evidence that the issue of *comperuerunt ad diem.* Leigh *v.* Bertles, 1 Marsh. 520, 6 Taunt. 167, 1 E. C. L. 559.

95. Sehr *v.* Lindemann, 153 Mo. 276, 54 S. W. 537.

96. Atty.-Gen. *v.* Hallett, 2 H. & N. 368, 378, 27 L. J. Exch. 89.

97. The words "competent," and "proper," are sometimes used synonymously; or, at any rate, the expression "proper probate court," is used synonymously with "probate court of competent jurisdiction." Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

98. Winter *v.* Shutter, 42 Kan. 544, 546, 22 Pac. 564; Dodd *v.* Templeman, 76 Tex. 57, 61, 13 S. W. 187; Webster Int. Dict. [*quoted* in King's Lake Drainage, etc., Dist. *v.* Jamison, (Mo. 1903) 75 S. W. 679, 683].

99. Dodd *v.* Templeman, 76 Tex. 57, 61, 13 S. W. 187; Webster Int. Dict. [*quoted* in King's Lake Drainage, etc., Dist. *v.* Jamison, (Mo. 1903) 75 S. W. 679, 683].

1. Webster Int. Dict. [*quoted* in King's Lake Drainage, etc., Dist. *v.* Jamison, (Mo. 1903) 75 S. W. 679, 683]. See also *In re* Pacheco, 23 Cal. 476 ("competent" as used in Cal. Prob. Act, § 69); Bowes *v.* Haywood, 35 Mich. 241, 245 ("competent" party for the purpose of executing a grant); Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341 ("competent and able to act" as applied to members of township board); Tyler *v.* Flanders, 58 N. H. 371, 373 (number of selectmen "competent" to act); Tenney *v.* State, 27 Wis. 387, 393 ("competent" clerk); Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 735, 9 L. ed. 283.

Where a "competent inspector" was provided for by statute, it was held that a lawyer might be appointed to the office. School Directors' Appeal, 179 Pa. St. 60, 36 Atl. 151. But see Tenny *v.* State, 27 Wis. 387, 393.

2. Com. *v.* Josephs, 15 Phila. (Pa.) 193, 196, 39 Leg. Int. (Pa.) 246.

3. Thus a competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 564, 25 N. E. 915, 34 N. Y. St. 214, 19 Am. St. Rep. 523 [*quoted* in Malay *v.* Mt. Morris Electric Light Co., 41 N. Y. App. Div. 574, 579, 58 N. Y. Suppl. 659; Cameron *v.* New York Cent., etc., R. Co., 77 Hun (N. Y.) 519, 522, 28 N. Y. Suppl. 898, 60 N. Y. St. 273].

4. Atty.-Gen. *v.* Hallett, 2 H. & N. 368, 377, 27 L. J. Exch. 89, where it is said: "There is no doubt that the legislature, in using the words 'competent to dispose by will of a continuing interest,' meant to refer to the quantity of interest, and not the mental capacity of the individual."

5. Black L. Dict.

6. Landers *v.* Staten Island R. Co., 53 N. Y. 450, 456.

local limits of its existing jurisdiction, and with reference to persons within those limits.[7] (See, generally, COURTS.)

COMPETENT JURISDICTION. The terms, in their usual signification, embrace the person as well as the cause.[8] (See, generally, COURTS.)

COMPETENT TRIBUNAL. One of the regularly established courts of the country and in it,[9] a court competent to try the question and party before it.[10] (See, generally, COURTS.)

COMPETING. In respect to transportation the term signifies a road completed and ready for operation.[11] (See COMPETITION.)

COMPETITION. That series of acts or course of conduct which is the result of the free choice of the individual, and not of any legal or moral obligation or duty.[12] (Competition: Agreement to Prevent, see CONTRACTS; MONOPOLIES. Combination to Prevent, see MONOPOLIES. Unfair, see TRADE-MARKS AND TRADE-NAMES.)

COMPILATION.[13] A literary production, composed of the works of others and arranged in a methodical manner.[14] (See ABRIDGMENT; COMPENDIUM; COPYRIGHT; LITERARY PROPERTY.)

COMPILE. To copy from various authors into one work.[15] (See COMPILATION.)

COMPLAINANT. One who applies to the courts for legal redress; one who exhibits a bill of complaint.[16] (Complainant: In Civil Cases, see EQUITY; PLEADING. In Criminal Cases, see CRIMINAL LAW. In Equity, see EQUITY.)

To constitute a competent court, several things are necessary: the presence of the president judge and jurors, grand and petit, drawn, summoned, and impannelled according to law. Clark *v.* Com., 29 Pa. St. 129, 135.

7. Washer *v.* Elliott, 1 C. P. D. 169, 176.

8. Babbitt *v.* Doe, 4 Ind. 355, 359.

"Competent jurisdiction," as used in the statute, "is susceptible of two meanings. It may signify that the court must acquire and exercise jurisdiction competent to grant the license, through and by reason of a strict conformity to the requirements of the statute, by which the steps preliminary to the issue of license are pointed out; or it may signify jurisdiction over the subject-matter, a sort of authority in the abstract, to hear and determine the case; in other words, 'by a probate court of competent jurisdiction' may be meant the court whose jurisdiction it is proper to invoke in the given instance." Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

9. *In re* Williamson, 26 Pa. St. 9, 30, 67 Am. Dec. 374.

10. People *v.* Liscomb, 3 Hun (N. Y.) 760, 778 [*reversed* in 60 N. Y. 559, 604, 19 Am. Rep. 211].

Where the statute requires that an oath must be taken before some "competent tribunal, officer, or person," it means that the oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. U. S. *v.* Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. ed. 534.

11. Pennsylvania R. Co. *v.* Com., (Pa. 1886) 7 Atl. 368, 373, where it is said: "Before completion it is 'parallel,' when completed it becomes 'competing.'"

12. Meredith *v.* New Jersey Zinc, etc., Co., 55 N. J. Eq. 211, 222, 37 Atl. 539.

"Competition is the life of trade."— People *v.* Sheldon, 139 N. Y. 251, 263, 34 N. E. 785, 54 N. Y. St. 513, 36 Am. St. Rep. 690, 23 L. R. A. 221 [*quoted* in State *v.* Armour Packing Co., (Mo. 1903) 73 S. W. 645, 652], where it is said: "The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid."

13. **Distinguished from an abridgment** see ABRIDGMENT, 1 Cyc. 197, note 25.

14. Black L. Dict.

What is a new work.— Each new compilation, where it is the result of labor devoted to gathering from original sources, and to arranging in convenient form, facts open to be published by any one, is a new work. Bullinger *v.* Mackey, 15 Blatchf. (U. S.) 550, 558, 4 Fed. Cas. No. 2,127.

15. Story *v.* Holcombe, 4 McLean (U. S.) 306, 314, 23 Fed. Cas. No. 13,497, 5 West. L. J. 145, where it is said: "In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result."

16. Black L. Dict.

This is the proper designation of one suing in equity, though "plaintiff" is often used in equity proceedings as well as at law. Black L. Dict.

In construing the Illinois Practice Act of 1853, the court said: "And to guard against misapprehension, the terms 'plaintiff' and 'complainant' are used, the former term being applicable to the actor in suits at law, and the

COMPLAINT. A form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or a crime committed; in the latter case generally under oath.[17] In civil practice, the first or initiatory pleading on the part of the plaintiff in a civil action.[18] In criminal practice, a charge, preferred before a magistrate having jurisdiction, that a person named (or an unknown person) has committed a specified offense, with an offer to prove the fact, to the end that a prosecution may be instituted.[19] (Complaint: In Civil Cases, see PLEADING. In Criminal Cases, see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.)

COMPLETE. As an adjective, having no deficiency, perfect.[20] As a verb,[21] to finish, end, perfect;[22] to consummate, execute, achieve, realize.[23] Used with reference to buildings or structures, the word signifies the finishing of unfinished work, bringing it from the condition in which it then was to a state in which there was no deficiency.[24]

COMPLETED. Finished, ended, perfected, fulfilled, accomplished.[25]

COMPLETELY. Fully, perfectly, entirely.[26]

COMPLETE PURCHASER. One who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it.[27]

COMPLETE TITLE. Instruments which constitute evidence of title and not the estate or interest thereby conveyed.[28] (See, generally, PUBLIC LANDS.)

COMPLETE TITLE TO LAND. Consists of *juris et sesinæ conjunctio;* the possession, the right of possession and the right of property.[29]

COMPLETING. Constructing.[30]

latter to the actor in suits in chancery." Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Robinson, 147 Ill. 138, 151, 35 N. E. 168.

17. Webster Dict. [*quoted* in State *v.* Dodge County, 20 Nebr. 595, 600, 31 N. W. 117].

18. Black L. Dict.

19. Black L. Dict.

It is also "a technical term, descriptive of proceedings before magistrates." Com. *v.* Davis, 11 Pick. (Mass.) 432, 436.

20. Webster Dict. [*quoted* in Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261, 282].

"Complete searches" of title and "title insurance" are not in their essence equivalent terms. Giltinan *v.* Lehman, 65 N. J. L. 668, 671, 48 Atl. 540.

"Full and complete" answer.— In reference to the phrase, "On filing a full and complete answer," as used in the statute, it is said that the word "complete" in our rule "gives no strength to the sentence, nor does it enlarge the meaning. A 'full' answer, is as extensive a term in describing one which is ample and sufficient, as though the term 'complete' had been superadded. The latter is mere tautology." Bentley *v.* Cleaveland, 22 Ala. 814, 817.

21. The verb, "to complete," like many others, is used with some indefiniteness of signification; and the idea conveyed by it frequently depends upon the connection in which it is found, or the object to which it refers. Newell *v.* People, 7 N. Y. 9, 131, per Welles, J., in dissenting opinion.

22. Webster Dict. [*quoted* in Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261, 282].

23. Delafield *v.* Westfield, 77 Hun (N. Y.) 124, 130, 28 N. Y. Suppl. 440, 59 N. Y. St. 73.

24. McElwaine *v.* Hosey, 135 Ind. 481, 492, 35 N. E. 272. See also Delafield *v.* Westfield, 77 Hun (N. Y.) 124, 28 N. Y. Suppl. 440, 59 N. Y. St. 73.

"It fairly imports that the building was completed to the satisfaction of the architect, as he gave the certificate, and also, that in his judgment, it was completed in accordance with the plans and specifications." Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261, 282.

Used in reference to streets.— By the word "complete," as used in the act passed in 1804, we do not suppose was intended that condition of the streets in which they are made smooth and finished, but some work by which they are made streets *de facto*. Fernald *v.* Boston, 12 Cush. (Mass.) 574.

25. Webster Dict. [*quoted* in State *v.* Bissell, 4 Greene (Iowa) 328, 333].

"Be completed," in a contract of construction, would clearly import a permanent finishing up. Tower *v.* Detroit, etc., R. Co., 34 Mich. 328, 336.

26. Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261, 282.

27. Preston *v.* Nash, 75 Va. 949, 954 [*quoting* 2 Minor Inst. 877].

28. Thus used in Spanish grants. Slidell *v.* Grandjean, 111 U. S. 412, 4 S. Ct. 475, 28 L. ed. 321 [*citing* De Haro *v.* U. S., 5 Wall. (U. S.) 599, 18 L. ed. 681].

29. Dingey *v.* Paxton, 60 Miss. 1038, 1054.

30. De Graff *v.* St. Paul, etc., R. Co., 23 Minn. 144, 146.

COMPLETION. Fulfilment; accomplishment.[31] (Completion: Of Contract — Generally, see CONTRACTS; Under Mechanics' Lien Laws, see MECHANICS' LIENS. Of Railroad, see RAILROADS. Of Sale — By Broker, see FACTORS AND BROKERS; Of Personalty, see SALES; Of Realty, see VENDOR AND PURCHASER.)

COMPLETION OF THE PURCHASE. Payment of the rest of the purchase money.[32] (See, generally, VENDOR AND PURCHASER.)

COMPLIANCE. The act of complying; a yielding or consenting, as to a request, desire, demand, or proposal; concession; submission.[33]

COMPLICE. One who is united with others in an ill design; an associate; a confederate; an accomplice.[34] (See ASSOCIATES; CRIMINAL LAW.)

COMPLIED WITH. Carried into execution.[35]

COMPLY. To acquiesce in; to be obsequious;[36] to fulfil; to perfect or carry into effect; to complete; to perform or execute.[37]

COMPOSING THE COMPANY. Persons who are entitled to the management of the company's affairs.[38] (See, generally, CORPORATIONS.)

COMPOSITION. A written or literary work invented and set in order;[39] a mixture or chemical combination of materials.[40] (Composition: Subject of — Copyright, see COPYRIGHT; Patent, see PATENTS. With Creditors, see COMPOSITIONS WITH CREDITORS.)

COMPOSITION DEED. See COMPOSITIONS WITH CREDITORS.

31. Century Dict. But see Yoke *v.* Shay, 47 W. Va. 40, 47, 34 S. E. 748 [*citing* Cushwa *v.* Improvement Loan, etc., Assoc., 45 W. Va. 490, 505, 32 S. E. 259], with respect to "completion" used in the sense of "commencement."

"**In the absence of any statutory qualification or definition** of the term 'completion,' there would be no room for its construction by the court, but it would be construed to mean actual completion, and would be a question of fact to be determined in each case. The statute has, however, provided that a substantial completion is all that is required in any case, whether the work be done at the direct instance of the owner, or under the provisions of a contract between him and an original contractor, by declaring that a 'trivial imperfection' shall not be deemed such a lack of completion as to prevent the filing of a lien." Willamette Steam Mills Lumbering, etc., Mfg. Co. *v.* Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. 629.

32. Mattock *v.* Kinglake, 10 A. & E. 50, 54, 3 Jur. 699, 8 L. J. Q. B. 215, 2 P. & D. 343, 37 E. C. L. 51.

33. Century Dict.

"**Full compliance with all the by-laws.**"— in Newhall *v.* Supreme Council A. M. of H., 181 Mass. 111, 117, 63 N. E. 1, construing a benefit certificate, it is said: "Even if the 'full compliance with all the by-laws' which is mentioned as a consideration for the promise is not interpreted and limited by the more specific provisions of the express conditions, 'compliance' in this connection means doing what the by-laws may require the member to do, not submission to seeing his only inducement to do it destroyed."

34. Black L. Dict.

35. Cleland *v.* Waters, 16 Ga. 496, 503.

36. Johnson Dict. [*quoted* in Cleland *v.* Waters, 16 Ga. 496, 502].

37. Webster Dict. [*quoted* in Cleland *v.* Waters, 16 Ga. 496, 503].

38. Rosevelt *v.* Brown, 11 N. Y. 148, 154.

39. Daly *v.* Palmer, 6 Blatchf. (U. S.) 256, 6 Fed. Cas. No. 3,552, 8 Am. L. Reg. N. S. 286, 3 Am. L. Rev. 453, 36 How. Pr. (N. Y.) 206.

A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented; and, if the representation is in public, it is a public representation. Daly *v.* Palmer, 6 Blatchf. (U. S.) 256, 6 Fed. Cas. No. 3,552, 8 Am. L. Reg. N. S. 286, 3 Am. L. Rev. 453, 36 How. Pr. (N. Y.) 206.

40. Black L. Dict.

"**Compositions of glass or paste**" are kindred compositions, such as may be either of glass in the nature of paste, or paste in the nature of glass. U. S. *v.* Popper, 66 Fed. 51, 52, 13 C. C. A. 325, where it is said: "The only articles which . . . seem to fit that description, are the imitation gems of glass, commonly known as 'paste.'"

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CROSS-REFERENCES

For Matters Relating to:
Accord and Satisfaction, see ACCORD AND SATISFACTION.
Account Stated, see ACCOUNTS AND ACCOUNTING.
Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Composition:
By Judgment Debtor, see JUDGMENTS.
Under Bankrupt Act, see BANKRUPTCY.
Under Insolvent Laws, see INSOLVENCY.
Compromise With a Single Creditor, see COMPROMISE AND SETTLEMENT.
Release, see RELEASE.

I. DEFINITION AND NATURE.

A. Definition. A composition with creditors is an agreement made by a debtor, either in insolvent or in embarrassed circumstances, or by someone in his behalf, with two or more of his creditors, by which it is agreed on the one side that each of the creditors who enters into the agreement shall be paid a specified amount or a certain percentage (in either case less than the whole) of their respective claims, or that all or a specified portion of the debtor's property shall be applied toward the payment of those claims *pro rata*, while on the other side the creditors agree to accept in satisfaction of their claims whatever is thus proffered.[1]

1. This definition is much broader than those to be found in the authorities, but it is submitted that an examination of the requisites of a composition with creditors (see *infra*, II) will show that the usually accepted definitions are either incomplete or are too broad in their scope, as including either a compromise and settlement or an accord and satisfaction or both, from each of which a composition differs essentially. Compare ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT.

Other definitions are: "An agreement between a debtor and various creditors, that he shall make certain stipulated partial payments, usually proportional, upon his debts, and that upon making these he shall be discharged from the residue." Abbott L. Dict.

"An engagement in which several of the creditors (not necessarily all, but a number) agree with the debtor, and in effect with each other, that the debtor shall be released on making the partial payments he proffers." Shinkle *v.* Shearman, 7 Ind. App. 399, 406, 34 N. E. 838.

"An agreement, made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, whereby the

B. Nature of Agreement — 1. In General. A composition is a new agreement, and effects a novation of the original claim.[2] It is not only an agreement between the debtor and the creditors who enter into it, but is also an agreement of those creditors among themselves, each with the others.[3]

2. Distinguished From Accord and Satisfaction and From Compromise.[4] A composition differs from an accord and satisfaction in that it carries its consider-

latter, for the sake of immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed *pro rata* in discharge and satisfaction of the whole." Black L. Dict. [*quoted* in Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 310, 66 N. W. 606].

"An agreement made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter, for the sake of immediate or sooner payment, agree to accept a dividend less than the whole amount of their claims, to be distributed *pro rata*, in discharge and satisfaction of the whole." Wilson *v.* Samuels, 100 Cal. 514, 518, 35 Pac. 148.

"An arrangement between a creditor and his debtor for the discharge of the debt, on terms or by means different from those required by the original contract or by law." 4 So. L. Rev. 639.

And *compare* Lanes *v.* Squyres, 45 Tex. 382; 8 Centr. L. J. 350. See also Bailey *v.* Boyd, 75 Ind. 125, 126, where a composition is defined to be an arrangement "between a debtor and creditor, whereby the debtor agrees to give, and the creditor to take, a less sum at a time fixed, instead of the original debt, according to its terms."

The definitions quoted are inaccurate and deficient. A composition need not be joined in by a considerable proportion of the creditors; two are sufficient (see *infra*, V, B, 1, a). It need not be an agreement to accept less than the whole amount of the debt; an assignment under which the creditors run the risk of losing a part of their claims is a composition, if accepted as such by the creditors, although they realize eventually the full amounts due them (see *infra*, II, A). And it is misleading to insert as a part of the definition that a composition must be upon sufficient consideration, as that would seem to imply that there must be an extrinsic consideration, whereas in a true composition the only consideration necessary is the intrinsic one created by the mutual agreements of the creditors who enter into it (see *infra*, II, F); and if there is an extrinsic consideration the transaction loses its nature as a composition and becomes an accord and satisfaction, or a compromise. Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

The object of a composition is to secure to the creditors an equal distribution of the debtor's assets, to relieve them from the strain and risk of a race for priority, and to secure the debtor from further pressure on the part of the creditors. Chase *v.* Bailey, 49 Vt. 71, 74, where it is said: "One of the principal considerations moving all the parties to a composition deed to enter into the same usually is, to secure the debtors, upon a surrender by them and division of their property equitably among the creditors, from future harassment by the creditors or any portion of them, and to leave the debtors free to form new business relations and enter upon new business enterprises." See Paddleford *v.* Thacher, 48 Vt. 574.

2. *Indiana.*— Shinkle *v.* Shearman, 7 Ind. App. 399, 34 N. E. 838.

Minnesota.— Brown *v.* Farnham, 48 Minn. 317, 51 N. W. 377.

New York.— Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun (N. Y.) 367]; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* on another point 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267].

England.— Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234.

Canada.— Tees *v.* McCulloch, 2 L. C. L. J. 135.

See, generally, Novation.

3. *California.*—Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.

Connecticut.— Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293.

Minnesota.— Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577.

New York.— Renard *v.* Tuller, 4 Bosw. (N. Y.) 107; Hughes *v.* Alexander, 5 Duer (N. Y.) 488.

Ohio.— Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545.

Pennsylvania.— Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931.

"Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid or given, and nothing more." Breck *v.* Cole, 4 Sandf. (N. Y.) 79, 83 [*quoted* in Renard *v.* Tuller, 4 Bosw. (N. Y.) 107, 117; Bowns *v.* Stewart, 28 Misc. (N. Y.) 475, 478, 59 N. Y. Suppl. 72]. And see Solinger *v.* Earle, 82 N. Y. 393 [*quoted* in Bank of Commerce *v.* Hoeber, 11 Mo. App. 475, 480].

Each creditor acts for himself, rather than for all the creditors. *Ex p.* Haines, 76 Me. 394.

4. Distinguished from discharge in bankruptcy.— A discharge discharges a bankrupt from his debts, whether there are or are not any assets for distribution. Under a compo-

ation within itself,[5] and does not necessarily operate as a discharge of the original debt until performed,[6] while an accord and satisfaction depends for its validity upon an extraneous consideration and operates as a discharge and complete novation of the original claim.[7] A composition is also distinguished from a compromise, in that it will operate as the settlement of an undisputed liability, and applies in strictness only to money demands arising out of contracts, while a compromise is the settlement of a disputed claim and applies to claims and demands of all sorts.[8] A composition further differs from both an accord and satisfaction and a compromise in that it requires the concurrence of at least two creditors to make it binding,[9] while either of the other modes of settlement will be valid, although between a debtor and a single creditor.[10]

II. REQUISITES.

A. In General. In order to constitute a valid composition,[11] the debtor must be in embarrassed circumstances,[12] although it is not necessary that he be actually insolvent[13] or that the creditors should receive from his estate less than the full amount of their respective claims. It is sufficient that they run the risk of losing

sition a sum of money is paid in satisfaction of the debt. *In re* Odell, 9 Ben. (U. S.) 247, 18 Fed. Cas. No. 10,427, 16 Nat. Bankr. Reg. 501.

5. See *infra*, II, F. A composition is said to be an exception to the rule that an agreement to take part of a debt in satisfaction of the whole is no legal satisfaction of the remainder. Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577; White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931. *Contra*, Wheeler *v.* Wheeler, 11 Vt. 60.

6. See *infra*, VIII, C, 1.

7. See ACCORD AND SATISFACTION.

Some authorities, however, ignore this distinction, and define composition in terms that are broad enough to include an accord and satisfaction. See Bailey *v.* Boyd, 75 Ind. 125; Bouvier L. Dict.; Rapalje & L. L. Dict.

8. See COMPROMISE AND SETTLEMENT.

9. See *infra*, V, B, 1, a.

Agreements held to be compositions.— An agreement to assign stock in trade and outstanding debts to the creditors, who agree to accept the same in full satisfaction of their respective debts. Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386. A delivery of property to trustees in satisfaction of the debts due various creditors upon a mutual written agreement among the creditors to receive the property as such and discharge the debtor. Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079. In Robbins *v.* Magee, 76 Ind. 381, it was held that when a grantor, by an ordinary warranty deed, without conditions or limitations therein expressed, conveys land to certain grantees named in the deed, without indicating that the grant is to them as trustees and without any direction therein as to how the property shall be disposed of, but at the same time executes an agreement with the grantees which shows that they take the property as trustees, and as such are to sell it and apply the proceeds thereof to the payment of the grantor's creditors who may become parties thereto, the transaction must be regarded as a composition agreement between the grantor and his creditors and not as a voluntary assignment. In Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931, the defendant proposed to his creditors that instead of using his money to procure a discharge in bankruptcy he should distribute it among them. The plaintiff, who was one of the creditors, assented, and authorized his attorney to act for him. He was told who the other creditors were, the amounts due them, and what they were to receive, and executed an agreement stating on what terms he would settle, which was to be shown to the other creditors. It was held that this constituted a composition.

When the transaction contains the elements of a compromise it will be held to be such rather than a composition. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Grabenheimer *v.* Blum, 63 Tex. 369; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

10. See ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT.

11. **As to validity** of compositions see *infra*, III.

12. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148; Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596; Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 310, 66 N. W. 606. See also Black L. Dict.

13. In Castleton *v.* Fanshaw, Prec. Ch. 99, 24 Eng. Reprint 48, creditors who had compounded with the executors of their debtor, fearing a deficiency of assets, were denied relief, although it appeared that there were assets sufficient to pay them in full.

Right of assignor for benefit of creditors to make a composition with his creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 282.

part by assenting to an assignment of the debtor's property for their benefit, although they eventually realize all that is due them,[14] or that they agree to an extension of time with the expectation of realizing their full claims in instalments.[15]

B. Advantage to Creditors. There must also be some advantage to the creditors in the settlement proposed, either in the distribution of the debtor's property, in fixed payments, or in the giving of security for the performance of the composition,[16] and consequently a mere extension of time without conditions and not under seal is not a composition, and irrespective of its enforceability as among the creditors themselves is not binding upon the creditors as between them and the debtor.[17]

C. Satisfaction of Debts. Although a composition is not an accord and satisfaction[18] it must contain all the elements necessary to give it the effect of such a transaction;[19] that is, it must operate until breach as a bar to recovery of the debt compounded.[20] A mere agreement to accept a composition therefore is an

14. Aiken *v.* Price, Dudley (S. C.) 50; Union Bank *v.* Rogan, 13 New South Wales 285. *Contra,* Reg. *v.* Cooban, 18 Q. B. D. 269. In Union Bank *v.* Rogan, 13 New South Wales 285, 291, a debtor assigned his estate for the benefit of his creditors by a deed to which they were parties, and by which they released the debtor from all debts owing by him to them. It was contended that this was not a composition, because there was no provision that the creditors should take less than twenty shillings in the pound. But the court held it to be a composition, saying: "It seems to me that in this case, although the property might be worth more than twenty shillings in the pound, nevertheless it was a composition. The debtor gave, and the creditors accepted, something which might fall short of payment in full. The creditors might get twenty shillings in the pound, and they might get considerably less. They took that risk. The deed under which they bound themselves to take that risk is properly called a composition deed, and the arrangement is properly called a compounding with the creditors."

15. Abel *v.* Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

16. Henry *v.* Patterson, 57 Pa. St. 346, 350, where it is said: "In all compositions the creditors are bound by some advantage to be obtained in a distribution of property or money by the debtor, or by fixed payments to be made by him securing to each a certain proportion of his assets."

Abandonment of a demand is not a composition. "To compound a debt is to abate a part, on receiving the residue." Haskins *v.* Newcomb, 2 Johns. (N. Y.) 405, 408.

An agreement which is not one for the payment by the debtor of any sum or thing, and which does not purport and is not intended to operate as a release of the debtor, is not a composition. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

17. Pitts Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Garnier *v.* Papin, 30 Mo. 243.

A paper without consideration or seal, by which the creditors agree to give the debtor an extension for one year, during which they will not obtain judgment against him, molest him by legal proceedings, or issue execution against his property, is not a composition. Henry *v.* Patterson, 57 Pa. St. 346.

But an agreement to discontinue bankruptcy proceedings and not to procure a discharge and certificate (which might be had within about ten weeks from the date of the agreement) is a good consideration for an extension of time for three years. Loomis *v.* Wainwright, 21 Vt. 520. And *compare* Towne *v.* Rutler, 51 Vt. 62.

Letter of license not an exception.— A letter of license (see *infra,* IV, B, 4) is only an apparent exception to this rule. Such an agreement is usually made in connection with a composition deed and as a part of the composition arrangement, and should always be under seal. But even if under seal a letter of license standing alone is not a composition, since it will not operate as a discharge or release of the debt. O'Brien *v.* Osborne, 10 Hare 92, 16 Jur. 960, 44 Eng. Ch. 92.

18. See *supra,* I, B, 2; Mellen *v.* Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234; Fiten *v.* Sutton, 5 East 230, 1 Smith K. B. 415; Webb *v.* Hewitt, 3 Kay & J. 438.

19. *Indiana.*— Shinkle *v.* Shearman, 7 Ind. App. 399, 34 N. E. 838.

Maine.— Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682.

New York.— Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528.

Tennessee.— Evans *v.* Bell, 15 Lea (Tenn.) 569.

A composition performed is equivalent to an accord and satisfaction. Therasson *v.* Peterson, 4 Abb. Dec. (N. Y.) 396, 2 Keyes (N. Y.) 636.

20. An agreement which does not purport and is not intended to operate as a release of the debtor is not a composition. Wilson *v.*

accord only, and if standing alone is no defense to an action on the original claim.[21] To make such an agreement operate as a composition it must, if between the debtor and a creditor, be part of a common purpose or understanding with other creditors;[22] and if between the creditors only must be accepted by the debtor either expressly or by acts.[23] But the agreement need not be executed; an executory composition is binding until breach.[24]

D. Mutuality — 1. Between Debtor and Creditors. In order to constitute a valid composition there must be mutuality of contract between the debtor or whoever proffers the composition and the creditors. A mere unilateral agreement which purports to bind only the debtor or someone who acts in his interest is not binding upon the creditors and cannot be enforced by them, unless they have accepted it;[25] while an agreement that in terms binds the creditors only cannot be enforced by the debtor, unless it has been accepted by him, even though

Samuels, 100 Cal. 514, 35 Pac. 148. In O'Brien *v.* Osborne, 10 Hare 92, 16 Jur. 960, 44 Eng. Ch. 92, a debtor conveyed his life-interest in certain property in trust for creditors, parties to the deed; and the creditors in consideration thereof granted to the debtor license to reside and attend to his affairs in any place he might think proper, without suit or molestation in his person or his goods, chattels, and effects by any such creditors; and that in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such license, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar. It was held that this amounted only to a license by the creditor to the debtor to live unmolested and did not operate as a release of the debt or a discharge of the debtor's estate.

A contract which is not completed, but remains inchoate merely, will not amount to a composition; there must be a consummated contract. In Dolese *v.* McDougall, 182 Ill. 486, 55 N. E. 547 [*affirming* 78 Ill. App. 629], the creditors met and partly prepared a composition agreement which was never signed or acted upon. It was held that there was no composition.

21. *Kentucky.*— Cutler *v.* Reynolds, 8 B. Mon. (Ky.) 596.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682.

Minnesota.— Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

Vermont.— Wheeler *v.* Wheeler, 11 Vt. 60.

England.—Reay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931; Lynn *v.* Bruce, 2 H. Bl. 317, 3 Rev. Rep. 381; Heathcote *v.* Cruikshanks, 2 T. R. 24.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 6.

Illustrations.—A promise to compromise on as favorable terms as any other creditor will not prevent suit for the original debt. Hayes *v.* Davidson, 70 N. C. 573. An agreement to give up part of a claim if other creditors will agree to give up part will not bind without some further consideration. Rosenthall *v.* Jacobs, 5 Ky. L. Rep. 419. But an agreement to take the composition will bind if the debtor assigns his property to trustees on the faith of it. Butler *v.* Rhodes, 1 Esp. 236, Peake 238.

22. See *infra*, II, D, 2.

Agreement to accept composition.— It is sometimes said that an agreement to accept a composition is not binding, unless others are thereby induced to enter into the composition. Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Greenwood *v.* Lidbetter, 12 Price 183. But this statement of the rule is inaccurate, as it presupposes knowledge of the other's agreement, which is not necessary. See Steinman *v.* Magnus, 2 Campb. 124, 11 East 390.

23. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148; Webb *v.* Stuart, 59 Me. 356; Garnier *v.* Papin, 30 Mo. 243. And see *infra*, II, D, 1.

24. Boyd *v.* Hind, 1 H. & N. 938, 947, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361, where it was said, per Williams, J.: "A composition agreement, by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof."

25. A voluntary assignment for the benefit of creditors will not operate as a composition, unless the creditors agree to accept it in satisfaction of their debts. Loney *v.* Bailey, 43 Md. 10; Allen *v.* Roosevelt, 14 Wend. (N. Y.) 100; Matter of Waley, 3 Drew. 165, 3 Eq. Rep. 380, 1 Jur. N. S. 338, 24 L. J. Ch. 499, 3 Wkly. Rep. 286; Garrard *v.* Lauderdale, 2 Russ. & M. 451, 11 Eng. Ch. 451 [*affirming* 3 Sim. 1, 6 Eng. Ch. 1].

The South Carolina consolidation act of Dec. 22, 1873, which authorized the issue of new bonds at the rate of fifty cents on the dollar for outstanding bonds and stocks to such as would accept them in exchange, was held not to be a composition by the state with its creditors. Walker *v.* State, 12 S. C. 200.

the creditors may enforce it as amongst themselves.[26] But the agreement, even when written, need not be signed by the parties; it is sufficient if they assent to or act upon it.[27]

2. AMONG CREDITORS. In addition to the ordinary mutuality necessary to every contract, a composition must contain the further element of mutuality among the creditors themselves. That is, it must be entered into by them in reliance upon their mutual concessions, and in furtherance of a common purpose to secure their claims by compromise and settlement.[28] A series of separate and independent compromises with individual creditors, whether on the same or different terms, will not constitute a composition.[29] But if the common purpose be present, the

26. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148; Webb *v.* Stuart, 59 Me. 356; Henry *v.* Patterson, 57 Pa. St. 346.

The following agreements have been held to lack the mutuality necessary to constitute a composition: "We the undersigned agree to take fifty per cent of the amount due us in full for account against D. M. Stuart, Ellsworth." Webb *v.* Stuart, 59 Me. 356. "We, the undersigned, creditors of Edward Ware of Waterville, in the county of Kennebec, hereby agree to accept thirty per cent of our actual net claims against him, the amounts of which are correctly stated against our respective names, in full discharge thereof; fifteen per cent in four months after September first, 1898, and fifteen per cent in eight months after said date." Guilford First Nat. Bank *v.* Ware, 95 Me. 388, 394, 50 Atl. 24.

An agreement for a mere extension of time without consideration lacks mutuality and is not binding. Pitts Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Garnier *v.* Papin, 30 Mo. 243; Henry *v.* Patterson, 57 Pa. St. 346.

27. *California.*— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

Kentucky.— Roberts *v.* Barnum, 80 Ky. 28.

Massachusetts.— Eaton *v.* Lincoln, 13 Mass. 424.

New York.— Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Fellows *v* Stevens, 24 Wend. (N. Y.) 294. But see Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

South Carolina.— Aiken *v.* Price, Dudley (S. C.) 50.

Wisconsin.— Melton *v.* Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781.

England.— Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191; Boothbey *v.* Lowden, 3 Campb. 175. In Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234, certain creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum: "Whereas, William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one-third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829." This paper was held to be a good composition agreement, although it was never signed by the debtor and there was no evidence of his presence when it was signed by the creditors; as it was in his possession at the time of the trial at which it was offered in defense, and he had procured it to be stamped.

What does not constitute assent.— A creditor cannot be held to have assented to a composition unless he has put himself in the same situation with regard to the debtor as if he had executed the deed. Forbes *v.* Limond, 4 De G. M. & G. 298, 18 Jur. 33, 2 Wkly. Rep. 262, 53 Eng. Ch. 231. Signing a letter of license which does not refer to a composition deed does not constitute an assent to the deed. Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84.

28. *Connecticut.*—Argall *v.* Cook, 43 Conn. 160.

Maine.— Guilford First Nat. Bank *v.* Ware, 95 Me. 388, 50 Atl. 24.

Massachusetts.— Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103.

Minnesota.— Sage *v.* Valentine, 23 Minn. 102.

North Carolina.— Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156.

Pennsylvania.— Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Heitzenreither *v.* Long, 4 Pa. Super. Ct. 524; Hartell *v.* Morgan, 1 Pittsb. (Pa.) 354.

Texas.— Lanes *v.* Squyres, 45 Tex. 382.

England.— Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361; Greenwood *v.* Lidbetter, 12 Price 183; 8 Centr. L. J. 350.

It is not necessary, however, that each creditor should be aware that the others have joined or will join in the composition; for in that case the first and the last would never be bound. All that is necessary is the common purpose. Steinman *v.* Magnus, 2 Campb. 124, 11 East 390; 4 So. L. Rev. 650; 17 Centr. L. J. 305. *Contra*, Greenwood *v.* Lidbetter, 12 Price 183.

29. *Alabama.*— Henry *v.* Murphy, 54 Ala. 246.

fact that the creditors are agreed with separately will not prevent the arrangement from being construed as a composition.[30] Neither a meeting of the creditors nor a final promise of each to each is necessary.[31]

E. Equality. Equality among the creditors who enter into it is of the essence of a composition, and is implied by law from the very nature of the transaction,[32] unless there be an express stipulation or understanding that they shall be treated

Minnesota.—Minneapolis First Nat. Bank *v.* Steele, 58 Minn. 126, 59 N. W. 959; Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846.

New York.— Kellogg *v.* Richards, 14 Wend. (N. Y.) 116.

North Carolina.— Hayes *v.* Davidson, 70 N. C. 573.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

Canada.— Forster *v.* Bettes, 5 U. C. Q. B. 599; 4 So. L. Rev. 646; 17 Centr. L. J. 305.

When a creditor does not accept the composition, but compromises independently without a new consideration, he may recover the balance of his debt. Bliss *v.* Shwarts, 65 N. Y. 444 [*reversing* 7 Lans. (N. Y.) 186, 64 Barb. (N. Y.) 215].

30. *Illinois.*— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Maryland.— Flack *v.* Garland, 8 Md. 188.

Minnesota.— M. A. Seed Dry-Plate Co. *v.* Underlich, 69 Minn. 288, 72 N. W. 122.

New York.— Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Kellogg *v.* Richards, 14 Wend. (N. Y.) 116.

Pennsylvania.— Heitzenreither *v.* Long, 4 Pa. Super. Ct. 524.

Wisconsin.— Johnson *v.* Parker, 34 Wis. 596.

Illustrations. — A covenant by which the creditors "severally and each for himself" agree to release and discharge the debtor will not render a composition deed void on the ground of its being several. Horstman *v.* Miller, 35 N. Y. Super. Ct. 29. In Crawford *v.* Krueger, 201 Pa. St. 348, 350, 50 Atl. 931, plaintiff was a judgment creditor of the defendant under a judgment entered in 1895. In 1898 the defendant began negotiations with his creditors for settlement. As a result of these negotiations the creditors with knowledge of each other's actions signed composition agreements, that of the plaintiff being as follows: "Pittsburg, Pa., Dec. 9th, 1898. To whom it may concern: This is to certify that R. C. Crawford, executor of Louisa M. Horn, in consideration of $100.00 to be paid him by O. E. Krueger, will satisfy the judgment of Louisa M. Horn vs. O. E. Krueger, at No. 352, May Term, 1895, D. S. B.; payment to be made within six months. T. J. Newlin, Attorney for R. C. Crawford, Ex." The agreements signed by the other creditors were of similar tenor. It was held that the facts showed a valid composition, Fell, J., who delivered the opinion of the court, saying: "The defendant owed a few thousand dollars, and had but a few hundred. He proposed to his creditors that instead of using his money to procure a discharge in bankruptcy, he should distribute it among them in discharge of his indebtedness. The plaintiff either personally or through an attorney who was fully authorized to act for him, assented to this proposition and agreed upon an amount for which he would give a release. He was told who the other creditors were, the amounts due them and what each was to receive in settlement. He was shown an agreement with one of them and was asked to sign a similar agreement to be shown the others. He prepared and executed an agreement addressed 'To whom it may concern,' in which he stated the terms on which he would settle. Manifestly the purpose in executing an agreement in this form was to promote a settlement, and it was given with the express understanding that it should be shown to the other creditors to induce them to settle, and it was shown them. This was not a separate settlement with a separate creditor, but a joint agreement between creditors, and a good composition."

31. Gillfillan *v.* Farrington, 12 Ill. App. 101; Johnson *v.* Parker, 34 Wis. 596; Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228; Fawcett *v.* Gee, 3 Anstr. 910; Cullingworth *v.* Loyd, 2 Beav. 385, 4 Jur. 284, 9 L. J. Ch. 218, 17 Eng. Ch. 385; Leicester *v.* Rose, 4 East 372, 1 Smith K. B. 41. See also 4 So. L. Rev. 650.

32. Bowns *v.* Stewart, 28 Misc. (N. Y.) 475, 59 N. Y. Suppl. 721 [*reversing* 27 Misc. (N. Y.) 842, 58 N. Y. Suppl. 1137]; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313; Pierce *v.* Jones, 8 S. C. 273, 28 Am. Rep. 288; Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

Further statements of rule.— The true foundation of a composition deed is equality of provision for all the signers of the deed and that all shall stand in like condition. Lee *v.* Sellers, 81 Pa. St. 473. "The true ground on which it rests is that each creditor is induced into the composition on the supposition that all are to share and suffer in equal proportion — that there is to be an equality of loss and benefit." Per Brickell, C. J., in Henry *v.* Murphy, 54 Ala. 246, 253. "When a composition agreement is executed, the debtor professes and holds out to deal with all the creditors who enter into it, on terms of perfect equality." Per Craig, J., in Hefter *v.* Cahn, 73 Ill. 296, 301. In *Ex p.* Milner, 15 Q. B. D. 605, 612, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867, Brett, M. R., said: "In my opinion it is of the very essence of a composition of this nature [a common-law composition] that all the creditors who come

differently.[33] And a mere equal distribution of assets is not the only thing required to preserve the necessary equality; the creditors must be put on the same basis in all respects, and any favor shown or advantage given to one or more will vitiate the composition, although the others receive their full share of the assets and are not prejudiced in any way except by the fact that all are not treated alike.[34] This principle, however, applies only where the agreement is silent; and if the other creditors assent each may secure for himself the best terms he can.[35]

F. Consideration. A composition is usually said to form an exception to the rule that requires a new consideration to support an agreement to accept part of a debt in satisfaction of the whole, and certainly no extrinsic consideration is required.[36] The exception, however, is more apparent than real. A composition

in under it oblige themselves to each other, and the debtor obliges himself to every one of them, that, so far as he is concerned, all of them shall come in upon a footing of equality. This equality is implied by law from the very nature of the transaction, and, if it is carried out by means of a deed, then, unless there is something in the deed which is plainly to the contrary, equality between the creditors becomes an implied condition of the deed, and if any breach of this condition is committed by the debtor the deed becomes voidable by every creditor who has executed it. It appears to me that this is a general principle which is applicable to deeds entered into independently of any statute, equally with deeds entered into under the provisions of a statute. . . . Equality among the creditors is an implied condition of such an arrangement, and, if the arrangement is carried into effect by a deed, this becomes an implied condition of the deed, and, if this condition is not carried out, any creditor who has executed the deed is no longer bound by it, even if the breach of the condition takes place after his execution."

Applications of rule.— If different rates are paid to different parties there is no composition. Forster *v.* Bettes, 5 U. C. Q. B. 599. But the fact that judgment creditors are to be paid on the basis of their debts and costs is not an inequality that will avoid the composition. Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636. And a covenant to give to all creditors promissory notes for their compositions, "as soon as the deed should be delivered" to the debtor, signed and sealed by the creditors, does not render the deed invalid because of inequality of treatment. Peel *v.* Webster, 36 L. J. Exch. 188, 16 L. T. Rep. N. S. 598. When interest on the debt is paid without deducting the income tax, the debtor cannot afterward deduct that tax from the debt before calculating the composition. *Ex p.* Turner, 11 L. T. Rep. N. S. 352, 13 Wkly. Rep. 104.

33. O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. 214; Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577; Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38. And see *infra*, XI, B. In O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 404, 97 Am. Dec. 332, the court, per Wagner, J., said: "The purport of a composition is that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors according to the order and terms prescribed in the deed itself. In all transactions of this description the utmost good faith is required, as each one signs the deed and comes into the agreement on the understanding that they will share mutually, or according to the terms embodied in the instrument."

34. Dauglish *v.* Tennent, L. R. 2 Q. B. 49, 8 B. & S. 1, 36 L. J. Q. B. 10, 15 Wkly. Rep. 196.

A secret benefit accruing to a creditor from a third party will vitiate the composition equally with one received from the debtor.

California.— Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Massachusetts.— Frost *v.* Gage, 3 Allen (Mass.) 560.

Missouri.— Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

New York.—Solinger *v.* Earle, 82 N. Y. 393, 60 How. Pr. (N. Y.) 116 [*affirming* 45 N. Y. Super. Ct. 80, 604]; Babcock *v.* Dill, 43 Barb. (N. Y.) 577.

Ohio.— Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545.

Pennsylvania.— Patterson *v.* Boehm, 4 Pa. St. 507.

England.— *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867; Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 488; Bradshaw *v.* Bradshaw, 9 M. & W. 29.

Canada.— Brigham *v.* La Banque Jacques-Cartier, 30 Can. Supreme Ct. 429.

See *infra*, XI, B, 1, c, d; and 10 Cent. Dig. tit. "Compositions with Creditors," § 26.

35. The creditors may release on different terms; some absolutely, others conditionally. Le Changeur *v.* Gravier, 2 Mart. N. S. (La.) 545.

36. *Minnesota.*— Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577.

Missouri.— Bank of Commerce *v.* Hoeber, 11 Mo. App. 475.

New York.— White *v.* Kuntz, 107 N. Y.

rests upon an intrinsic consideration, namely, the mutual agreement of the creditors to forego their legal rights and accept what is offered for their common benefit. In other words, the promise of each is the consideration for that of the others.[87] There may of course be an additional extrinsic consideration, but the

518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun (N. Y.) 367]; Blair *v.* Wait, 69 N. Y. 113 [*affirming* 6 Hun (N. Y.) 477].

Pennsylvania.— Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931.

England.— Pfleger *v.* Browne, 28 Beav. 391.

Contra, see Wheeler *v.* Wheeler, 11 Vt. 60.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 8; and Ala. Civ. Code (1896), § 1806.

37. *Alabama.*— Montgomery Bank *v.* Ohio Buggy Co., 100 Ala. 626, 13 So. 621.

California.— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148; Pierson *v.* McCahill, 21 Cal. 122.

Illinois.— National Time Recorder Co. *v.* Feypel, 93 Ill. App. 170; Gillfillan *v.* Farrington, 12 Ill. App. 101.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28; Ricketts *v.* Hall, 2 Bush (Ky.) 249.

Massachusetts.— Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103.

Minnesota.— Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577; Brown *v.* Farnham, 48 Minn. 317, 51 N. W. 377; Murchie *v.* McIntire, 40 Minn. 331, 42 N. W. 348; Sage *v.* Valentine, 23 Minn. 102.

Missouri.— Diermeyer *v.* Hackman, 52 Mo. 282; Mullin *v.* Martin, 23 Mo. App. 537; Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359]; Tutt *v.* Price, 7 Mo. App. 194.

New Hampshire.— Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

New York.—White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun (N. Y.) 367]; Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38; Renard *v.* Tuller, 4 Bosw. (N. Y.) 107; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Smythe *v.* Graydon, 29 How. Pr. (N. Y.) 224.

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89; Hayes *v.* Davidson, 70 N. C. 573.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470; Hartell *v.* Morgan, 1 Pittsb. (Pa.) 354.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Johnson *v.* Parker, 34 Wis. 596.

United States.— Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

England.— Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234; Boothbe *v.* Sowden, 3 Campb. 175; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193; Evans *v.* Paris, 1 Exch. 601, 11 Jur. 1043; Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361; Hawley *v.* Beverley, 6 M. & G. 221, 46 E. C. L. 221.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 8; and 4 So. L. Rev. 640.

Further statements of rule.— The new consideration which enters into and supports such an agreement is the undertaking of the other creditors to give up a portion of their claims. Stewart *v.* Langston, 103 Ga. 290, 30 S. E. 35. The consideration for such an agreement is the mutual promise of the several creditors to take from their debtors something less or different than they were entitled to under their previous contracts with them. Schroeder *v.* Pissis, 128 Cal. 209, 60 Pac. 758. "An agreement to discharge the whole of a debt upon receiving payment of a portion is *nudum pactum* and not binding. But to this general rule there are some exceptions, one of which is a composition agreement where the creditors agree to take a portion of their debts in satisfaction of the whole. In such a case the agreement of each creditor is said to furnish a consideration for the agreement of every other creditor who becomes a party to the composition agreement. Each creditor enters into a new agreement with the debtor the consideration of which is the forbearance by all the other creditors who became parties to the composition to insist upon their claims in full." Per Earl, J., in Baxter *v.* Bell 86 N. Y. 195, 199 [*reversing* 19 Hun (N. Y.) 367].

Agreement to forbear merely.— There is an apparent exception to this rule in the case of an agreement merely to forbear, which is held by the weight of authority not to be binding, although entered into mutually by the creditors, unless there is some additional consideration, in the way of an advantage to the creditors. Pitts Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Henry *v.* Patterson, 57 Pa. St. 346. This doctrine, however, would seem to be without sound foundation; for if the mutual agreement of the creditors can form a consideration for what would otherwise be a mere *nudum pactum,* in one case, it certainly should so operate in all like cases; and in point of fact there is an advantage accruing to each creditor from the agreement of the others not to push their claims, thus granting an opportunity of satisfying the whole claim of each, if the debtor prospers. See cases cited *supra,* this note.

agreement is then no longer a composition but a compromise or an accord and satisfaction.[38]

III. VALIDITY.

A. In General. A true composition[39] rests upon a sufficient consideration,[40] and consequently if made in good faith and free from fraud is a valid contract and should be upheld and enforced.[41] It cannot be regarded as a fraud upon creditors if it affords all an opportunity of obtaining an equal composition for all their debts.[42] But any fraud, whether practised on the creditors by the debtor or by one creditor upon another, will invalidate the composition as to all injured parties.[43]

B. Execution. A composition agreement, even when in the form of a deed or other written instrument, need not be signed by the parties,[44] except when so

38. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Grabenheimer *v.* Blum, 63 Tex. 369; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

Some of the earlier cases state or imply that a composition is not binding without an extrinsic consideration. Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Wheeler *v.* Wheeler, 11 Vt. 60. This, however, is clearly no longer law. See cases cited *supra*, note 35.

39. As to requisites of compositions see *supra*, II.

As to the effect of mistake see *infra*, X.

As to the effect of fraud see *infra*, XI.

40. *Kentucky.*— Ricketts *v.* Hall, 2 Bush (Ky.) 249.

Missouri.— Diermeyer *v.* Hackman, 52 Mo. 282; Tutt *v.* Price, 7 Mo. App. 194.

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Texas.— Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899.

England.— Hawley *v.* Beverley, 6 M. & G. 221, 46 E. C. L. 221.

See *supra*, II, F; and 10 Cent. Dig. tit. "Compositions with Creditors," § 8.

41. *California.*— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28; Ricketts *v.* Hall, 2 Bush (Ky.) 249; Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921.

Minnesota.— Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577; Murchie *v.* McIntire, 40 Minn. 331, 42 N. W. 348.

Missouri.— Diermeyer *v.* Hackman, 52 Mo. 282; Tutt *v.* Price, 7 Mo. App. 194.

New Hampshire.— Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183.

New York.— White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Blair *v.* Wait, 69 N. Y. 113 [*affirming* 6 Hun (N. Y.) 477].

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Johnson *v.* Parker, 34 Wis. 596.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 18 *et seq.*

Policy of law to uphold rather than restrain.— "In entering into these compromise agreements, ordinarily, an important consideration operating upon the creditors is, the idea of relieving an unfortunate debtor from a cloud of debt that may perhaps otherwise overshadow his whole life, and paralyze all his future efforts at success; and this purpose can be accomplished only by all the creditors joining therein, and then by each being held thereto after it has been fully and fairly executed. We think that reason and good policy require that such agreements should be encouraged and upheld rather than restrained, as there is little danger that they will become too frequent, or result in mischief." Per Pierpoint, C. J., in Paddleford *v.* Thacher, 48 Vt. 574, 577. See also Diermeyer *v.* Hackman, 52 Mo. 282.

42. Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636. Thus when, in pursuance of a composition agreement, a corporation is formed to take over the debtor's property, which is transferred to it in good faith after notice to all the creditors and with the approval of most of them, and the stock of the corporation is transferred to another as collateral security, the transaction is not a fraud upon the creditors. Kingman *v.* Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169 [*affirming* 81 Ill. App. 462].

As to equality generally see *supra*, II, E.

43. See *infra*, XI.

44. *California.*— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

Kentucky.— Robert *v.* Barnum, 80 Ky. 28.

Massachusetts.—Eaton *v.* Lincoln, 13 Mass. 424.

New Hampshire.— Browne *v.* Stackpole, 9 N. H. 478.

New York.— Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Halstead *v.* Ives, 73 Hun (N. Y.) 56, 25 N. Y. Suppl. 1058, 57 N. Y. St. 125 [*affirmed* in 144 N. Y. 705, 39 N. E. 857, 70 N. Y. St. 867]; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294.

required,[45] or in cases that fall within the statute of frauds.[46] And even when the agreement itself contains an express provision that it shall be void if not signed by all the creditors that condition will be satisfied if some of them accept it without signing.[47] The failure of some of the trustees to execute a deed of assignment will not invalidate it.[48] Nor will a composition be invalidated by the fact that blanks are left in the deed which are subsequently filled in,[49] or by the fact that a recited schedule is not attached.[50]

C. Conditions. A composition may contain any reasonable condition for the benefit of either the debtor or the creditors,[51] and such conditions must be per-

But see Acker *v.* Phœnix, 4 Paige (N. Y.) 305, where it was held that the debtor must sign.

South Carolina.— Aiken *v.* Price, Dudley (S. C.) 50.

Vermont.— Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

Wisconsin.— Mellen *v.* Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781.

United States.— Danzig *v.* Gumersell, 27 Fed. 185; *In re* Decker, 8 Ben. (U. S.) 81, 7 Fed. Cas. No. 3,723.

England.— Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191; Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713; Boothbey *v.* Sowden, 3 Camph. 175; Bradley *v.* Gregory, 2 Campb. 383, 11 Rev. Rep. 742; Spottiswoode *v.* Stockdale, Coop. 102, 10 Eng. Ch. 102; Butler *v.* Rhodes, 1 Esp. 236, Peake 238; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193; Wood *v.* Roberts, 2 Stark. 417, 3 E. C. L. 470; *Ex p.* Sadler, 15 Ves. Jr. 52, 10 Rev. Rep. 18.

Canada.— Lawson *v.* Salter, 5 Nova Scotia 79, 731.

The assent of the creditors is necessary; not that their names shall appear in the contract, but that their respective debts shall participate in the distribution. Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

45. When by its terms a deed of composition is limited to those who sign it, it must be signed or it cannot take effect. Carey *v.* Barrett, 4 C. P. D. 379.

When an assignment is made for the benefit of those creditors who execute it within a limited time one who does not execute it within that time will not be bound by it, although he made a parol promise within that time to execute it. Battles *v.* Fobes, 2 Metc. (Mass.) 93, 21 Pick. (Mass.) 239.

46. Alchin *v.* Hopkins, 1 Bing. N. Cas. 99, 3 L. J. C. P. 272, 4 Moore & S. 615, 27 E. C. L. 561; Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453; Brunskill *v.* Metcalf, 2 U. C. C. P. 431, 3 U. C. C. P. 143. See also *infra*, IV, C.

A deed of composition not signed within the time limited is void at law, but good in equity, if those who have not signed assent to it and act under it. *In re* Baker, L. R. 10 Eq. 554, 40 L. J. Ch. 144, 18 Wkly. Rep. 1131; Spottiswoode *v.* Stockdale, Coop. 102, 10 Eng. Ch. 102.

When a composition agreement provides that it shall be void upon refusal to execute or assent within six months, one seeking to avoid the deed must show a positive refusal, and a mere failure to execute the agreement is not evidence of a refusal to execute or assent. Holmes *v.* Love, 3 B. & C. 242, 10 E. C. L. 117, 5 D. & R. 56, 2 L. J. K. B. O. S. 226, R. & M. 138, 21 E. C. L. 717.

47. Jolly *v.* Wallis, 3 Esp. 228.

48. Small *v.* Marwood, 9 B. & C. 300, 4 M. & R. 181, 17 E. C. L. 140.

49. The fact that blank spaces are left for the amounts due certain creditors will not invalidate the deed. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148. In Hudson *v.* Revett, 5 Bing. 368, 7 L. J. C. P. O. S. 145, 2 M. & P. 663, 30 Rev. Rep. 649, 15 E. C. L. 625, a blank space was left in a deed of composition for one principal debt, the exact amount of which being ascertained was inserted in the blank the next day, in the defendant's presence and with his assent. He subsequently recognized the deed as valid in various ways, especially being present when his wife executed it and joining with her in a fine to inure to the uses of the deed. It was held that the deed was valid, although the blank was filled up after its execution.

In an action against a trustee in a composition deed it is no defense that the amount of the debt was not set opposite the plaintiff's name in the schedule; it is sufficient that the trustee had notice of the claim before the action was brought. Daniel *v.* Saunders, 2 Chit. 564, 18 E. C. L. 788.

50. Thurgar *v.* Travis, 7 N. Brunsw. 272.

51. See cases cited *infra*, this note.

Illustrations.— A requirement that nonassenting creditors must present their demands in writing is not unreasonable. Hernulewicz *v.* Jay, 6 B. & S. 697, 11 Jur. N. S. 581, 34 L. J. Q. B. 201, 12 L. T. Rep. N. S. 494, 13 Wkly. Rep. 807, 118 E. C. L. 697. A condition in a deed of composition that the debtor shall deal for twelve years with the creditors in the articles of their respective trades is valid, but must be understood as qualified by an implied condition that the articles shall be good and marketable. If not the condition will not bind. Thornton *v.* Sherratt, 8 Taunt. 529, 20 Rev. Rep. 543, 4 E. C. L. 262. A provision that those who do not come in shall lose the benefit of the composition

formed by the other party or the composition will not be binding.[52] Moreover, any individual creditor may impose any condition he sees fit, as the terms upon which he will enter into the composition, and such condition must be given effect if possible or he will be released from the obligation of the composition.[53] The conditions usually imposed are that all the creditors shall sign or join in the composition,[54] that they must join within a limited time,[55] that remedies against sureties, indorsers, and other joint debtors shall be reserved,[56] and that the composition shall not deprive a creditor of the benefit of any security he may have for his debt.[57]

IV. FORM.

A. In General. As a general rule no particular form is essential to constitute a composition.[58] It may be effected by deed,[59] or by parol,[60] and even, when the statute of frauds does not forbid, by an oral agreement.[61] It is not essential that all the creditors should join in one agreement; they may compound separately, if their several agreements are in pursuance of a common understanding and purpose.[62] And it is not necessary that there should be a formal release,[63] or

is valid; but a provision that they shall lose their debts is invalid. Thompson *v.* Gunthorpe, 11 L. T. Rep. N. S. 708. A condition that only those shall share in the estate to whom the trustees shall give debentures after an investigation and allowance of their claims will be upheld and enforced. Drever *v.* Mawdesley, 13 Jur. 330, 18 L. J. Ch. 273, 16 Sim. 511, 39 Eng. Ch. 511. The creditors may be required to apply for the notes to be given under the composition. Solomon *v.* Laverick, 17 L. T. Rep. N. S. 545. A provision in a composition agreement that the debtor should manage a hotel, "for the use and benefit entirely of" the creditors, will not impose on the creditors any liability for operating expenses. Pensacola Gas Co. *v.* Lotze, 23 Fla. 368, 2 So. 609.

52. See *infra*, VII, A, D.

53. Magee *v.* Kast, 49 Cal. 141; Le Changeur *v.* Gravier, 2 Mart. N. S. (La.) 545; 4 So. L. Rev. 655; 17 Centr. L. J. 306. See also *infra*, VII, A, D.

54. Magee *v.* Kast, 49 Cal. 141; Atherton *v.* Worth, Dick. 375, 21 Eng. Reprint 315. See also *infra*, V, B, 1.

55. Magee *v.* Kast, 49 Cal. 141; Evans *v.* Gallantine, 57 Ind. 367; Battles *v.* Fobes, 2 Metc. (Mass.) 93, 21 Pick. (Mass.) 239; Thompson *v.* Gunthorpe, 11 L. T. Rep. N. S. 708. See also *infra*, V, B, 3.

But a reasonable time must be allowed. Broadbent *v.* Thornton, 4 De G. & Sm. 65; Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273.

56. *Connecticut.*— Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293.

Kentucky.— Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921.

Maine.— Merritt *v.* Bucknam, 90 Me. 146, 37 Atl. 885; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79.

Massachusetts.— Richardson *v.* Pierce, 119 Mass. 165; Sohier *v.* Loring, 6 Cush. (Mass.) 537.

Missouri.— Boatmen's Sav. Bank *v.* Johnson, 24 Mo. App. 316.

New York.— Lysaght *v.* Phillips, 5 Duer (N. Y.) 106; Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482.

England.— Green *v.* Wynn, L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385 [*affirming* L. R. 7 Eq. 28]; *Ex p.* Carstairs, Buck 560; *Ex p.* Glendinning, Buck 517; Close *v.* Close, 4 De G. M. & G. 176, 53 Eng. Ch. 137; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128; Davidson *v.* McGregor, 11 L. J. Exch. 164, 8 M. & W. 755.

Australia.— White *v.* Glass, 2 Vict. L. R. 46.

See also *infra*, VIII, A, 1, b, (II); VIII, B, 2, c, 5, 6, 7, 8; and 10 Cent. Dig. tit. "Compositions with Creditors," § 61.

57. Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921; Powles *v.* Hargreaves, 3 De G. M. & G. 430, 2 Eq. Rep. 162, 17 Jur. 1083, 23 L. J. Ch. 1, 2 Wkly. Rep. 21, 52 Eng. Ch. 336; Lee *v.* Lockhart, 1 Jur. 769, 3 Myl. & C. 302, 14 Eng. Ch. 302. See also *infra*, VIII, D, 2.

58. Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156.

The form of a composition agreement is immaterial if the essential elements of concession to an insolvent or embarrassed debtor and mutuality of contract between the creditors are present. Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931.

59. See *infra*, IV, B.

60. See *infra*, IV, C, 1.

61. See *infra*, IV, C, 2.

62. Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Johnson *v.* Parker, 34 Wis. 596; Fawcett *v.* Gee, 3 Anstr. 910. See also *supra*, II, D; III, B; *infra*, VIII, A, 2, b.

63. Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156; Paddleford *v.* Thacher, 48 Vt. 574; Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361; 4 So. L. Rev. 654; Ala. Civ. Code (1896), p. 1806. *Contra*, Wheeler *v.* Wheeler, 11 Vt. 60.

even an express agreement for a release. Such a release or agreement may be implied from the terms of the composition.[64]

B. Composition by Deed[65]**—1. Assignment to Trustees.** The method of composition by deed most frequently employed in early times and one that is still often made use of is an assignment of his property by the debtor to trustees, who are usually but not necessarily some of his creditors, in trust to convert the assigned property into money, and distribute the proceeds ratably among such of the creditors as shall come in as parties to the deed, either by signing it or accepting its provisions.[66]

2. Deed of Inspectorship. Another method of composition by deed is what is called a deed of inspectorship, by which the property of the debtor is assigned for the better security of the creditors, but he is permitted to manage it himself for a specified time, under the supervision of certain individuals appointed for that purpose by the body of creditors, whose duty it is to see that the property is disposed of in the manner most conducive to the interests of the creditors. In these cases a release is usually given to the debtor, which is either absolute and takes effect at once or is conditional upon the fulfilment by him of certain terms.[67]

3. Letter of License. Another form of composition by deed is what is known as a letter of license, by which the creditors covenant for a temporary suspension of their rights and bind themselves not to sue or molest their debtor for a certain specified time, during which he is allowed to carry on his trade or business at his own discretion.[68]

64. Johnson *v.* Parker, 34 Wis. 596; Cook *v.* Saunders, 1 B. & Ald. 46; Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84.

65. When the law of compositions was still in the formative period, and the opinion prevailed that a composition without some new consideration was merely an accord, what would to-day be considered as a strict composition agreement always took the form of a deed under seal, which supplied the consideration supposed to be necessary; and while it is now admitted everywhere that a composition need not be made by deed, it is nevertheless preferable when practicable to effect a composition by means of such an instrument. Fellows *v.* Stevens, 24 Wend. (N. Y.) 294, 297, where it is said: "To do the whole by parol would be exceedingly loose, and often unavailable for want of adequate proof." See also *supra*, II, F; and *infra*, IV, B, 1 *et seq.*

66. Lanes *v.* Squyres, 45 Tex. 382; Dauchy *v.* Goodrich, 20 Vt. 127. See also *infra*, XII; and, generally, Assignments For Benefit of Creditors.

An instrument in writing, whereby a debtor transfers all his assets to an assignee, for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition. Gundry *v.* Johnston, 28 Ont. 147.

It may be made a valid condition of the discharge of the debtor that he shall assign for the benefit of his creditors. Shaw *v.* Canter, 8 Mart. N. S. (La.) 689.

67. This form of composition is now rarely met with and seems to be confined to England and her dependencies. Forsyth Comp. 2; 4 So. L. Rev. 639. And see Glegg *v.* Gilbey, 2 Q. B. D. 6, 46 L. J. Q. B. 7, 35 L. T. Rep. N. S. 761, 25 Wkly. Rep. 42 [*affirmed* in 2 Q. B. D. 209, 46 L. J. Q. B. 325, 35 L. T. Rep. N. S. 927, 25 Wkly. Rep. 311]; Forbes *v.* Limond, 4 De G. M. & G. 298, 18 Jur. 33, 2 Wkly. Rep. 262, 53 Eng. Ch. 231; Graham *v.* Ackroyd, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046, 1 Wkly. Rep. 107, 44 Eng. Ch. 192.

68. Forsyth Comp. 2; 4 So. L. Rev. 639.

A letter of license is an instrument or writing made by creditors to their insolvent debtor by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts, and that they will not arrest or molest him in his person or property till after the expiration of such additional time. Bouvier L. Dict. See also Gibbons *v.* Vouillon, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J. C. P. 74, 65 E. C. L. 483; Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84; Field *v.* Donoughmore, 1 Dr. & War. 227; *Re* Hoile, 12 Wkly. Rep. 1087; Mooney *v.* Bossom, 2 Nova Scotia 254; Lamoureaux *v.* Dupras, 16 Rev. Lég. 243; Atkinson *v.* Nesbitt, 1 Rev. Lég. 110; Beaudry *v.* Barreille, 1 Rev. Lég. 33.

This mode is now of rare occurrence and is probably never made use of in the United States. Bouvier L. Dict. But see *In re* Leslie, 10 Daly (N. Y.) 76. The compositions in Loomis *v.* Wainwright, 21 Vt. 520, and Towne *v.* Rublee, 51 Vt. 62, which closely resemble letters of license, were both upon sufficient consideration; in the former an agreement to discontinue bankruptcy proceedings and

4. Modern Composition Deed. The last form of composition by deed and the one of latest origin, but on account of its efficacy and simplicity now employed more frequently than any other, is what for the sake of distinction may be called a modern composition deed, by which the debtor, or someone in his behalf, agrees to pay to each creditor who accepts the deed a fixed sum, or a certain percentage or proportion of the debts due him, either at once or at a specified future time, either in a lump or in instalments, and either with or without security for the performance of the agreement, on condition that the creditors will accept what is thus offered them as in satisfaction of their entire claims; while the creditors, in consideration of the performance of the debtor's undertaking, agree to accept the composition and to relieve the debtor from all further liability to them, either absolutely, or upon performance.[69] The instrument need not provide for a present executed composition, but may be merely an executory agreement to enter into a composition in the future.[70]

C. Parol and Oral Compositions — 1. Parol Composition. Before it was established that a composition agreement carries its consideration in itself so far as the creditors are concerned, and therefore forms an apparent exception to the general rule that acceptance of part of a debt is no satisfaction of the whole, without a new consideration, it was held that a composition must be under seal so as to import the necessary consideration, and that a parol composition was not binding.[71] But it is now well settled that a parol composition is valid and binding equally with one under seal, when the debts compounded are simple contract debts, and also wherever the distinction between simple contracts and specialties has been abolished.[72] It has been doubted, however, whether a composition of a

not obtain a discharge, and in the latter an agreement that the debtor should assign to creditors, and that the trustee should dispose of the property assigned as directed. In the latter case also the extension of time was embodied in the composition.

Without a seal or a new consideration a letter of license is merely an extension of time and cannot bind the creditors. Pitts Sons' Mfg. Co. *v.* Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Henry *v.* Patterson, 57 Pa. St. 346; Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84; O'Brien *v.* Osborne, 10 Hare 92, 16 Jur. 960, 44 Eng. Ch. 92. *Compare* Towne *v.* Rublee, 51 Vt. 62; Loomis *v.* Wainwright, 21 Vt. 520.

Unless it provides for a release or a discharge of the debtor a letter of license cannot by itself constitute a composition. O'Brien *v.* Osborne, 10 Hare 92, 16 Jur. 960, 44 Eng. Ch. 92. Hence it is usually made with and as an adjunct to a deed of composition. Gibbons *v.* Vouillon, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J. C. P. 74, 65 E. C. L. 483.

A letter of license which does not refer to a composition deed is not equivalent to an assent to the deed. Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84.

A composition deed which provides for a letter of license is not invalid because it provides for the prior payment of the cost of carrying on the business. Fitzpatrick *v.* Bourne, L. R. 3 Q. B. 446, 9 B. & S. 157, 37 L. J. Q. B. 266, 18 L. T. Rep. N. S. 731, 16 Wkly. Rep. 849.

69. See Dauchy *v.* Goodrich, 20 Vt. 127.

70. Dauchy *v.* Goodrich, 20 Vt. 127; Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073; Cook *v.* Saunders, 1 B. & Ald. 46; Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713; Bradley *v.* Gregory, 2 Campb. 383, 11 Rev. Rep. 742; Butler *v.* Rhodes, 1 Esp. 236, Peake 238; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193.

71. Acker *v.* Phœnix, 4 Paige (N. Y.) 305. See Henry *v.* Patterson, 57 Pa. St. 346.

72. *Maryland.*— Gardner *v.* Lewis, 7 Gill (Md.) 377.

Missouri.— Tutt *v.* Price, 7 Mo. App. 194.

New York.— Van Bokkelen *v.* Taylor, 62 N. Y. 105 [*reversing* 2 Hun (N. Y.) 138, 4 Thomps. & C. (N. Y.) 422]; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515.

South Carolina.— Pierce *v.* Jones, 8 S. C. 273, 28 Am. Rep. 288; Aiken *v.* Price, Dudley (S. C.) 50.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Johnson *v.* Parker, 34 Wis. 596.

England.— Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234; Boothbey *v.* Sowden, 3 Campb. 175; Steinman *v.* Magnus, 2 Campb. 124, 11 East 390; Webb *v.* Hewitt, 3 Kay & J. 438.

Ala. Civ. Code (1896), p. 1806, provides that "all settlements in writing, made in good

specialty, where the distinction is preserved, should not be under seal.[73] But it would seem clear that there is no good reason for requiring a seal to a composition of such debts, since a composition is binding even when not operative as a release.[74]

2. **Oral Composition.** Unless it is otherwise provided by statute, an oral composition is valid whenever a parol composition would be;[75] but in cases that fall within the statute of frauds the composition must be in writing; for example, where a third person without any interest undertakes to pay the composition or secure its payment,[76] or when the composition concerns an interest in lands[77] or falls within any other clause of the statute.[78]

faith for the composition of debts, must be taken as evidence, and held to operate according to the intention of the parties, though no release under seal is given, and no new consideration has passed."

73. Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294.

74. See Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361. And see *infra*, VIII, A, 2, a; VIII, C, 1.

75. *New Hampshire.*— Brown *v.* Stackpole, 9 N. H. 478.

New York.— Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Halstead *v.* Ives, 73 Hun (N. Y.) 56, 25 N. Y. Suppl. 1058, 57 N. Y. St. 125 [*affirmed* in 144 N. Y. 705, 39 N. E. 857, 70 N. Y. St. 867].

South Carolina.—Aiken *v.* Price, Dudley (S. C.) 50.

Wisconsin.— Mellen *v.* Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781.

England.—Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713; Bradley *v.* Gregory, 2 Campb. 383, 11 Rev. Rep. 742; Butler *v.* Rhodes, 1 Esp. 236, Peake 238; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193; Wood *v.* Roberts, 2 Stark. 417, 3 E. C. L. 470.

And see 4 So. L. Rev. 652; and 10 Cent. Dig. tit. "Compositions with Creditors," § 5.

76. Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453; 4 So. L. Rev. 652.

77. Alchin *v.* Hopkins, 1 Bing. N. Cas. 99, 3 L. J. C. P. 272, 4 Moore & S. 615, 27 E. C. L. 561; 4 So. L. Rev. 652.

78. Brunskill *v.* Metcalf, 2 U. C. C. P. 431.

Reasons for rule.— In Brunskill *v.* Metcalf, 3 U. C. C. P. 143, 153, on a motion for a new trial, Macaulay, C. J., said: "If the property to be assigned is such that an executory agreement in respect thereof is by the Statute of Frauds required to be in writing, and signed by the party to be charged therewith, I find no authority for treating composition agreements as differing, or upon any other footing than other agreements for the sale and purchase of such property as respected mere choses in action or contracts that in law cannot be assigned so as to substitute the vendee in the place of the vendor — as in building contracts — however such an assignment or an agreement therefor may in law constitute a valid consideration for anything undertaken and agreed to be done by the other party. Still, if the subject is an interest in real estate, or goods exceeding 10*l.* in value, or for something not to be performed within a year, it seems essential to be proved by a written note or memorandum when set up and relied upon in support of an action, or by plea, as a good subsisting agreement against an action.— In Alchin *v.* Hopkins, 1 Bing. N. Cas. 102, 3 L. J. C. P. 272, 4 Moore & S. 615, 27 E. C. L. 561, Tindal, C. J. (speaking of the agreement in that case), said 'it appeared that it was never signed by the defendant. In case therefore the creditors should sue upon it they would be met by the preliminary objection that a contract for the profits of a living, &c., was for an interest in, or concerning lands, &c., and that no action would lie upon it as it had not been signed by the defendant, or by any person by him thereunto lawfully authorized'— wherefore he held the proof insufficient: 'for,' he said, 'the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement by mutual consent, and on good consideration, in the stead or place of the old contract, which was the point established by the case of Good *v.* Cheeseman. The new or substituted agreement must therefore of necessity be one which is legal and valid, &c.'— In Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453, Lord Chancellor (Truro) held the agreement within the Statute of Frauds, and that it must be in writing; and see also, Laythorpe *v.* Bryant, 2 Bing. N. Cas. 735, 2 Hodges 25, 5 L. J. C. P. 217, 3 Scott 238, 29 E. C. L. 735; Barber *v.* Fox, 2 Saund. 136." But in Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713, the defendant, being sued by the plaintiff for a debt, defended on the ground, that previously, when he was insolvent, a verbal agreement was entered into between several of his creditors and one Thomas Weston, whereby Weston agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to Weston. It was held

V. PARTIES.

A. The Debtor. When the debtor compounds personally with his creditors he is of course a necessary party,[79] although he is not required to execute the composition agreement, but may become a party by simply accepting the composition and acting under it;[80] and when the composition is entered into by a third party on the debtor's behalf, as is allowable,[81] the debtor himself need not become a party at all.

B. The Creditors — 1. What Creditors Must Join — a. In General. It is not necessary to its validity that all or even the greater part of the creditors should join in a composition, unless there is a requirement to that effect in the agreement, either by express stipulation or by necessary implication;[82] and in the absence of such a requirement if any two or more of the creditors join the composition will be valid and binding upon them and the debtor.[83]

that this agreement was binding, and not within the statute of frauds, since it was not a collateral promise to pay the debt of another, but an original contract to purchase the debts; and that the plaintiff could not recover.

79. See *supra*, II, D.

80. Roberts *v.* Barnum, 80 Ky. 28; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234. See *supra*, II, D.

81. See *infra*, XIII. *Contra*, Henry *v.* Murphy, 54 Ala. 246.

82. **Parol evidence inadmissible.**— If the agreement does not show on its face that all must join before it shall be binding, parol evidence is not admissible to show that it was in fact stipulated that all must join. Beard *v.* Boylan, 59 Conn. 181, 22 Atl. 152; Van Bokkelen *v.* Taylor, 62 N. Y. 105 [*reversing* 2 Hun (N. Y.) 138, 14 Thomps. & C. (N. Y.) 422]; Strickland *v.* Harger, 16 Hun (N. Y.) 465 [*affirmed* in 81 N. Y. 623]. But see Tutt *v.* Price, 7 Mo. App. 194. See also *infra*, VI, B. And *vice versa* if the agreement does imply or state that all must join it cannot be proved by parol that a certain class of creditors should not join. Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

83. *California.*— Schroeder *v.* Pissis, 128 Cal. 209, 60 Pac. 758; Pierson *v.* McCahill, 21 Cal. 122.

Connecticut.— Beard *v.* Boylan, 59 Conn. 181, 22 Atl. 152.

Georgia.— Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813; Stewart *v.* Langston, 103 Ga. 290, 30 S. E. 35.

Illinois.— Condict *v.* Flower, 106 Ill. 105; Goodrich *v.* Lincoln, 93 Ill. 359; Gillfillan *v.* Farrington, 12 Ill. App. 101.

Indiana.— Devou *v.* Ham, 17 Ind. 472; Shinkle *v.* Shearman, 7 Ind. App. 399, 34 N. E. 838.

Maryland.— Cheveront *v.* Textor, 53 Md. 295; Gardner *v.* Lewis, 7 Gill (Md.) 377.

Massachusetts.— Eaton *v.* Lincoln, 13 Mass. 424.

Minnesota.— Murchie *v.* McIntire, 40 Minn. 331, 42 N. W. 348.

Missouri.— Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

New York.— Van Bokkelen *v.* Taylor, 62 N. Y. 105; Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982; Strickland *v.* Harger, 16 Hun (N. Y.) 465 [*affirmed* in 81 N. Y. 623]; Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38; Renard *v.* Tuller, 4 Bosw. (N. Y.) 107; Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41.

Pennsylvania.— Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Laird *v.* Campbell, 92 Pa. St. 470; Lehigh Coal, etc., Co. *v.* Hibbs, 2 Wkly. Notes Cas. (Pa.) 96.

Texas.— Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899.

Vermont.— Chittenden *v.* Woodbury, 52 Vt. 562; Loomis *v.* Wainwright, 21 Vt. 520.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

United States.— Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

England.— Wells *v.* Greenhill, 5 B. & Ald. 869, 1 D. & R. 493, 7 E. C. L. 472; Carey *v.* Barrett, 4 C. P. D. 379; Field *v.* Donoughmore, 1 Dr. & War. 227; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193.

See 17 Centr. L. J. 305; and 10 Cent. Dig. tit. "Compositions with Creditors," § 10 *et seq.*

In some of the cases there are expressions that would seem to indicate that all or at least the majority of the creditors should enter into a composition; but these expressions are either mere *dicta*, or have since been overruled. See Lanes *v.* Squyres, 45 Tex. 382; Reay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931.

The debtor may compound with one class of creditors only: e. g., unsecured creditors. Battles *v.* Fobes, 2 Metc. (Mass.) 93, 21 Pick. (Mass.) 239; Phenix Bank *v.* Sullivan, 9 Pick. (Mass.) 410; Zoebisch *v.* Van Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Carey *v.* Barrett, 4 C. P. D. 379; Gould *v.* Robertson, 4 De G. & Sm. 509; Field *v.* Donoughmore, 1 Dr. & War. 227; Drever *v.* Mawdesley, 13 Jur. 330, 18 L. J. Ch. 273,

But the authorities are unanimous in support of the doctrine that one creditor alone cannot make a composition.[84]

b. All or a Specified Number. If the composition agreement requires that a specified number of the creditors, whether all or less, shall join, there will be no composition, and even those who enter into the agreement will not be bound, unless the required number compound.[85]

16 Sim. 511, 39 Eng. Ch. 511; Raworth *v* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117 4 Wkly. Rep. 273.

84. *California.*— Pierson *v.* McCahill, 21 Cal. 122.

Minnesota.— Minneapolis First Nat. Bank *v.* Steele, 58 Minn. 126, 59 N. W. 959.

New York.— Sun Mut. Ins. Co. *v.* Hubbell, 6 N. Y. Wkly. Dig. 82.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

United States.— Latapee *v.* Pecholier, 2 Wash. (U. S.) 180, 14 Fed. Cas. No. 8,101.

England.— Lynn *v.* Bruce, 2 H. Bl. 317, 3 Rev. Rep. 381; Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361.

Canada.—Mooney *v.* Bossom, 2 Nova Scotia 254.

See 8 Centr. L. J. 350; and 10 Cent. Dig. tit. "Compositions with Creditors," § 10 *et seq.*

85. *California.*— Magee *v.* Kast, 49 Cal. 141.

Indiana.— Falconbury *v.* Kendall, 76 Ind. 260.

Massachusetts.— Day *v.* Jones, 150 Mass. 231, 22 N. E. 898.

Minnesota.— Abel *v.* Allemannia Bank, 79 Minn. 419, 82 N. W. 680; M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 72 N. W. 122; Trunkey *v.* Crosby, 33 Minn. 464, 23 N. W. 846.

New Jersey.— Paulin *v.* Kaighn, 27 N. J. L. 503.

New York.— Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

Pennsylvania.— Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065; Laird *v.* Campbell, 100 Pa. St. 159; Laird *v.* Campbell, 92 Pa. St. 470; Lane's Appeal, 82 Pa. St. 289; Lower *v.* Clement, 25 Pa. St. 63; Bartol *v.* Forker, 17 Pa. St. 313.

Tennessee.— Bissenger *v.* Guiterman, 6 Heisk. (Tenn.) 277.

Vermont.— Chase *v.* Bailey, 49 Vt. 71; Cobleigh *v.* Pierce, 32 Vt. 788.

England.—Reay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931; Atherton *v.* Worth, 1 Dick. 375, 21 Eng. Reprint 315; Brown *v.* Dakeyne, 11 Jur. 39.

Canada.— Clarke *v.* Ritchey, 11 Grant Ch. (U. C.) 499; Cuvillier *v.* Buteau, 1 Rev. Lég. 109.

See 4 So. L. Rev. 811; and 10 Cent. Dig. tit. "Compositions with Creditors," § 10 *et seq.*

A stipulation that all the creditors must join is a condition precedent, performance of which must be alleged and proved on setting up the composition agreement as a defense to an action by a creditor. Falconbury *v.* Kendall, 76 Ind. 260; Reay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931. *Contra*, Mathews *v.* Taylor, 5 Jur. 321, 2 M. & G. 667, 3 Scott N. R. 52, 40 E. C. L. 797.

When all creditors holding claims over one hundred dollars are to sign, and any such creditor does not, those who have signed can sue for their original claims. Raudenbush *v.* Bushong, 43 Leg. Int. (Pa.) 366.

A composition "not to be binding unless signed by all the unsecured creditors" will not bar an action by a creditor who has signed, unless signed by all the unsecured creditors. Walker *v.* Mayo, 143 Mass. 42, 8 N. E. 873.

When all are to sign except certain named lienholders, it must be shown that all signed who were required to, or the composition will not be binding; and the fact that the agreement recites that the subscribers have little prospect of realizing anything on their claims and that the composition is made in order to secure something thereon out of the debtor's property, will not justify the importation into it, by construction contrary to its express language, of an intention that other secured creditors than those named shall not be required to sign. Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065.

Effect on third parties.— The makers and indorsers of the composition notes will not be liable thereon, unless the required number of creditors sign the composition. Doughty *v.* Savage, 28 Conn. 146; Falconbury *v.* Kendall, 76 Ind. 260; Enderby *v.* Corder, 2 C. & P. 203, 12 E. C. L. 528. And when it is agreed that a surety shall not be bound unless all the creditors execute the composition deed, and the deed is delivered to one creditor to get the signatures of the rest, but all do not sign, the surety will not be bound. Johnson *v.* Baker, 4 B. & Ald. 440, 23 Rev. Rep. 338, 6 E. C. L. 551.

What will not excuse breach of condition.— When a composition is not to be binding unless all the creditors become parties it will not bind if one does not sign, although that one is paid in full within the time allowed for signing (Turner *v.* Comer, 6 Gray (Mass.) 530; Durgin *v.* Ireland, 14 N. Y. 322; Spooner *v.* Whiston, 8 Moore C. P. 580, 17 E. C. L. 547), or had security for his debt, and therefore did not enter the composition, for a provision that all creditors must sign is not to be construed as limited to unsecured creditors. Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065; Cobleigh *v.* Pierce, 32 Vt. 788; Kinsing *v.* Bartholew, 1 Dill. (U. S.) 156, 14 Fed.

c. Construction of Stipulation as to Joining. A requirement that a certain number of the creditors shall join will be construed strictly as against the creditors and will not be extended to cases beyond its letter,[86] or be held to apply to

Cas. No. 7,831, 14 Int. Rev. Rec. 94, 5 West. Jur. 448. And see Enderby *v.* Corder, 2 C. & P. 203, 12 E. C. L. 528, where the debtor was a bankrupt at the time of the composition.

When breach will be ignored.— But on the principle of *de minimis*, when all were required to sign, and one creditor who had a debt of two dollars and fifty cents only did not, it was held that the others could not take advantage of the omission. Fahey *v.* Clarke, 80 Ky. 613. And in Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324, where the deed was not to be binding unless all the creditors signed, and over ninety-eight per cent in value signed, it was held that the failure of the others to sign would not prevent the recovery of a fraudulent preference given to one of the creditors, it appearing that the greater part of the creditors believed that all had signed in good faith.

Waiver of condition.— A condition that all must join may be waived by the creditors. See also *infra*, V, B, 1, d; VII, C.

86. See cases cited *infra*, this note.

What amounts to a requirement that all must join.— The following have been construed as requiring all the creditors to join: "If the creditors of the said church would release their claims against the said church, the plaintiffs would release their claim." Shenandoah M. E. Church *v.* Robbins, 81 Pa. St. 361, 362, 2 Wkly. Notes Cas. (Pa.) 592. "In consideration of the payment in cash to us by Albert Wunderlich within twenty days from this date of the sum of $383.80, being 50 per cent. of his entire indebtedness to us, and in consideration of other creditors accepting a like percentage of their respective claims and demands against him in full settlement and compromise thereof, we hereby agree to accept such percentage of our said claims and demands against him in full settlement and compromise thereof." M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 289, 72 N. W. 122. "In consideration that Milford G. Falconbury will agree to pay us, the creditors of Sylvester Kendall, fifty cents on the dollar of our claims against said Kendall, within twelve months from this date, with ten per cent. from date, and secure the same by a mortgage on the house and lot of said Kendall, in Greensburg, made by said Kendall and wife, the notes to be signed by said Falconbury, we agree to release said Kendall from all further liability on said indebtedness. Upon all the creditors of said Kendall signing this paper, said Falconbury is to execute his notes to said creditors as above specified, and said mortgage to be executed March 2d, 1876." Falconbury *v.* Kendall, 76 Ind. 260, 261. "We, the undersigned depositors and creditors of the Allemannia Bank of St. Paul, for the purpose of effecting a reopening of said bank, hereby agree with said bank, and with each other, that we will accept in payment of the amounts due us from said bank, which are respectively set opposite our names hereinafter, certificates of deposit of said bank, or its successor in case of a reorganization, payable in five annual instalments of twenty per cent. each, to bear interest at two per cent. per annum, and to be dated on the day of the reopening of said bank." Abel *v.* Allemannia Bank, 79 Minn. 419, 421, 82 N. W. 680. In Chase *v.* Bailey, 49 Vt. 71, an action of assumpsit for money paid, etc., the defendants, who were insolvent, and had been trying to compound with their creditors, and whose property had been attached at the suit of one of their creditors, introduced in evidence in bar of plaintiff's claim, a written instrument signed by plaintiff and others, but not all of their creditors, hy the attaching creditor, and by the defendants themselves, whereby it was agreed that "the creditors of" the defendants should "accept their *pro rata* parts of the sum of twelve hundred dollars in full satisfaction of their respective claims," that their several dividends should be ascertained by ascertaining defendants' entire unsecured indebtedness, and dividing said sum *pro rata* upon such indebtedness, paying to each creditor such a part of such sum as his debt was of such entire indebtedness, and that the defendants and the attaching creditor should pay to each creditor his part of said sum upon demand, after execution of said instrument, and after proof of, or agreement upon, the sum due. It was held that this instrument required that all the creditors should become parties, and that as it was not executed by all, it was not binding upon the plaintiff.

What is a sufficient signing.— Acceptance of a composition or security satisfies a requirement that all creditors shall "sign." Jolly *v.* Wallis, 3 Esp. 228. In Chittenden *v.* Woodbury, 52 Vt. 562, hy a deed of composition an insolvent dehtor covenanted to pay his creditors a certain percentage on their respective claims, provided all creditors "came into the arrangement"; and the creditors severally agreed that if he would do so they would discharge their several claims. Certain of the creditors of a solvent firm of which the dehtor was a member did not sign the deed. It was held that the contract did not require such creditors to sign; and that the provision of the contract requiring all creditors to sign was a condition of the debtor's and not of the creditors' covenant. In Richardson *v.* Pierce, 119 Mass. 165, one Rindge, a creditor of the debtor Pierce, holding a promissory note of which Pierce was the maker and one

others than the parties for whose benefit it is made.[87] And it must be expressed or implied clearly and unequivocally, for in the absence of a specific provision to the contrary it is but fair to infer that the agreement was intended to be binding on as many as might enter into it, without regard to the action of others.[88]

d. Waiver of Condition as to Joining. A requirement that a certain number of creditors must join may be waived by the others, and the agreement will then be binding upon them;[89] but the proof of such a waiver must be clear.[90]

2. Who May Avail Themselves of the Composition. When a composition is not in terms limited to any particular class of creditors, any creditor may avail himself of its provisions, whether he signs the agreement or not;[91] but if it be limited to a certain class (for example, to unsecured creditors, or to those who shall sign, or the like), then only those who are within the class specified can claim its benefit.[92] Furthermore, a creditor who acts inconsistently with or

Lochman the indorser, signed a composition deed by which the creditors of Pierce released all claims against him, the deed to be null and void unless signed by all his creditors, and wrote after his name the words, "provided this does not release the indorser in any manner." In an action against Pierce by another creditor, who had signed the deed, Lochman's name did not appear among the signers of the deed; but it was agreed that if the signing by Rindge did not release the indorser, then all the creditors had signed. It was held that the composition deed was a bar to the action, as the condition annexed by Rindge to his signature was equivalent to a reservation of his rights against Lochman, and therefore did not release the latter. In Towne *v.* Rublee, 51 Vt. 62, Alwin A. Mead, one of the creditors, refused to sign the composition, whereupon one Amanda C. Clark purchased his claim and signed the contract. All other creditors signed. After all had signed the plaintiff learned of the refusal of Mead to sign and of the subsequent purchase of his claim and signing by Clark, and thereupon notified the debtor that he considered himself not bound by the contract, and would not abide by it and subsequently brought suit. It was held that the suit was prematurely brought; that the agreement became binding so far as the condition was concerned when it was so executed that all the debts were bound, as it was when Clark and the other creditors signed; and that plaintiff's notice that he would not abide by the contract availed him nothing.

87. Chittenden *v.* Woodbury, 52 Vt. 562.

88. 4 So. L. Rev. 654. See also Wells *v.* Greenhill, 5 B. & Ald. 869, 1 D. & R. 493, 7 E. C. L. 472, and cases cited *infra*, this note.

Rule applied.— The expressions, "we, the subscribers, creditors," etc., and "we, the undersigned, creditors," etc., do not imply that all the creditors must sign. Lambert *v.* Shetler, 71 Iowa 463, 32 N. W. 424; Renard *v.* Tuller, 4 Bosw. (N. Y.) 107; Laird *v.* Campbell, 92 Pa. St. 470. A recital in a composition deed, "whereas, C. G. Hayes & Son, bankers, are indebted to the undersigned, their several creditors, in divers amounts, but by reason of sundry losses and disappointments are unable to pay and satisfy our demands in full," was held not to imply that the composition was not to become binding until all the creditors had signed it, the words, "their several creditors," not being synonymous with "all their creditors." Strickland *v.* Harger, 16 Hun (N. Y.) 465 [*affirmed* in 81 N. Y. 623]. A clause in a composition deed, "we, who have hereunto subscribed our names and affixed our seals, creditors of David H. Koehler and Burnard Kepfur, comprising the firm of Koehler & Kepfur, "limits the effect of the instrument to those persons who should become parties to it, and does not render it indispensable to its validity that all the creditors should execute the paper." Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482. In Carey *v.* Barrett, 4 C. P. D. 379, 380, at a meeting of the defendant's creditors, the following agreement was made and signed by all the creditors present: "We the undersigned creditors of William Barrett, of Tunbridge Wells, coal-merchant and builder, in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said William Barrett, the whole of the creditors receiving not exceeding a like sum in discharge of their debts." This agreement was held to be limited to the creditors signing it.

89. Condict *v.* Flower, 106 Ill. 105; Dauchy *v.* Goodrich, 20 Vt. 127; Kinsing *v.* Bartholew, 1 Dill. (U. S.) 155, 14 Fed. Cas. No. 7,831, 14 Int. Rev. Rec. 94, 5 West. Jur. 448. See also Bissenger *v.* Guiteman, 6 Heisk. (Tenn.) 277.

90. Mere acceptance of payment under the composition is not a waiver of a condition that all must sign. Greer *v.* Shriver, 53 Pa. St. 259; Davis *v.* Doerr, 5 Leg. & Ins. Rep. (Pa.) 107. But acceptance of the composition money and the execution of a release is a waiver. Dauchy *v.* Goodrich, 20 Vt. 127. See also Cobleigh *v.* Pierce, 32 Vt. 788.

91. Cosser *v.* Radford, 1 De G. J. & S. 585, 66 Eng. Ch. 454.

92. Battles *v.* Fobes, 2 Metc. (Mass.) 93, 21 Pick. (Mass.) 239; Phenix Bank *v.* Sullivan, 9 Pick. (Mass.) 410; Carey *v.* Barrett, 4 C. P. D. 379; Gould *v.* Robertson, 4 De G.

in opposition to the composition cannot afterward claim a right to share in its benefits.[93]

3. When Creditors May Come In — a. In General. The right of a creditor to come in under the composition and share in its benefits, after it has been agreed upon between the debtor and others, depends somewhat on the nature of the composition.[94]

b. Effect of Limitation of Time For Joining — (1) *In General.* It is competent to provide in the composition agreement that only those who come in or sign within a limited time shall enjoy its benefits,[95] if the time thus limited is reasonable under the circumstances;[96] and while such a provision, if it does not

& Sm. 509; Field *v.* Donoughmore, 1 Dr. & War. 227; Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273.

Illustrations.— A composition deed which reads, "We, the undersigned, hereby agree," etc., is limited to those signing it. Carey *v.* Barrett, 4 C. P. D. 379. *Compare* cases cited *supra*, note 88. In Drever *v.* Mawdesley, 13 Jur. 330, 18 L. J. Ch. 273, 16 Sim. 511, 39 Eng. Ch. 511, a debtor and his father, in pursuance of an arrangement between themselves, conveyed estates of which they were seized for life and in remainder respectively, to trustees, in trust to sell for the payment of the debtor's debts; but no creditor was to be entitled to the benefit of the trust unless the trustees, after having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors, after which one of the trustees instituted a suit against his co-trustees, etc., on the hearing of which the master was directed to take an account of "all" the debtor's debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day to be named or be excluded from the benefit of the decree. The plaintiff and several other creditors of the debtor proved their debts under the decree, but the court, nevertheless, on a hearing for further directions, held that none of them except the plaintiff and the debenture creditors were entitled to the benefit of the trust.

93. Watson *v.* Knight, 19 Beav. 369; *In re* Meredith, 29 Ch. D. 745; Johnson *v.* Kershaw, 1 De G. & Sm. 260, 11 Jur. 553, 795; Field *v.* Donoughmore, 1 Dr. & War. 227.

Encumbrancers who claim priority over a deed of composition and fail in their contention will not be allowed subsequently to execute the deed and share in its benefits. *In re* Meredith, 29 Ch. D. 745.

But the mere bringing of an action to test the validity of the deed will not forfeit rights accruing under it. Latter *v.* White, L. R. 5 H. L. 578, 41 L. J. Q. B. 342 [*affirming* 25 L. T. Rep. N. S. 658, 19 Wkly. Rep. 1149].

94. If it contains an assignment for the benefit of creditors a creditor may come in at any time before an account is settled, although he cannot disturb a dividend already made. Field *v.* Cook, 23 Beav. 600; Broadbent *v.* Thornton, 4 De G. & Sm. 65. One who executes a deed of composition after the time set for payment adopts it except as to time, and the debtor will be liable to pay on demand. Harvey *v.* Hunt, 119 Mass. 279; Bowen *v.* Holley, 38 Vt. 574. But a creditor who had notice of the deed shortly after it was executed by others and did not himself execute it cannot come in seven years after the death of the debtor, because the debtor cannot have the benefit of the consideration. Lane *v.* Husband, 9 Jur. 1001, 14 Sim. 656, 37 Eng. Ch. 656. And where the composition is for the payment of a fixed sum or specified instalments it would seem reasonable that a creditor who has not previously assented should not be allowed to come in after the time set for payment of the composition, or of the first instalment thereof, or at least a reasonable time thereafter, especially when the composition is paid by a third person; although of course as it is to the debtor's interest to compound with all, this question is not likely to be often raised. See *infra*, V, B, 3, b.

95. Magee *v.* Kast, 49 Cal. 141; Evans *v.* Gallantine, 57 Ind. 367; Battles *v.* Fobes, 2 Metc. (Mass.) 93, 21 Pick. (Mass.) 239. A condition that those who do not sign within a specified time, or within such further time as the trustees under the deed shall appoint, shall be excluded from the benefit of the composition, is valid. Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273. A provision that those who do not come in within the time limited shall lose the benefit of the composition is valid, but a condition that they shall lose their debts is void. Broadbent *v.* Thornton, 4 De G. & Sm. 65; Thompson *v.* Gunthorpe, 11 L. T. Rep. N. S. 708.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 14.

96. Broadbent *v.* Thornton, 4 De G. & Sm. 65. In Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273, a composition deed contained a proviso that such creditors as should not execute or assent in writing to the deed on or before a certain day, or within such further time, not exceeding thirty days, as the trustees should appoint, should be excluded from the benefit of the deed. The trustees issued an advertisement, which stated their power of extending the time for execution. The debtor owed his son a large sum of money. The son was in America at the date of the deed. A solicitor who had acted for him when in England, wrote to the trustees on his behalf, on the last day for execution, signifying his assent

contain words of exclusion, will not necessarily prevent a creditor from coming in after the expiration of the time set,[97] yet if it is exclusive either by express language or by necessary implication, it will debar any from coming in after the time limited has expired,[98] unless there are equitable grounds for relief, such as fraud, accident, or mistake, in which case a court of equity upon proper application will grant leave to come in.[99]

(II) *ACTUAL EXECUTION WITHIN TIME LIMITED NOT ESSENTIAL.* It is not necessary, however, that the creditors should actually execute the composition agreement within the time limited for joining; it will be sufficient if they assent to it and act under it.[1]

C. Third Parties — 1. IN GENERAL. A composition agreement may be effected by a third party in behalf of the debtor, either as his agent or independently,[2] and a partner may compound debts due to his firm[3] or he may compound

to the deed. Subsequently he received from the son a power of attorney to execute the deed, and before the end of the period for which the trustees might have enlarged the time for execution, he applied to them to permit him to execute on behalf of the son. It was held that the son was entitled under these circumstances to the benefit of the deed, because it was the duty of the trustees to enlarge the time, so as to allow his attorney to execute the deed.

97. Nicholson *v.* Tutin, 1 Jur. N. S. 1201, 2 Kay & J. 18.

The other creditors may have a bill in equity to compel those who have not yet come in to do so or renounce. Dunch *v.* Kent, 1 Vern. 260.

98. Phenix Bank *v.* Sullivan, 9 Pick. (Mass.) 410; Watson *v.* Knight, 19 Beav. 369; Collins *v.* Reece, 1 Coll. 675, 28 Eng. Ch. 675; Johnson *v.* Kershaw, 1 De G. & Sm. 260, 11 Jur. 553, 795. In Gould *v.* Robertson, 4 De G. & Sm. 509, a debtor assigned all his property to trustees for the benefit of his creditors, with a proviso that in case any creditor should not come in under the deed for six months after its date, he should be peremptorily excluded from its benefits. It was held that a mortgagee of part of the property, whose solicitor corresponded with the trustees on the subject of the mortgage, but who did not express any intention to come in under the deed for some years afterward, was not entitled to the benefit of the trust.

It is immaterial that there has been no distribution or that the instrument of composition contains no release. Phenix Bank *v.* Sullivan, 9 Pick. (Mass.) 410.

99. Watson *v.* Knight, 19 Beav. 369; Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84; Broadbent *v.* Thornton, 4 De G. & Sm. 65; Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273. But a creditor who actively refuses to come in or assent to the deed within the time limited, and does not retract his refusal within that time, will not be indulged. Johnson *v.* Kershaw, 1 De G. & Sm. 260, 11 Jur. 553, 795. In Brandling *v.* Plummer, 27 L. J. Ch. 188, 6 Wkly. Rep. 117, the deed prescribed a limited time for its execution, but provided that the trustees should have discretion to let others in after the time had expired. A judgment creditor who relying on his judgment did not execute the deed for twenty-two years, and then, his judgment proving bad, petitioned to be allowed the benefit of the deed, was denied relief, on the ground that there was no mistake or misapprehension such as would entitle him to the assistance of equity.

When a third party agrees to pay the composition, creditors who do not come in within the time limited will not be relieved, unless the third party has fraudulently misled them. Williams *v.* Mostyn, 33 L. J. Ch. 54, 9 L. T. Rep. N. S. 476, 12 Wkly. Rep. 69.

1. *In re* Baker, L. R. 10 Eq. 554, 40 L. J. Ch. 144, 18 Wkly. Rep. 1131; Spottiswoode *v.* Stockdale, Coop. 102, 10 Eng. Ch. 102. See *supra*, III, B.

But a creditor cannot be held to have assented to a composition unless he has put himself in the same situation with regard to the debtor as if he had executed the deed. Forbes *v.* Limond, 4 De G. M. & G. 298, 18 Jur. 33, 2 Wkly. Rep. 262, 53 Eng. Ch. 231. Signing a letter of license which does not refer to the deed does not constitute an assent to the deed. Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84.

2. *Massachusetts.*— Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Holton *v.* Bent, 122 Mass. 278.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229.

New York.— Babcock *v.* Dill, 43 Barb. (N. Y.) 577.

Ohio.— Brown *v.* Dougherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239.

Pennsylvania.— Patterson *v.* Boehm, 4 Pa. St. 507.

Vermont.— Bowen *v.* Holly, 38 Vt. 574.

England.— Williams *v.* Mostyn, 33 L. J. Ch. 54, 9 L. T. Rep. N. S. 476, 12 Wkly. Rep. 69; Emmet *v.* Dewhurst, 3 Macn. & G. 587, 15 Jur. 1115, 21 L. J. Ch. 497, 49 Eng. Ch. 453.

See also *infra*, XIII.

3. *Louisiana.*— Shaw *v.* Canter, 8 Mart. N. S. (La.) 689.

claims against it.[4] One joint creditor may release the joint claim by a composition, although he cannot bind his fellow creditors by an agreement not to sue.[5]

2. AGENTS. A composition made by a duly authorized agent will bind his principal, whether debtor or creditor,[6] especially if the principal be a corporation, which can act only through agents.[7] But the authority of the agent to compound

Maryland.— Smith *v.* Stone, 4 Gill & J. (Md.) 310.

New Hampshire.— Allen *v.* Cheever, 61 N. H. 32.

New York.— Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311, 33 N. Y. St. 220 [*affirming* 55 Hun (N. Y.) 335, 8 N. Y. Suppl. 695, 29 N. Y. St. 258, under statute]; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58.

United States.— Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

England.— Hawkshaw *v.* Parkins, 2 Swanst. 539, 19 Rev. Rep. 125.

See also *infra*, XIV, A.

A surviving partner may compound the debts due the firm. Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

4. Sigler *v.* Platt, 16 Mich. 206; Le Page *v.* McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Molson's Bank *v.* Connolly, 17 L. C. Jur. 189, 4 Rev. Lég. 683. See also *infra*, XIV, B.

5. Walmesley *v.* Cooper, 11 A. & E. 216, 10 L. J. Q. B. 49, 3 P. & D. 149, 39 E. C. L. 136.

6. Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Hawley *v.* Beverley, 6 M. & G. 221, 46 E. C. L. 221.

A clerk, authorized to represent a creditor at a creditors' meeting "in the most favorable manner," is authorized at such a meeting to act upon or to make in behalf of his principal, every proposition made in the course of that evening, tending to a fair and just composition; and can agree to an extension of time to make the necessary investigation of the debtor's affairs. Gardner *v.* Lewis, 7 Gill (Md.) 377.

Extent of authority.— When an agent is authorized to represent a creditor, and his principal assures the other parties that whatever the agent does will be satisfactory, the agent may not only grant an extension of time, but may bind his principal by a clause in the agreement prescribing a penalty for a breach by the creditors. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

The same party cannot be agent of both debtor and creditor in making a composition; but when the composition has been agreed upon between the creditor and an agent of the debtor, the latter may then become the agent of the creditor for another and distinct purpose; for example, the creditor may direct the agent to receive the composition money for him, and in that case delivery to the agent will bind the creditor. Hinckley *v.* Arey, 27 Me. 362.

The debtor is responsible for the acts of his agent, and hence will be responsible for the false representations or concealments of the latter, if he (the debtor) was aware of the real state of the facts at the time, although those representations were innocently made, and without the knowledge of the debtor; for the knowledge of the agent is the knowledge of the principal. Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

The knowledge of the agent is the knowledge of his principal; and consequently the payment by an agent employed to effect a compromise of an additional sum to induce a creditor to enter the composition, not disclosed to the others, will invalidate the composition. Bank of Commerce *v.* Hoeber, 88 Mo. 37, 57 Am. Rep. 359 [*affirming* 11 Mo. App. 47].

7. Bank of Commerce *v.* Jenkins, 16 Ont. 215.

The directors of a corporation may compromise and release a claim of the corporation, especially when that authority is conferred upon them by the articles of association. *In re* Melbourne Locomotive & Engineering Works, Ltd., 21 Vict. L. R. 442.

When the president of a bank subscribes a composition agreement at its office with the apparent approval of one of its directors, and the bank receives the composition notes and endeavors to collect them, it sanctions the acts of its officers in obtaining the notes, and an objection to the authority of the president to sign the composition is untenable. Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482.

Act of cashier.— In Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267], a debtor proposed to compound with the plaintiff bank and two other banks, and the other banks agreed to compound if plaintiff would. The debtor proposed to the cashier of the plaintiff bank to secure its claim by a note with one Goldsmith as indorser. The cashier consulted with plaintiff's president, and at the request of the debtor's agent wrote to one of the other banks on paper with the bank heading, signing as cashier, that plaintiff proposed to take the debtor's note, indorsed as above, and to discharge the debtor in full on payment thereof. The plaintiff subsequently repudiated this agreement; but before the debtor learned of the repudiation he had settled with the other banks and been discharged. It did not appear that he owed any other debts. He afterward tendered a certified check for the agreed amount which was refused. The president and cashier were the active managers of the plaintiff bank;

must be clear;[8] and a composition made by an agent without authority or in excess of his authority will not be binding.[9]

3. Personal Representatives. An executor or administrator may compound the debts or claims of his decedent.[10]

VI. Construction.

A. In General — Strict Construction. A composition agreement should be strictly construed,[11] and should not receive an interpretation more comprehensive than the reasonable import of the language used will warrant;[12] but language other than technical terms should be construed in its popular sense.[13] The agree-

the composition was not repudiated on the ground of want of authority in the cashier; and there was no evidence that he acted without authority. Compromises were of common occurrence in that bank. It was held that the plaintiff was bound by the agreement and could not recover the original indebtedness.

8. Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328, holding that the mere fact of attendance at a meeting of creditors will not clothe a clerk with authority to assent to a composition on behalf of his master.

9. Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453; Lawrence *v.* Anderson, 17 Can. Supreme Ct. 349; Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328.

A deed of composition, signed by a mandatory without any authority to accept a composition is not binding on his principal. Bolt, etc., Co. *v.* Gougeon, 7 Montreal Leg. N. 40.

Absence of authority.— An agreement for a composition by the creditors of an insolvent bank, which upon its face implies coöperation of all to whom it is indebted, will not authorize the person to whom it is delivered to effect such composition to consent to any settlement not concurred in by all the creditors of such bank. Abel *v.* Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

Estoppel and ratification.— In Lawrence *v.* Anderson, 17 Can. Supreme Ct. 349, 351, the defendant pleaded a release by deed. On the trial it was proved that the defendant had executed an assignment for the benefit of creditors, and received authority by telegram to sign the same for the plaintiff, who was one of his creditors. The deed was dated Oct. 8, 1881, and afterward, with knowledge of it, the plaintiff continued to send goods to the defendant, and on Nov. 5, 1881, he wrote to the defendant as follows: "I have done as you desired by telegraphing you to sign deed for me and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a check for $800." In April, 1885, the defendant wrote a letter to the plaintiff, in which he said: "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated. It was held that the execution of the deed on his behalf being made without sufficient authority, the plaintiff was not bound by the release contained therein; and as he had never subsequently assented to the deed or recognized or acted under it he was not estopped from denying that he had executed it. But when a composition is procured by an unauthorized representation by an agent, the debtor cannot adopt its benefits without at the same time being bound by the representations; and therefore an unauthorized representation by an agent that the composition will not be binding unless all sign will render the composition void, if all do not sign, as to a creditor who signed on the faith of that representation. Laird *v.* Campbell, 100 Pa. St. 159.

10. Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352; Brady *v.* Sheil, 1 Camph. 147; Castleton *v.* Fanshaw, Prec. Ch. 99, 24 Eng. Reprint 48; Pollen *v.* Huband, 1 P. Wms. 751, 24 Eng. Reprint 598.

11. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

Mere assent to a composition without defining its terms will not bind the assenting creditor to accept a composition by which the original claim is novated and discharged. Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328.

"All borrowed money."— In Register *v.* Spencer, 24 Md. 520, a deed of composition contained a provision for the payment of "all borrowed money and accommodation notes," etc. It was held that the words "all borrowed money," include in ordinary popular sense all sums of money loaned by a creditor to a debtor, without regard to the mode, or the existence of any security or evidence of indebtedness; and there being nothing in the context to limit the meaning of the words, it was incumbent on the party who objected to the above interpretation to establish by clear and satisfactory proof that the terms used had acquired and were used in a technical or peculiar sense.

12. Lipman *v.* Lowitz, 78 Ill. 252.

13. See, generally, Contracts.

"Creditors" will generally be construed to mean secured as well as unsecured creditors. M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 72 N. W. 122; Cobleigh *v.* Pierce, 32 Vt. 788; Kinsing *v.* Bartholew, 1 Dill. (U. S.) 156, 14 Fed. Cas. No. 7,831, 14 Int. Rev. Rec. 94, 5 West. Jur. 448. The fact

ment should be limited in its effect to such matters as were within the contemplation of the parties[14] and should be construed in the light of the financial condition of the debtor at the time it was executed.[15]

B. Construction as a Whole — Intention of Parties. A composition agreement should be construed as a whole, and so that full effect may be given to all its parts, and inconsistencies be avoided;[16] and although the construction will be varied to meet the intention of the parties, this intention must be collected from the instrument itself and not from matters *dehors* the writing;[17] and consequently parol evidence is not admissible as a general rule to explain or contradict a written composition.[18]

C. Effect of Particular Recitals on General Terms. General words in the agreement may be restrained by a particular clause or recital;[19] but a mere

that the agreement recites that the subscribers have little prospect of realizing anything on their claims, and that the composition is made in order to secure something thereon out of the debtor's property, will not justify a construction, contrary to its express language, that secured creditors shall not be required to sign. Artman *v.* Truby, 130 Pa. St. 619, 25 Wkly. Notes Cas. (Pa.) 63, 18 Atl. 1065.

But "general creditors" was construed to mean unsecured creditors only, in Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901.

14. Lipman *v.* Lowitz, 78 Ill. 252. In *In re* Hollister, 3 Fed. 452, a composition agreement contained a provision that upon any debts or claims which the bankrupt should pay thereunder, for which he was merely surety, he should "have the right to collect and receive, towards helping me [the bankrupt] to meet and comply with the above proposition [of composition], from my principal or his estate, for remuneration therefor, or a proper *pro rata* therefrom, for what may be paid as aforesaid on such debt or claim." This proposition was accepted by a creditor for whom the bankrupt was surety, the principal being in bankruptcy at the same time. It was held that the composition agreement gave the surety a contract right to prove the payment thereunder as a debt against the principal's estate, upon which he was entitled to a *pro rata* dividend; and that the creditor must credit the debt with such payment, and prove only for the balance.

15. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

16. Preston *v.* Ettler, 140 Mass. 465, 5 N. E. 168; Constable *v.* Andrew, 2 Cr. & M. 298, 4 Tyrw. 206.

17. Matlack's Appeal, 7 Watts & S. (Pa.) 79. See also 4 So. L. Rev. 667. In Tuckerman *v.* Newhall, 17 Mass. 581, where the debtor surrendered all his property for the use of his creditors, and in consideration thereof they covenanted "that they [the said creditors] will receive their respective proportions of the moneys," etc., "and will forever release and discharge the said" debtor, this language was held to amount to a present release.

A release in the deed of composition will be construed as a release of the balance only, where the debtor and a creditor are mutually indebted to each other. Fazakerly *v.* McKnight, 6 E. & B. 795, 2 Jur. N. S. 1020, 26 L. J. Q. B. 30, 4 Wkly. Rep. 677, 88 E. C. L. 795.

Mere statement of the motive with which a composition is made will not limit its effect. De Voss *v.* Johnson, 18 Barb. (N. Y.) 170.

18. Farrington *v.* Hodgdon, 119 Mass. 453; Van Bokkelen *v.* Taylor, 62 N. Y. 105 [*reversing* 2 Hun (N. Y.) 138, 4 Thomps. & C. (N. Y.) 422]; Coon *v.* Stoker, 2 N. Y. St. 626.

Absolute release.— When a composition contains an absolute release for a consideration then paid, a creditor cannot show by parol evidence that it was not intended to include a certain debt in the composition, and that the debt was in fact not included (Meyer *v.* McKee, 19 Ill. App. 109; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14); nor that it was intended to include an omitted debt (Rice *v.* Woods, 21 Pick. (Mass.) 30).

Discussions among the creditors and their impressions about the claim of one of them before accepting the deed, and afterward, cannot be allowed to control its interpretation and construction, in the absence of all charges of fraud in procuring its execution. Register *v.* Spencer, 24 Md. 520.

"Conditional release."—But when a release, although absolute in its terms, is entitled "conditional release," parol evidence is admissible to show an express condition that all releases to be executed should be binding only in the event that all the creditors should come into the composition. Tutt *v.* Price, 7 Mo. App. 194.

Parol evidence, when admissible.—In Hartford, etc., Transp. Co. *v.* Hartford First Nat. Bank, 46 Conn. 569, it was held that parol evidence was admissible to show that the amount for which the creditor signed the composition was that of his unsecured claims, and that the agreement was not intended to apply to another secured claim.

19. Matlack's Appeal, 7 Watts & S. (Pa.) 79; Payler *v.* Homersham, 4 M. & S. 423, 16 Rev. Rep. 516.

When the deed refers to a schedule a gen-

statement of the indebtedness due to a creditor will not necessarily limit the effect of the composition to the debts specified.[20]

VII. PERFORMANCE AND BREACH.

A. Performance in General. A composition must be performed strictly and punctually, and any infraction of its provisions by one party will release the others from its obligation, in so far as that party is concerned.[21] All conditions

eral release may be held to refer to scheduled debts only. Averill *v.* Lyman, 18 Pick. (Mass.) 346.

20. Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574. See also *infra*, VIII, C, 2.

General words of release in a deed of composition will not be restrained by a prior recital that the debtor is indebted to the creditors in the several sums set opposite their names in the schedule. Britten *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671.

No statement of amount of claims.— A written agreement by creditors to discharge a debtor upon receipt of a certain percentage of their respective claims, without any words in the body of the agreement referring to the amount of the claims, applies only to such claims as are then actually held by the several creditors, and if a creditor adds a particular sum opposite his name, this will not amount to a covenant that he then has or will procure claims to that amount. Fowler *v.* Perley, 14 Allen (Mass.) 18.

21. *California.*— Stewart *v.* Tipton, 56 Cal. 52; Magee *v.* Kast, 49 Cal. 141.

Illinois.— National Time Recorder Co. *v.* Feypel, 93 Ill. App. 170; Meyer *v.* McKee, 19 Ill. App. 109.

Indiana.— Bailey *v.* Boyd, 75 Ind. 125; Evans *v.* Gallantine, 57 Ind. 367; Collins *v.* Kemp, 29 Ind. 281.

Iowa.— Melhop *v.* Tathwell, 74 Iowa 571, 38 N. W. 420.

Kentucky.— Taylor *v.* Farmer, 81 Ky. 458; Cutler *v.* Reynolds, 8 B. Mon. (Ky.) 596.

Maine.— Chapman *v.* Dennison Paper Mfg. Co., 77 Me. 205.

Maryland.— Flack *v.* Garland, 8 Md. 188.

Massachusetts.— Mt. Wollaston Nat. Bank *v.* Porter, 122 Mass. 308; Lothrop *v.* King, 8 Cush. (Mass.) 382; Whitney *v.* Whitaker, 2 Metc. (Mass.) 268; Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682; Whittemore *v.* Stephens, 48 Mich. 573, 12 N. W. 858.

Minnesota.— Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

Missouri.— Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702; Pupke *v.* Churchill, 91 Mo. 81, 3 S. W. 829 [*affirming* 16 Mo. App. 334]; Mullin *v.* Martin, 23 Mo. App. 537.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982; Hadley Falls Nat. Bank *v.* May, 29 Hun (N. Y.) 404 [*affirmed* in 99 N. Y. 671]; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Penniman *v.* Elliott, 27 Barb. (N. Y.) 315; Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38; Warburg *v.* Wilcox, 2 Hilt. (N. Y.) 118, 7 Abb. Pr. (N. Y.) 336; Dale *v.* Fowler, 12 How. Pr. (N. Y.) 462; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294; Talbot *v.* Adams, 12 N. Y. Wkly. Dig. 410; Orr *v.* McEwen, 1 N. Y City Ct. 141.

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Ohio.— Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

Pennsylvania.— Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065; Laird *v.* Campbell, 92 Pa. St. 470.

Texas.— Lanes *v.* Squyres, 45 Tex. 382.

Vermont.— Bowen *v.* Holly, 38 Vt. 574; Cobleigh *v.* Pierce, 32 Vt. 788.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; Danzig *v.* Gumersell, 27 Fed. 185; Ransom *v.* Geer, 20 Blatchf. (U. S.) 535, 12 Fed. 60.

England.—*In re* Hatton, L. R. 7 Ch. 723, 42 L. J. Bankr. 12, 27 L. T. Rep. N. S. 396, 20 Wkly. Rep. 978; Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393; Newell *v.* Van Praagh, L. R. 9 C. P. 96, 43 L. J. C. P. 94, 29 L. T. Rep. N. S. 891, 22 Wkly. Rep. 377; Edwards *v.* Coombe, L. R. 7 C. P. 519, 41 L. J. C. P. 202, 27 L. T. Rep. N. S. 315, 21 Wkly. Rep. 107; Goldney *v.* Lording, L. R. 8 Q. B. 182, 42 L. J. Q. B. 103, 21 Wkly. Rep. 543; Hart *v.* Smith, L. R. 4 Q. B. 61, 9 B. & S. 543, 38 L. J. Q. B. 25, 19 L. T. Rep. N. S. 419, 17 Wkly. Rep. 158; Rose *v.* Rose, Ambl. 331, 27 Eng. Reprint 222; Leigh *v.* Barry, 3 Atk. 583, 26 Eng. Reprint 1136; *Ex p.* Bennet, 2 Atk. 527, 26 Eng. Reprint 716; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234; Garrard *v.* Woolner, 8 Bing. 258, 21 E. C. L. 531, 4 C. & P. 471, 19 E. C. L. 607, 1 Moore & S. 327; *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768; Deacon *v.* Stodhart, 9 C. & P. 685, 38 E. C. L. 398; Ward *v.* Bird, 5 C. & P. 229, 24 E. C. L. 539; *Ex p.* Bateson, 1 Mont. D. & D. 289; Rosling *v.* Muggeridge, 4 D. & L. 298, 16 L. J. Exch. 38, 16 M. & W. 181; Hyde *v.* Watts, 1 D. & L. 479, 13 L. J. Exch. 41, 12 M. & W. 254; Cooper *v.* Philipps, 3 Dowl.

precedent must be strictly complied with,[22] the composition money, or each instalment thereof, if it be payable in instalments, must be paid or tendered punctually at the time or times fixed,[23] and the composition notes or bills must be delivered

P. C. 196, 1 C. M. & R. 649, 5 Tyrw. 166; Leake *v.* Young, 5 E. & B. 955, 2 Jur. N. S. 516, 25 L. J. Q. B. 265, 4 Wkly. Rep. 282, 85 E. C. L. 955; Evans *v.* Powis, 1 Exch. 601, 11 Jur. 1043; Hazard *v.* Mare, 6 H. & N. 434, 30 L. J. Exch. 97, 5 L. T. Rep. N. S. 743, 9 Wkly. Rep. 252; Oughton *v.* Trotter, 2 L. J. K. B. 185, 2 N. & M. 71, 28 E. C. L. 566; *In re* Stock, 66 L. J. Q. B. 146, 75 L. T. Rep. N. S. 422, 3 Manson 324, 45 Wkly. Rep. 480; Milligan *v.* Salmon, 18 L. T. Rep. N. S. 887; Hoadley *v.* Jenkins, 16 L. T. Rep. N. S. 389; Ilderton *v.* Castrique, 13 L. T. Rep. N. S. 506; Cranley *v.* Hillary, 2 M. & S. 120; Lowe *v.* Eginton, 7 Price 604; Sewell *v.* Musson, 1 Vern. 210; *Ex p.* Vere, 19 Ves. Jr. 93; Mackenzie *v.* Mackenzie, 16 Ves. Jr. 372.

Canada.— Hill *v.* Rutherford, 9 Grant Ch. (U. C.) 207; Tees *v.* McCulloch, 2 L. C. L. J. 135; Rolland *v.* Seymour, 2 Montreal Leg. N. 324; Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328; Bolt *v.* Lee, 16 Rev. Lég. 53; Atkinson *v.* Nesbitt, 1 Rev. Lég. 110; Beaudry *v.* Barrielle, 1 Rev. Lég. 33.

And see Forsyth Comp. 29; 4 So. L. Rev. 815; and 10 Cent. Dig. tit. "Compositions with Creditors," § 68 *et seq.*

What will constitute a breach of a composition.—A composition which is not carried out because of the default of others is not binding. McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712 [*reversing* 63 Ill. App. 259]. Becoming bankrupt is a breach of a composition. *Ex p.* Bennet, 2 Atk. 527, 26 Eng. Reprint 716. An attachment by one creditor of the goods of the debtor is a breach of the composition, and a fraudulent disposition of property, or an intended fraudulent conveyance, will release the creditors from the obligation of a composition. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702. A voluntary payment of one of the creditors in full will constitute a breach by the debtor. Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273, 100 Ala. 626, 13 So. 621. And see *infra*, XI, B, 3. But a voluntary payment in full of other creditors will not violate a composition which stipulates merely that no other creditor should receive better terms. *In re* Sturges, 8 Biss. (U. S.) 79, 23 Fed. Cas. No. 13,565, 10 Chic. Leg. N. 33, 16 Nat. Bankr. Reg. 304.

22. *California.*— Magee *v.* Kast, 49 Cal. 141.

Indiana.— Falconbury *v.* Kendall, 76 Ind. 260; Collins *v.* Kemp, 29 Ind. 281.

Kentucky.— Taylor *v.* Farmer, 81 Ky. 458.

Missouri.— Luhrmann *v.* St. Louis Furniture Co., 21 Mo. App. 499.

New York.—Hall *v.* Merrill, 5 Bosw. (N. Y.) 866, 18 How. Pr. (N. Y.) 38; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294.

Pennsylvania.—Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065; Lower *v.* Clement, 25 Pa. St. 63.

England.— Reay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931; Deacon *v.* Stodhart, 9 C. & P. 685, 38 E. C. L. 398; Rosling *v.* Muggeridge, 4 D. & L. 298, 16 L. J. Exch. 38, 16 M. & W. 181.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 71.

Suspension of rights prior to happening of condition.— When creditors entered into an agreement to execute a release when the property assigned should realize £238, it was held that they could sue for their original debts, on the property failing to realize that amount, although they had taken security from a purchaser of the stock in trade for £223. Wigglesworth *v.* White, 1 Stark. 218, 2 E. C. L. 89.

Trustees' refusal to account.— A covenant in a deed of assignment to trustees not to sue if the trustees fairly account for the effects will not operate as a release of the debts if the trustees refuse to account. Kesterton *v.* Sabery, 2 Chit. 541, 18 E. C. L. 777.

23. *Maryland.*— Flack *v.* Garland, 8 Md. 188.

Massachusetts.—Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982; Penniman *v.* Elliott, 27 Barb. (N. Y.) 315; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528.

Ohio.— Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

Vermont.— Cobleigh *v.* Pierce, 32 Vt. 788.

United States.—Ransom *v.* Geer, 20 Blatchf. (U. S.) 535, 12 Fed. 607.

England.— In re Hatton, L. R. 7 Ch. 723, 42 L. J. Bankr. 12, 27 L. T. Rep. N. S. 396, 20 Wkly. Rep. 978; Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393; Newell *v.* Van Praagh, L. R. 9 C. P. 96, 43 L. J. C. P. 94, 29 L. T. Rep. N. S. 891, 22 Wkly. Rep. 377; Edwards *v.* Coombe, L. R. 7 C. P. 519, 41 L. J. C. P. 202, 27 L. T. Rep. N. S. 315, 21 Wkly. Rep. 107; Goldney *v.* Lording, L. R. 8 Q. B. 182, 42 L. J. Q. B. 103, 21 Wkly. Rep. 543; Hart *v.* Smith, L. R. 4 Q. B. 61, 9 B. & S. 543, 38 L. J. Q. B. 25, 19 L. T. Rep. N. S. 419, 17 Wkly. Rep. 158; *Ex p.* Bennet, 2 Atk. 527, 26 Eng. Reprint 716; Hyde *v.* Watts, 1 D. & L. 479, 13 L. J. Exch. 41, 12 M. & W. 254; Leake *v.* Young, 5 E. & B. 955, 2 Jur. N. S. 516, 25 L. J. Q. B. 265, 4 Wkly. Rep. 282, 85 E. C. L.

or tendered as agreed on[24] and be paid when they fall due,[25] although the holders must demand payment before they can claim a breach.[26] A slight variation from strict performance, however, will not be considered as a breach of the composi-

955; Evans *v.* Powis, 1 Exch. 601, 11 Jur. 1043; Hazard *v.* Mare, 6 H. & N. 434, 30 L. J. Exch. 97, 5 L. T. Rep. N. S. 743, 9 Wkly. Rep. 252; Oughton *v.* Trotter, 2 L. J. K. B. 185, 2 N. & M. 71, 28 E. C. L. 566; *Ex p.* Bateson, 1 Mont. D. & D. 289; Lowe *v.* Eginton, 7 Price 604; Sewell *v.* Musson, 1 Vern. 210; Mackenzie *v.* Mackenzie, 16 Ves. Jr. 572.

Canada.— Rolland *v.* Seymour, 2 Montreal Leg. N. 324; Bolt *v.* Lee, 16 Rev. Lég. 53; Beaudry *v.* Barreille, 1 Rev. Lég. 33.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 68 *et seq.*

What will not excuse default.— When a debtor, in compounding with his creditors, gives them the security of a third person for the last three instalments he will not be discharged on payment of these instalments only if the first instalment remains unpaid. Walker *v.* Seaborne, 1 Taunt. 526. Absence from the country will excuse payment on tender only when the creditor leaves after the composition. Fessard *v.* Mugnier, 18 C. B. N. S. 286, 11 Jur. N. S. 283, 34 L. J. C. P. 126, 11 L. T. Rep. N. S. 635, 13 Wkly. Rep. 388, 114 E. C. L. 286. And the fact that the debtor did not obtain the signature of the last creditor to the composition deed until after the time fixed for payment will not relieve him from his default, if the operation of the instrument is not dependent on that circumstance. Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982.

When default will not avoid composition.— The non-payment of an instalment due will not vitiate a release given by a creditor who by a secret arrangement with the debtor has already received more than the whole amount of the composition. *Ex p.* Oliver, 4 De G. & Sm. 354. A failure by mistake to pay an instalment due will not avoid a release if the instalment be paid or tendered seasonably. Newington *v.* Levy, L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 594, 19 Wkly. Rep. 473.

When time for performance begins to run. — When a composition deed which provides for the acceptance by the creditors of twenty-five per cent of their claims, payment to be made within two months from the date of the instrument, is dated the —— day of August, 1898, the two months mentioned in the deed do not begin to run until the end of August. Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982.

24. And a prior demand by the creditors is not requisite.

California.— Stewart *v.* Tipton, 56 Cal. 52.

Massachusetts.— Whitney *v.* Whitaker, 2 Metc. (Mass.) 268.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Warburg *v.* Wilcox, 2 Hilt. (N. Y.) 118, 7 Abb. Pr. (N. Y.) 336.

Vermont.— Cobleigh *v.* Pierce, 32 Vt. 788.

England.— Cranley *v.* Hillary, 2 M. & S. 120; Oughton *v.* Trotter, 2 N. & M. 71, 2 L. J. K. B. 185, 28 E. C. L. 566.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 73½.

Extent of rule.— When it is agreed by a composition that the creditors shall accept notes indorsed by A, and A dies before the notes are executed, the creditors cannot be compelled to accept any other notes and the composition fails. Danzig *v.* Gumersell, 27 Fed. 185. But when the composition does not bind the debtor to deliver the composition notes to any one by name, and there is no proof that he had notice that the plaintiff was a creditor, the plaintiff cannot claim that the debtor is in default by reason of failure to deliver the notes, until he has made demand for them. Matthewson *v.* Henderson, 13 U. C. C. P. 96.

25. Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528. In the absence of an express stipulation composition bills and notes are not payments until paid. Pupke *v.* Churchill, 16 Mo. App. 334 [*affirmed* in 91 Mo. 81, 3 S. W. 829]. In Constable *v.* Andrew, 2 Cr. & M. 298, 303, 4 Tyrw. 206, the defendant agreed to pay a composition of fifteen shillings in the pound, by two instalments; and a surety, in consideration that the creditors would discharge the defendant from all debts and demands on receiving such composition, agreed to pay a sum of money in part payment of the first instalment and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing "to discharge and exonerate Andrew, on payment of the said 15s. in the pound." It was also agreed that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, which had been before indorsed by the defendant, and handed over to the plaintiffs, "shall be considered as in part payment of the said 15s. in the pound." It was held that the bills left in the hands of the plaintiffs were not under this agreement to be considered as an absolute payment, unless they were paid at maturity, and, one of them having been dishonored, that the defendant remained liable upon his indorsement.

26. Salomonson *v.* Blyth, 3 L. J. Ch. O. S. 169; Soward *v.* Palmer, 2 Moore C. P. 274, 8 Taunt. 277, 19 Rev. Rep. 515, 4 E. C. L. 144.

A mere notice from the makers that the notes will not be paid will not excuse the holders from demanding payment, at the place where the notes are made payable; and if the makers of the notes place the money in the bank to pay them the failure to pay does not occur, and the original debt is not revived

tion;[27] and where no time is set for performance the debtor will be allowed a reasonable time.[28]

B. Tender. Actual payment or performance of the composition is not essential, if the creditor refuses to accept it; a proper tender of payment or performance is all that is required, and the creditor refuses it at his peril.[29] But a tender

notwithstanding such notice. Green *v.* McArthur, 34 Barb. (N. Y.) 450.

When the terms of the composition require the creditors to apply for the composition notes they cannot claim a breach unless they do so apply. Solomon *v.* Laverick, 17 L. T. Rep. N. S. 545.

27. Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

Applications of rule.— In Fahey *v.* Clarke, 80 Ky. 613, where all the creditors were required to join in the composition, and one creditor, who had a debt of two dollars and fifty cents only, did not join, it was held that the others could not take advantage of the omission. When the composition was to be effected by giving notes payable in thirty days, and subsequently the debtor agreed to pay in cash within the thirty days, and the other creditors agreed, the plaintiff was held to be bound also. Eisenhart *v.* Lynn, 29 Wkly. Notes Cas. (Pa.) 113. A tender of a note on January 1, for the right amounts, at seven, ten, and thirteen months, is a sufficient tender of notes to be given February 1, at six, nine, and twelve months. Renard *v.* Tuller, 4 Bosw. (N. Y.) 107. When the composition was for notes to be given in ten days, at three, six, and nine months, and none were given, but the full amount of the composition was tendered after the ten days, but before suit, and the money was deposited in court, judgment was given for the defendant in an action for breach of the composition. Thurston *v.* Viau, 32 L. C. Jur. 244. In Mackenzie *v.* Mackenzie, 16 Ves. Jr. 372, where the composition notes were not paid when due, or until suit had been brought, it was held inequitable to the other creditors to allow the creditor to recover more than the amount of the composition. The fact that the assignee, instead of the assignor, pays dividends, under a composition by which the assignor was to carry on the business, will not vitiate the composition, where the assignee carries on the business with the aid of the assignor, and the dividends are really paid out of the fund intended. Matter of Leslie, 10 Daly (N. Y.) 76. In Geisse *v.* Franklin, 56 Conn. 83, 13 Atl. 148, an action on an account, the defendant and other creditors of the plaintiff had agreed to receive sixty per cent of their claims in full payment thereof, if paid by a certain time. Within that time the defendant, as trustee and agent of the plaintiff, had possession of funds of the plaintiff sufficient to pay all the claims. It was held that the defendant was bound by the agreement, although his claim was not discharged until after the time agreed upon. See 10 Cent. Dig. tit. "Compositions with Creditors," § 69.

28. Chapman *v.* Dennison Paper Mfg. Co., 77 Me. 205; Oughton *v.* Trotter, 2 L. J. K. B. 185, 2 N. & M. 71, 28 E. C. L. 566.

Illustrations.— When a composition provides that notes shall be given for equal amounts at six, nine, and twelve months from January 1, they need not be delivered or tendered January 1, but if no demand is made may be given within a reasonable time thereafter. Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38. In Harvier *v.* Guion, 3 E. D. Smith (N. Y.) 76, a composition was on condition that three fourths of the creditors should sign, but no time was limited for obtaining their signatures. The plaintiff covenanted that if the instalments of the composition were paid as due they would not sue until the expiration of the time limited for payment, and the instrument contained an absolute discharge until then of all suits commenced or to be commenced. It was held that the debtor had the full time to get the necessary signatures and that if the instalments were paid as they fell due the composition was a good defense to a suit by the plaintiff within the term of the covenant. But sixteen months is not a reasonable time for payment of a composition; and after a delay for that time the creditors can make their assent, and recover their entire debts. Bolt *v.* Lee, 16 Rev. Lég. 53. When a creditor comes in after the time for payment has arrived, the debtor is liable to pay him on demand. Harvey *v.* Hunt, 119 Mass. 279; Bowen *v.* Holly, 38 Vt. 574.

29. *California.*— Schroeder *v.* Pissis, 128 Cal. 209, 60 Pac. 758; Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148; Stewart *v.* Tipton, 56 Cal. 52.

Georgia.— Stewart *v.* Langston, 103 Ga. 290, 30 S. E. 35.

Illinois.— Gillfillan *v.* Farrington, 12 Ill. App. 101.

Maryland.— Flack *v.* Garland, 8 Md. 188.

Massachusetts.— Eaton *v.* Lincoln, 13 Mass. 424.

Michigan.— Harrison *v.* Gamble, 69 Mich. 96, 36 N. W. 682.

United States.—Ransom *v.* Geer, 20 Blatchf. (U. S.) 535, 12 Fed. 607.

England.— Edwards *v.* Coombe, L. R. 7 C. P. 519, 41 L. J. C. P. 519, 27 L. T. Rep. N. S. 315, 21 Wkly. Rep. 107. But see Cooper *v.* Phillips, 1 C. M. & R. 649, 3 Dowl. P. C. 196, 5 Tyrw. 166; Garrod *v.* Simpson, 3 H. & C. 395, 11 Jur. N. S. 227, 34 L. J. Exch. 70, 11 L. T. Rep. N. S. 777, 13 Wkly. Rep. 460; Lowe *v.* Eginton, 7 Price 604; Ilderton *v.* Castrique, 13 L. T. Rep. N. S. 506.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 72.

When tender is sufficient.— A tender is suf-

must be unconditional,[30] and must be made to someone with authority to represent the creditor; a tender to a mere servant or workman is not sufficient.[31] A tender must be kept up;[32] but the weight of authority seems to incline to the view that payment into court is not necessary,[33] although of course it is always advisable, as being the safe practice. A tender may be waived,[34] for example, by a dispute as to the amount due,[35] or by refusal to accept a prior tender,[36] or by leaving the country after the composition is entered into.[37] The debtor need not tender more than the amount actually due under the composition.[38] Tender of payment of composition bills and notes is unnecessary; it is the duty of the holder to present them for payment.[39]

C. Waiver of Performance. Strict performance may be waived by any party interested; and in that case he may hold the others to their agreement,[40]

ficient if refused without objection. Eaton *v.* Lincoln, 13 Mass. 424; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]. When the composition provides for the payment of a sum in cash and the execution of a note, the fact that the money was tendered on one day and the note on another is immaterial, if no objection was made at the time of the tender to its sufficiency. Schroeder *v.* Pissis, 128 Cal. 209, 60 Pac. 758. In Renard *v.* Tuller, 4 Bosw. (N. Y.) 107, a tender on Jan. 1, 1857, of notes for the right amounts at seven, ten, and thirteen months was held to be a sufficient tender of notes at six, nine, and twelve months to begin Feb. 1, 1857. In Thurston *v.* Viau, 32 L. C. Jur. 244, where the composition was for notes at three, six, and nine months, to be given in ten days, and none were given, but the full amount of the composition was tendered after the ten days had expired, but before suit was brought, and was deposited in court, it was held that the tender was sufficient.

When tender is insufficient.— A check or draft is no tender. Webb *v.* Stuart, 59 Me. 356; Browning *v.* Crouse, 40 Mich. 339. It is doubtful whether a certified check is a good tender; although it will be good if the creditor fails to object to it on the ground that it is not money. Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]. An offer to pay, without producing the money or showing a waiver of production, is not a good tender. Bowen *v.* Holly, 38 Vt. 574. And a tender after the expiration of the time for payment or performance is not sufficient. Sewell *v.* Musson, 1 Vern. 210; Hill *v.* Rutherford, 9 Grant Ch. (U. C.) 207; Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328; Beaudry *v.* Barreille, 1 Rev. Lég. 33. The debtor must show a readiness, not a mere willingness, to comply with the composition. Warburg *v.* Wilcox, 2 Hilt. (N. Y.) 118, 7 Abb. Pr. (N. Y.) 336.

30. In Melhop *v.* Tathwell, 74 Iowa 571, 38 N. W. 420, the debtor deposited the necessary amount in bank, notifying the creditor's attorney that it would be paid him on depositing with the bank a receipt in his client's name, acknowledging full satisfaction of the debt. This was held not to be a sufficient tender and no defense to a suit for the debt.

31. Hoadley *v.* Jenkins, 16 L. T. Rep. N. S. 389.

32. Browning *v.* Crouse, 40 Mich. 339; Chemical Nat. Bank *v.* Kohner, 45 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Semple *v.* McAuley, 1 Montreal Leg. N. 62.

33. Newington *v.* Levy, L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 594, 19 Wkly. Rep. 473; Bamford *v.* Clewes, L. R. 3 Q. B. 729, 9 B. & S. 539. *Contra*, Allen *v.* Cheever, 61 N. H. 32; Cooper *v.* Phillips, 1 C. M. & R. 649, 3 Dowl. P. C. 196, 5 Tyrw. 166.

A tender must be renewed by plea or the money paid into court. Semple *v.* McAuley, 1 Montreal Leg. N. 62.

34. Stewart *v.* Tipton, 56 Cal. 52; Ilderton *v.* Castrique, 13 L. T. Rep. N. S. 506.

35. *Ex p.* Hemingway, L. R. 7 Ch. 724 note; Reay *v.* White, 1 Cr. & M. 748, 2 L. J. Exch. 229, 3 Tyrw. 597.

36. *In re* Sullivan, 36 L. J. Bankr. 1, 15 L. T. Rep. N. S. 434, 15 Wkly. Rep. 185.

37. But a tender is not waived or excused when the creditor is out of the country at the time of the execution of the composition. Fessard *v.* Mugnier, 18 C. B. N. S. 286, 11 Jur. N. S. 283, 34 L. J. C. P. 126, 11 L. T. Rep. N. S. 635, 13 Wkly. Rep. 388, 114 E. C. L. 286.

38. Farrington *v.* Hodgdon, 119 Mass. 453.

39. Salomonson *v.* Blyth, 3 L. J. Ch. O. S. 169; Soward *v.* Palmer, 2 Moore C. P. 274, 8 Taunt. 277, 19 Rev. Rep. 515, 4 E. C. L. 144.

40. In Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234, a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay two thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, although it appeared that the debtor was always willing to perform his part of the agreement. It was held that one cred-

and will himself be bound equally as if the agreement had been performed, whether it is avoided as to the others or not.[41] Acceptance of the composition money or securities after a default, with full knowledge of the facts, will constitute a waiver,[42] except when the composition is void;[43] but the debtor and trustees cannot waive performance by one creditor so as to hold another who would otherwise be released.[44]

D. Effect of Breach — 1. By Debtor — a. In General. A default or breach of performance of a composition agreement by the debtor entitles the creditors to an action against the debtor,[45] unless the agreement itself expressly restricts that

itor could not maintain an action for his original debt.

41. Ilderton *v.* Castrique, 13 L. T. Rep. N. S. 506. And see 4 So. L. Rev. 817. In a composition deed the debtor covenanted to pay £1500 to trustees and to insure his life for that amount, but subsequently paid £500 to the trustees, and insured for £1000 only. It was held that a creditor who knew of the insurance soon after it was effected and acquiesced could not take advantage of the breach of covenant. Watts *v.* Hyde, 10 Jur. 127, 17 L. J. Ch. 409. In Howland *v.* Grant, 26 Can. Supreme Ct. 372, on default in performance, a new arrangement was made to which all the creditors assented; and it was held that a creditor who benefited by the arrangement and acted so as to induce the belief that he adopted it could not repudiate it on the ground that he did not fully understand it, without giving up the advantage he had received.

This rule holds good, especially when the composition is effected by giving notes with surety, for the surety is presumed to become a party on the faith of the discharge of the debt, and as relying on that discharge as furnishing him the means for an indemnity. Dauchy *v.* Goodrich, 20 Vt. 127.

42. *Massachusetts.*— Harvey *v.* Hunt, 119 Mass. 279.

New York.— Penniman *v.* Elliott, 27 Barb. (N. Y.) 315.

Tennessee.—Bissenger *v.* Guiteman, 6 Heisk. (Tenn.) 277.

Vermont.— Cobleigh *v.* Pierce, 32 Vt. 788.

United States.— *In re* Decker, 8 Ben. (U. S.) 81, 7 Fed. Cas. No. 3,723.

England.— *Ex p.* Bennet, 2 Atk. 527, 26 Eng. Reprint 716; Geach *v.* Ames, 16 Ves. Jr. 375 note.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 76.

The acceptance of security for the composition, and the execution of a discharge, are equivalent to a waiver. Dauchy *v.* Goodrich, 20 Vt. 127.

Acceptance of composition money.— In Browning *v.* Crouse, 40 Mich. 339, the debtor paid the composition irregularly and the creditors refused the lost tender and sued for the balance of their original claims. The defendant paid part and tendered the rest of the amount agreed upon, but the tender was not kept good. The creditors recovered judgment. It was held that this was erroneous; that under the circumstances the creditors could not claim a failure of the composition or the defendant a tender; and that the creditors should have had judgment for the amount still due under the composition with costs.

Mere silence, however, will not constitute a waiver.— In Danzig *v.* Gumersell, 27 Fed. 185, the proposed indorser of the composition notes died before the notes were executed. The debtor wrote to the creditors, notifying them of this fact and suggesting another indorser as a substitute, and closed his letter as follows: "Should you deem his indorsement sufficient, please advise me promptly." It was held that a creditor who did not signify his intention until notes indorsed by the proposed substitute had been accepted by the other creditors was not bound to accept such notes, and having refused to do so was at liberty to sue on his original cause of action.

43. M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 72 N. W. 122.

44. Williams *v.* Mostyn, 33 L. J. Ch. 54, 9 L. T. Rep. N. S. 476, 12 Wkly. Rep. 69.

45. McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712 [*reversing* 63 Ill. App. 259]; Melhop *v.* Tathwell, 74 Iowa 571, 38 N. W. 420; Hart *v.* Smith, L. R. 4 Q. B. 61, 9 B. & S. 543, 38 L. J. Q. B. 25, 19 L. T. Rep. N. S. 419, 17 Wkly. Rep. 158; Forsyth Comp. 29. In Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 497, 51 S. W. 702, Marshall, J., said: "There is always present in such a contract [a composition] an implied agreement by the debtor that he will, in good faith, carry out the agreement, and that the status and rights of all parties shall not be changed to their detriment by any fraudulent or wrongful act of his. He could not therefore set up the composition agreement as a shield against his own fraud. The agreement of the creditors *inter sese*, is that they will extend the time of payment to a particular date, but there is always the implied stipulation that the debtor shall not act fraudulently with respect to the property and assets left in his care and management. This being the nature and extent of the agreement, if the debtor fraudulently disposes of his property before the extended time for payment has expired, there is no rule of law or morals and no precedent that prevents any of the creditors from immediately taking steps to protect himself. The composition agreement is broken, and the parties are then in the same attitude towards the debtor and each other as if no agreement had been made. Any other rule

right.[46] A breach as to one is a breach as to all,[47] but the damages arising therefrom are severable and each creditor can sue separately.[48]

b. Cause of Action For Breach — (i) *When Composition Is Executory.* The cause of action for breach or default by the debtor varies according to the nature of the composition. If that is executory merely, and does not contemplate the release or discharge of the debtor until full performance, a breach or default avoids the composition and revives the original debt; and the creditor may sue for the whole of that debt or the balance over what he has already received under the composition, as the case may be,[49] or prove therefor in bankruptcy or insol-

would make it possible for the debtor to effectually dispose of his property at his leisure, while the hands of his creditors were tied by a contract which he himself has broken."

The fact that the breach may operate to the advantage of the creditor will not prevent the avoidance of the composition. Artman *v.* Truby, 130 Pa. St. 619, 18 Atl. 1065.

It is not sufficient to prevent suit for the original debt to show that the creditor may eventually receive his whole debt from the debtor's property, if it is to be procured by violating the terms of the composition. Smythe *v.* Graydon, 29 How. Pr. (N. Y.) 11.

Parol evidence is admissible to prove noncompliance by the debtor with the conditions of the composition. Meyer *v.* McKee, 19 Ill. App. 109.

If after breach by the debtor some of the creditors who have assented to the composition accept from him payment of their claims by a conveyance of his property, the property so conveyed is not, in the hands of the creditors to whom it is conveyed, a trust fund for the equal benefit of all the debtor's creditors, and such creditors do not thereby become trustees by implication of the property so conveyed to them, for the benefit of all the assenting creditors. Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273.

46. When a composition deed contained a clause that if default should be made in paying any instalment of the composition for twenty-one days, then it should be lawful for the trustees, by notice in writing, to declare the deed void, "and in such event the creditors shall be entitled to enforce their claims as if the said deed had never been made or executed," and a default occurred for twenty-one days, but the trustees did not give notice, it was held that a creditor under the deed was not entitled to serve a bankruptcy notice and present a petition in bankruptcy on account of the debt due him. *In re* Clement, 3 Morr. Bankr. Rep. 153.

47. Evans *v.* Gallantine, 57 Ind. 367.

48. Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

49. *Alabama.*— Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273.

Illinois.— National Time Recorder Co. *v.* Feypel, 93 Ill. App. 170.

Indiana.— Bailey *v.* Boyd, 75 Ind. 125.

Kentucky.— Taylor *v.* Farmer, 81 Ky. 458.

Maine.— Chapman *v.* Dennison Paper Mfg. Co., 77 Me. 205.

Massachusetts.— National Mt. Wollaston Bank *v.* Porter, 122 Mass. 308; Whitney *v.* Whitaker, 2 Metc. (Mass.) 268; Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298.

Missouri.— Pupke *v.* Churchill, 91 Mo. 81, 3 S. W. 829 [*affirming* 16 Mo. App. 334].

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Vogt *v.* Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Suppl. 982; Hadley Falls Nat. Bank *v.* May, 29 Hun (N. Y.) 404 [*affirmed* in 99 N. Y. 671]; Penniman *v.* Elliott, 27 Barb. (N. Y.) 315; Dale *v.* Fowler, 12 How. Pr. (N. Y.) 462; Orr *v.* McEwen, 1 N. Y. City Ct. 141.

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Pennsylvania.— Laird *v.* Campbell, 92 Pa. St. 470.

Vermont.— Cobleigh *v.* Pierce, 32 Vt. 788.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; Danzig *v.* Gumersell, 27 Fed. 185; Ransom *v.* Geer, 20 Blatchf. (U. S.) 535, 12 Fed. 607; *In re* Hurst, 1 Flipp. (U. S.) 462, 12 Fed. Cas. No. 6,925, 3 Centr. L. J. 78, 8 Chic. Leg. N. 147, 13 Nat. Bankr. Reg. 455.

England.— *In re* Hatton, L. R. 7 Ch. 723, 42 L. J. Bankr. 12, 27 L. T. Rep. N. S. 396, 20 Wkly. Rep. 978; Newell *v.* Van Praagh, L. R. 9 C. P. 96, 43 L. J. C. P. 94, 29 L. T. Rep. N. S. 891, 22 Wkly. Rep. 377; Edwards *v.* Coombe, L. R. 7 C. P. 519, 41 L. J. C. P. 202, 27 L. T. Rep. N. S. 315, 21 Wkly. Rep. 107; Goldney *v.* Lording, L. R. 8 Q. B. 182, 42 L. J. Q. B. 103, 21 Wkly. Rep. 543; Rose *v.* Rose, Ambl. 331, 27 Eng. Reprint 222; Leigh *v.* Barry, 3 Atk. 583, 26 Eng. Reprint 1136; *Ex p.* Bennet, 2 Atk. 827, 26 Eng. Reprint 716; Thomas *v.* Courtnay, 1 B. & Ald. 1; Garrard *v.* Woolner, 8 Bing. 258, 21 E. C. L. 531, 4 C. & P. 471, 19 E. C. L. 607, 1 Moore & S. 327; *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768; Constable *v.* Andrew, 2 Cr. & M. 298, 4 Tyrw. 206; Leake *v.* Young, 5 E. & B. 955, 2 Jur. N. S. 516, 25 L. J. Q. B. 265, 4 Wkly. Rep. 282, 85 E. C. L. 955; Evans *v.* Powis, 1 Exch. 601, 11 Jur. 1043; Hazard *v.* Mare, 6 H. & N. 434, 30 L. J. Exch. 97, 5 L. T. Rep. N. S. 743, 9 Wkly. Rep. 252; Oughton *v.* Trotter, 2 L. J. K. B. 185, 2 N. & M. 71, 28 E. C. L. 566; Milligan *v.* Salmon, 18 L. T. Rep. N. S. 887; *Ex p.* Bateson, 1 Mont. D. & D. 289; Sewell *v.* Musson, 1 Vern. 210.

vency proceedings,[50] or under an assignment for the benefit of creditors,[51] although he may at his option stand upon the composition and sue for the sum or the balance of the sum agreed to be paid thereunder.[52]

(II) *When There Is an Absolute Release.* If the composition is executed and there has been a complete novation by an absolute release or discharge, a breach or default will not avoid the composition or revive the original debt, and the only remedy of the creditors is an action for damages for non-performance, in which the measure of damages is the balance of the composition over what has already been received[53] (being practically an action to specifically enforce the composition), unless the release contains a provision that it shall be null and void on default, in which case a default revives the original debt,[54] or unless the entire composition is void, in which case the release is void also, and the original debt never has been discharged.[55]

c. When Statute of Limitations Begins to Run. On breach or default in

Canada.— Hill *v.* Rutherford, 9 Grant Ch. (U. C.) 207; Rolland *v.* Seymour, 2 Montreal Leg. N. 324; Semple *v.* McAuley, 1 Montreal Leg. N. 62; Weese *v.* Banfield, 22 Ont. App. 489; Andrews *v.* Toronto Bank, 15 Ont. 648; Bolt *v.* Lee, 16 Rev. Lég. 53; Atkinson *v.* Nesbitt, 1 Rev. Lég. 110; Beaudry *v.* Barreille, 1 Rev. Lég. 33. And see 17 Centr. L. J. 307.

But see Pickering *v.* Pickering, 25 Ch. D. 247, 53 L. J. Ch. 550, 50 L. T. Rep. N. S. 131, 32 Wkly. Rep. 511.

Applications of rule.— The debtor cannot enjoin the execution of a judgment recovered for the original debt. Flach *v.* Garland, 8 Md. 188. A conditional release will not be effective if the condition is not performed. Magee *v.* Kast, 49 Cal. 141; Deacon *v.* Stodhart, 9 C. & P. 685, 38 E. C. L. 398. When the plaintiff (a creditor) and other creditors signed resolutions for entering into a composition deed with the defendants, on their property being assigned to trustees for the benefit of creditors, and the defendants and the trustees refused to allow the plaintiff to come in under the deed, it was held that he might sue for his whole original debt, notwithstanding the resolutions. Garrard *v.* Woolner, 8 Bing. 258, 21 E. C. L. 531, 4 C. & P. 471, 19 E. C. L. 607, 1 Moore & S. 327. When a discharge is conditional on carrying out the composition the original claim remains in default, and the creditor can claim on a second assignment the balance of his debt, not merely the balance of the composition. *In re* Clark, 4 Rev. Lég. 225.

But where composition notes were paid after they fell due, and after suit had been brought, it was held that it would be inequitable to other creditors to permit the recovery of more than the amount of the composition. Mackenzie *v.* Mackenzie, 16 Ves. Jr. 372.

When the composition is paid by a third party it would seem that the creditor cannot sue without returning what he has received under it. Babcock *v.* Dill, 43 Barb. (N. Y.) 577.

50. *Ex p.* Bennet, 2 Atk. 527, 26 Eng. Reprint 716; *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768; *Ex p.* Bateson, 1 Mont. D. & D. 289; *Ex p.* Vere, 19 Ves. Jr. 93.

51. *In re* Clark, 4 Rev. Lég. 225.

52. Bailey *v.* Boyd, 75 Ind. 125; *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768.

But a surety for the composition cannot compel the creditor to elect whether he will carry out the composition or sue for the original debt. *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768.

53. *Massachusetts.*— Lothrop *v.* King, 8 Cush. (Mass.) 382.

Minnesota.— Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

Missouri.— Mullin *v.* Martin, 23 Mo. App. 537.

New York.— Talbot *v.* Adams, 12 N. Y. Wkly. Dig. 410.

Vermont.— Bowen *v.* Holly, 38 Vt. 574.

United States.— *In re* Decker, 8 Ben. (U. S.) 81, 7 Fed. Cas. No. 3,723.

England.— Solomon *v.* Laverick, 17 L. T. Rep. N. S. 545.

Canada.— Tees *v.* McCulloch, 2 L. C. L. J. 135; Piton *v.* Murphy, 6 Quebec 33, 17 Centr. L. J. 307.

When the composition contains a release, a breach will not revive the original debt, and the creditor can sue only on the covenants in the deed. Chapman *v.* Dennison Paper Mfg. Co., 77 Me. 205.

When composition notes are accepted in payment, a failure to pay them at maturity, in the absence of a fraudulent intent not to pay them, existing at the time of the composition, will not authorize suit on the original debt. Mullin *v.* Martin, 23 Mo. App. 537; Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Orr *v.* McEwen, 1 N. Y. City Ct. 141; Lanes *v.* Squyres, 45 Tex. 382.

54. Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393.

55. Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173; M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 72 N. W. 122.

the performance of a composition, the law implies a fresh promise, and the statute of limitations begins to run from the time of the breach or default.[56]

d. Abatement of Action. An action brought before the full time for performance has elapsed is premature and must be abated.[57]

2. By Creditor. A creditor who commits a breach of the composition will be liable to his fellow creditors in damages, if any accrue to them;[58] and an agent employed by a creditor to make a composition can bind his principal to answer in liquidated damages, or a penalty, in case of a breach.[59]

VIII. EFFECT OF COMPOSITION.

A. On the Parties — 1. Debtor — a. In General. A composition agreement binds the debtor equally with the creditors. He cannot revoke it, after any two of the creditors have assented,[60] and after paying the composition cannot recover part of it on the ground of mistake as to his liability for the claim.[61] But a composition will not bar the right of the debtor to recover, on a bill for an account, the amount paid a creditor because of overcharges.[62]

b. Joint Debtors — (I) *When Discharged.* In the absence of a statute or special agreement a composition with one joint debtor which contains or operates as a release or contemplates that a release shall be given discharges all those who are liable jointly with him.[63]

(II) *When Not Discharged.* If, however, a joint debtor consents to the

56. *In re* Stock, 66 L. J. Q. B. 146, 75 L. T. Rep. N. S. 422, 3 Manson 324, 45 Wkly. Rep. 480. But see *Ex p.* Bateson, 1 Mont. D. & D. 289.

As to statute of limitations generally see Limitations of Actions.

57. Smythe *v.* Graydon, 29 How. Pr. (N. Y.) 224; Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

As to abatement of actions generally see Abatement and Revival.

58. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234. In Hamilton *v.* McClintock, 174 Pa. St. 28, 34 Atl. 302, the seller of promissory notes agreed with the purchaser to use all due diligence in collecting them. The seller had an additional and independent claim against the maker of the notes, and subsequently to the sale he signed a composition agreement with other creditors of the maker by which the creditors were to accept fifty per cent of their respective claims in settlement. The seller lumped his own claim with the notes, but had a secret agreement with the debtor by which his own claim was to be paid in full. The purchaser of the notes, without knowledge of this secret agreement, acquiesced in the settlement and was paid fifty per cent of the notes. It also appeared by some evidence in the cause that the maker of the notes had real estate out of which the notes could have been recovered in the exercise of due diligence. In an action by the purchaser of the notes against the seller to recover the unpaid portion of the notes it was held that the secret agreement of the seller with the maker was a fraud upon the purchaser; that under the circumstances the purchaser did not waive his right to due diligence on the part of the seller, by accepting fifty per cent of the amount of the notes, and that a judgment for the purchaser should be sustained.

59. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702.

60. Towne *v.* Ruhlee, 51 Vt. 62; Harland *v.* Binks, 15 Q. B. 713, 14 Jur. 979, 20 L. J. Q. B. 126, 69 E. C. L. 713; Wilding *v.* Richards, 1 Coll. 655, 14 L. J. Ch. 211, 28 Eng. Ch. 655; Mackinnon *v.* Stewart, 20 L. J. Ch. 49, 1 Sim. N. S. 76, 40 Eng. Ch. 76.

61. Jones *v.* Wright, 71 Ill. 61.

62. Pike *v.* Dickinson, L. R. 7 Ch. 61, 41 L. J. Ch. 171, 25 L. T. Rep. N. S. 579, 20 Wkly. Rep. 81 [*affirming* L. R. 12 Eq. 64].

63. Merritt *v.* Bucknam, 90 Me. 146, 37 Atl. 885; Rice *v.* Woods, 21 Pick. (Mass.) 30; Tuckerman *v.* Newhall, 17 Mass. 581; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313; White *v.* Glass, 2 Vict. L. Rep. 46. In Molsons Bank *v.* Connolly, 17 L. C. Jur. 189, 4 Rev. Lég. 683, it was held that where a creditor agrees to a composition with one of two members of an insolvent firm for a debt due from the firm, and obtains security for such composition, and afterward releases the compounding debtor without the consent of the other debtor for a less amount than the composition, and surrenders the security, the other member of the firm may successfully resist an action against him by the creditor to recover the balance of his claim. See also, generally, Release.

But a composition under the bankruptcy acts will not discharge a joint debtor. Andrew *v.* Macklin, 6 B. & S. 201, 11 Jur. N. S. 409, 34 L. J. Q. B. 89, 13 Wkly. Rep. 291, 118 E. C. L. 201.

As to partners see *infra*, XIV, B.

composition, or becomes a party thereto, without himself compounding, it will not release him, although it may discharge others;[64] and if a creditor, in compounding with such a debtor, reserves his rights and remedies against others bound jointly with the latter, or stipulates that the composition shall not affect his claims against such others, they will not be released[65] and may recover contribution from the one released if compelled afterward to make good the debt.[66] In several of the United States there are statutes providing that a composition with one or more of several joint debtors shall not release the rest.[67]

(III) *Effect of Covenant Not to Sue.* A mere covenant not to sue will not operate to discharge joint debtors.[68]

2. Creditors — a. In General. A valid composition, whether executed or executory, is a binding contract until breach, and a creditor who has once joined therein cannot revoke his assent or withdraw without the consent of the other parties;[69] and while the composition remains in force it will operate as a bar to

64. Hosack *v.* Rogers, 25 Wend. (N. Y.) 313.

65. Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921; Merritt *v.* Bucknam, 90 Me. 146, 37 Atl. 885; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; White *v.* Glass, 2 Vict. 46. In North *v.* Wakefield, 13 Q. B. 536, 540, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536, Patteson, J., said: "Now the deed contained an express clause that the release to Goddard should not operate to discharge any one jointly or otherwise liable to the plaintiff for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor. Neither does such a clause qualifying the release operate as a fraud on other creditors; for, as it appears on the face of the deed, all who execute that deed are aware of it and agree to it."

66. North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536. See also Baker *v.* Hunt, 88 Mo. 405; Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219.

As to partners see *infra*, XIV, B.

67. See for example Conn. Gen. Stat. (1888), § 1022; Minn. Stat. (1894), §§ 5167–5169; Miss. Code (1892), § 2352; Mo. Rev. Stat. (1899), § 897; Mont. Code Civ. Proc. (1895), § 1786; Nev. Gen. Stat. (1885), §§ 4931–4933; N. Y. Code Civ. Proc. § 1942; Farmers', etc., Bank *v.* Hawn, 79 N. Y. App. Div. 640, 79 N. Y. Suppl. 524; Brightly Purd. Dig. Pa. (1894), 1648; 1 S. C. Rev. Stat. (1893), § 2311; Vt. Stat. (1894), § 1177; Va. Code (1887), § 2856; Wis. Stat. (1898), § 4204.

In some states the statutes provide that the release of one of two or more joint debtors **shall not release** the others, unless they are mere guarantors. Cal. Civ. Code (1901), § 1543; N. D. Comp. Laws (1895), § 3834; S. D. Comp. Laws (1887), § 3493.

It is questionable whether these statutes apply to debtors whose liability is several as well as joint. Abbott *v.* Royce, 3 N. Y. Suppl. 503, 20 N. Y. St. 694.

These statutes do not affect the right of the debtors who are not released to contribution from the one released. Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219.

Under the Missouri statute cited above, any creditor of two or more debtors may compound with any and every one or more of his debtors for such sum as he may see fit, and release him or them from all further liability for such indebtedness without impairing his right to collect the balance of such indebtedness from the other debtor or debtors not so released, whether said indebtedness is evidenced by note or otherwise; and such release will not impair the right of any debtor not so released to have contribution from his co-debtors. Baker *v.* Hunt, 88 Mo. 405.

68. Tuckerman *v.* Newhall, 17 Mass. 581; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313; Mallet *v.* Thompson, 5 Esp. 178.

A stipulation not to sue one of two judgment debtors is no discharge of the other, although there should be no express reservation of rights as against such other. Dewar *v.* Sparling, 18 Grant Ch. (U. C.) 633.

69. A creditor cannot withdraw without the consent of the debtor. Browne *v.* Stackpole, 9 N. H. 478; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing*, on another point, 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294; Brady *v.* Sheil, 1 Campb. 147; Bank of Commerce *v.* Jenkins, 16 Ont. 215. And see 4 So. L. Rev. 657; 17 Centr. L. J. 305. When several creditors have agreed with their debtor to compound their claims against him at a stipulated rate, each agreeing to such composition upon consideration of the like agreement of the others, no one of them can avoid or rescind such agreement on his part upon the ground that it was made through mistake, forgetfulness, or ignorance as to the amount or situation of his

any action to recover the original debt or claim of any creditor who has joined, and if properly pleaded and proved will afford a complete defense to such an action.[70]

claim, or the manner in which it was secured. Johnson *v.* Parker, 34 Wis. 596, 603. In this case Dixon, C. J., said: "Arrangements of this nature are of frequent occurrence and of the greatest practical importance, especially in commercial circles. The peace and tranquillity of the whole commercial world, or of great numbers in it, as well as that trust and confidence which are the life of trade and commerce, are to a great extent dependent upon the validity and finality of such settlements. It would not be easy to estimate, but the numbers are not small, in all our large towns and cities, of persons engaged in commercial pursuits who stand upon such settlements as the foundation of their credit and solvency; and, such foundation being taken away, pecuniary ruin must not only come to themselves, but loss and disaster must likewise fall upon many others, who, acting on the faith of the settlements, have entered into commercial dealings with, and given extensive credits to, the debtors making them. And this condition of things, owing to the misfortunes of some, the incapacity of others, and the dishonesty or extravagance of still others, as also to the contractions and expansions of the circulating medium and fluctuations of the money market, which are always occurring at periods more or less frequent, always has existed and probably always will exist, in all commercial communities. The indifference of the law to such settlements, or the easy and successful disregard of them by the assenting creditors, or any of them, must therefore always be attended with widespread disturbance and mischief, and be the constant source of distrust and alarm. Hence it is that the law is not indifferent to them, but guards and upholds them with a solicitude and watchfulness proportionate to the evils which must follow if it were otherwise. or if they were easily to be set aside, or broken up and abandoned for slight and trivial causes. For it is of the constitution of these agreements that they cannot be impeached or disregarded by one creditor without at the same time opening the door to all others, and annulling the settlement to all intents and for all purposes. Such are the constituent elements and essential qualities of them, that they must bind and conclude all the creditors joining in their execution, or they will bind and conclude none. If one creditor is permitted to go behind and disregard the agreement, every other must have the same privilege; and thus the whole settlement falls to the ground and loses all force by the successful attack or impeachment of one."

But if the debtor consents to the withdrawal he cannot afterward set up the composition as a defense to the original claim. Fellows *v.* Stevens, 24 Wend. (N. Y.) 294.

When creditors meet on the invitation of their debtor and agree to extend their claims, with a provision that they should be paid in four instalments, and that the debtor should incur no new indebtedness pending the term of the extension, none of the assenting creditors can by legal steps or by agreement secure a preference over the other assenting creditors, at least until the debtor has committed a default. Montgomery Bank *v.* Ohio Buggy Co., 100 Ala. 626, 13 So. 621. But see Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273.

The last signer is bound equally with the first, although he does not actively induce the others to sign. Steinman *v.* Magnus, 2 Campb. 124, 11 East 390.

70. *Alabama.*— Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273, 100 Ala. 626, 13 So. 621.

California.— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

Connecticut.—Warren *v.* Skinner, 20 Conn. 559.

Georgia.— Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813; Stewart *v.* Langston, 103 Ga. 290, 30 S. E. 35.

Illinois.— Condict *v.* Flower, 106 Ill. 105; National Time Recorder Co. *v.* Feypel, 93 Ill. App. 170; Meyer *v.* McKee, 19 Ill. App. 109; Gillfillan *v.* Farrington, 12 Ill. App. 101.

Indiana.— Bailey *v.* Boyd, 75 Ind. 125; Devon *v.* Ham, 17 Ind. 472.

Iowa.— Murray *v.* Snow, 37 Iowa 410.

Kentucky.— Fahey *v.* Clarke, 80 Ky. 613; Robert *v.* Barnum, 80 Ky. 28; Ricketts *v.* Hall, 2 Bush (Ky.) 249; Cutler *v.* Reynolds, 8 B. Mon. (Ky.) 596; Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921; White *v.* Dyer, 16 Ky. L. Rep. 160; Rosenthall *v.* Jacobs, 5 Ky. L. Rep. 419; Rouse *v.* Hughes, 1 Ky. L. Rep. 320.

Louisiana.— Shaw *v.* Canter, 8 Mart. N. S. (La.) 689.

Maine.— Hinckley *v.* Arey, 27 Me. 362.

Maryland.— Textor *v.* Hutchings, 62 Md. 150; Miller *v.* Mackenzie, 43 Md. 404, 20 Am. Rep. 111; Gardner *v.* Lewis, 7 Gill (Md.) 377.

Massachusetts.— Trecy *v.* Jefts, 149 Mass. 211, 21 N. E. 360; Huckins *v.* Hunt, 138 Mass. 366; Farrington *v.* Hodgdon, 119 Mass. 453; Richardson *v.* Pierce, 119 Mass. 165; Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Tuckerman *v.* Newhall, 17 Mass. 581; Eaton *v.* Lincoln, 13 Mass. 424; Lyman *v.* Clark, 9 Mass. 235.

Michigan.— Browning *v.* Crouse, 40 Mich. 339; Sigler *v.* Platt, 16 Mich. 206.

Minnesota.— Brown *v.* Farnham, 48 Minn. 317, 51 N. W. 377; Murchie *v.* McIntire, 40 Minn. 331, 42 N. W. 348; Sage *v.* Valentine, 23 Minn. 102.

But a composition agreement will not operate in such manner as to prevent those

Missouri.—Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702; Diermeyer *v.* Hackman, 52 Mo. 282; Bank of Commerce *v.* Holber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

New Hampshire.— Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183; Allen *v.* Cheever, 61 N. H. 32; Browne *v.* Stackpole, 9 N. H. 478.

New Jersey.— Daniels *v.* Hatch, 21 N. J. L. 391, 47 Am. Dec. 169.

New York.— White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun (N. Y.) 367]; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Blair *v.* Wait, 69 N. Y. 113 [*affirming* 6 Hun (N. Y.) 477]; Therasson *v.* Peterson, 4 Abb. Dec. (N. Y.) 396, 2 Keyes (N. Y.) 636; Robinson *v.* Striker, 47 Hun (N. Y.) 546, 15 N. Y. St. 420 [*affirmed* in 113 N. Y. 635, 20 N. E. 878, 22 N. Y. St. 994]; Strickland *v.* Harger, 16 Hun (N. Y.) 465 [*affirmed* in 81 N. Y. 623]; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Penniman *v.* Elliott, 27 Barb. (N. Y.) 315; De Voss *v.* Johnson, 18 Barb. (N. Y.) 170; Horstman *v.* Miller, 35 N. Y. Super. Ct. 29; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Bowns *v.* Stewart, 28 Misc. (N. Y.) 475, 59 N. Y. Suppl. 721 [*reversing* 27 Misc. (N. Y.) 842, 58 N. Y. Suppl. 113]; Coon *v.* Stoker, 2 N. Y. St. 626; Smythe *v.* Graydon, 29 How. Pr. (N. Y.) 224; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528; Orr *v.* McEwen, 1 N. Y. City Ct. 141; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294; Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574.

North Carolina.— Hayes *v.* Davidson, 70 N. C. 573; McKenzie *v.* Culbreth, 66 N. C. 534.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Oregon.— Nicolai *v.* Lyon, 8 Oreg. 56.

Pennsylvania.— Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Laird *v.* Campbell, 92 Pa. St. 470; Heitzenreither *v.* Long, 4 Pa. Super. Ct. 524; Eisenhart *v.* Lynn, 29 Wkly. Notes Cas. (Pa.) 113; Bright *v.* Murray, 1 Leg. Chron. (Pa.) 22, 2 Leg. Op. (Pa.) 591.

South Carolina.— Pierce *v.* Jones, 8 S. C. 273, 28 Am. Rep. 288; Aiken *v.* Price, Dudley (S. C.) 50.

Tennessee.— A. Landreth Co. *v.* Schevenel, 102 Tenn. 486, 52 S. W. 148; Evans *v.* Bell, 15 Lea (Tenn.) 569.

Vermont.— Chittenden *v.* Woodbury, 52 Vt. 562; Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444; Towne *v.* Rublee, 51 Vt. 62; Paddleford *v.* Thacher, 48 Vt. 574.

Wisconsin.— Mellen *v.* Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781; Johnson *v.* Parker, 34 Wis. 596.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; Danzig *v.* Gumersell, 27 Fed. 185; *In re* Decker, 8 Ben. (U. S.) 81, 5 Fed. Cas. No. 3,723; Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073.

England.— Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234; Harrley *v.* Wall, 1 B. & Ald. 103, 2 Stark. 195, 3 E. C. L. 374; Cook *v.* Saunders, 1 B. & Ald. 46; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191; Tatlock *v.* Smith, 6 Bing. 339, 8 L. J. C. P. O. S. 54, 3 M. & P. 676, 19 E. C. L. 158; Butler *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671; Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713; Boothbey *v.* Sowden, 3 Camph. 175; Steinman *v.* Magnus, 2 Camph. 124, 11 East 390; Brady *v.* Sheil, 1 Camph. 147; Reay *v.* White, 1 C. & M. 748, 3 Tyrw. 597; Spottiswoode *v.* Stockdale, Coop. 102, 10 Eng. Ch. 102; Seager *v.* Billington, 5 C. & P. 456, 24 E. C. L. 653; Butler *v.* Rhodes, 1 Esp. 236, Peake 238; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193; Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164, 5 Wkly. Rep. 361; Blackstone *v.* Wilson, 26 L. J. Exch. 229; Castleton *v.* Fanshaw, Prec. Ch. 99, 24 Eng. Reprint 48; *Ex p.* Sadler, 15 Ves. Jr. 52, 10 Rev. Rep. 18; Wood *v.* Roberts, 2 Stark. 417, 3 E. C. L. 470; Couston *v.* Robins, 12 Wkly. Rep. 1012.

Canada.— Tees *v.* McCulloch, 2 L. C. L. J. 135; Evans *v.* Cross, 15 L. C. Rep. 86 [*affirmed* in 16 L. C. Rep. 469]; Thurgar *v.* Travis, 7 N. Brunsw. 272; Lawson *v.* Salter, 5 Nova Scotia 79, 731; Mooney *v.* Bossom, 2 Nova Scotia 254; Fowler *v.* Perrin, 16 U. C. C. P. 258.

See Forsyth Comp. 20; 4 So. L. Rev. 644; and 10 Cent. Dig. tit. "Compositions with Creditors," §§ 38 *et seq.*, 58 *et seq.* But see Fitch *v.* Sutton, 5 East 230, 1 Smith K. B. 415.

Reason for rule.— It has frequently been stated that this doctrine rests upon the principle that it would be a fraud on the other creditors to allow one who had joined the composition to sue for his original claim.

Alabama.— Montgomery Bank *v.* Ohio Buggy Co., 100 Ala. 626, 13 So. 621.

Iowa.— Murray *v.* Snow, 37 Iowa 410.

Kentucky.— Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596.

Maryland.— Textor *v.* Hutchings, 62 Md. 150.

North Carolina.— Hayes *v.* Davidson, 70 N. C. 573.

South Carolina.— Pierce *v.* Jones, 8 S. C. 273, 28 Am. Rep. 288.

who join in the making or in the execution of the same from contesting each other's claims.[71]

b. Who Are Bound. It is not necessary, however, that a composition should have been signed by a creditor in order to make it binding upon him, and bar an action on the original debt. Assent or acquiescence, as by accepting the benefits of the composition or acting under it, is as effective as an actual signing;[72] and

England.— Britten *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671; Blackstone *v.* Wilson, 26 L. J. Exch. 229; Wood *v.* Roberts, 2 Stark. 417, 3 E. C. L. 470.

Canada.— Fowler *v.* Perrin, 16 U. C. C. P. 258.

But this is a relic of the days when the true consideration of a composition, and therefore the real reason why it should be treated as binding, were but imperfectly understood; and a better foundation for the binding nature of a composition is to be found in the fact that it is a contract upon sufficient consideration, and therefore cannot be broken at will. See, generally, CONTRACTS; and *supra*, I; II.

Applications of rule.— A composition, if such as the court could not order, will supersede proceedings in insolvency. State *v.* Young, 44 Minn. 76, 46 N. W. 204. Acceptance of a composition under a deed void under the bankruptcy acts will bind, and the balance of the original claim cannot be recovered. Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72. The creditor cannot sue for the balance of his debt, even though after paying the others there may be assets sufficient to pay him in full. Robert *v.* Barnum, 80 Ky. 28. After a composition is accepted and paid the creditors who join cannot attack a conveyance by the debtor as a fraud upon creditors. A. Landreth Co. *v.* Schevenel, 102 Tenn. 486, 52 S. W. 148. A composition is equally binding on the creditors, although made with a third party on behalf of the debtor, instead of with the debtor himself. Falconbury *v.* Kendall, 76 Ind. 260; Eaton *v.* Lincoln, 13 Mass. 424; Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713. See also *infra*, XIII. A judgment creditor who compounds cannot enforce his judgment afterward. Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636. See also *infra*, VIII, A, 2, d. An assignee of a promissory note who joins in a composition cannot recover against the assignor. Pontious *v.* Durflinger, 59 Ind. 27. And a composition will prevail against a subsequent indorsee of a promissory note. Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079. But a composition deed between members of a firm and the firm creditors will not bar suit against one partner by his individual creditors. European Cent. R. Co. *v.* Westall, L. R. 1 Q. B. 167, 6 B. & S. 970, 35 L. J. Q. B. 9, 14 Wkly. Rep. 177, 118 E. C. L. 970. In the absence of fraud or collusion, one creditor cannot enjoin another from suing for the balance of his debt, even though he has advanced money to pay the composition. McBride *v.* Little, 115 Mass. 308.

71. Garidel *v.* Fogliardi, 4 Mart. N. S. (La.) 432.

72. *California.*— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.

New Hampshire.— Brown *v.* Stackpole, 9 N. H. 478.

New York—Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294.

South Carolina.— Aiken *v.* Price, Dudley (S. C.) 59.

Vermont.— Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

United States.— Danzig *v.* Gumersell, 27 Fed. 185; *In re* Decker, 8 Ben. (U. S.) 81, 5 Fed. Cas. No. 3,723.

England.— Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191; Back *v.* Gooch, 4 Campb. 232, Holt 13, 3 E. C. L. 16; Spottiswoode *v.* Stockdale, Coop. 102, 10 Eng. Ch. 102; *Ex p.* Lowe, 1 Glyn & J. 78; *Ex p.* Shaw, 1 Madd. 598; *Ex p.* Cankwell, 1 Rose 313, 19 Ves. Jr. 233; *Ex p.* Sadler, 15 Ves. Jr. 52, 10 Rev. Rep. 18.

Canada.— Lawson *v.* Salter, 5 Nova Scotia 79, 731.

See *supra*, III, B; Forsyth Comp. 50; and 10 Cent. Dig. tit. "Compositions with Creditors," § 10 *et seq.*

What will constitute assent.— Assent to a composition is evinced by surrendering debts and taking composition notes, as well as by signing the composition deed. Fellows *v.* Stevens, 24 Wend. (N. Y.) 294. In Heitzenreither *v.* Long, 4 Pa. Super. Ct. 524, 539, Willard, J., said: "The evidence in the case fairly submitted to the jury established the fact of a common purpose among the creditors to secure the payment of their claims by compromise and settlement. Relying upon each other and each influenced by the presence, action and acquiescence of the other, meetings were held and by united action without a dissenting voice questions were voted upon and decided, committees were appointed and authorized to act according to their best judgment for the whole body of creditors, the action of the committees adopted, resulting finally in the adoption and ratification of the proposition presented by the individuals composing the copartnership, and a receipt of a

one who has agreed to execute a composition deed or release, if he induces others to join or share the common purpose, will be bound equally with those who sign, although he afterward refuses to execute the instrument.[73]

c. Who Are Not Bound. But as no creditor is obliged to come in under a common-law composition unless he chooses to do so, such a composition will not bind creditors who neither join nor assent; and such creditors can sue or prove in bankruptcy or insolvency for the full amount of their claims.[74] Similarly, a cred-

large sum of the money by the creditors, under the terms of the accepted proposition. Under the evidence submitted as above stated, the jury was fully warranted in finding the appellant a party to the settlement by his presence, action, acquiescence and subsequent ratification." In Mitchell *v.* Mitchell, 27 U. C. C. P. 160, the defendant, a trader, being in insolvent circumstances, wrote to the plaintiff, a creditor in Scotland, giving him a statement of his account and informing him of his intention to make some arrangement with his creditors, and that plaintiff must rank with the others on his estate, which he stated would not pay more than fifty cents on the dollar. The plaintiff replied expressing no dissent, and again that he was satisfied if no preference was given. In the meantime the defendant had effected an arrangement with his creditors for a composition of thirty cents on the dollar, on his representation that the plaintiff would accept it, without which the whole arrangement would have fallen through, and the defendant must have gone into insolvency. On the same day the defendant informed the plaintiff, by letter, of the arrangement, to which the plaintiff replied without expressing dissatisfaction, and afterward, without dissent, he received the instalments of the composition sent to him, and on the receipt of the last instalment acknowledged it as a payment of "the last instalment of your indebtedness to me." It was held that the plaintiff must be deemed to have accepted the composition with the other creditors and that he could not sue the defendant for the balance.

What will not constitute assent.— It is not sufficient to show assent that the creditor merely stood by and took no part in the matter. Mere silence will not estop. Danzig *v.* Gumersell, 27 Fed. 185; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191. Acceptance of the composition will not necessarily prove assent. Chadwick *v.* Burrows, 42 Hun (N. Y.) 39 [*appeal dismissed* in 115 N. Y. 671, 22 N. E. 1126, 26 N. Y. St. 977]; Barfol *v.* Forker, 17 Pa. St. 313. In Emerson *v.* Gerber, 178 Mass. 130, 59 N. E. 666, an assignment for benefit of creditors provided that all creditors assenting to it thereby discharged their claim against the debtor. Notice of the assignment was mailed to all creditors with a statement that those who wished to receive dividends must assent to the assignment. Subsequently one creditor received from the assignee a check purporting to be a final dividend intended to be accepted in full discharge of the creditors' claim, but which by mistake was for considerably less than the *pro rata* dividend. It was held that the receipt and use of the check were not sufficient to show an assent on his part to the composition and that he could sue for and recover the balance of his claim. After the composition agreement is complete, acceptance of the composition money will not make a creditor who never entered into the agreement a party thereto. Guilford First Nat. Bank *v.* Ware, 95 Me. 388, 50 Atl. 24.

Participation in preliminary negotiations will not constitute an assent to a subsequent composition that does not conform to the terms there proposed, unless others are induced to join by the representations of the creditor so participating. Bartol *v.* Forker, 17 Pa. St. 313.

73. Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073; Cork *v.* Saunders, 1 B. & Ald. 46; Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713; Bradley *v.* Gregory, 2 Campb. 383, 11 Rev. Rep. 742; Brady *v.* Sheil, 1 Campb. 147; Butler *v.* Rhodes, 1 Esp. 236, Peake 238; Norman *v.* Thompson, 4 Exch. 755, 19 L. J. Exch. 193; Wood *v.* Roberts, 2 Stark. 417, 3 E. C. L. 470.

"The validity of such an agreement does not depend upon the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity, which treat the violation of a failure to execute such an agreement as a fraud, not only upon the debtor, but more especially upon the other creditors, who have been lured in by the agreement to relinquish their further demands, upon the supposition that the debtor would thereby be discharged of the remainder of his debts." Per Orton, J., in Mellen *v.* Goldsmith, 47 Wis. 573, 579, 3 N. W. 592, 32 Am. Rep. 781.

When, at a meeting of the creditors of a deceased insolvent, called by his executor, the creditors agree to a ratable distribution, on the faith of which he executes a deed of assignment of all the assets which have come to his hands, for the benefit of his creditors, one of the latter cannot subsequently refuse to come in under the deed, and bring an action for his debt against the executor. Brady *v.* Sheil, 1 Campb. 147.

74. *Connecticut.*—Alsop *v.* White, 45 Conn. 499.

Kentucky.— Taylor *v.* Farmer, 81 Ky. 458.

Massachusetts.— Emerson *v.* Gerber, 178 Mass. 130, 59 N. E. 666; Guild *v.* Butler, 122 Mass. 498, 23 Am. Rep. 378; Sohier *v.* Loring, 6 Cush. (Mass.) 537.

itor who has not joined with the others, but who accepts a dividend under the composition after it is completed without becoming a party thereto, or being bound thereby, may recover from the debtor his full claim, less the dividend received;[75] but when, after an assignment for the benefit of creditors, some of the creditors compound for a fixed sum, non-assenting creditors cannot claim the entire surplus remaining after payment of the composition; they are entitled only to what would have been their *pro rata* dividend if the other had not accepted the fixed composition.[76]

d. Effect on Judgment Creditors. A judgment creditor is bound by a composition to the same extent as any other creditor. He cannot enforce his judgment after compounding, unless he has properly reserved that right;[77] but he may sign for the debt and then recover the costs, to be given to his attorney as compensation for his services,[78] and may compound for the full amount of his judgment and costs.[79]

B. On Third Parties — 1. Privies. A composition agreement binds not only the parties who have entered into it, but their privies as well,[80] and may be

New York.— Chadwick *v.* Burrows, 42 Hun (N. Y.) 39 [*appeal dismissed* in 115 N. Y. 671, 22 N. E. 1126, 26 N. Y. St. 977].

Pennsylvania.— Bartol *v.* Forker, 17 Pa. St. 313.

Wisconsin.— Lerdall *v.* Charter Oak L. Ins. Co., 51 Wis. 426, 8 N. W. 280.

United States.— Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324.

England.— Buvelot *v.* Mills, L. R. 1 Q. B. 104, 35 L. J. Q. B. 3, 13 L. T. Rep. N. S. 321, 14 Wkly. Rep. 98; Hamilton *v.* Houghton, 2 Bligh 169, 4 Eng. Reprint 290; Dingwall *v.* Edwards, 4 B. & S. 738, 10 Jur. N. S. 386, 33 L. J. Q. B. 161, 10 L. T. Rep. N. S. 132, 12 Wkly. Rep. 597, 116 E. C. L. 738; Ilderton *v.* Castrique, 14 C. B. N. S. 99, 9 Jur. N. S. 993, 32 L. J. C. P. 206, 8 L. T. Rep. N. S. 537, 11 Wkly. Rep. 755, 108 E. C. L. 99; Gurrin *v.* Kopera, 3 H. & C. 694, 11 Jur. N. S. 491, 34 L. J. Exch. 128, 12 L. T. Rep. N. S. 432, 13 Wkly. Rep. 843; Chesterfield, etc., Silkstone Colliery Co. *v.* Hawkins, 3 H. & C. 677, 11 Jur. N. S. 468, 34 L. J. Exch. 121, 12 L. T. Rep. N. S. 427; 13 Wkly. Rep. 840; *Re* Simmonds, 14 Wkly. Rep. 882.

Canada.— Green *v.* Swan, 22 U. C. C. P. 307.

See 10 Cent. Dig. tit. "Compositions with Creditors," §§ 3, 10 *et seq.*

Extent and limits of rule.— When an assignment is made to a trustee or assignee to pay to each of the creditors a certain percentage of their respective debts, a provision that such payments shall be in full of such debts will be construed as applicable only to such creditors as consent to adopt the same and to be bound thereby; and any creditor who does not agree to be bound may collect the specified percentage from the assignee, and may recover the balance from the debtor. Chadwick *v.* Burrows, 42 Hun (N. Y.) 39 [*appeal dismissed* in 115 N. Y. 671, 22 N. E. 1126, 26 N. Y. St. 977]; Woodham *v.* Edwardes, 5 A. & E. 771, 2 Hurl. & W. 443, 6 L. J. K. B. 38, 1 N. & P. 207, 31 E. C. L. 819. But a composition under the bankruptcy acts will bind non-assenting creditors. Wells *v.* Hacon, 5 B. & S. 196, 10 Jur. N. S. 862, 33 L. J. Q. B. 204, 10 L. T. Rep. N. S. 411, 12 Wkly. Rep. 790, 117 E. C. L. 196; Whitehead *v.* Porter, 5 B. & S. 193, 117 E. C. L. 193. But see Martin *v.* Gribble, 3 H. & C. 631, 11 Jur. N. S. 490, 34 L. J. Exch. 108, 12 L. T. Rep. N. S. 395, 13 Wkly. Rep. 690. When, after an assignment for the benefit of creditors, a composition is entered into, creditors who refuse to join in the composition are entitled, in the final accounting of the assignee, only to the proportionate share of the assets, they, in common with all the creditors, would have received had no composition been made. Matter of Orsor, 10 Daly (N. Y.) 26.

75. Guilford First Nat. Bank *v.* Ware, 95 Me. 388, 50 Atl. 24; Loney *v.* Bailey, 43 Md. 10.

76. Baldwin *v.* Thomas, 15 Grant Ch. (U. C.) 119.

77. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636. See also 4 So. L. Rev. 808.

78. Robbins *v.* Alexander, 11 How. Pr. (N. Y.) 100.

79. Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636.

80. Thus a subsequent indorsee of a promissory note due at the date of the composition, and not excluded from its terms, cannot recover on it against the debtor. Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079. And when, after the acceptance of a note, the payee, in a composition of the creditors of the maker, agrees that the note shall be paid according to the terms of a trust deed, one who acquires the note after maturity will hold it subject to the provisions of the trust deed, although the deed was not recorded when the note was acquired. Karn *v.* Blackford, (Va. 1894) 20 S. E. 149. But

enforced by the privies or personal representatives of the parties as well as by the parties themselves.[81]

2. Persons Primarily Liable For the Debt — Principal or Maker. A composition with a surety will not discharge the principal.[82] Nor will the maker of a negotiable instrument be released by a composition with the indorser.[83]

3. Persons Secondarily Liable For the Debt — a. Accommodation Maker. An accommodation maker will be discharged by an unqualified composition with the party for whose accommodation the note or bill was made; although if the remedies of the creditor against him are reserved he will remain liable;[84] but his claim against the payee and indorsee will not be discharged by a composition of the debts of either, to which he is not a party;[85] and a mere covenant not to sue the payee will not discharge the maker.[86]

b. Sureties — (i) *When Discharged.* A composition, whether executed or executory, will release the sureties for the debts compounded, no matter how beneficial it may be to them, unless they consent thereto, or unless the rights of the creditors against them are reserved; for they have a right to stand on the strict letter of their contract,[87] and their discharge will not be prevented by the fact that the composition was due to a mistake.[88] A composition, however, with one cosurety will not discharge the others; but the compounding creditor cannot recover from the other cosureties more than the proportion they would have paid, if the cosurety released had contributed his share.[89] The creditor may reserve his remedy against some cosureties, while releasing others.[90]

after the debtor's death, creditors cannot enforce a merely private arrangement for the personal convenience of the debtor. Garrard *v.* Lauderdale, 2 Russ. & M. 451, 11 Eng. Ch. 451 [*affirming* 3 Sim. 1, 6 Eng. Ch. 1].

81. If the debtor dies before the composition is all paid his personal representatives can pay the balance and will then be subrogated to the rights of the creditors. Matter of Leslie, 10 Daly (N. Y.) 76. Under a composition by which the debtor promises to pay his creditors a certain percentage of their claims, and to pay the whole if he should be able, a release of his debt by one of the creditors during the lifetime of the debtor will inure to the benefit of the other creditors; but a release of a debt after the death of the debtor will not inure to the benefit of the other creditors but to that of the heirs. Le Changeur *v.* Gravier, 2 Mart. N. S. (La.) 545.

82. Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322.

83. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322.

A discharge given by the holder of a promissory note to one who signed upon the back will not discharge one who signed upon the face of the note, when there is no evidence that the holder had any other knowledge of the relation between the signers than such as was obtained from an examination of the note. Auburn First Nat. Bank *v.* Marshall, 73 Me. 79.

84. Nichols *v.* Norris, 3 B. & Ad. 41, 23 E. C. L. 28. See also Forsyth Comp. 90, 91.

85. Thomas *v.* Liebke, 81 Mo. 675 [*affirming* 9 Mo. App. 424].

86. Mallet *v.* Thompson, 5 Esp. 178.

87. Cilley *v.* Colby, 61 N. H. 63; Perry *v.* Armstrong, 39 N. H. 583; Paddleford *v.* Thacher, 48 Vt. 574; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; *Ex p.* Glendinning, Buck 517; Hawkshaw *v.* Parkins, 2 Swanst. 539, 19 Rev. Rep. 125; *Ex p.* Gifford, 6 Ves. Jr. 805, 6 Rev. Rep. 53. See also Forsyth Comp. 85; 4 So. L. Rev. 806. The principles which discharge a surety where time has been given to the original debtor apply with equal if not greater force to a case where the creditor, without the consent of the surety, releases the principal by accepting a composition in discharge of his debt. Wharton *v.* Duncan, 83 Pa. St. 40. A composition which necessarily involves, although it does not expressly stipulate for an extension of time, releases a surety who does not consent thereto. Lambert *v.* Shetler, 71 Iowa 463, 32 N. W. 424; Lambert *v.* Shiler, 62 Iowa 72, 17 N. W. 187; Perry *v.* Armstrong, 39 N. H. 583.

A composition in bankruptcy or insolvency will not discharge a surety. Skillings *v.* Marcus, 159 Mass. 51, 34 N. E. 80; Cilley *v.* Colby, 61 N. H. 63.

88. *Ex p.* Wilson, 11 Ves. Jr. 410. The fact that the creditor believed that the surety would not be discharged will not prevent his release. Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679.

89. Wharton *v.* Duncan, 83 Pa. St. 40; *Ex p.* Gifford, 6 Ves. Jr. 805, 6 Rev. Rep. 53. See also 4 So. L. Rev. 808.

90. It is competent for creditors executing a deed of composition with the principal debtor and certain of his sureties to reserve their remedies against other sureties. Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S.

(II) *When Not Discharged.* A surety who consents to a composition[91] or joins therein[92] will not be released thereby; and a composition which does not take effect will be treated as if never signed and sureties will not be discharged.[93] If prior to the giving of the release by the creditors the surety has paid part of the debt and given a security for the remainder, the general rule will not apply and the creditor, notwithstanding the release, will retain his right against the surety in the absence of evidence to the contrary.[94]

(III) *Reservation of Rights Against Sureties.* It is competent for a creditor, on entering into a composition, to reserve his rights and remedies against a surety for the debt; and such a reservation will prevent the composition from operating as a release as to the sureties whom it affects[95] and will also preserve the right of the sureties to indemnity from the debtor;[96] but such a reservation

196, 1 M. & R. 549, 14 E. C. L. 330; *Ex p.* Carstairs, Buck 560.

91. Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128; Davidson *v.* McGregor, 11 L. J. Exch. 164, 8 M. & W. 755; Smith *v.* Winter, 8 L. J. Exch. 34, 4 M. & W. 454; Cowper *v.* Smith, 4 M. & W. 519. When a surety agrees that no composition with the principal debtor shall discharge his liability he will not be discharged by a deed of composition which contains an absolute discharge of the principal. Union Bank of Manchester *v.* Beech, 3 H. & C. 672, 34 L. J. Exch. 133, 12 L. T. Rep. N. S. 499, 13 Wkly. Rep. 922.

Mere knowledge of a composition, however, does not amount to consent thereto. Lambert *v.* Shetler, 71 Iowa 463, 32 N. W. 424.

92. Reed *v.* Tarbell, 4 Metc. (Mass.) 93; Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528. See Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293.

93. In Day *v.* Jones, 150 Mass. 231, 22 N. E. 898, a composition agreement under seal, which never took effect because not signed by all the creditors, without which signing it was by its terms not to be binding, contemplated the debtor's release upon the payment of a certain percentage of the debts on or before a certain date, and was signed, among other creditors, by the payee of a promissory note made by the debtor as principal and another as surety. It was held that no agreement to give the debtor time, such as would discharge the surety, could be inferred.

94. Hall *v.* Hutchons, 3 L. J. Ch. 45, 3 Myl. & K. 426, 10 Eng. Ch. 426.

95. *Connecticut.*— Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293.

Kentucky.— Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921.

Maine.—Auburn First Nat. Bank *v.* Marshall, 73 Me. 79.

Missouri.— Boatmen's Sav. Bank *v.* Johnson, 24 Mo. App. 316.

New York.— Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482.

England.— Green *v.* Wynn, L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385 [*affirming* L. R. 7 Eq. 28]; Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S. 196, 1 M. & R. 549, 14 E. C. L. 330; *Ex p.* Carstairs, Buck 560; *Ex p.* Glendinning, Buck 517; Stevens *v.* Stevens, 5 Exch. 306; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128; Close *v.* Close, 4 De G. M. & G. 176, 53 Eng. Ch. 137. See also Forsyth Comp. 78; 4 So. L. Rev. 807.

But in Webb *v.* Hewitt, 3 Kay & J. 438, Vice-Chancellor Sir W. Page Wood held that when the creditor releases the debtor he cannot reserve any right against the surety, because the debt is just at law, and equity will treat the reservation as a nullity; and that an agreement between a bond debtor and his creditor, not under seal, that the latter shall take all the debtor's property, and shall pay his other creditors five shillings in the pound, although not a discharge of the bond at law by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt, and it is not possible in equity, upon such a transaction as that, to reserve any rights against the surety, any attempt to do so being void, as inconsistent with the agreement.

A covenant not to sue entered into by the creditor with the principal debtor without the surety's consent, but with a reservation of remedies against other parties, does not discharge such surety. Hall *v.* Thompson, 9 U. C. C. P. 257.

When the surety is also a creditor, and signs the deed before another creditor, he will be presumed to assent to a reservation of the latter's rights against him, made when signing the composition deed. Rockville Nat. Bank *v.* Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293.

When a deed of trust was given to indemnify sureties, and a surety compounded with his creditors, the creditors reserving their rights against others bound for the same debts, but discharged the surety, it was held that the creditors of both surety and principal were entitled to the benefit of the deed of trust. Wiswall *v.* Potts, 58 N. C. 184.

96. 4 So. L. Rev. 810. When the creditor reserves his rights against the surety, the latter may recover from the principal debtor whatever he is forced to pay, even though he consented to the reservation. Close *v.* Close, 4 De G. M. & G. 176, 53 Eng. Ch. 137; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16

must appear plainly[97] and cannot be effected by parol if the composition is by deed.[98]

(iv) *Measure of Liability of Sureties.* A surety who remains liable to the creditor after a composition will be liable only for the difference between the debt and the amount received under the composition; and the creditor may prove in bankruptcy or insolvency only for this difference, and not for the whole debt.[99]

c. Drawer. The holder of a bill of exchange, who discharges the accepter by composition, cannot recover thereafter from the drawer, if the composition was made without the consent of the latter;[1] but if the remedies against the drawer are reserved the holder can then recover from him the difference between the amount due on the bill and that received under the composition,[2] and the drawer can recover from the accepter what he is thus compelled to pay.[3]

d. Indorser. The indorser of a negotiable instrument, being practically a surety, will be discharged by a composition with the maker,[4] unless the creditor reserves his remedy against the indorser;[5] but if the indorser joins in the compo-

M. & W. 128. See also Williams *v.* Schreiber, 14 Hun (N. Y.) 38. In Green *v.* Wynn, L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385 [*affirming* L. R. 7 Eq. 28], the debtor by a mortgage deed covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterward by deed assigned his property to a trustee in trust to sell and divide the proceeds among his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor. It was held that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but could pay off the principal to the creditor and recover the amount from the debtor.

97. Boultbee *v.* Stubbs, 18 Ves. Jr. 20.

98. *Ex p.* Glendinning, Buck 517.

99. Sohier *v.* Loring, 6 Cush. (Mass.) 537; Williams *v.* Schreiber, 14 Hun (N. Y.) 38; Lamoureux *v.* Dupras, 16 Rev. Lég. 243. In *In re* Hollister, 3 Fed. 452, a composition proposition made by a bankrupt contained a provision that upon any claims which the bankrupt should pay thereunder, upon which he was merely surety, "I am to have the right to collect and receive, towards helping me to meet and comply with the above propositions, from my principal or his estate, for remuneration therefor, or a proper *pro rata* therefrom, for what may be paid as aforesaid on such debt or claim." The principal was in bankruptcy at the same time. It was held that as to a creditor for whom the compounding debtor was a surety only, this agreement gave the surety a contract right to prove the payment thereunder as a debt against the principal's estate, upon which he would receive a *pro rata* dividend; and that the creditor must credit the debt with such payment and prove only for the balance.

1. *Ex p.* Smith, 3 Bro. Ch. 1; *Ex p.* Wilson, 11 Ves. Jr. 410. See also 4 So. L. Rev. 808. But see *Ex p.* Wildman, 1 Atk. 109, 26 Eng. Reprint 72.

2. Lysaght *v.* Phillips, 5 Duer (N. Y.) 106.

A composition by which the holder of a bill of exchange gives time to the accepter and agrees to discharge him on receiving payment of part of the debt, reserving his remedies against other parties to the bill, will not discharge the drawer and indorsers; but those who enter into the composition can recover from the drawer only the amount due on the bill over and above the composition. Sohier *v.* Loring, 6 Cush. (Mass.) 537.

3. Lysaght *v.* Phillips, 5 Duer (N. Y.) 106.

4. *Indiana.*— Pontious *v.* Durflinger, 59 Ind. 27.

Massachusetts.— Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322.

New Hampshire.— Perry *v.* Armstrong, 39 N. H. 583.

England.— Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; *Ex p.* Smith, 3 Bro. Ch. 1.

Canada.— Thurgar *v.* Travis, 7 N. Brunsw. 272.

And see 4 So. L. Rev. 808.

Mistake.—And this is so even though the composition is due to a mistake. Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679.

5. Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Richardson *v.* Pierce, 119 Mass. 165; Tobey *v.* Ellis, 114 Mass. 120; Sohier *v.* Loring, 6 Cush. (Mass.) 537; Lysaght *v.* Phillips, 5 Duer (N. Y.) 106; Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482; 4 So. L. Rev. 808. In Williams *v.* Schreiber, 14 Hun (N. Y.) 38, where a deed of composition provided that "it is expressly understood that nothing herein contained shall be held or construed as relieving or discharging the indorser upon any paper held by either of us," it was held that the parties

sition[6] or assents to it[7] he will be liable, although the creditor may not have reserved his remedy; and the indorsers of a note expressly excepted from the composition will not be released.[8]

e. **Guarantor and Others.** The above rules apply to all other cases of secondary liability.[9] While a guarantor who does not consent will be discharged by a composition which does not reserve a right or remedy against him, he will not be discharged if the rights or remedies of the creditors are reserved or if he joins in or agrees to the composition.[10]

C. On Debts — 1. In General — Extinguishment. An executed composition supersedes the original causes of action, and settles the claims and extinguishes the debts included in it, and the rights and remedies of the parties depend thereafter on the new agreement,[11] while an executory composition merely suspends

only intended to retain a claim upon the indorsers as additional security, in case from any cause the composition should fail; on the ground that to hold the clause to be a reservation of all rights against the indorsers would defeat the object of the composition, as the debtors would then be liable over to the indorsers. But the court was clearly wrong. See Green *v.* Wynn, L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385 [*affirming* L. R. 7 Eq. 28]; Close *v.* Close, 4 De G. M. & G. 176, 53 Eng. Ch. 137; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128.

6. Reed *v.* Tarbell, 4 Metc. (Mass.) 93; Gloucester Bank *v.* Worcester, 10 Pick. (Mass.) 528. In Bruen *v.* Marquand, 17 Johns. (N. Y.) 58, a deed of composition was entered into between a firm of debtors and their creditors, by which the former assigned all their property, in trust for their creditors, to certain trustees, and the creditors by the same instrument released the debtors from all their debts. One of the trustees named in this deed was one Marquand, the defendant, who was the indorser of a promissory note made by the debtors, and held by the firm of M. Bruen & Sons, the plaintiffs, one of the partners of which firm executed the composition deed. This note was described in the schedule of debts annexed to the deed as due to "Isaac Marquand, indorsed to M. Bruen & Sons, 500 dollars." Marquand executed the deed as creditor as well as trustee. It was held that the execution of the deed by the holders of the note did not release the indorser; for upon the true construction of the whole instrument the latter, having signed as creditor as well as trustee, had thereby relinquished all right of action against the makers, and was to be considered as assenting to a discharge of the makers by the holders also, with a full understanding that his liability to them, as indorser, was not to be thereby impaired.

7. An indorser who consents to a letter of license agrees thereby to remain bound for the difference between the amount of the composition and the amount of the note. Lamoureux *v.* Dupras, 16 Rev. Lég. 243.

8. Garnier *v.* Papin, 30 Mo. 243.

9. In Nicolai *v.* Lyon, 6 Oreg. 457, 8 Oreg. 56, the defendant, a broker, undertook, for compensation, to secure for the plaintiff a first-mortgage security as an investment for the plaintiff's money; and the plaintiff accordingly deposited with the defendant two thousand dollars for that purpose. The broker negligently loaned the money on a second mortgage and thereby became liable to the plaintiff to make good the security. The property was sold for no more than sufficient to satisfy the first mortgage; and the borrowers, being insolvent, entered into a composition with their creditors, which was signed by the plaintiff and by which he released the borrowers from personal liability beyond the lien of the mortgage. It was held that the release of the borrowers by the plaintiff had the effect to release the defendant, the broker, from his contingent liability to the plaintiff.

10. Cowper *v.* Smith, 4 M. & W. 519.

A reservation of the creditors' remedies against a guarantor will prevent the composition from operating as a discharge as to the latter, especially when he knows of the reservation and agrees to it. Davidson *v.* McGregor, 11 L. J. Exch. 164, 8 M. & W. 755.

When a guarantee expressly permits a composition the guarantor will not be released. Union Bank of Australia *v.* Rogan, 13 New South Wales 285.

11. *Indiana.*— Bailey *v.* Boyd, 75 Ind. 125; Pontious *v.* Durflinger, 59 Ind. 27.

Iowa.— Murray *v.* Snow, 37 Iowa 410.

Kentucky.— White *v.* Dyer, 16 Ky. L. Rep. 160; Rosenthal *v.* Jacobs, 5 Ky. L. Rep. 419; Rouse *v.* Hughes, 1 Ky. L. Rep. 320.

Louisiana.— Shaw *v.* Canter, 8 Mart. N. S. (La.) 689.

Massachusetts.— Trecy *v.* Jefts, 149 Mass. 211, 21 N. E. 360; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Tuckerman *v.* Newhall, 17 Mass. 581; Lyman *v.* Clark, 9 Mass. 235.

Minnesota.— Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352, 48 Minn. 317, 51 N. W. 317; Murchie *v.* McIntire, 40 Minn. 331, 42 N. W. 348.

New Hampshire.— Bartlett *v.* Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264; Allen

the right of action on the original claims while it remains in force, and a breach of the composition will revive them.[12] In other words, an executed composition is a perfected novation while an executory composition is an inchoate novation. But in order that a composition may be regarded as executed, or as a complete novation, it is not necessary that it should be performed, unless the discharge of the debtor is conditional upon payment or performance. If it appears clearly from the language of the composition that the creditors intend that the agreement itself shall be a discharge of their claims, and that they accept it in satisfaction, the original debts will be discharged and extinguished, although the composition is not performed.[13] But a composition that is void, or fails for want of consideration, will not extinguish the original debt and the debtor will be liable thereon, although the release is absolute.[14]

v. Cheever, 61 N. H. 32; Browne *v.* Stackpole, 9 N. H. 478.

New York.— Therasson *v.* Peterson, 4 Abb. Dec. (N. Y.) 396, 2 Keyes (N. Y.) 636; Robinson *v.* Striker, 47 Hun (N. Y.) 546 [*affirmed* in 113 N. Y. 635, 20 N. E. 878, 22 N. Y. St. 994]; Com. *v.* Stoker, 2 N. Y. St. 626; Orr *v.* McEwen, 1 N. Y. City Ct. 141; Hosack *v.* Rogers, 25 Wend. (N. Y.) 313.

South Carolina.— Peirce *v.* Jones, 8 S. C. 273, 28 Am. Rep. 288.

Tennessee.— Evans *v.* Bell, 15 Lea (Tenn.) 569.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

England.— Reay *v.* White, 1 Cr. & M. 748, 2 L. J. Exch. 229, 3 Tyrw. 597; Boyd *v.* Hind, 1 H. & N. 938, 3 Jur. N. S. 566, 26 L. J. Exch. 164; Solomon *v.* Laverick, 17 L. T. Rep. N. S. 545.

Canada.— Tees *v.* McCulloch, 2 L. C. L. J. 135; Thurgar *v.* Travis, 7 N. Brunsw. 272.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 50 *et seq.*

When the composition is absolute the creditor can prove in subsequent bankruptcy proceedings against the debtor only for the amount of the composition. *In re* Decker, 8 Ben. (U. S.) 81, 7 Fed. Cas. No. 3,723.

After a composition is accepted and paid, the creditors who join cannot attack a conveyance by the debtor as a fraud upon creditors. A. Landreth Co. *v.* Schevenel, 102 Tenn. 486, 52 S. W. 148.

When specific property is assigned to trustees for the benefit of creditors, under a mutual agreement, signed by the creditors, by which they accept the property in full satisfaction of their several demands, and discharge the same, there is a valid accord and satisfaction, which extinguishes their demands; and the indorsee of a promissory note, payable on demand, given by the debtor to one of the parties to the agreement, who held another demand against the debtor, cannot recover on the note if it does not appear that the note was transferred before the date of the agreement. Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079.

12. See *supra*, VII, D, 1, h, (I).

13. Goodrich *v.* Stanley, 24 Conn. 613; Brown *v.* Farnham, 48 Minn. 317, 51 N. W. 377; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 254. In Brown *v.* Farnham, 55 Minn. 27, 32, 56 N. W. 352, Vanderburgh, J., said: "This agreement was before the court in the case of Brown *v.* Farnham, 48 Minn. 317, 51 N. W. 377. It is not, however, set out in the report of the case, and its terms are not specially referred to in the opinion, but it was considered, without much discussion, therein, that this instrument fell within the rule laid down in a class of cases to which belong Goodrich *v.* Stanley, 24 Conn. 613; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; and Good *v.* Cheesman, 2 B. & A. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234 — where the agreement to discharge by the creditors rests upon the agreement to perform by the debtors, in contradistinction from ordinary cases, in which the composition necessarily involves a settlement by payment of the amount stipulated, its validity being supported by the legal consideration imported by the mutual promises of the creditors. In all cases where the creditors agree with the debtor and with one another to take a less sum than the amount severally due them in discharge of all, or where the discharge is conditional upon payment or performance, there is no discharge or bar to a suit upon the original debt, unless and until payment is made as required. If the agreement is performed, it is then a valid and final settlement of the debt. In the former class of cases, however, especially where the agreement is to transfer property to creditors in order to effect a settlement, the rule is that 'an acceptance, in discharge of a debt, of an agreement, with mutual promises on which the creditor has a legal remedy for its non-performance, is a satisfaction of the debt, although such promises are not performed.' Goodrich *v.* Stanley, *supra*; Pars. Cont. pt. 12, ch. 3, § 4; 1 Smith Lead. Cas. (6th ed.) 444. It is competent for the parties to put their agreement in that form, and their intention, as gathered from its terms, must control."

14. See *supra*, VII, D; and *infra*, XI, A, 1, f; XI, B, 3.

For example a release made by creditors in consideration of a deed of trust professing to

2. What Debts Will Be Discharged — a. In General. A composition will discharge all debts and demands specified therein, whether due at the date of the agreement or not;[15] and a general composition will also discharge all debts and demands that have accrued prior to its date to the creditors who join, whether such debts and demands are mentioned in the agreement or not,[16] unless they are expressly reserved or excluded by the necessary meaning of the terms used.[17]

convey for their benefit the property of their debtors must fail on the deed being declared void, and the debts which it released will remain as they were before its execution. Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173.

15. See cases cited *infra*, this note.

A composition which embraces all debts not secured either by liens on the debtor's property, by personal sureties, or by parties bound as coöbligors, includes a debt on which the debtor is bound as surety for a firm then insolvent, which had already made an assignment, such claim being unsecured to the extent that it was not paid out of the estate of the principals.' Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921.

A composition will discharge the contingent liability of the debtor as indorser of a note or bill not yet due, if properly worded. Pierce *v.* Parker, 4 Metc. (Mass.) 80; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597. In Bowns *v.* Stewart, 28 Misc. (N. Y.) 475, 59 N. Y. Suppl. 721 [*reversing* 27 Misc. (N. Y.) 842, 58 N. Y. Suppl. 1137], the holder of an unmatured note, executed by one A. D. Coe, signed a composition deed compounding all the debts of his immediate indorser, stating first all the accrued indebtedness to him, and added to this statement the words "contingent as endorser A. D. Coe note, 367.50." The creditor received his stipulated dividend, subsequently had the note protested for non-payment, and thereafter accepted a partial payment upon it from some of the prior indorsers. He then sued the immediate indorser, with whom he had previously compounded upon the note. It was held that he could not recover without allegation and proof that the immediate indorser had after demand failed to comply with the conditions of the composition deed.

When a creditor represents his debt as due to a third person and the debtor compounds with the latter the debt is discharged and the creditor cannot recover on proof that his statement was untrue. Blair *v.* Wait, 6 Hun (N. Y.) 477 [*affirmed* in 69 N. Y. 113].

And when the creditor signs for a debt, part of which he subsequently transfers to another, and the debtor is compelled to pay the latter in full, the creditor is entitled on the part retained only to the excess of the composition on the whole over the amount paid to the transferee. Farrington *v.* Hodgdon, 119 Mass. 453.

When the composition includes a debt which has been assigned, the creditor impliedly undertakes to protect the debtor from it, and if payment is enforced against the debtor, he can recover from the creditor, although the release was voluntary. Harloe *v.* Foster, 53 N. Y. 385; Hawley *v.* Beverley, 6 M. & G. 221, 46 E. C. L. 221.

But a written agreement by creditors to discharge a debtor upon receipt of a certain percentage of their respective claims, without any words in the body of the agreement referring to the amount of the claims, applies only to such claims as are then actually held by the several creditors; and if a creditor adds a particular sum opposite to his name, this will not amount to a covenant that he then has or that he will procure claims to that amount. Fowler *v.* Perley, 14 Allen (Mass.) 18.

16. Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; Harrhy *v.* Wall, 1 B. & Ald. 103, 2 Stark. 195, 3 E. C. L. 374; Bisset *v.* Burgess, 23 Beav. 278, 2 Jur. N. S. 1221, 26 L. J. Ch. 697; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597; Stephenson *v.* Hayward, Prec. Ch. 310, 24 Eng. Reprint 147; Purefoy *v.* Purefoy, 1 Vern. 28; Fowler *v.* Perrin, 16 U. C. C. P. 258; 4 So. L. Rev. 668. In Graham *v.* Ackroyd, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046, 1 Wkly. Rep. 107, 44 Eng. Ch. 192, a creditor, at the date of a deed of inspectorship and trust, made by a debtor for the benefit of his creditors, had a claim against the debtor for an ascertained sum of £1974, and for an unascertained sum on account of acceptances which he had given to the debtor on goods shipped by the debtor through the creditor as his factor, on a *del credere* commission, and which had not then been sold, but of the acceptances £5000 had then become due. In this state of affairs the creditor executed the deed generally, without specifying in the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold, it appeared that a balance of £5348 was due to the creditor from the debtor; and it was held that the creditor was entitled to a dividend from the debtor's estate in the sum of £5348, and not merely in the sum of £1974.

A composition will discharge a note payable on demand, given prior to the composition. Bartlett *v.* Rogers, 3 Sawy. (U. S.) 62, 2 Fed. Cas. No. 1,079.

A claim for damages for breach of contract accruing prior to the composition. Textor *v.* Hutchings, 62 Md. 150.

And when a creditor in compounding retains a mortgage security, the composition will discharge a claim arising from a deficiency in that security. Baxter *v.* Bell, 86 N. Y. 195 [*reversing* 19 Hun (N. Y.) 367].

17. For example, when not within the scope of the composition. Averill *v.* Lyman,

b. Debts Omitted or Withheld. All debts and demands due at the date of the composition should be brought into it, in order that the creditor may realize his full share of the debtor's assets; for if any debt, or any part of a debt, is omitted or withheld, without the knowledge or assent of the other creditors, it cannot be recovered afterward, since to permit such withholding and recovery would destroy the equality which forms the very foundation of every true composition, and operate as a fraud upon other creditors.[18] This is true *a fortiori*, where the creditor represents to the others that he compounds for his entire claim.[19]

3. What Debts Will Not Be Discharged — a. In General. A composition will not discharge a claim or demand not yet due,[20] a mere contingent liability,[21] or a debt due to a third party, who does not enter into the arrangement,[22] unless so

18 Pick. (Mass.) 346; Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901; Robbins *v.* Alexander, 11 How. Pr. (N. Y.) 100.

18. *Illinois.*— Meyer *v.* McKee, 19 Ill. App. 109.

Maryland.— Textor *v.* Hutchings, 62 Md. 150.

Minnesota.— Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901.

New Hampshire.— Perry *v.* Armstrong, 39 N. H. 583.

New York.— Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14.

England.— Cecil *v.* Plaistow, 1 Anstr. 202; Britten *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671; Seager *v.* Billington, 5 C. & P. 456, 24 E. C. L. 653; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597; Holmer *v.* Viner, 1 Esp. 131; Hancock *v.* Clay, 2 Stark. 100, 3 E. C. L. 334.

Canada.— Mooney *v.* Bossom, 2 Nova Scotia 254; Fowler *v.* Perrin, 16 U. C. C. P. 258.

And see Forsyth Comp. 38; 4 So. L. Rev. 668; and 10 Cent. Dig. tit. "Compositions with Creditors," § 50 *et seq.*

A composition is a good defense, although the debt is larger than the sum named in the composition. Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597.

A promissory note, which by its date appears to have been due prior to the execution of the composition deed, will be considered as included in the composition, and suit thereon will be dismissed on proof of the payment of the composition. Evans *v.* Cross, 15 L. C. Rep. 86 [*affirmed* in 16 L. C. Rep. 469].

The creditor cannot show by parol that a certain debt was not included in the composition. Meyer *v.* McKee, 19 Ill. App. 109; Perry *v.* Armstrong, 39 N. H. 583; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14. But see Hartford, etc., Transp. Co. *v.* Hartford First Nat. Bank, 46 Conn. 569.

When a promissory note is made to a creditor on the same day that he executes and delivers to the debtor, the maker of the note, a release of all demands, it will be presumed that the note was released, unless it be proved that it was made after the execution of the release. Macaltioner *v.* Croasdale, 3 Houst. (Del.) 365.

19. Blackstone *v.* Wilson, 26 L. J. Exch. 229.

20. Preston *v.* Etter, 140 Mass. 465, 5 N. E. 168; Hamblen *v.* Ratigan, 119 Mass. 153; Smith *v.* Krauskopf, 13 Hun (N. Y.) 526; Crawford *v.* Swearingen, 15 Ohio 264. And see 4 So. L. Rev. 671. A creditor who becomes such after the execution of an assignment under a composition cannot enforce the trusts therein contained. La Touche *v.* Earl of Lucan, 7 Cl. & F. 772, 7 Eng. Reprint 1262, 2 Dr. & Wal. 432, West 477, 9 Eng. Reprint 570. An agreement by which a creditor agrees to take twenty-five per cent on each and every dollar that his debtor owes and is indebted to him in full discharge and satisfaction of the several debts and sums of money that the debtor owes and stands indebted to him, does not affect any debts that may afterward accrue to the creditor. Lipman *v.* Lowitz, 78 Ill. 252.

21. Lipman *v.* Lowitz, 78 Ill. 252; Holton *v.* Bent, 122 Mass. 278; Smith *v.* Krauskopf, 13 Hun (N. Y.) 526; Crawford *v.* Swearingen, 15 Ohio 264.

Where, in an action of debt on a bond, the defendant pleaded a general composition and release of all claims, it was held that the plaintiffs might reply that the bond was given by the defendant with others as a security for the repayment of bills drawn upon them by the defendant, and for moneys advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the moneys intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part, included or meant by them or by defendant to be included, in the sum set against their names or in the release. Payler *v.* Homersham, 4 M. & S. 423, 16 Rev. Rep. 516.

22. Reed *v.* Tarbell, 4 Metc. (Mass.) 93; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597. See also *supra*, VIII, A, 2, c.

A note or bill assigned to a third party before the composition agreement is executed will not be discharged. Farrington *v.* Hodgdon, 119 Mass. 453; Fowler *v.* Perley, 14 Allen

worded as to include such claims.[23] Moreover, when the agreement evinces a clear intent that its operation shall be confined to certain claims, those claims only will be discharged.[24] One who furnishes money to pay the composition is not a creditor within the terms of the composition, and his claim will not be discharged.[25]

b. Debts Omitted or Withheld. If the other creditors assent or acquiesce, a creditor may compound validly for a part only of his claim,[26] and if the composition is void, because all do not join,[27] or if the creditor is ignorant of the fraud

(Mass.) 18; Crawford *v.* Swearingen, 15 Ohio 264; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597.

The claims of an accommodation maker against the payee and indorsee of a note will not be discharged by a composition of the debts of either of the latter, to which the maker is not a party. Thomas *v.* Liebke, 9 Mo. App. 424 [*affirmed* in 81 Mo. 675].

When notes which the creditor agrees to deliver up are passed away before the composition, the court will not order them to be delivered up. Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

23. Pierce *v.* Parker, 4 Metc. (Mass.) 80; Crawford *v.* Swearingen, 15 Ohio 264; Bain *v.* Cooper, 1 Dowl. N. S. 11, 11 L. J. Exch. 325, 9 M. & W. 701.

24. Coddington *v.* Davis, 1 N. Y. 186 [*affirming* 3 Den. (N. Y.) 16]; Lanyon *v.* Davey, 12 L. J. Exch. 200, 11 M. & W. 218. When a composition recites that the creditors who become parties to it "release unto the said" debtors "the several debts and sums of money, written opposite to their respective names in the schedules hereto annexed," no other debts than those scheduled will be released, and parol evidence is inadmissible to show that it was intended to include other debts. Rice *v.* Woods, 21 Pick. (Mass.) 30. Where the plaintiffs held both a secured claim and an unsecured claim against the defendant, and joined with other creditors of the defendant in a composition agreement, in which they all designated themselves as "general creditors," and agreed to take from the defendant a certain consideration for their respective claims, the amount of each of which was stated, and the plaintiffs stated only the amount of their unsecured claims, it was held that the term "general creditors" meant "unsecured creditors," and that by executing the agreement the plaintiffs did not release their secured claim. Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901. In Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349] the plaintiff, holding claims against the defendant partly secured by mortgage, signed a composition agreement for the release of his unsecured claims. The defendant's other secured creditors did not sign this agreement, and it was understood that the compromise extended only to unsecured claims. Plaintiff and others afterward executed to defendant a release of all claims whatever, reciting that it was in consideration of his compliance with the agreement. Defendant did not pay or tender anything on the secured claims within the specified time, and knew that plaintiff did not intend to include them in the agreement or release. On a subsequent settlement in which the secured claims were included, a mortgage was given to secure a balance found due to plaintiff. It was held that it was founded on a good consideration.

25. Holton *v.* Bent, 122 Mass. 278.

26. Britten *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671; Fennell *v.* Day [*cited* in Britten *v.* Hughes, 5 Bing. 460, 463, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671].

Rule applied and illustrated.— The composition may be confined to unsecured claims. Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901; Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* 47 Hun (N. Y.) 213, 13 N. Y. St. 349]. In Hartford, etc., Transp. Co. *v.* Hartford First Nat. Bank, 46 Conn. 569, where a creditor of an insolvent had with other creditors signed an agreement to accept twenty-five per cent upon their claims, the amount of the creditors' claim being stated in connection with its signature, and certain debts being reserved, it was held that, in the absence of any proof of fraud on the other creditors, a receipt afterward given by the creditor for its percentage, and also parol evidence, were admissible to show that the amount for which the creditor signed the composition was that of its unsecured claims, and that the agreement was not intended to apply to another secured claim. In Garnier *v.* Papin, 30 Mo. 243, one creditor signed the composition agreement, adding to his signature, "Provided I have the same endorsers for $3,500," and surrendered notes amounting to three thousand five hundred dollars. It was held that he thereby reserved the right to sue upon another note held by him and not included in the three thousand five hundred dollars, and that the indorsers on that note were not released. A judgment creditor may sign for the debt, but reserves the costs, to be given to his attorney as compensation for his services. Robbins *v.* Alexander, 11 How. Pr. (N. Y.) 100. In Averill *v.* Lyman, 18 Pick. (Mass.) 346, where a composition deed referred to a schedule, and a creditor had named one debt in the schedule, omitting another secured debt, it was held that a release "of all demands" referred to the scheduled debt only, and not to the other; but the ruling was limited strictly to the peculiar facts of the case.

27. M. A. Seed Dry-Plate Co. *v.* Wunderlich, 69 Minn. 288, 72 N. W. 122.

on which his demand is founded,[28] acceptance of the composition on the debts included will not prevent recovery on the amount not included.

D. On Collateral Securities — 1. When Will Be Released. When a composition amounts to a release of the debts compounded those debts are extinguished, and the creditors who enter into the agreement lose the right to retain or enforce any liens, equities, or collateral securities they may hold from the debtor, which revert at once to the latter, since to allow one creditor to retain and enforce such liens or securities would be a fraud upon the others.[29] A judgment creditor[30] or mortgagee[31] who releases cannot enforce his judgment or mortgage thereafter, and a lien creditor who relies upon his lien cannot have the benefit of the composition.[32]

2. When Will Not Be Released. A creditor may, however, retain his lien, equity, or security, if the others assent, and consequently may reserve his right to enforce such lien, equity, or security, as a condition of entering into the composition, if the reservation is made known to the other creditors;[33] and it would

28. Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574, 15 Wend. (N. Y.) 351.

29. Robinson *v.* Striker, 47 Hun (N. Y.) 546 [*affirmed* in 113 N. Y. 635, 20 N. E. 878, 22 N. Y. St. 994]; Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633; Mackenzie *v.* Mackenzie, 16 Ves. Jr. 372; City Bank *v.* McDougall, 17 New South Wales 14. And see 4 So. L. Rev. 805.

Rule applied.— Consequently the surrender of a collateral security after or as part of a composition is no consideration for a parol promise to pay the balance of the debt over the composition. Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633. See also Robinson *v.* Striker, 47 Hun (N. Y.) 546 [*affirmed* in 113 N. Y. 635, 20 N. E. 878, 22 N. Y. St. 994]. When a composition deed between a debtor and his creditors provides that those who come in under it shall thereby release their debts, a lien creditor cannot realize his lien and prove for the difference, but if he elects to take the benefit of the deed must first give up the property on which he claims the lien. Buck *v.* Shippam, 10 Jur. 581, 15 L. J. Ch. 356, Phil. Ch. 694, 19 Eng. Ch. 694 [*affirming* 8 Jur. 567, 13 L. J. Ch. 391, 14 Sim. 239, 37 Eng. Ch. 239]. A creditor who has received the composition cannot, after the lapse of ten years, repay it and claim the benefit of a security that has then fallen in. Pfleger *v.* Browne, 28 Beav. 391.

30. Chicago, etc., Land Co. *v.* Peck, 112 Ill. 408; Crawford *v.* Krueger, 201 Pa. St. 348, 50 Atl. 931; Evans *v.* Jones, 3 H. & C. 423, 11 Jur. N. S. 784, 34 L. J. Exch. 25, 11 L. T. Rep. N. S. 636. See also *supra*, VIII, A, 2, d.

31. Cullingworth *v.* Loyd, 2 Beav. 385, 4 Jur. 284, 9 L. J. Ch. 218, 17 Eng. Ch. 385.

32. Gould *v.* Robertson, 4 De G. & Sm. 509; Brandling *v.* Plummer, 27 L. J. Ch. 188, 6 Wkly. Rep. 117.

33. Wakefield *v.* Georgetown First Nat. Bank, 19 Ky. L. Rep. 426, 40 S. W. 921; Lehigh Coal, etc., Co. *v.* Hibbs, 2 Wkly. Notes Cas. (Pa.) 96; Powles *v.* Hargreaves, 3 De G. M. & G. 430, 2 Eq. Rep. 162, 17 Jur. 1083, 23 L. J. Ch. 1, 2 Wkly. Rep. 21, 52 Eng. Ch. 336; Lee *v.* Lockhart, 1 Jur. 769, 3 Myl. & C. 302, 14 Eng. Ch. 302; Bryan *v.* Christie, 1 Stark. 329, 2 E. C. L. 129. And see Forsyth Comp. 126; 4 So. L. Rev. 805, 806.

Applications of rule.— When the first creditor to sign adds to his signature the words "without prejudice to the securities which I hold," and the other creditors sign under his name, the execution of the composition will not release the securities held by the first creditor. Duffy *v.* Orr, 5 Bligh N. S. 620, 5 Eng. Reprint 449, 1 Cl. & F. 253, 6 Eng. Reprint 912. When a composition agreement stipulates that the creditors do not waive any lien either of them may have upon the property assigned, the creditors will be presumed to have inquired as to the condition of the property and the liens to which it is subject, and in order to avoid such an agreement it must be proved that active fraud was practised upon the creditors. Nicolai *v.* Lyon, 8 Oreg. 56. In Squire *v.* Ford, 9 Hare 47, 15 Jur. 619, 20 L. J. Ch. 308, 41 Eng. Ch. 47, a deed conveying the real and personal estate of a debtor to trustees for the benefit of his creditors contained a covenant by the creditors that it should operate and inure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, and demands, both at law and in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mortgage, pledge, lien, or other specific security which any creditor possessed. It was held, upon the construction of the entire deed, that the general words used did not have the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees.

seem that a composition will not affect a collateral security given by a third person, who does not enter into the composition.[34] If the composition agreement does not amount to a release it will not affect the right of a secured creditor to realize on his lien or security, in addition to the composition;[35] and a creditor who does not compound need not notify the others that he holds securities of the debtor.[36]

E. Pleading and Proof of Composition — 1. PLEADING.[37] At common law a composition need not be specially pleaded in an action of assumpsit, but may be given in evidence under the general issue,[38] although under the code system of California it has been held that it must be pleaded specially, and cannot be given in evidence under a plea of accord and satisfaction.[39] But in pleading a composition specially it is not sufficient as a general rule to aver the fact of composition alone, but the debtor must also set forth the terms of the composition[40] and aver compliance with all conditions precedent,[41] and payment or performance or tender,

A creditor who wishes to retain the benefit of his security must either hold himself aloof from the other creditors, or distinctly communicate with them on the subject, if he acts in common with them. In Cullingworth *v.* Loyd, 2 Beav. 385, 4 Jur. 284, 9 L. J. Ch. 218, 17 Eng. Ch. 385, a debtor entered into negotiations for a composition with his creditors, but there did not appear to have been any general meeting, or any agreement entered into by them generally. One of the creditors stipulated that in addition to the amount of the composition he should have the benefit of an equitable mortgage (by deposit of title deeds) which he held. He accepted the composition, but did not execute the composition deed until after his equitable mortgage had been transferred by deed into a legal mortgage on the same premises. He then executed the composition deed, by which he purported to release the debtor altogether, without any reservation of the mortgage; and another creditor subsequently executed the deed. The stipulation that the benefit of the mortgage should be retained was not communicated to the other creditors; but there was no fraudulent concealment. It was held that the creditor could not retain the mortgage in addition to the amount of the composition and must pay the debtor the purchase-money received from a sale under a power of sale in the mortgage.

The creditor need not disclose the extent of his security; the fact that the reservation is made known to the others is sufficient. Henderson *v.* Macdonald, 20 Grant Ch. (U. C.) 334.

Doubtful agreement.— When in a composition by a surety indemnified by a deed of trust, the creditors reserve the right to enforce their claims against all others bound for the same debts, but discharge the surety absolutely, and it is left doubtful by the agreement which party shall have the benefit of the deed of trust, the trust fund should be divided *pro rata* among the creditors, without regard to the arrangements made by some of them with their sureties. Wiswall *v.* Potts, 58 N. C. 184.

34. See Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 406. When, prior to the release of the principal debtor, a surety has paid part of the debt and gives a security for the remainder, the creditor, notwithstanding the release, will retain his right against the surety, in the absence of any evidence to the contrary. Hall *v.* Hutchons, 3 L. J. Ch. 45, 3 Myl. & K. 426, 10 Eng. Ch. 426.

35. In Thomas *v.* Courtnay, 1 B. & Ald. 1, the creditors of an insolvent agreed by an instrument not under seal, that they would accept in full satisfaction of their debts twelve shillings in the pound, payable by instalments, and would release the debtor from all demands. One of the creditors who signed for the full amount of his debt held at the time as a security for part a bill of exchange drawn by the debtor and accepted by a third person; the money due on this bill having been paid subsequently by the accepter, it was held that the creditor might retain it, as the composition agreement did not contain any stipulation for the surrender of securities, and did not have the effect of extinguishing the debt.

36. *In re* Thorn, 2 Pa. St. 331.

37. See, generally, PLEADING.

38. Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073; Browne *v.* Stackpole, 9 N. H. 478.

But if a composition is not pleaded in bar it cannot be availed of to set aside an execution. Whitmore *v.* Wakerley, 3 H. & C. 538, 11 Jur. N. S. 182, 34 L. J. Exch. 83, 11 L. T. Rep. N. S. 683, 13 Wkly. Rep. 350. Nor can it be set up as a defense to a suit on the judgment. Ellis *v.* McHenry, L. R. 6 C. P. 228, 40 L. J. C. P. 109, 23 L. T. Rep. N. S. 861, 19 Wkly. Rep. 503.

39. Smith *v.* Owens, 21 Cal. 11.

40. Taylor *v.* Farmer, 81 Ky. 458.

41. Falconbury *v.* Kendall, 76 Ind. 260; Lower *v.* Clement, 25 Pa. St. 63; Rosling *v.* Muggeridge, 4 D. & L. 298, 16 L. J. Exch. 38, 16 M. & W. 181. And see 4 So. L. Rev. 839. But see Mathews *v.* Taylor, 5 Jur. 321, 2 M. & G. 667, 3 Scott N. R. 52, 40 E. C. L. 797. A plea that only one came in, when the composition required that all should join, is insufficient. Keay *v.* Richardson, 2 C. M. & R. 422, 1 Gale 219, 4 L. J. Exch. 236, 5 Tyrw. 931. A plea of composition which does not aver that the creditor agreed to take it or

or facts sufficient to excuse performance or tender,[42] unless the agreement contains an absolute release.[43] A plea of an agreement to accept a composition is no defense without a further averment that the composition was accepted[44] and that it was accepted in satisfaction of the debt.[45]

2. PROOF. The proof must correspond with the allegations of the plea or the defense will be insufficient;[46] and the debtor will be bound by the case he has averred and cannot set up another at the trial.[47]

F. Payment of Expenses of Carrying on Business. When a composition agreement provides that the business shall be carried on by the debtor or a third party for the benefit of the creditors, the expenses of carrying on the business must be paid before the creditors are entitled to receive any part of the proceeds;[48] and a provision for the payment of such expenses if inserted in the composition agreement will not invalidate it.[49]

IX. RIGHTS AND LIABILITIES OF SURETY FOR COMPOSITION.

A. Rights. A surety for the payment of the composition may recover from the debtor whatever he is forced to pay in respect of the composition and may prove the same against the estate of the debtor in bankruptcy or insolvency.[50]

acted under it is bad. Tuck *v.* Tooke, 9 B. & C. 437, 7 L. J. K. B. O. S. 282, 4 M. & R. 393, 17 E. C. L. 200 [*affirming* 4 Bing. 224, 5 L. J. C. P. O. S. 157, 12 Moore C. P. 435, 13 E. C. L. 478]. In Cutter *v.* Reynolds, 8 B. Mon. (Ky.) 596, a plea of composition which averred that the plaintiff agreed to take the composition if the eastern creditors would also take it, was held insufficient without averments that the debtor was in embarrassed circumstances and that the eastern creditors had made a like agreement.

42. *Kentucky.*— Taylor *v.* Farmer, 81 Ky. 458.

Michigan.— Whittemore *v.* Stephens, 48 Mich. 573, 12 N. W. 858.

New York.— Warburg *v.* Wilcox, 2 Hilt. (N. Y.) 118, 7 Abb. Pr. (N. Y.) 336.

Ohio.— Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

Pennsylvania.— Lower *v.* Clement, 25 Pa. St. 63.

England.— Fessard *v.* Mugnier, 18 C. B. N. S. 286, 11 Jur. N. S. 283, 34 L. J. C. P. 126, 11 L. T. Rep. N. S. 635, 13 Wkly. Rep. 388, 114 E. C. L. 286; Rosling *v.* Muggeridge, 4 D. & L. 298, 16 L. J. Exch. 38, 16 M. & W. 181; Evans *v.* Powis, 1 Exch. 601, 11 Jur. 1043; Hazard *v.* Mare, 6 H. & N. 434, 30 L. J. Exch. 97, 5 L. T. Rep. N. S. 743, 9 Wkly. Rep. 252; Lowe *v.* Eginton, 7 Price 604.

And see 4 So. L. Rev. 839.

A plea of a binding agreement to accept a composition, coupled with an averment of tender, is sufficient. Garrod *v.* Simpson, 3 H. & C. 395, 11 Jur. N. S. 227, 34 L. J. Exch. 70, 11 L. T. Rep. N. S. 777, 13 Wkly. Rep. 460.

43. Hart *v.* Smith, L. R. 4 Q. B. 61, 9 B. & S. 543, 38 L. J. Q. B. 25, 19 L. T. Rep. N. S. 419, 17 Wkly. Rep. 158.

44. Heathcote *v.* Crookshanks, 2 T. R. 24. A plea that plaintiff agreed with defendant and others to execute a composition deed should also aver payment or tender. Lowe *v.* Eginton, 7 Price 604. In Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386, a defendant pleaded *puis darrein continuance* that he together with another being indebted to the plaintiff and several others, agreed to assign all their stock in trade and outstanding debts to the plaintiff and their other creditors, who agreed to accept the same in full satisfaction of their respective debts, and averred that he and his co-debtor did deliver all their stock in trade and assigned all the debts due to them for the use and benefit of the plaintiff and their other creditors, which delivery of stock and assignment of debts were received in full satisfaction by the plaintiff and the other creditors. This was held to be a good plea of accord and satisfaction.

45. Hall *v.* Flockton, 16 Q. B. 1039, 15 Jur. 600, 20 L. J. Q. B. 201, 71 E. C. L. 1039 [*affirming* 19 L. J. Q. B. 1]; Brunskill *v.* Metcalf, 2 U. C. C. P. 431.

46. Brown *v.* Dakeyne, 11 Jur. 39; Brunskill *v.* Metcalf, 3 U. C. C. P. 143; Foster *v.* Bettes, 5 U. C. Q. B. 599. See Brunskill *v.* Metcalf, 2 U. C. C. P. 431.

47. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Tuck *v.* Tooke, 9 B. & C. 437, 7 L. J. K. B. O. S. 282, 4 M. & R. 393, 17 E. C. L. 200 [*affirming* 4 Bing. 224, 5 L. J. C. P. O. S. 156, 12 Moore C. P. 435, 13 E. C. L. 478].

48. For example where one of the members of a debtor partnership is appointed to carry on the business and to pay the creditors out of the proceeds. Karn *v.* Blackford, (Va. 1894) 20 S. E. 149.

49. Fitzpatrick *v.* Bourne, L. R. 3 Q. B. 446, 9 B. & S. 157, 34 L. J. Q. B. 266, 18 L. T. Rep. N. S. 731, 16 Wkly. Rep. 849. See also Karn *v.* Blackford, (Va. 1894) 20 S. E. 149.

50. *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768.

But he cannot come into the composition as a creditor[51] nor can he compel a creditor in case of breach to elect whether he will carry out the composition *in toto* or reject it *in toto*.[52]

B. Liabilities. A surety for the payment of the composition (or an indorser of the composition notes, who stands in the same position as a surety) will not be discharged from his undertaking so long as the terms of the composition are complied with, except as may be provided by the agreement itself.[53]

C. Release From Liability. Any change in the terms of the composition,[54] any breach thereof or any fraudulent practice which materially affects the surety will release him from liability as to creditors who are aware of the breach or fraud,[55] although not as to creditors who are *bona fide* ignorant thereof.[56]

X. EFFECT OF MISTAKE.

In the absence of fraud or misrepresentations neither the debtor nor the creditor can rescind or set aside a composition for mistake either of law[57] or of

51. See Holton *v.* Bent, 122 Mass. 278.

52. *Ex p.* Gilbey, 8 Ch. D. 248, 47 L. J. Bankr. 49, 38 L. T. Rep. N. S. 728, 26 Wkly. Rep. 768.

53. Glegg *v.* Gilbey, 2 Q. B. D. 6, 46 L. J. Q. B. 7, 35 L. T. Rep. N. S. 761, 25 Wkly. Rep. 42 [*affirmed* in 2 Q. B. D. 209, 46 L. J. Q. B. 325, 35 L. T. Rep. N. S. 927, 25 Wkly. Rep. 311].

But when the surety, on delivering the composition notes to the trustees, notifies the latter not to give them to a particular creditor, that creditor cannot maintain detinue against the surety. Latter *v.* White, L. R. 5 H. L. 578, 41 L. J. Q. B. 342 [*affirming* 25 L. T. Rep. N. S. 658, 19 Wkly. Rep. 1149].

54. If a creditor holding a composition bond, by an agreement with the debtor for a valuable consideration, without the knowledge or consent of the surety, materially changes the terms of the contract of indebtedness, he thereby releases the surety. Bailey *v.* Boyd, 75 Ind. 125.

55. In Johnson *v.* Baker, 4 B. & Ald. 440, 23 Rev. Rep. 338, 6 E. C. L. 551, before executing a deed of composition it was agreed in the presence of the surety that the deed should be void if all the creditors did not sign. At the same interview the surety subsequently executed the deed in the usual way, saying nothing at the time of execution about the condition that all should sign; and the deed was delivered to one creditor to get the signatures of the rest. It was held that this was equivalent to a delivery of the deed in escrow, and as all the creditors did not sign it the surety was not bound. In Doughty *v.* Savage, 28 Conn. 146, a composition agreement contained a stipulation that it should not be binding unless signed by all the creditors. The composition notes, indorsed by the defendant as surety for the debtor, were delivered to the plaintiffs under this agreement. The agreement was not in fact signed by all the creditors, but this fact was not known to the surety when he indorsed the notes. It was further agreed between the plaintiffs and the debtor, as a condition of their signing the composition agreement, that the debtor should assume and include in the indebtedness which was the basis of the composition, a debt due them from another party for which he was not liable, and that he should give his note for the balance of the indebtedness not covered by the composition notes. This agreement was also unknown to the surety. It was held that in both these particulars the agreement was a fraud upon the surety, of which he could take advantage in an action brought upon the notes indorsed by him.

After a waiver of strict performance, a creditor cannot sue for the original debt, since that would be a fraud upon a surety for the composition, who must be supposed to become a party to the composition on the faith that the debt is discharged, and relying on that discharge as furnishing him the means for his indemnity. Dauchy *v.* Goodrich, 20 Vt. 127.

56. In Whittemore *v.* Obear, 58 Mo. 280, a composition agreement between creditors, the debtor, and a surety for the composition, provided that the surety should indorse certain notes of the debtor, provided that all creditors to amounts exceeding two hundred dollars should sign. It was held that it was the duty of the surety to see to it that all such creditors had signed the agreement; that his indorsement of the note as to a creditor who was ignorant of any failure in the fulfilment of the condition or its procurement by fraud was a waiver of that condition, that he could not avail himself of such failure or fraud against such creditor, and that even if the creditor was aware of such failure or fraud and chose to waive the objection it did not lie in the mouth of the surety to set it up as a defense.

57. The acceptance of a composition under a deed void under the bankruptcy act binds, and the creditor cannot recover the balance over the composition, since he acted under a mistake of law. Kitchin *v.* Hawkins, L. R. 2 C. P. 22, 12 Jur. N. S. 928, 15 L. T. Rep. N. S. 185, 15 Wkly. Rep. 72. In Howland *v.* Grant, 26 Can. Supreme Ct. 372, upon de-

fact;[58] and the debtor cannot recover back a portion of the sum paid under the composition on the ground of an alleged mistake as to his liability, especially when he has made a full and careful investigation of his affairs prior to compounding and paying.[59] But when the creditor has made overcharges in settling the account under the composition the debtor may recover the amount paid because of such overcharges by a bill for an accounting;[60] and if by mistake he pays the whole amount of the debt under a fifty per cent composition, supposing the debt to be twice its real amount, he can recover half of the amount so paid.[61]

XI. EFFECT OF FRAUD AND MISREPRESENTATION.

A. In General — 1. Of Debtor — a. Generally. The policy of the law demands the utmost good faith on the part of the debtor in effecting a composition; and any fraud, misrepresentation, concealment, or suppression practised by him with respect to any material fact will vitiate the composition and entitle a creditor injured thereby to treat it at his option as null and void, at any time within the statute of limitations.[62] The mere receipt of part or even of all of the benefit of the composition will not validate the transaction, for a composition

fault in the performance of the provisions of a deed of composition a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented. It was held that a creditor who had benefited by the realization of the assets and by his action had given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it.

58. Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Johnson *v.* Parker, 34 Wis. 596; Cleaveland *v.* Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. ed. 384; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]. See also *infra*, XV.

59. Jones *v.* Wright, 71 Ill. 61.

60. Pike *v.* Dickinson, L. R. 7 Ch. 61, 41 L. J. Ch. 171, 25 L. T. Rep. N. S. 579, 20 Wkly. Rep. 81 [*affirming* L. R. 12 Eq. 64].

61. Trecy *v.* Jefts, 149 Mass. 211, 21 N. E. 360.

62. *Connecticut.*— Huntington *v.* Clark, 39 Conn. 540.

Georgia.— Woodruff *v.* Saul, 70 Ga. 271.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Indiana.— Seving *v.* Gale, 28 Ind. 486.

Maryland.— Jackson *v.* Hodges, 24 Md. 468.

Massachusetts.— Cobb *v.* Togg, 166 Mass. 466, 44 N. E. 534.

Missouri.— Enneking *v.* Stahl, 9 Mo. App. 390.

New Hampshire.— Blodgett *v.* Webster, 24 N. H. 91; Pierce *v.* Wood, 23 N. H. 519; Browne *v.* Stackpole, 9 N. H. 478.

New York.— Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Smith *v.* Salomon, 7 Daly (N. Y.) 216; Baxter *v.* Hebberd, 5 N. Y. St. 854; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528; Irving *v.* Humphrey, 1 Hopk. Ch. (N. Y.) 284.

Pennsylvania.— Stuart *v.* Blum, 28 Pa. St. 225; Carter *v.* Connell, 1 Whart. (Pa.) 392.

Texas.—Grabenheimer *v.* Blum, 63 Tex. 369.

Vermont.— Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

United States.— Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545; Phettiplace *v.* Sayles, 4 Mason (U. S.) 312, 19 Fed. Cas. No. 11,083; Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

England.— Mallalieu *v.* Hodgson, 16 Q. B. 689, 15 Jur. 817, 20 L. J. Q. B. 339, 71 E. C. L. 689; Wood *v.* Barker, L. R. 1 Eq. 139, 11 Jur. N. S. 905, 35 L. J. Ch. 276, 13 L. T. Rep. N. S. 318, 14 Wkly. Rep. 47; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; Wenham *v.* Fowle, 3 Dowl. P. C. 43; Monger *v.* Kett, 12 Mod. 558; Vine *v.* Mitchell, 1 M. & Rob. 337; Cooling *v.* Noyes, 6 T. R. 263.

Canada.— Girard *v.* Hall, 1 L. C. L. J. 58.

And see Ga. Code (1895), § 2692; Forsyth Comp. 27; 4 So. L. Rev. 658; 17 Centr. L. J. 305; and 10 Cent. Dig. tit. "Compositions with Creditors," § 18 *et seq.*

What misrepresentations will avoid a composition.— A false representation that all will sign if one does, on the faith of which that one signs, will release him from the composition. Cooling *v.* Noyes, 6 T. R. 263. The concealment of the existence of a partnership is a fraud that will vitiate a composition by one partner. Carter *v.* Connell, 1 Whart. (Pa.) 392. Evidence that a partner, to induce a creditor to sign the composition agreement, had represented to him that the assets of the debtor firm would not pay more than

fraudulent in its inception can be validated only by the receipt of a new consideration, and the receipt of the composition money or securities is not such a consideration, nor will it constitute a waiver of the fraud.[63] A prior conveyance in fraud of creditors will invalidate a composition,[64] and the debtor will be compelled to make good his representations at the option of the creditors.[65]

b. Representations as to Affairs or Assets. Misrepresentation or suppression by the debtor of any material fact in stating the condition of his affairs, the amount of his property, his debts, etc., will avoid the composition;[66] and although

fifty cents on the dollar, that in fact a surplus remained after that payment, and that the partner confessed that he had secreted goods and kept two sets of books, one of which was afterward destroyed, is sufficient to raise the question for the jury as to whether or not the composition was procured by fraud. Smith *v.* Salomon, 7 Daly (N. Y.) 216.

What misrepresentations will not avoid a composition.— A misrepresentation as to the legal effect of a deed or as to a condition not inserted in the deed will not avoid the composition. Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679. See Smith *v.* Stone, 4 Gill & J. (Md.) 310. The mere fact that the debtor has made a previous assignment of property, which would be fraudulent as to creditors, if known to the creditor, or if not intended to mislead him, will not vitiate the composition. Phettiplace *v.* Sayles, 4 Mason (U. S.) 312, 19 Fed. Cas. No. 11,083. The fact that after a composition by a firm was effected one partner declared that the firm would make ten thousand dollars by the composition will make no difference as to its validity, if there was no misrepresentation or concealment of any material fact to induce signing. Renard *v.* Tuller, 4 Bosw. (N. Y.) 107. A composition will not be set aside in the absence of any proof of false representations or fraud except the omission of the debtor to inform his creditors that he had held the title to certain houses and lots, and had made a gift of them to another. Jackson *v.* Miner, 101 Ill. 550. Where a creditor is induced to join the composition by a representation that no person had received any other thing than the composition, the fact that a promissory note in excess of the composition rate was given to another creditor will not vitiate the composition, when that note has been adjudged void in an action thereon, since the creditor has suffered no injury. Bartlett *v.* Blaine, 83 Ill. 25, 25 Am. Rep. 346. A partial failure in the arrangement on the faith of which the creditors execute the deed will not avoid the composition. Matthewson *v.* Henderson, 15 U. C. C. P. 90. In Page *v.* Bent, 2 Metc. (Mass.) 371, it was held that when a defendant sets up the plaintiff's release of the demand in suit, and the plaintiff seeks to avoid the release on the ground that he was induced to make it by the misrepresentations of the defendant concerning his assets, etc., the burden of proof is on the plaintiff, and he must show that such misrepresentations were intentional, as unintentional misrepresentations in such a case will not render the release void.

63. Stuart *v.* Blum, 28 Pa. St. 225.

But a creditor who has accepted a note with surety for the composition cannot, after the payment of the note, repudiate the composition and sue for the balance of his debt, on the ground of a fraud of which he knew when he accepted payment of the note. Bower *v.* Metz, 54 Iowa 394, 6 N. W. 551.

64. Blodgett *v.* Webster, 24 N. H. 91; Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456; Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545. Unless the creditor knew of the fraudulent conveyance when he entered into the composition. Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

65. In Fraser *v.* Sutherland, 2 Grant Ch. (U. C.) 442, a debtor, in order to effect a composition with his creditors, offered them a mortgage on certain property, which property he represented as belonging to another person who desired to assist him. The creditors accepted the offer and took the mortgage, but afterward discovered that before it was executed the debtor had obtained a conveyance of the property to himself. It was held that under the circumstances the conveyance was subject to the mortgage.

66. *Georgia.*— Woodruff *v.* Saul, 70 Ga. 271; Ga. Code (1895), § 2692.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Indiana.— Seving *v.* Gale, 28 Ind. 486.

Maryland.— Jackson *v.* Hodges, 24 Md. 468.

Missouri.— Enneking *v.* Stahl, 9 Mo. App. 390.

New Hampshire.— Blodgett *v.* Webster, 24 N. H. 91.

New York.— Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

United States.— Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 18 *et seq.*

The concealment of assets is a fraud upon the creditors. Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545. If the debtor leaves the creditor under a false impression as to the extent of his estate the creditor can sue for the balance of his debt. Vine *v.* Mitchell, 1 M. & Rob. 337. In Wenham *v.* Fowle, 3 Dowl. P. C. 43,

he is not required to disclose his financial condition unless asked, so long as he does nothing to mislead, and the composition cannot be assailed solely on the ground of failure to make such disclosure,[67] yet, if the duty of making such disclosure is cast upon him by circumstances, he must make a full and fair statement or the composition will not be permitted to stand against objections.[68] But a mere statement of opinion as to his pecuniary condition and the state of his property at a time of financial distress is not such a misrepresentation as will invalidate a composition.[69]

c. Fraud of Agent of Debtor. The fraud or misrepresentations of the debtor's agent will avoid the composition equally with that of the debtor himself,[70] and the fraud of a partner will vitiate a composition by the firm.[71]

d. Creditor Must Be Misled. In order to avoid a composition on the ground of fraud or misrepresentation by the debtor it must appear that the creditor who assails it was misled thereby, and thereby induced to join in the agreement;[72] and fraud practised on other creditors will not invalidate the composition as to those not affected by it.[73] And if one compounds a debt with a full knowledge of all the facts, acting at arm's length upon his own judgment, he must abide the consequences. Neither fraud nor mistake can be imputed to such an agreement.[74]

e. Effect of Creditor's Fraud. The fact that the creditor who assails the

there was an express provision in the deed of composition that it should be void if the debtor should conceal any personal estate or should not convey to the trustees all his realty.

67. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143.

A composition with a firm cannot be assailed merely because the agent of the firm to effect the composition omitted to disclose the financial ability of one partner to pay the debts of the firm. Cleaveland *v.* Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. ed. 384.

68. Hefter *v.* Cahn, 73 Ill. 296; Seving *v.* Gale, 28 Ind. 486; Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545.

If the debtor furnishes a statement of his affairs as the basis of the composition he is answerable for its truth. Irving *v.* Humphrey, 1 Hopk. Ch. (N. Y.) 284.

When the debtor represents that he will have "some means" left after paying his creditors forty-five cents on the dollar, it is not to be presumed that such expression was understood by the creditors as meaning that the debtor would have more "means" by half than he was paying his creditors. Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

69. Denny *v.* Gilman, 26 Me. 149. In Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606, a statement made by the receiver of an insolvent firm to its creditors on the board of trade soon after he had taken charge of its affairs, in which he said that he found such affairs in great confusion, but gave his estimate of assets, liabilities, etc., and presented and urged the acceptance of the proposition for a settlement at fifty cents on the dollar, was held not to have been false or fraudulent so as to invalidate the settlement.

70. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Laird *v.* Campbell, 100 Pa. St. 159. See also 4 So. L. Rev. 661; 17 Centr. L. J. 305. A debtor is responsible for the false representations or concealments of his agent, although made innocently and without his knowledge, if he (the debtor) was aware of the real state of the facts at the time. Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

71. Smith *v.* Salomon, 7 Daly (N. Y.) 216. See also Baxter *v.* Hebberd, 5 N. Y. St. 854.

72. Nicolai *v.* Lyon, 8 Oreg. 56. To avoid a composition on the ground of fraud, it must appear that the creditors or their agent relied on the truth of the debtor's representations concerning the facts on which the composition was based, and that acceptance of the composition was induced by such reliance. Lichtenstein *v.* Loewnstein, 2 Tex. Unrep. Cas. 382.

73. Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]. See also Huntington *v.* Clark, 39 Conn. 540. When a creditor who has been defrauded into joining a composition sues for and recovers his full claim, that fact will not invalidate the composition as to others who are not affected by the fraud, merely because the equality between them is destroyed. Cheveront *v.* Textor, 53 Md. 295. In such event the composition is void as to the defrauded creditor, and the case stands as if he had never entered into it; and as the principle of equality applies only between those who enter a composition, it has no application to such facts. A finding by the jury that one creditor has been defrauded, in a suit brought by him, does not conclusively establish that others have been. Cheveront *v.* Textor, 53 Md. 295.

74. Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

composition has himself been guilty of fraudulent conduct toward other creditors will not prevent him from obtaining relief,[75] unless the fraud or misrepresentation of which he complains was connected with, or committed in, the perpetration of, the other fraud.[76]

f. Remedies of Creditor — (I) *In General.* A creditor who has been induced to enter into a composition by the fraud or misrepresentation of the debtor may at his option bring suit to set aside the agreement or release,[77] or may disregard the composition and sue directly for his original claim, or the balance of that claim over what he has received under the composition,[78] or may sue for damages for the fraud.[79] If he sues in equity, however, the court is not bound to vacate the release absolutely, but may subject the defendant to liability for the payment of his debts to the extent to which his property has not been applied to that object.[80]

(II) *Rescission and Restoration.*[81] When the transaction is a pure composition, the creditor may sue for the balance of his original claim, without formal rescission and without restoring or offering to restore what he has received under the composition, since his right of action is not for the fraud, but on the original

75. The setting down of a debt of forty-five thousand dollars as only twenty-five thousand dollars is a fraud upon other creditors only, and the creditor who is guilty thereof can avail himself of the debtor's fraud, and recover the balance due on his original claim over and above the composition. Huntington *v.* Clark, 39 Conn. 540. If a composition is induced by the false representations of the debtor, the fact that a creditor deceived thereby was fraudulently preferred will not debar him from suing for his original claim. Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57. And the debtor cannot recover the secret preference. Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545.

76. A creditor secretly preferred cannot avoid the composition on the ground that the debtor falsely represented that no one was preferred but himself, since that misrepresentation was made in the perpetration of a fraud. Mallalieu *v.* Hodgson, 16 Q. B. 689, 15 Jur. 817, 20 L. J. Q. B. 339, 71 E. C. L. 689.

77. *Maryland.*—Jackson *v.* Hodges, 24 Md. 468.

New York.— Smith *v.* Salomon, 7 Daly (N. Y.) 216; Baxter *v.* Hebberd, 5 N. Y. St. 854.

Vermont.— Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

United States.— Phettiplace *v.* Sayles, 4 Mason (U. S.) 312, 19 Fed. Cas. No. 11,083.

England.— Wood *v.* Barker, L. R. 1 Eq. 139, 11 Jur. N. S. 905, 35 L. J. Ch. 276, 13 L. T. Rep. N. S. 318, 14 Wkly. Rep. 47.

Canada.— Girard *v.* Hall, 1 L. C. L. J. 58.

See 10 Cent. Dig. tit. "Compositions with Creditors," §§ 22, 66.

Illustrations.— When the debtor has fraudulently concealed or misrepresented his assets, the property so withheld may be subjected to the claims of creditors in the suit to set aside the composition. Jackson *v.* Hodges, 24 Md. 468; Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545. The court may in the one proceeding, under proper prayers, decree the setting aside of the composition, the redelivery of the original evidences of indebtedness, and the payment of the original claim. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534.

78. *Connecticut.*— Huntington *v.* Clark, 39 Conn. 540.

Georgia.— Saul *v.* Buck, 72 Ga. 254; Woodruff *v.* Saul, 70 Ga. 271.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Indiana.— Seving *v.* Gale, 28 Ind. 486.

Massachusetts.— Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534.

Missouri.— Enneking *v.* Stahl, 9 Mo. App. 390.

New Hampshire.— Blodgett *v.* Webster, 24 N. H. 91.

New York.—Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Baxter *v.* Hebberd, 5 N. Y. St. 854.

Wisconsin.— Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

United States.— Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545; Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

England.— Vine *v.* Mitchell, 1 M. & Rob. 337; Cooling *v.* Noyes, 6 T. R. 263.

And see 4 So. L. Rev. 822; 8 Centr. L. J. 351; and 10 Cent. Dig. tit. "Compositions with Creditors," § 82 *et seq.*

A creditor who has delivered up the notes on which his claim against the debtor was founded may declare on them and recover the balance due. Stuart *v.* Blum, 28 Pa. St. 225.

79. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Grabenheimer *v.* Blum, 63 Tex. 369. And see 4 So. L. Rev. 835.

80. Irving *v.* Humphrey, 1 Hopk. Ch. (N. Y.) 284.

81. See, generally, CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

claim, revived by the failure of the composition because of the fraud.[82] If the transaction amounts to a compromise, however, the creditor cannot retain what he has received and sue for the rest as due upon account or contract; he may rescind and restore, and then sue for the original debt, but if he retains the sums paid under the composition he can sue only for damages for the fraud.[83] It seems also that when a third party compounds the creditor must rescind and restore before he can sue the original debtor for the debt.[84]

(III) *MEASURE OF DAMAGES.* When the creditor sues upon his original claim the measure of damages is of course the sum remaining unpaid;[85] but in an action based upon the fraud, the measure of damages is the amount that the creditor would have received if no fraud had been practised.[86] If the creditor sues for damages for the fraud only he cannot recover the original debt either on the ground of this or any other fraud; he is bound by the case he has alleged.[87]

(IV) *EVIDENCE.* In any form of action the statements of partners are evidence on the question of fraud,[88] which is for the jury, not for the court;[89] and when the creditor sues for damages for the fraud, any evidence which tends to show what he would have received on a fair application of the debtor's assets is admissible.[90] The evidence of one witness, if clear and uncontradicted, is sufficient to establish that misrepresentations were made.[91]

(V) *LIMITATION OF ACTIONS.* As in other cases of fraud, the statute of limitations will not begin to run until the discovery of the fraud, or until the time when it should have been discovered by the exercise of due diligence.[92]

2. OF CREDITORS. When one creditor, by fraud or false representations, induces another to enter into a composition, the latter cannot avoid the composition if the debtor be innocent, and the guilty creditor did not act as the debtor's agent; but the guilty creditor will be liable in damages to any one injured by his fraud, or will be held to make good his representations;[93] and

82. Enneking *v.* Stahl, 9 Mo. App. 390; Blodgett *v.* Webster, 24 N. H. 91; Pierce *v.* Wood, 23 N. H. 519. And see *infra*, XI, B, 3, a.

Where a creditor's signature to a composition agreement has been obtained by fraud on the part of the debtor, the creditor, upon the discovery of the fraud, although he has received under the composition the amount specified in full payment of his debt, may maintain an action upon the original cause of action for the unpaid balance, without first bringing an equitable action to set aside the composition agreement as fraudulent, and without having first restored or offered to restore the amount received under the composition. Smith *v.* Salomon, 7 Daly (N. Y.) 216.

The creditor may declare on the original notes delivered up under the composition, although they are no longer in his possession. Blodgett *v.* Webster, 24 N. H. 91. See *infra*, XI, B, 3, note 46.

83. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Grabenheimer *v.* Blum, 63 Tex. 369.

84. Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679.

85. Enneking *v.* Stahl, 9 Mo. App. 390; Blodgett *v.* Webster, 24 N. H. 91; Pierce *v.* Wood, 23 N. H. 519; Smith *v.* Salomon, 7 Daly (N. Y.) 216.

86. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Grabenheimer *v.* Blum, 63 Tex. 369; 4 So. L. Rev. 835. The damages depend on the debtor's ability to pay. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218. They cannot be reduced by deducting losses which the perpetrator of the fraud may have suffered incidentally as the result of an arrangement procured by his fraud. Grabenheimer *v.* Blum, 63 Tex. 369.

87. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218.

88. Baxter *v.* Hebberd, 5 N. Y. St. 854.

89. Smith *v.* Salomon, 7 Daly (N. Y.) 216.

90. The witnesses for the defense may be asked whether the debtor had property or assets sufficient to pay more than the amount of the composition. Whiteside *v.* Hyman, 10 Hun (N. Y.) 218.

To show that the defendant had other property than that applied to the claims of his creditors, the plaintiff may show, in connection with other evidence, that sixteen months after the composition the debtor bought a farm for three thousand one hundred dollars. Blodgett *v.* Webster, 24 N. H. 91.

91. Dolsen *v.* Arnold, 10 How. Pr. (N. Y.) 528.

92. Jackson *v.* Hodges, 24 Md. 468. See, generally, LIMITATIONS OF ACTIONS.

93. A creditor who states his claim as less than it really is or compounds for a part only, without informing the other creditors that he has withheld part, cannot recover the balance after the composition is effected.

Illinois.— Meyer *v.* McKee, 19 Ill. App. 109.

when a creditor represents to the debtor that he owns a certain debt[94] or that a debt apparently due to him is in reality due to a third party,[95] he must make good these representations. A composition deed will not prevent the debtor, in equity at least, from recovering the amount paid because of overcharges by a creditor in settling an account under the composition.[96]

B. Preferences — 1. Invalidity of Secret Preference — a. Good Faith and Equality Required. The policy of the law demands of those who enter into a composition that they shall exercise the utmost good faith toward each other;[97] and in the absence of an express stipulation to the contrary there is in every composition an implied agreement that the creditors who enter into it shall share alike, or on the terms and in the exact proportions stated in the composition itself, and that no one shall receive more than the others, without the assent of the others, or more than the latter have expressly assented to.[98]

b. Secret Preference Void and Unenforceable. Consequently a secret payment to one creditor of more than his due share under the composition, if a part of the composition with him, will not only render the composition void as to an innocent creditor,[99] but may be recovered back by the debtor or his assignees or trustees in bankruptcy or insolvency;[1] and any agreement with or promise to a creditor, made as a part of the composition transaction, and not disclosed to the other creditors, by which the former receives or expects to receive any advantage or benefit not conferred upon the others, is against public policy and void both at law and in equity, as a fraud upon them, and if executory cannot be enforced;[2]

Minnesota.— Noyes *v.* Chapman-Drake Co., 60 Minn. 88, 61 N. W. 901.

New Hampshire.— Perry *v.* Armstrong, 39 N. H. 583.

New York.—Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574.

England.— Britten *v.* Hughes, 5 Bing. 460, 7 L. J. C. P. O. S. 188, 3 M. & P. 79, 15 E. C. L. 671; Margetson *v.* Aitken, 3 C. & P. 338, 14 E. C. L. 597; Holmes *v.* Viner, 1 Esp. 131; Blackstone *v.* Wilson, 26 L. J. Exch. 229.

Canada.— Fowler *v.* Perrin, 16 U. C. C. P. 258.

See *supra*, VIII, C, 2, b.

When a creditor induces others to agree to a composition on the faith of false representations that he owns no other bills or that the bills for which he accepts the composition are the only bills of the debtor that he has, he cannot sue the debtor on others afterward, if this defense is properly pleaded and proved. Blackstone *v.* Wilson, 26 L. J. Exch. 229.

94. And if the debtor is obliged to pay the debt to the real owner, the creditor can claim in the composition only the difference between the composition rate on the debts he professed to own and the sum thus paid by the debtor. Farrington *v.* Hodgdon, 119 Mass. 453.

95. Blair *v.* Wait, 6 Hun (N. Y.) 477 [*affirmed* in 69 N. Y. 113].

96. Pike *v.* Dickinson, L. R. 7 Ch. 61, 41 L. J. Ch. 171, 25 L. T. Rep. N. S. 579, 20 Wkly. Rep. 81 [*affirming* L. R. 12 Eq. 64].

97. *California.*— Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. 214; Smith *v.* Owens, 21 Cal. 11.

Connecticut.— Huntington *v.* Clark, 39 Conn. 540.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Iowa.— Bower *v.* Metz, 54 Iowa 394, 6 N. W. 551.

Missouri.— O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 97 Am. Dec. 332.

New York.—Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Bradley, etc., Co. *v.* Lally, 2 Misc. (N. Y.) 285, 21 N. Y. Suppl. 1044, 51 N. Y. St. 152 [*affirmed* in 3 Misc. (N. Y.) 635, 22 N. Y. Suppl. 1131, 51 N. Y. St. 945].

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Vermont.— Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444.

United States.— Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324.

See Forsyth Comp. 3; 4 So. L. Rev. 642, 644, 663; 8 Centr. L. J. 350; and 10 Cent. Dig. tit. "Compositions with Creditors," § 23 *et seq.*

98. O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. 214; Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577; O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 97 Am. Dec. 332. And see 4 So. L. Rev. 661.

A composition implies a promise from each creditor to the others to accept the composition and refrain from all efforts to get more. Hall *v.* Merrill, 5 Bosw. (N. Y.) 266, 18 How. Pr. (N. Y.) 38.

99. See *infra*, XI, B, 3.

1. See *infra*, XI, B, 2.

2. *Alabama.*— Henry *v.* Murphy, 54 Ala. 246.

and if suit or action be brought thereon, the debtor or promisor may defend by setting up the illegality of the agreement or promise, in spite of the rule that

Connecticut.— Clement's Appeal, 49 Conn. 519, 52 Conn. 464; Baldwin *v.* Rosenman, 49 Conn. 105; Huntington *v.* Clark, 39 Conn. 540; Doughty *v.* Savage, 28 Conn. 146.

Georgia.— Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813.

Indiana.— Carey *v.* Hess, 112 Ind. 398, 14 N. E. 235.

Maine.— Merritt *v.* Bucknam, 90 Me. 146, 37 Atl. 885.

Massachusetts.— Brown *v.* Nealley, 161 Mass. 1, 36 N. E. 464; Frost *v.* Gage, 3 Allen (Mass.) 560, 6 Allen (Mass.) 50; Lothrop *v.* King, 8 Cush. (Mass.) 382; Ramsdell *v.* Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503.

Missouri.— Bannantine *v.* Cantwell, 27 Mo. App. 658; Bastian *v.* Dreyer, 7 Mo. App. 332.

New Hampshire.— Trumball *v.* Tilton, 21 N. H. 128.

New York.— Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519, 59 N. Y. St. 794, 40 Am. St. Rep. 607, 27 L. R. A. 33, 59 N. Y. St. 794 [*reversing* 66 Hun (N. Y.) 33, 20 N. Y. Suppl. 780, 49 N. Y. St. 432]; Meyer *v.* Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500, 16 N. Y. St. 380 [*reversing* 19 Abb. N. Cas. (N. Y.) 214]; Van Bokkelen *v.* Taylor, 62 N. Y. 105 [*reversing* 2 Hun (N. Y.) 138, 4 Thomps. & C. (N. Y.) 422]; Adams *v.* Outhouse, 45 N. Y. 318; Bliss *v.* Matteson, 45 N. Y. 22; Hanover Nat. Bank *v.* Blake, 60 Hun (N. Y.) 428, 14 N. Y. Suppl. 913, 39 N. Y. St. 335; Hadley Falls Nat. Bank *v.* May, 29 Hun (N. Y.) 404 [*affirmed* in 99 N. Y. 671]; Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Hughes *v.* Alexander, 5 Duer (N. Y.) 488; Bowns *v.* Stewart, 28 Misc. (N. Y.) 475, 59 N. Y. Suppl. 721 [*reversing* on another point 27 Misc. (N. Y.) 842, 58 N. Y. Suppl. 113].

North Carolina.— Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156.

Ohio.— Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545.

Pennsylvania.— Hamilton *v.* McClintock, 174 Pa. St. 28, 34 Atl. 302; Lee *v.* Sellers, 81 Pa. St. 473; Stuart *v.* Blum, 28 Pa. St. 225; Mann *v.* Darlington, 15 Pa. St. 310.

Texas.— Willis *v.* Morris, 63 Tex. 458, 51 Am. Rep. 655.

Vermont.— Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444; Richards *v.* Hunt, 6 Vt. 251, 27 Am. Dec. 545.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; *In re* Chapin, 115 Fed. 162; Fairbanks *v.* Amoskeag Nat. Bank, 38 Fed. 630; Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124; Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228; Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073; Bean *v.* Brookmire, 1 Dill. (U. S.) 151, 2 Fed. Cas. No. 1,169, 3 Chic. Leg. N. 378, 1 Leg. Op. 178, 5 West. Jur. 505, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324; Fenner *v.* Dickey, 1 Flipp. (U. S.) 34, 8 Fed. Cas. No. 4,729, 3 West. L. Month. 208; Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57.

England.— Mallalieu *v.* Hodgson, 16 Q. B. 689, 15 Jur. 817, 20 L. J. Q. B. 339, 71 E. C. L. 689; *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867; Wood *v.* Barker, L. R. 1 Eq. 139, 11 Jur. N. S. 905, 35 L. J. Ch. 276, 13 L. T. Rep. N. S. 318, 14 Wkly. Rep. 47; Howden *v.* Haigh, 11 A. & E. 1033, 9 L. J. Q. B. 198, 3 P. & D. 661, 39 E. C. L. 539; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; Pfleger *v.* Browne, 28 Beav. 391; Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 656; Clay *v.* Ray, 17 C. B. N. S. 188, 112 E. C. L. 188; *In re* Lenzberg, 7 Ch. D. 650, 47 L. J. Ch. 178, 26 Wkly. Rep. 258; Matter of Cross, 4 De G. & Sm. 364; Smith *v.* Bromley, Dougl. 670 note; Turner *v.* Hoole, D. & R. N. P. 27, 16 E. C. L. 418; Leicester *v.* Rose, 4 East 372, 1 Smith K. B. 41; Higgins *v.* Pitt, 4 Exch. 312, 18 L. J. Exch. 488; Geere *v.* Mare, 2 H. & C. 339, 33 L. J. Exch. 50, 8 L. T. Rep. N. S. 463, 12 Wkly. Rep. 17; Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633; Bradshaw *v.* Bradshaw, 9 M. & W. 29; Bryant *v.* Christie, 1 Stark. 329, 2 E. C. L. 129; Jackson *v.* Lomas, 4 T. R. 166; Child *v.* Danbridge, 2 Vern. 71; *Ex p.* Phillips, 36 Wkly. Rep. 567; *In re* Hoile, 12 Wkly. Rep. 1087; Coleman *v.* Waller, 3 Y. & J. 212.

Canada.— Howland *v.* Grant, 26 Can. Supreme Ct. 372; Clarke *v.* Ritchey, 11 Grant Ch. (U. C.) 499.

And see Forsyth Comp. 104; 4 So. L. Rev. 663; 17 Centr. L. J. 305; 8 Centr. L. J. 350; and 10 Cent. Dig. tit. "Compositions with Creditors," § 26 *et seq.*

It is not necessary that all the creditors should have joined in the composition; it is sufficient if any one is defrauded. Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41.

What will constitute a secret preference.— Any secret consideration or prospect of advantage moving one creditor which is purposely concealed from the others is a fraud upon them. Bastian *v.* Dreyer, 7 Mo. App. 332. An assignment of an insurance policy to a creditor in addition to his composition is fraudulent and void. Alsager *v.* Spaulding, 1 Arn. 181, 4 Bing. N. Cas. 407, 7 L. J. C. P. 225, 6 Scott 204, 33 E. C. L. 777.

forbids a party to allege his own fraud as a ground of relief, since the agreement itself is against public policy, and the parties are not regarded as *in pari delicto*.[3] A secret preference or advantage is void *a fortiori*, when it is made an express condition of the composition that no creditor shall receive more than the specified rate or amount.[4]

c. Source of Preference Immaterial. It makes no difference in what the advantage consists,[5] whence it comes, or who gives it; and the result will be the same, although it be given by a third party with no direct interest in the debtor's business,[6] and *a fortiori* if given by the debtor's agent.[7]

d. Invalidity Not Affected by Circumstances. The fraud of the creditor is the vital point,[8] and consequently the operation of the above rules will not be affected by the fact that the secret preference does not affect the debtor's assets,[9]

If on a composition one creditor who signs the deed stipulates that the debtor shall keep up a policy on his life for the ultimate payment of the balance such agreement is void unless the other creditors assent. Pfleger *v.* Browne, 28 Beav. 391. The payment of fifty per cent in cash at once instead of seventy per cent on time is a fraudulent preference if done secretly, and the payment so embarrasses the debtor that he cannot meet the payments to other creditors as they mature. Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228. A promise to pay the agent of the creditor for urging others to accept the composition is void. Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124.

3. *Indiana.*— Morrison *v.* Schlesinger, 10 Ind. App. 665, 38 N. E. 493.

Massachusetts.— Brown *v.* Nealley, 161 Mass. 1, 36 N. E. 464; Frost *v.* Gage, 3 Allen (Mass.) 560, 6 Allen (Mass.) 50.

Minnesota.— Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577.

Missouri.— O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 97 Am. Dec. 332.

New York.— Carroll *v.* Shields, 4 E. D. Smith (N. Y.) 466.

Pennsylvania.— Lee *v.* Sellers, 81 Pa. St. 473; Mann *v.* Darlington, 15 Pa. St. 310.

England.— Higgins *v.* Pitt, 4 Exch. 312, 18 L. J. Exch. 488.

Contra, Moses *v.* Katzenberger, 1 Handy (Ohio) 46, 12 Ohio Dec. (Reprint) 19.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 23 *et seq.*

4. Crandall *v.* Cochran, 3 Thomps. & C. (N. Y.) 203.

5. Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228.

6. *Illinois.*— Hefter *v.* Cahn, 73 Ill. 296. But see Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600].

Missouri.— Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

New York.— Solinger *v.* Earle, 82 N. Y. 393, 60 How. Pr. (N. Y.) 116 [*affirming* 45 N. Y. Super. Ct. 80, 604]; Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 524, 62 N. Y. St. 404; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Hughes *v.* Alexander, 5 Duer (N. Y.) 488; Martin *v.* Adams, 14 N. Y. Suppl. 626, 38 N. Y. St. 397.

Ohio.— Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545.

Pennsylvania.— Patterson *v.* Boehm, 4 Pa. St. 507.

England.— *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679; Bradshaw *v.* Bradshaw, 9 M. & W. 29; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229; Coleman *v.* Waller, 3 Y. & J. 212.

Canada.— Brigham *v.* La Banque Jacques-Cartier, 30 Can. Supreme Ct. 429.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 26 *et seq.*

7. Luehrmann *v.* St. Louis Furniture Co., 21 Mo. App. 499; Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

8. Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

9. For example, when the preference is given by a third party.

California.— Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.

Georgia.— Woodruff *v.* Saul, 70 Ga. 271.

Massachusetts.— Frost *v.* Gage, 3 Allen (Mass.) 560.

New York.— Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519, 59 N. Y. St. 794, 40 Am. St. Rep. 607, 27 L. R. A. 33 [*reversing* on another point 66 Hun (N. Y.) 33, 20 N. Y. Suppl. 780, 49 N. Y. St. 432].

Ohio.— Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545.

England.— Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 488; Leicester *v.* Rose, 4 East 372, 1 Smith K. B. 41.

See Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444; and *contra,* Feize *v.* Randall, 1 Esp. 224, 6 T. R. 146.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 31.

Especially when the debtor knows of the

or deprive the other creditors of any portion of the amount they have agreed to receive,[10] that no actual benefit accrues to the preferred creditor,[11] that the preferred creditor is surety for the composition,[12] indorses the composition notes,[13] or surrenders as part of the consideration for the preference securities held for the original debt,[14] that the creditor would not have signed without the preference,[15] or that he signs after the creditor who attacks the composition or even last of all.[16] The fact that the composition is not effected will not validate a fraudulent preference,[17] and the number of persons actually deceived cuts no figure in determining its validity or invalidity.[18]

e. Invalidity of Security Given For Secret Preference. Authorities are not wanting in support of the doctrine that a promissory note, bill, check, draft,[19]

preference does the rule apply. Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867.

The rule does not rest upon participation by the debtor.— Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.

10. Breck *v.* Cole, 4 Sandf. (N. Y.) 79. It makes no difference that the preference is not paid out of the proceeds of the property assigned. Ramsdell *v.* Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503. But see Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600]; Frost *v.* Gage, 3 Allen (Mass.) 560, 563, and quotation therefrom in note 60, *infra*.

11. Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523, 62 N. Y. St. 404. For example, when the fraudulent preference is not enforced and no attempt even is made to enforce it (Howden *v.* Haigh, 11 A. & E. 1033, 9 L. J. Q. B. 198, 3 P. & D. 661, 39 E. C. L. 539) or where the promise is made to the debtor's agent (Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124). A payment or promise to the creditor's agent which is paid or turned over by the agent to the creditor is *a fortiori* fraudulent and void. Harvey *v.* Hunt, 119 Mass. 279.

12. Wood *v.* Barker, L. R. 1 Eq. 139, 11 Jur. N. S. 905, 35 L. J. Ch. 276, 13 L. T. Rep. N. S. 318, 14 Wkly. Rep. 47.

13. Baldwin *v.* Rosenman, 49 Conn. 105.

14. Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239.

15. Townsend *v.* Newell, 22 How. Pr. (N. Y.) 164.

16. McFarland *v.* Garber, 10 Ind. 151; Pinneo *v.* Higgins, 12 Abb. Pr. (N. Y.) 334; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14; Patterson *v.* Boehm, 4 Pa. St. 507; *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867; Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 656; Jackson *v.* Lomar, 4 T. R. 166. *Contra*, Smith *v.* Stone, 4 Gill & J. (Md.) 310; Page *v.* Carter, 16 N. H. 254, 42 Am. Dec. 726. And see Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600].

Especially when the debtor knows of the preference. *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867.

17. Wells *v.* Girling, 1 B. & B. 447, 4 Moore C. P. 78, 5 E. C. L. 733.

18. Harvey *v.* Hunt, 119 Mass. 279.

19. **Bills and notes.**— A promissory note for twice the amount actually due, to enable the creditor to get a larger composition, is void as between the parties. Sternburg *v.* Bowman, 103 Mass. 325. A note given by an insolvent to one of his creditors, who was also one of the inspectors of his estate, as a condition of his assent to a composition, is void, and no action can be maintained thereon. Cartier *v.* Genser, 21 Quebec Super. Ct. 139. A promise made by the debtor's father to pay the debt in full if the creditor will sign is not binding, and a note given for the balance of the debt in pursuance of such a promise is void. Clement's Appeal, 49 Conn. 519, 52 Conn. 464. A note given for a secret preference is void, although given to a third party who pays the amount to the creditor, if the third party knew of the circumstances under which the note was given. Winn *v.* Thomas, 55 N. H. 294. A promise to pay the agent of a creditor an additional amount is invalid, and a note given for such an amount under a threat to defeat the composition is void in the hands of the payee and cannot be recovered on. Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124. The fact that all have not signed the composition agreement as required by its terms or that the debtor has defaulted in performance, will not validate a note given for a secret preference, if the default is waived and the composition actually carried out. Harvey *v.* Hunt, 119 Mass. 279. When the debtor gives notes to one creditor for the balance of his debt, to become due before any of the composition notes, the former will be void as between the parties, whether given before or after the composition is performed. Way *v.* Langley, 15 Ohio St. 392; Langley *v.* Van Allen, 3 Ont. L. Rep. 5. In Mare *v.* Warner, 3 Giff. 100, 7 Jur. N. S. 1228, 4 L. T. Rep. N. S. 351, a bankrupt trader compounded with his creditors for four shillings in the pound, giving to one as security his I O U for the whole debt to induce him to concur in annulling the bankruptcy. Subsequently, as consideration for a loan, he exchanged the

bond,[20] guaranty,[21] or any other security or obligation[22] given to a creditor by the debtor or by a third person on his behalf, with the object of securing to the recipient a secret advantage over other creditors, is void, both at law and in equity, in the hands of the payee or of one who is not a *bona fide*[23] holder for value, and cannot be enforced by either;[24] and a court of equity, in a proper pro-

I O U for bills which he accepted. In an action by the debtor to set aside the bills, the court declared them to be invalid and ordered them to be delivered up but without costs. To the same effect is Mare *v.* Earle, 3 Giff. 108, 7 Jur. N. S. 1230, 4 L. T. Rep. N. S. 352. In Wells *v.* Girling, 1 B. & B. 447, 4 Moore C. P. 78, 5 E. C. L. 733, the debtor gave a creditor a promissory note for the amount due, signed by himself and another, in consideration that the creditor would induce the other creditors to assent to the composition. The creditor failed to secure the composition and it was held that the agreement was void and that he could not recover on the note. In Harvey *v.* Hunt, 119 Mass. 279, in an action upon a promissory note by the payee against the maker, there was evidence that before the making of the note the plaintiff agreed to take thirty-five per cent of his debt and sign a composition deed; that he afterward deposited his claim with an attorney to whom the defendant, induced by fear of an attachment of his property, paid a part of the whole claim in cash, and the rest by the note in suit; and that the plaintiff subsequently signed a composition deed, by which the creditors agreed to take thirty-five per cent of their claims, which was signed by "substantially all" the creditors, and was to be void unless the composition was paid within seven days after the date of the deed. The plaintiff's signature to the deed was affixed after the expiration of the seven days and his signature preceded those of a majority of the creditors who signed. The trial judge instructed the jury that if, after the plaintiff agreed to sign with other creditors of the defendant the deed of composition, the plaintiff's attorney, by threats of an attachment, collected of the defendant in cash a sum equal to or larger than the sum agreed in the deed to be taken in discharge, and obtained the note declared on and delivered it to the plaintiff, who in consideration that he had thus received the full amount of his debt, affixed his signature to the deed, the jury would be warranted in finding that the note was without consideration; but that if there was no relation between the plaintiff's signing the deed and the giving the note, and if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration. It was held that this instruction was correct; that the evidence justified the jury in finding that the note was signed upon the understanding that the deed should be signed, and that the validity of the consideration was to be tested by the object with which the contract was entered into and not by the number of persons actually deceived by the plaintiff's signature.

20. Bonds.— A bond given without the knowledge of the other creditors to secure the payment to one creditor of more than his share under the composition is void and cannot be enforced. McFarland *v.* Garber, 10 Ind. 151; Lee *v.* Sellers, 81 Pa. St. 473; Cecil *v.* Plaistow, 1 Anstr. 202; Spurret *v.* Spiller, 1 Atk. 105, 26 Eng. Reprint 69; Eastbrook *v.* Scott, 3 Ves. Jr. 456. And a judgment entered on a warrant of attorney contained in such a bond is equally void and unenforceable. Loucheim's Appeal, 67 Pa. St. 49.

21. Guarantee and surety.— A guarantee to one creditor only of his share of the composition or of any additional sum will not bind the guarantor. Clement's Appeal, 49 Conn. 519, 52 Conn. 464; Morrison *v.* Schlesinger, 10 Ind. App. 665, 38 N. E. 493; Bannantine *v.* Cantwell, 27 Mo. App. 658; Clay *v.* Ray, 17 C. B. N. S. 188, 112 E. C. L. 188; Coleman *v.* Waller, 3 Y. & J. 212. A secret guarantee of a debt, providing for future credit, is invalid even as to future indebtedness. Morrison *v.* Schlesinger, 10 Ind. App. 665, 38 N. E. 493.

22. Other securities.— The same rules apply to a check (Bradshaw *v.* Bradshaw, 9 M. & W. 29), a mortgage (Feldman *v.* Gamble, 26 N. J. Eq. 494), and a judgment note (Gibbon *v.* Bellas, 2 Phila. (Pa.) 390, 14 Leg. Int. (Pa.) 327).

23. Who is not a bona fide holder.— One who takes such a negotiable security after maturity is not a *bona fide* holder. Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423; Carroll *v.* Shields, 4 E. D. Smith (N. Y.) 466; Ray *v.* Brown, 7 Ohio Dec. (Reprint) 494, 3 Cinc. L. Bul. 545. Nor is one who takes it for a precedent debt. Lawrence *v.* Clark, 36 N. Y. 128.

24. *California.*— Smith *v.* Owens, 21 Cal. 11.

Connecticut.— Clement's Appeal, 49 Conn. 519, 52 Conn. 464; Doughty *v.* Savage, 28 Conn. 146.

Delaware.— Macaltioner *v.* Croasdale, 3 Houst. (Del.) 365.

Georgia.— Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813.

Illinois.— Bartlett *v.* Blaine, 83 Ill. 25, 25 Am. Rep. 346; Hefter *v.* Cahn, 73 Ill. 296; Woodman *v.* Stow, 11 Ill. App. 613.

Indiana.— Morrison *v.* Schlesinger, 10 Ind. App. 665, 38 N. E. 493.

Kansas.— Rothschild *v.* Cozad, 10 Kan. App. 447, 62 Pac. 6.

Kentucky.— Montgomery *v.* Lampton, 3 Metc. (Ky.) 519; Goodwin *v.* Blake, 3 T. B. Mon. (Ky.) 106, 16 Am. Dec. 87.

ceeding, will order such a security (unless held by a *bona fide* purchaser for value) to be set aside, canceled, or delivered up to the maker,[25] or will enjoin the

Louisiana.— Weaver *v.* Waterman, 18 La. Ann. 241.

Massachusetts.— Walker *v.* Mayo, 143 Mass. 42, 8 N. E. 873; Huckins *v.* Hunt, 138 Mass. 366; Fay *v.* Fay, 121 Mass. 561; Harvey *v.* Hunt, 119 Mass. 279; Sternburg *v.* Bowman, 103 Mass. 325; Howe *v.* Litchfield, 3 Allen (Mass.) 443; Case *v.* Gerrish, 15 Pick. (Mass.) 49.

Michigan.— Tinker *v.* Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.

Minnesota.— Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Minneapolis First Nat. Bank *v.* Steele, 58 Minn. 126, 59 N. W. 959; Newell *v.* Higgins, 55 Minn. 82, 56 N. W. 577.

Missouri.— O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 97 Am. Dec. 332; Bastian *v.* Dreyer, 7 Mo. App. 332.

Nebraska.— Freiberg *v.* Treitschke, 36 Nebr. 880, 55 N. W. 273.

New Hampshire.—Grant *v.* Porter, 63 N. H. 229; Winn *v.* Thomas, 55 N. H. 294; Browne *v.* Stackpole, 9 N. H. 478.

New Jersey.—Crossley *v.* Moore, 40 N. J. L. 27; Feldman *v.* Gamble, 26 N. J. Eq. 494.

New York.— Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519, 59 N. Y. St. 794, 40 Am. St. Rep. 607, 27 L. R. A. 33 [*reversing* 66 Hun (N. Y.) 33, 20 N. Y. Suppl. 780, 49 N. Y. St. 432]; White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Solinger *v.* Earle, 82 N. Y. 393, 60 How. Pr. (N. Y.) 116 [*affirming* 45 N. Y. Super. Ct. 80, 604]; Lawrence *v.* Clark, 36 N. Y. 128; Hanover Nat. Bank *v.* Blake, 60 Hun (N. Y.) 428, 14 N. Y. Suppl. 913, 39 N. Y. St. 335; Williams *v.* Schreiber, 14 Hun (N. Y.) 38; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Crandall *v.* Cochran, 3 Thomps. & C. (N. Y.) 203; Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423; Eldridge *v.* Strenz, 34 N. Y. Super. Ct. 491 [*affirmed* in 65 N. Y. 556]; Breck *v.* Cole, 4 Sandf. (N. Y.) 79; Gilmour *v.* Thompson, 6 Daly (N. Y.) 95, 49 How. Pr. (N. Y.) 198; Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41; Carroll *v.* Shields, 4 E. D. Smith (N. Y.) 466; Bradley, etc., Co. *v.* Lally, 2 Misc. (N. Y.) 285, 21 N. Y. Suppl. 1044, 51 N. Y. St. 152 [*affirmed* in 3 Misc. (N. Y.) 635, 22 N. Y. Suppl. 1131, 51 N. Y. St. 945]; Smith *v.* Zeigler, 17 N. Y. Suppl. 338, 44 N. Y. St. 50; Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482; Pinneo *v.* Higgins, 12 Abb. Pr. (N. Y.) 334; Townsend *v.* Newell, 22 How. Pr. (N. Y.) 164; Higgins *v.* Mayer, 10 How. Pr. (N. Y.) 363; Russell *v.* Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574.

Ohio.— Way *v.* Langley, 15 Ohio St. 392; Moses *v.* Katzenberger, 1 Handy (Ohio) 46, 12 Ohio Dec. (Reprint) 19; Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239.

Pennsylvania.— Lee *v.* Sellers, 81 Pa. St. 473; Loucheim's Appeal, 67 Pa. St. 49; Stuart *v.* Blum, 28 Pa. St. 225; Patterson *v.* Boehm, 4 Pa. St. 507; Callahan *v.* Ackley, 9 Phila. (Pa.) 99, 30 Leg. Int. (Pa.) 12.

Texas.— Willis *v.* Morris, 63 Tex. 458, 51 Am. Rep. 655.

Vermont.— Wheeler *v.* Wheeler, 11 Vt. 60.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

United States.— Bullene *v.* Blain, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124.

England.— Howden *v.* Haigh, 11 A. & E. 1033, 9 L. J. Q. B. 198, 3 P. & D. 661, 39 E. C. L. 539; Fawcett *v.* Gee, 3 Anstr. 910; Cecil *v.* Plaistow, 1 Anstr. 202; Alsager *v.* Spalding, 1 Arn. 181, 4 Bing. N. Cas. 407, 7 L. J. C. P. 225, 6 Scott 204, 33 E. C. L. 777; Spurret *v.* Spiller, 1 Atk. 105, 26 Eng. Reprint 69; Wells *v.* Girling, 1 B. & B. 447, 4 Moore C. P. 78, 5 E. C. L. 733; Cullingworth *v.* Loyd, 2 Beav. 385, 4 Jur. 284, 9 L. J. Ch. 218, 17 Eng. Ch. 385; Clay *v.* Ray, 17 C. B. N. S. 188, 112 E. C. L. 188; *In re* Lenzberg, 7 Ch. D. 650, 47 L. J. Ch. 178, 26 Wkly. Rep. 258; Constantein *v.* Blachc, 1 Cox Ch. 287; Higgins *v.* Pitt, 4 Exch. 312, 18 L. J. Exch. 488; Mare *v.* Warner, 3 Giff. 100, 7 Jur. N. S. 1228, 4 L. T. Rep. N. S. 351; Mare *v.* Sandford, 1 Giff. 288; Smith *v.* Cuff, 6 M. & S. 160; Horton *v.* Riley, 13 L. J. Exch. 81, 11 M. & W. 492; Bradshaw *v.* Bradshaw, 9 M. & W. 29; Middleton *v.* Onslow, 1 P. Wms. 768, 24 Eng. Reprint 605; Cockshott *v.* Bennett, 2 T. R. 763, 1 Rev. Rep. 617; *Ex p.* Sadler, 15 Ves. Jr. 52, 10 Rev. Rep. 18; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229; Eastabrook *v.* Scott, 3 Ves. Jr. 456. *Contra*, Feize *v.* Randall, 1 Esp. 224, 6 T. R. 146.

Canada.— Brigham *v.* La Banque Jacques-Cartier, 30 Can. Supreme Ct. 429; Sinclair *v.* Henderson, 9 L. C. Jur. 306; Samuel *v.* Fairgrieve, 21 Ont. App. 418 [*reversing* 24 Ont. 486, but *reversed* on another point in Craig *v.* Samuel, 24 Can. Supreme Ct. 278]; Langley *v.* Van Allen, 3 Ont. L. Rep. 5 [*affirming* 32 Ont. 216].

And see Forsyth Comp. 104; 4 So. L. Rev. 827; 17 Centr. L. J. 306; and 10 Cent. Dig. tit. "Compositions with Creditors," §§ 23 *et seq.*, 27 *et seq.*

A creditor cannot recover from the surety on a note given as a secret preference. Weaver *v.* Waterman, 18 La. Ann. 241.

25. Cheveront *v.* Textor, 53 Md. 295; Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Moses *v.* Katzenberger, 1 Handy (Ohio) 46, 12 Ohio Dec. (Reprint) 19; Wood *v.* Barker, L. R. 1 Eq. 139, 11 Jur. N. S. 905, 35 L. J. Ch. 276, 13 L. T. Rep. N. S. 318, 14 Wkly. Rep. 47; Fawcett *v.* Gee, 3 Anstr. 910; Spurret *v.* Spiller, 1 Atk. 105, 26 Eng. Reprint 69; Mare *v.* Earle, 3 Giff. 108, 7 Jur. N. S. 1230, 4 L. T. Rep. N. S. 352; Mare *v.* Warner, 3 Giff. 100, 7 Jur. N. S. 1228, 4 L. T. Rep. N. S.

holder (unless a *bona fide* purchaser for value) from proceeding thereon.[26] A non-negotiable security will be equally void and unenforceable, even in the hands of a *bona fide* purchaser for value.[27] But a *bona fide* holder for value may enforce a negotiable security, even though it be given as a secret preference.[28] Parol evidence is admissible to show that a note or other security was given secretly and fraudulently.[29]

2. Recovery of Secret Preference — a. When Recoverable — (i) *By Debtor* — (a) *Amount Paid Creditor.* The debtor may recover from the creditor, by bill in equity, or without a formal rescission, by action at law for money paid, any sum that the creditor has received from him by way of secret preference, if the payment was such as the law regards as involuntary,[30] and may also recover the proceeds of such a fraudulent preference, if other than money.[31]

(b) *Amount Paid Holder of Negotiable Security.* If a note or other negotiable security given as a secret preference is enforced by a *bona fide* holder, the debtor may recover from the creditor to whom the security was given, in an action for money had and paid out to the use of the latter, the amount which he has been compelled to pay upon it;[32] and when a secret preference is given a creditor by a third party, and the composition bills or notes are negotiated and the debtor is compelled to pay them, he can recover from the creditor the amount received by him in excess of the composition.[33]

(ii) *By Assignees or Trustees.* A payment by way of secret preference or the proceeds of a secret preference given otherwise than in money may

351; Mare *v.* Sandford, 1 Giff. 288; Middleton *v.* Onslow, 1 P. Wms. 768, 24 Eng. Reprint 605; Eastabrook *v.* Scott, 3 Ves. Jr. 456.

Contra, Moses *v.* Katzenberger, 1 Handy (Ohio) 46, 12 Ohio Dec. (Reprint) 19.

Extent and limits of rule.— The guarantor of the composition can sue to set aside his guarantee (Pendlebury *v.* Walker, 4 Y. & C. Exch. 424), and a bond given by the debtor's son to secure the balance of the debt was ordered to be delivered up to the maker, with costs (Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229). But when the debtor has been guilty of a breach of trust the security will not be set aside at his instance. Small *v.* Brackley, 2 Vern. 602.

26. Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Fawcett *v.* Gee, 3 Anstr. 910; Cecil *v.* Plaistow, 1 Anstr. 202; Spurret *v.* Spiller, 1 Atk. 105, 26 Eng. Reprint 69; Constantein *v.* Blache, 1 Cox Ch. 287; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229.

Execution of a judgment obtained on a warrant of attorney in a note or bond given as a fraudulent preference may be enjoined. Gibbon *v.* Bellas, 2 Phila. (Pa.) 390, 14 Leg. Int. (Pa.) 327; Cecil *v.* Plaistow, 1 Anstr. 202. See Blodget *v.* Hogan, 10 La. Ann. 18.

27. Gibbon *v.* Bellas, 2 Phila. (Pa.) 390, 14 Leg. Int. (Pa.) 327.

28. Lawrence *v.* Clark, 36 N. Y. 128; Hagaman *v.* Burr, 41 N. Y. Super. Ct. 423; Gilmour *v.* Thompson, 6 Daly (N. Y.) 95, 49 How. Pr. (N. Y.) 198.

29. Ramsdell *v.* Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503.

30. Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813; Solinger *v.* Earle, 82 N. Y. 393, 60 How. Pr. (N. Y.) 116 [*affirming* 45 N. Y. Super. Ct. 80, 604]; *In re* Chaplin, 115 Fed. 162; Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418. 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324; Clarke *v.* Shee, Cowp. 197, Dougl. 672, note *b*: Smith *v.* Bromley, Dougl. 670 note; Higgins *v.* Pitt, 4 Exch. 312, 18 L. J. Exch. 488; Atkinson *v.* Denby, 7 H. & N. 934, 8 Jur. N. S. 1012, 31 L. J. Exch. 362, 7 L. T. Rep. N. S. 93, 10 Wkly. Rep. 389 [*affirming* 6 H. & N. 778, 7 Jur. N. S. 1205, 30 L. J. Exch. 361, 4 L. T. Rep. N. S. 252, 9 Wkly. Rep. 539]; Bradshaw *v.* Bradshaw, 9 M. & W. 29. And see Forsyth Comp. 109; 4 So. L. Rev. 824; 17 Centr. L. J. 306; 8 Centr. L. J. 350; 22 Sol. J. & Rep. 506.

When by mistake the debtor pays the whole amount of the debt in a fifty per cent composition, supposing that the debt was twice its actual amount, he can recover the excess paid over the composition. Trecy *v.* Jefts, 149 Mass. 211, 21 N. E. 360.

31. For example, moneys received on an insurance policy (Alsager *v.* Spalding, 1 Arn. 181, 4 Bing. N. Cas. 407, 7 L. J. C. P. 225, 6 Scott 204, 33 E. C. L. 777; *In re* Lenzberg, 7 Ch. D. 650, 47 L. J. Ch. 178, 26 Wkly. Rep. 258) and the proceeds of bills collected by the creditor (Turner *v.* Hoole, D. & R. N. P. 27, 16 E. C. L. 418).

32. Gilmour *v.* Thompson, 6 Daly (N. Y.) 95, 49 How. Pr. (N. Y.) 198; Stock *v.* Manson, 1 B. & P. 286; Horton *v.* Riley, 13 L. J. Exch. 81, 11 M. & W. 492; Smith *v.* Cuff, 6 M. & S. 160; Manson *v.* Stock, 6 Ves. Jr. 300. And see Forsyth Comp. 109.

33. Bradshaw *v.* Bradshaw, 9 M. & W. 29.

be recovered by the debtor's assignees or trustees in bankruptcy or insolvency, either at law or in equity.[34]

(III) *BY CREDITORS.* It has been said that the other creditors may by bill in equity on the principle of following a trust fund recover from a creditor fraudulently preferred whatever he has received from the debtor by way of secret preference.[35] But this rule can apply only where the fund can be traced, and in those jurisdictions only where the assets of a debtor are regarded as a trust fund for his creditors, unless perhaps also where the debtor has proposed to assign all his property in trust for his creditors.[36]

b. When Not Recoverable — (I) *BY DEBTOR OR HIS ASSIGNEES, ETC.* Neither the debtor nor his assignees or trustees can recover a secret preference, if it was given voluntarily,[37] if the composition was procured by fraud or by

34. Fairbanks *v.* Amoskeag Nat. Bank, 38 Fed. 630; Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 12 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Rep. 228; Bean *v.* Brookmire, 1 Dill. (U. S.) 151, 2 Fed. Cas. No. 1,169, 3 Chic. Leg. N. 378, 1 Leg. Opin. (Pa.) 178, 5 West. Jur. 505, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324. In Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228, a partner compounded with the firm creditors, calling them "his" creditors, and signed the composition notes with the firm names. The creditors regarded the firm as dissolved, and its assets as placed in the partner's hands for settlement. The partner paid out firm funds in fraud of the firm creditors and was afterward declared a bankrupt. It was held that his assignees in bankruptcy could recover in the interest of the firm creditors the sums so paid in fraud of their rights.

The facts that the composition deed was not to be binding unless all should sign — and all did not sign, and that the creditor's agent was authorized to sign only after all the others had signed, will not prevent a recovery by the debtor's assignees from the creditor of a fraudulent preference. Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 12 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Reg. 228.

The debtor's assignees in bankruptcy may recover moneys received by a creditor on an insurance policy assigned to him as a secret advantage, although the composition has not been paid. Alsager *v.* Spalding, 1 Arn. 181, 4 Bing. N. Cas. 407, 7 L. J. C. P. 225, 6 Scott 204, 33 E. C. L. 777.

35. Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324.

36. In Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273, upon the invitation of a debtor in embarrassed circumstances, his creditors met and entered into an agreement between themselves and the debtor to extend their demands upon the promise by the latter that they should be paid in four instalments, and upon condition that the debtor should incur no new indebtedness pending the extension, and if such new indebtedness should be incurred, then all the claims so extended should become due and collectable. Upon the happening of the contingency provided for in the agreement, by the contracting of new indebtedness by the debtor, some of the assenting creditors took from the debtor payment of their claims by a conveyance of his property. It was held that the property so conveyed was not, in the hands of the creditors to whom it was conveyed, a trust fund for the equal benefit of all the creditors, and that such creditors did not become by implication trustees in possession of the property so conveyed to them, for the benefit of all the assenting creditors. See also Montgomery Bank *v.* Ohio Buggy Co., 100 Ala. 626, 13 So. 621.

37. Crossley *v.* Moore, 40 N. J. L. 27. But in *In re* Chaplin, 115 Fed. 162, it was held that a trustee in bankruptcy could recover a secret preference, although voluntary.

Rule illustrated.— When a payment over the amount of the composition is made after the composition is paid and a release given it cannot be recovered back or counterclaimed, although made in pursuance of a prior secret promise. Smith *v.* Zeigler, 17 N. Y. Suppl. 338, 44 N. Y. St. 50. A payment of a bill given for a secret preference after it has been dishonored is voluntary, and cannot be recovered. Wilson *v.* Ray, 10 A. & E. 82, 3 Jur. 384, 8 L. J. Q. B. 224, 2 P. & D. 253, 37 E. C. L. 67. In Langley *v.* Van Allen, 3 Ont. L. Rep. 5 [*affirming* 32 Ont. 216] the defendant, on entering into an extension agreement with other creditors, took from the debtor, without the knowledge of the other creditors, notes at short dates for a large portion of his claim in favor of his nominee. These notes were paid at maturity and shortly after the debtor made an assignment for the benefit of his creditors, the general extension payments not having been met. It was held that the payments on the short notes were voluntary, and that the other parties to the extension agreement, suing in their own names and in the name of an assignee under an order, could not recover them from the defendant.

false representations,[38] or if the debtor has not performed the requirements of the composition.[39]

(II) *By Third Parties.* A third party who gives a note for a secret preference to induce a composition and is compelled to pay its amount to a *bona fide* holder cannot recover from the creditor, although the transaction is fraudulent, as he is a mere volunteer;[40] and a guarantor of a debt, who has paid a creditor the difference between the composition and the debt to induce the composition, and then has drawn a bill on the debtor to reimburse himself, cannot recover on the bill, although the debtor may have accepted it.[41]

3. Rights of Innocent Creditors — a. Recovery on Original Debt. A fraudulent preference of one creditor renders the composition null and void as to all innocent creditors, and they may sue for and recover their original claims or the balance of those claims over what they may have received under the composition,[42]

38. 4 So. L. Rev. 826. When the debtor sues to recover a fraudulent preference, it is a good defense that the composition was obtained by misrepresentation and that the debtor concealed a valuable portion of his assets. Armstrong *v.* Mechanics' Nat. Bank, 6 Biss. (U. S.) 520, 1 Fed. Cas. No. 545.

39. Ward *v.* Bird, 5 C. & P. 229, 24 E. C. L. 539, holding that when an assenting creditor is paid in full after he has executed the deed of composition the debtor cannot recover without proof of payment of the composition notes or evidence equivalent thereto. But it is no defense to an action to recover a fraudulent preference that the composition deed was invalid because not signed by all the creditors pursuant to its terms (which provided that it should not be binding unless all signed) if it appears that the greater part of the creditors (over ninety-eight per cent in value) had signed and believed in good faith that all had signed. Bean *v.* Brookmire, 2 Dill. (U. S.) 108, 2 Fed. Cas. No. 1,170, 2 Am. L. Rec. 222, 6 Am. L. T. Rep. 418, 5 Chic. Leg. N. 314, 7 Nat. Bankr. Reg. 568, 7 West. Jur. 324.

40. Solinger *v.* Earle, 82 N. Y. 393, 60 How. Pr. (N. Y.) 116 [*affirming* 45 N. Y. Super. Ct. 80, 604].

41. Bryant *v.* Christie, 1 Stark. 329, 2 E. C. L. 129.

42. *California.*— Kullman *v.* Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. 214; Smith *v.* Owens, 21 Cal. 11.

Connecticut.— Huntington *v.* Clark, 39 Conn. 540; Doughty *v.* Savage, 28 Conn. 146.

Georgia.— Saul *v.* Buck, 72 Ga. 254; Woodruff *v.* Saul, 70 Ga. 271; Ga. Code (1895), § 2692.

Illinois.— Hefter *v.* Cahn, 73 Ill. 296.

Indiana.— Kahn *v.* Gumberts, 9 Ind. 430; Shinkle *v.* Shearman, 7 Ind. App. 399, 34 N. E. 838.

Maryland.— Smith *v.* Stone, 4 Gill & J. (Md.) 310.

Massachusetts.— Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Walker *v.* Mayo, 143 Mass. 42, 8 N. E. 873; Cobb *v.* Tirrell, 137 Mass. 143; Partridge *v.* Messer, 14 Gray (Mass.) 180; Turner *v.* Comer, 6 Gray (Mass.) 530.

Minnesota.— Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460.

Missouri.— Luehrmann *v.* St. Louis Furniture Co., 21 Mo. App. 499; Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359]; Bank of Commerce *v.* Hoeber, 8 Mo. App. 171.

New York.— White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Martin *v.* Adam, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523, 62 N. Y. St. 404; Martin *v.* Adams, 60 Hun (N. Y.) 578, 14 N. Y. Suppl. 626, 38 N. Y. St. 397; Crandall *v.* Cochran, 3 Thomps. & C. (N. Y.) 203; Smith *v.* Ziegler, 17 N. Y. Suppl. 338, 44 N. Y. St. 50.

North Carolina.— Zell Guano Co. *v.* Emry, 113 N. C. 85, 18 S. E. 89.

Ohio.— Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239.

Pennsylvania.— Shenandoah M. E. Church *v.* Robbins, 81 Pa. St. 361; Stuart *v.* Blum, 28 Pa. St. 225.

Vermont.— Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444; Cobleigh *v.* Pierce, 32 Vt. 788.

Wisconsin.— Musgat *v.* Wybro, 33 Wis. 515.

United States.— *In re* Chaplin, 115 Fed. 162; *In re* Sturges, 8 Biss. (U. S.) 79, 23 Fed. Cas. No. 13,565, 10 Chic. Leg. N. 33, 16 Nat. Bankr. Reg. 304; Brownsville Mfg. Co. *v.* Lockwood, 3 McCrary (U. S.) 608, 11 Fed. 705; Chuck *v.* Mesritz, 2 Woods (U. S.) 204, 5 Fed. Cas. No. 2,710.

England.— *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867; *Ex p.* Cowen, L. R. 2 Ch. 563, 16 L. T. Rep. N. S. 469, 15 Wkly. Rep. 859; Danglish *v.* Tennent, L. R. 2 Q. B. 49, 8 B. & S. 1, 36 L. J. Q. B. 10, 15 Wkly. Rep. 196; Leicester *v.* Rose, 4 East 372, 1 Smith K. B. 41; Foley *v.* Hoare, Hayes & J. 90; Spooner *v.* Whiston, 8 Moore C. P. 580, 17 E. C. L. 547; *Ex p.* Nelson, 13 Wkly. Rep. 760.

Canada.— Forster *v.* Bettes, 5 U. C. Q. B. 599.

See 4 So. L. Rev. 661, 822; 17 Centr. L. J.

or file a petition in bankruptcy if circumstances warrant,[43] or, if judgment creditors, issue execution[44] without returning or offering to return what they have received under the composition, since their right of action is not one of rescission for the fraud, but on contract for the original debt, revived by the failure of the composition because of the fraud;[45] and they may declare on their original evidences of indebtedness, although delivered up under the composition, and therefore out of their possession.[46] But a fraudulent preference does not *ipso facto* deprive an innocent creditor of his rights under the composition; the debtor cannot set up its invalidity as against such a creditor, and an innocent creditor may therefore at his option insist on the performance of the composition according to its terms, in so far as he is concerned.[47]

b. Equitable Remedies. The injured creditors may if they prefer instead of suing at law on their original debts sue in equity to set aside the composition;[48] and in such a suit the court may also order the notes or other evidences of debt originally held by the creditors to be redelivered to them, and decree payment thereof.[49] Execution of a judgment confessed as a secret preference may be enjoined and the payment in full of the debt of the injured creditor be decreed in one proceeding.[50]

306; 8 Centr. L. J. 351. But see Page *v.* Carter, 16 N. H. 254, 42 Am. Dec. 726, where it was held that the other creditors could not sue if the preferred creditor did not come in until after they had signed.

See 10 Cent. Dig. tit. "Compositions with Creditors," §§ 27 *et seq.*, 87 *et seq.*

Illustrations.—"Nothing less than the strictest compliance with the terms of the proposed composition on the part of the debtor, and on the part of the other creditors also, can bind him. The most perfect good faith is required of all. Any preference of one creditor over another, whether that preference relates to the amount to be paid him, to the time when it is to be paid, or to the manner of securing its prompt payment, taints the whole contract and renders it void." Per Burwell, J., in Zell Guano Co. *v.* Emry, 113 N. C. 85, 89, 18 S. E. 89. A composition will not be specifically enforced at the suit of a debtor who has secretly agreed to pay some of the compounding creditors all their debts. Child *v.* Danbridge, 2 Vern. 71. In Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519, 59 N. Y. St. 794, 40 Am. St. Rep. 607, 27 L. R. A. 331 [*reversing* 66 Hun (N. Y.) 33, 20 N. Y. Suppl. 780, 49 N. Y. St. 432] it was said that innocent creditors would be released only when the agreement for secret preference is executed, and that if it is executory merely they will still be bound; but this *dictum* stands alone and is not supported by either reason or authority. But when an insolvent firm had gone into the hands of a receiver, and the receiver in submitting to the creditors a proposition for settlement at fifty cents on the dollar stated that the settlement would involve the necessity of dismissing all suits, attachments, etc., it was held that the settlement was not invalidated so as to entitle other creditors to sue for their original debts, by his payment, in addition to the stipulated dividend, of the attorney's fees incurred by certain creditors in attachment suits previously commenced. Continental Nat. Bank *v.* McGeoch, 92 Wis. 296, 66 N. W. 606. See also Robbins *v.* Alexander, 11 How. Pr. (N. Y.) 100.

43. *Ex p.* Cowen, L. R. 2 Ch. 563, 16 L. T. Rep. N. S. 469, 15 Wkly. Rep. 859.

44. *Ex p.* Milner, 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. Rep. N. S. 652, 2 Morr. Bankr. Rep. 190, 33 Wkly. Rep. 867.

45. Hefter *v.* Cahn, 73 Ill. 296; Cobb *v.* Tirrell, 137 Mass. 143; Bank of Commerce *v.* Hoeber, 8 Mo. App. 171; Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239. See also 17 Centr. L. J. 306.

But if the composition is paid by a third party the creditors must return to him what they have received before suing the original debtor. Babcock *v.* Dill, 43 Barb. (N. Y.) 577.

46. Bank of Commerce *v.* Hoeber, 8 Mo. App. 171; Stuart *v.* Blum, 28 Pa. St. 225; Forster *v.* Bettes, 5 U. C. Q. B. 599. See also Blodgett *v.* Webster, 24 N. H. 91.

47. Eldridge *v.* Strenz, 34 N. Y. Super. Ct. 491 [*affirmed* in 65 N. Y. 556].

48. Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523, 62 N. Y. St. 404; Martin *v.* Adams, 14 N. Y. Suppl. 626, 38 N. Y. St. 397.

It has been suggested in some cases that an individual creditor should not be permitted in any case to sue for his debt alone, but that the only proceeding should be by bill in equity to set aside the composition for the benefit of all, as only in this way can the vital element of equality be preserved. Cheveront *v.* Textor, 53 Md. 295; Evans *v.* Bell, 15 Lea (Tenn.) 569. But this clearly rests upon a double error: (1) that a rescission is necessary, which is clearly not the law; and (2) that the composition stands, notwithstanding the fraud, whereas the fraud avoids it as to the innocent creditor. See *supra*, XI, B, 1, b; XI, B, 3, a.

49. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534.

50. Blodget *v.* Hogan, 10 La. Ann. 18.

e. Effect of Ignorance of Debtor. Some cases hold that a secret preference will render the composition invalid as to an innocent creditor, even though the debtor was ignorant of the giving of the preference.[51] But others have adopted what would seem to be a more equitable rule, holding that a preference given by a third party, not the agent of the debtor, of which the debtor is ignorant, although void and unenforceable as to the creditor to whom it is given, will not avoid the composition as between the debtor and innocent creditors.[52]

d. What Creditors Are Not Affected. But if the other creditors knew of the secret preference at the time they entered into the composition or if ignorant of it then have accepted payment of the composition, or of an instalment thereof after becoming aware of the fraud practised on them, they cannot repudiate the composition and sue to set it aside or to recover on their original claims.[53] The

51. Luehrmann *v.* St. Louis Furniture Co., 21 Mo. App. 499; Bank of Commerce *v.* Hoeber, 11 Mo. App. 475 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359]; Bradshaw *v.* Bradshaw, 9 M. & W. 29.

Reasons for this doctrine.— "Where one of the creditors gets, as a price of signing the agreement a preference over the other creditors, it is immaterial whether he gets it from the debtor or from a third person, or whether he gets it with the knowledge of the debtor, or whether the debtor is wholly innocent of it. By receiving such a preference he commits a fraud on the other creditors; and the case falls within the principle that where a party to a contract conceals or misrepresents a material matter which forms the whole or a part of the inducement upon which the other contracting parties enter into the contract, this avoids the contract. Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 559, 19 Eng. L. & Eq. 387. It is a misrepresentation or concealment *dans locum contractui* — as to the thing which gave occasion to the contract; therefore it avoids the contract. The creditors who sign such an agreement act, in a measure, upon the faith of each other's judgment, and they suppose, and rightfully suppose, that the judgment of each of the other creditors is influenced by the same considerations which influence their own judgment; and they are cheated by any creditor who is influenced by the motive of a benefit in which they do not share, and the knowledge of which is concealed from them. . . . It is said that this view of the law works a hardship upon the defendant, who is innocent of any wrong. The answer is, that it is no hardship for a man to be compelled to pay his honest debts in full, though it may be hard for him to do it. He agreed to do it when he contracted the debts, and he stands under a continual moral obligation to do it, until he has done it. It is a greater hardship for his creditors to be compelled to take a part of what is due them in discharge of the whole, and the law ought not to compel them to do this, except upon a mutual agreement, entirely open and fair, in which each one gets what the agreement purports to give him, and no more." Per Thompson, J., in Bank of Commerce *v.* Hoeber, 11 Mo. App. 475, 479, 482 [*affirmed* in 88 Mo. 37, 57 Am. Rep. 359].

52. Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523, 62 N. Y. St. 404; Babcock *v.* Dill, 43 Barb. (N. Y.) 577, where it was held that the voluntary payment of a note given as a secret preference by a third party, made by the debtor after the execution of the composition agreement, although with knowledge of its character, is not such a fraud as will avoid the composition.

53. *Iowa.*— Bower *v.* Metz, 54 Iowa 394, 6 N. W. 551.

Missouri.— O'Shea *v.* Collier White Lead, etc., Co., 42 Mo. 397, 97 Am. Dec. 332.

New Hampshire.— Gage *v.* De Courcey, 68 N. H. 579, 41 Atl. 183.

New York.— Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523, 62 N. Y. St. 404.

Vermont.— Cobleigh *v.* Pierce, 32 Vt. 788.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

England.— North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536; Pfleger *v.* Browne, 28 Beav. 391; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229. See also Coleman *v.* Waller, 3 Y. & J. 212.

See 10 Cent. Dig. tit. "Compositions with Creditors," § 29.

Rule applied.—In Carey *v.* Barrett, 4 C. P. D. 379, at the time of the composition it was known that the debtor was being sued for a small sum; and it was held that the subsequent payment of this claim in full before the cause was ripe for trial was not a fraud upon the other creditors, since it was made under pressure and not in pursuance of a prior arrangement for a preference. And in Continental Nat. Bank *v.* McGeoch, 92 Wis. 296, 66 N. W. 606, where the question was whether the plaintiff bank, when it accepted the composition and executed a release in full, knew that the claim of another creditor, who was a party to said agreement, had been paid in full, a copy of a Sunday issue of a newspaper giving an account of the securing in full of such claim was held to be admissible in evidence, where both the president and cashier of the plaintiff were accustomed to take and read that paper, al-

general rule also applies only in favor of those who enter into the composition; and a secret preference will not be held fraudulent (except where all preferences are fraudulent) as to those who do not join.[54]

4. Rights of Creditor Secretly Preferred — a. Repudiation of Composition. A creditor who has received a secret preference cannot repudiate the composition on the ground of the fraud in which he has participated[55] nor on the ground of a like preference given to another creditor without his knowledge or assent;[56] but if the composition is void or voidable for other reasons not connected with his preference, operating on the inception of the composition, he can recover the balance of his original debt over the preference, or over the preference and what he has received under the composition, as the case may be, notwithstanding his own fraud,[57] although a breach of performance of the composition will not vitiate a release given by a secretly preferred creditor,[58] especially if he has received the full amount of the composition as a secret preference.[59]

b. Enforcement of Composition. There is an irreconcilable conflict of authority on the question whether a composition is so far invalidated by a fraudulent preference that the creditor so preferred cannot recover the amount due him under the composition. The weight of authority favors the rule that he cannot recover;[60] and this rule would seem to be supported also by reason and justice.

though there was no evidence that either of them read or received that particular issue; and evidence was also held admissible that a majority of the plaintiff's directors were members of the board of trade of which the debtor was a member, that its cashier was frequently there, and that the securing of the other creditors in full became publicly and generally known on said board of trade and in the city; and it was further held that the jury was properly allowed to take into consideration the matters above mentioned, with other circumstances tending to prove knowledge on the part of the plaintiff, where they were also instructed that plaintiff was not chargeable with the knowledge of its directors acting as individuals, or with the knowledge of its officers having nothing to do with the composition.

54. Loucheim's Appeal, 67 Pa. St. 49.

55. Huckins *v.* Hunt, 138 Mass. 366; Babcock *v.* Dill, 43 Barb. (N. Y.) 577. See also 4 So. L. Rev. 830.

56. O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. 214; Baldwin *v.* Roseman, 49 Conn. 105; White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Mallalieu *v.* Hodgson, 16 Q. B. 689, 15 Jur. 217, 20 L. J. Q. B. 339, 71 E. C. L. 689. See also 4 So. L. Rev. 830. But see Cobleigh *v.* Pierce, 32 Vt. 788.

57. For example, on the ground of non-performance (Walker *v.* Mayer, 143 Mass. 42, 8 N. E. 873; Weese *v.* Banfield, 22 Ont. App. 489) or on the ground of misrepresentations as to other matters (Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57). See also Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88].

58. *Ex p.* Phillips, 36 Wkly. Rep. 567.

When a creditor has received payments after an instalment is defaulted such payments are a fraud on the others, and on payment of the instalments remaining due he will be enjoined from suing for the balance of his original debt. Geach *v.* Ames, 16 Ves. Jr. 375 note.

59. *Ex p.* Oliver, 4 De G. & Sm. 354.

60. *Connecticut.*— Doughty *v.* Savage, 28 Conn. 146.

Delaware.— Macaltioner *v.* Croasdale, 3 Houst. (Del.) 365.

Massachusetts.— Huckins *v.* Hunt, 138 Mass. 366; Frost *v.* Gage, 3 Allen (Mass.) 560.

New York.— Bradley, etc., Co. *v.* Lally, 2 Misc. (N. Y.) 286, 21 N. Y. Suppl. 1044, 51 N. Y. St. 152 [*affirmed* in 3 Misc. (N. Y.) 635, 22 N. Y. Suppl. 1131, 51 N. Y. St. 945].

Ohio.— Moses *v.* Katzenberger, 1 Handy (Ohio) 46, 12 Ohio Dec. (Reprint) 19.

England.— Mallalieu *v.* Hodgson, 16 Q. B. 689, 15 Jur. 817, 20 L. J. Q. B. 339, 71 E. C. L. 689; Howden *v.* Haigh, 11 A. & E. 1033, 9 L. J. Q. B. 198, 3 P. & D. 661, 39 E. C. L. 539; Higgins *v.* Pitt, 4 Exch. 312, 18 L. J. Exch. 488; Matter of Cross, 4 De G. & Sm. 364; *Ex p.* Phillips, 36 Wkly. Rep. 567.

See Forsyth Comp. 135; and 10 Cent. Dig. tit. "Compositions with Creditors," § 36 *et seq.*

Applications, and reason for rule.— A creditor fraudulently preferred cannot sue out a petition in bankruptcy against the debtor, since the original debt is released by the composition, and his claim under the composition is invalidated by the fraud. Matter of Cross, 4 De G. & Sm. 364; *Ex p.* Phillips, 36 Wkly. Rep. 567. Nor can he prove in bankruptcy. Leicester *v.* Rose, 4 East 372, 1 Smith K. B. 41; *Ex p.* Sadler, 15 Ves. Jr. 52, 10 Rev. Rep. 18. "It is quite immaterial that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agree-

But the trend of modern decisions is toward the more lenient rule that the composition stands as between the preferred creditor and the debtor, and that the former can recover the balance of the composition over the secret preference.[61] The preferred creditor cannot prove in bankruptcy for an independent debt, however, without surrendering the preference;[62] and if he has received the full amount due under the composition, by way of secret preference, either wholly or partially, he cannot recover anything under the composition.[63] It seems that a creditor who gives a fraudulent preference to another forfeits his rights under the composition.[64]

5. Rights of Third Parties. A fraudulent preference will release a third party who has made himself responsible in any way for the performance of the conditions of the composition agreement by the debtor, either as guarantor,[65]

ment. The fraud consists not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors. Such an agreement vitiates the whole transaction, so that the party can claim no benefit under a composition into which he entered in consequence of such corrupt or fraudulent contract." Per Bigelow, C. J., in Frost *v.* Gage, 3 Allen (Mass.) 560, 562. In Bannantine *v.* Cantwell, 27 Mo. App. 658, it was held that in an action on a composition agreement, which was in fact invalid owing to a secret preference given to the plaintiff, the answer need not set up the fraud in the composition, since it is incumbent on the plaintiff to show that the condition upon which the defendant's promise to pay was dependent had been fulfilled.

61. Shinkle *v.* Shearman, 7 Ind. App. 399, 34 N. E. 838; Hanover Nat. Bank *v.* Blake, 142 N. Y. 404, 37 N. E. 519, 59 N. Y. St. 794, 40 Am. St. Rep. 607, 27 L. R. A. 33; Hanover Nat. Bank *v.* Blake, 60 Hun (N. Y.) 428, 14 N. Y. Suppl. 913, 39 N. Y. St. 335; White *v.* Kuntz, 107 N. Y. 518, 14 N. E. 423, 12 N. Y. St. 297, 1 Am. St. Rep. 886 [*affirming* 13 Daly (N. Y.) 286]; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; *In re* Chaplin, 115 Fed. 162; Eastabrook *v.* Scott, 3 Ves. Jr. 456. See also Bradshaw *v.* Bradshaw, 9 M. & W. 29. In Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 58, 54 N. E. 157 [*affirming* 78 Ill. App. 600, and *distinguishing* Hefter *v.* Cahn, 73 Ill. 296], it was held that a creditor who refuses to enter into an arrangement, previously agreed to by all the other creditors, to accept certain real estate of the debtor as full payment of all their demands, until he has obtained a bond from the debtor, with outside security, for any deficiency on his claim, is not guilty of such fraud as will deter him from enforcing the trust in equity, although the other creditors were ignorant of the bond. In *In re* Chaplin, 115 Fed. 162, a debtor in compounding with his creditors transferred to one, as a secret preference, a note of a third person, which the creditor applied, at its face value, on his debt, receiving payment on the balance due him at the composition rate. The debtor was afterward adjudged a bankrupt, and the creditor sought to prove other debts against his estate. It was held that in determining the amount of the fraudulent preference received by him in the composition, he must be charged with the note at its face value, regardless of the amount which he actually realized from it.

62. Under the federal bankruptcy act of 1898, when a creditor of a bankrupt has received a fraudulent preference, recoverable by the trustee, such preference will not be treated as a set-off, either to reduce the amount of his claim, or against the dividend to be received thereon, but the amount must be surrendered to the trustee before the creditor will be permitted to prove an independent debt. *In re* Chaplin, 115 Fed. 162.

63. *Ex p.* Oliver, 4 De G. & Sm. 354. In Knight *v.* Hunt, 5 Bing. 432, 7 L. J. C. P. O. S. 165, 3 M. & P. 18, 30 Rev. Rep. 692, 15 E. C. L. 656, the plaintiff, who had refused to sign an agreement to receive a composition from the debtor of ten shillings in the pound, signed the agreement upon the debtor's brother offering to supply him with coal to the amount of the other ten shillings. The other creditors knew nothing of the coal transaction. It was held that after receiving the coal, the plaintiff could not recover on a promissory note given for the ten shillings composition.

64. Where a voluntary assignment for the benefit of creditors has been executed by a debtor, upon the delivery to him of a release from his debts, a creditor who, by a secret agreement not to claim any portion of the proceeds of the estate, induced the assignee, who was also a creditor, to sign the release and to procure the signatures of other creditors thereto, cannot maintain an action against the assignee to recover the dividend upon his debt. Frost *v.* Gage, 3 Allen (Mass.) 560. See also Frost *v.* Gage, 6 Allen (Mass.) 50.

65. Bannantine *v.* Cantwell, 27 Mo. App. 658; Clarke *v.* Ritchey, 11 Grant Ch. (U. C.) 499; Pendleton *v.* Walker, 4 Y. & C. Exch. 424; Coleman *v.* Waller, 3 Y. & J. 212.

surety,[66] or indorser of the composition notes,[67] from the obligation thus assumed; especially when that obligation was undertaken at the inducement of the creditor who receives the fraudulent preference.[68]

6. What Preferences Are Not Fraudulent — a. In General. A preferential payment not connected with the composition will not affect it;[69] and consequently a payment of more than the composition rate to one who is not a party thereto will not invalidate the composition agreement.[70] *Vice versa*, one who is not a party to the composition cannot complain of a preference as a fraud upon him, except where all preferences are fraudulent.[71] A recovery by a creditor of his full debt, on the ground of fraud practised upon him, is not such a preference as will avoid a composition as to others,[72] although a collusive recovery in an action to which a good defense might be made by the debtor would doubtless be fraudulent; and the receipt of less than the composition is not a fraud upon other creditors.[73] The debtor may pledge a part of his assets to a creditor to secure the payment of a new loan made to assist him in paying the composition.[74]

b. Where There Is No Composition. Where there is no general agreement or understanding, but a series of separate compromises, a secret preference given to one creditor will not operate as a fraud upon the others,[75] and consequently, when the transaction is a mere sale of claims, a secret preference will not vitiate

66. Doughty *v.* Savage, 28 Conn. 146; Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460.

67. Doughty *v.* Savage, 28 Conn. 146; Arpin *v.* Poulin, 22 L. C. Jur. 331, 1 Montreal Leg. N. 290.

But when the debtor's property has been transferred to the indorser to meet the composition payments, a fraudulent preference will not release the indorser, but will merely entitle him to deduct from the amount of the composition due the preferred creditor the amount of the preference received. Martin *v.* Poulin, 1 Dorion (U. C.) 75, 4 Montreal Leg. N. 20.

68. Clarke *v.* Ritchey, 11 Grant Ch. (U. C.) 499.

69. The fact that before the composition was entered into notes were assigned in good faith in full payment of a *bona fide* debt will not vitiate the composition. Lambert *v.* Jones, 2 Patt. & H. (Va.) 144. And the mere fact that a third person, not a member of the compounding firm, but who was liable for its debt to the plaintiff, gave on the day the firm failed certain collateral security to another creditor for whose debt he was also liable, which other creditor thereafter voluntarily signed the composition agreement and accepted the composition payment, is not sufficient ground for setting aside the settlement and discharge of plaintiff's debt. Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606.

70. Henry *v.* Murphy, 54 Ala. 246; Holton *v.* Bent, 122 Mass. 278; Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88]; Renard *v.* Tuller, 4 Bosw. (N. Y.) 107; *In re* Thorn, 2 Pa. St. 331. In Loomis *v.* Wainwright, 21 Vt. 520, a creditor with an individual claim against the debtor, who was also a member of a firm with a claim, agreed that the firm would compound if security should be given him for his individual claim. The other creditors were not informed of this arrangement. It was held that the security given was not fraudulent, in the absence of proof that other creditors were induced to believe that the individual claim would be included in the composition. So where the debtor pleads a composition, and that the security sued on was given as a secret preference, but does not aver that the plaintiffs agreed to take it or acted thereunder, the security will be held valid, and the debtor will not be allowed to set up any other fraud than that alleged. Tuck *v.* Tooke, 9 B. & C. 437, 7 L. J. K. B. O. S. 282, 4 M. & R. 393, 17 E. C. L. 200 [*affirming* 4 Bing. 224, 5 L. J. C. P. O. S. 156, 12 Moore C. P. 435, 13 E. C. L. 478].

71. Loucheim's Appeal, 67 Pa. St. 49.

72. Cheveront *v.* Textor, 53 Md. 295.

73. Continental Nat. Bank *v.* Koehler, 4 N. Y. St. 482.

74. Brossard *v.* Dupras, 19 Can. Supreme Ct. 531.

75. *Illinois.*— Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600].

Maryland.— Smith *v.* Stone, 4 Gill & J. (Md.) 310.

Massachusetts.— Harvey *v.* Hunt, 119 Mass. 279.

Minnesota.— Minneapolis First Nat. Bank *v.* Steele, 58 Minn. 126, 59 N. W. 959.

New York.— Williams *v.* Carrington, 1 Hilt. (N. Y.) 515; Sun Mut. Ins. Co. *v.* Hubbell, 6 N. Y. Wkly. Dig. 82.

North Carolina.— Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156.

United States.— Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540].

England.— Smith *v.* Salzmann, 9 Exch. 535, 23 L. J. Exch. 177.

Canada.— Forster *v.* Bettes, 5 U. C. Q. B. 599.

any of the sales,[76] although if the sales amount to a composition they will be invalidated by such a preference.[77]

c. When Composition Fails. If for any reason the composition is void or fails to take effect a secret preference will not be void and may be enforced;[78] and a preference given after a default or breach by the debtor is not fraudulent.[79]

7. Validity of Preference After Composition — a. Prior Agreement For Preference. An agreement, promise, or security for the payment of all or a part of the balance of the debt compounded, given to a creditor after the composition is effected, will be void and unenforceable as a fraud upon the others if given in pursuance of a secret agreement or understanding existing at the time of the composition;[80] and even if there be no such agreement or understanding it will nevertheless be equally unenforceable — as a fraud, if the composition is executory and not yet performed, and as without consideration if the composition is executed or performed, unless there is a new consideration, or the promise is under

See 10 Cent. Dig. tit. "Compositions with Creditors," § 23 *et seq.*

If there is no mutual agreement or understanding, and the debtor correctly states the facts as to his assets, etc., and offers as large a percentage as he is then able to pay, a promise to pay some creditors in full, if ever able to do so, will not avoid the settlements with others. Argall *v.* Cook, 43 Conn. 160.

76. Henry *v.* Murphy, 54 Ala. 246; Goldenbergh *v.* Hoffman, 69 N. Y. 321 [*affirming* 7 Hun (N. Y.) 324]. In Mansfield *v.* Rutland Mfg. Co., 52 Vt. 444, an action of assumpsit by creditors to recover their original debt, it appeared that the defendant debtor, being insolvent, entered into an agreement with certain of its creditors, among whom were the plaintiffs, whereby it was agreed that the defendant might convey its property to certain trustees in trust for the payment of defendant's debts *pro rata* from the avails thereof; that defendant accordingly conveyed its property to the trustees in trust to sell and "convert the same into money" and to pay creditors therefrom in proportion to their respective demands; that some of the creditors refused to enter into the arrangement and brought suits against defendant; that one of the trustees, with the concurrence of the others, settled the claims of some of those creditors, paying some in full and others more than *pro rata,* and using for that purpose personal property that came to them under the conveyance, but understanding that they were buying the claims on their personal responsibility and admitting that in the distribution to creditors under the agreement the creditors who signed the agreement would be entitled to their respective proportionate shares under the agreement without deduction on account of payments to others in excess of their shares. It did not appear that the trustees had closed their trust or that they held any dividend to which the plaintiffs were entitled; but it did appear that they were personally able to make good the requirements of the agreement. It was held that the agreement and conveyance amounted in substance to a composition, that it was intended that the trustees should convert the property into money and pay creditors *pro rata,* and that all debts should participate; and that although the debtor itself might not apply the funds to overpayment of any creditor, yet that the purchase of claims by trustees, if purchased in good faith and held for an equal percentage only, would not vitiate the arrangement.

77. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Bastian *v.* Dreyer, 7 Mo. App. 332; Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239; Patterson *v.* Boehm, 4 Pa. St. 507.

78. Davis *v.* Benton, 24 Conn. 555.

A secret advantage will not bar action on the original obligation, if the composition was induced by the misrepresentations of the debtor. Elfelt *v.* Snow, 2 Sawy. (U. S.) 94, 8 Fed. Cas. No. 4,342, 6 Nat. Bankr. Reg. 57. See also Almon *v.* Hamilton, 100 N. Y. 527, 3 N. E. 580 [*affirming* 30 Hun (N. Y.) 88].

79. And the recipient will not become by implication a trustee of the property received for the benefit of the other creditors. Montgomery Bank *v.* Ohio Buggy Co., 110 Ala. 360, 18 So. 273. 100 Ala. 626, 13 So. 621.

80. *California.*—Smith *v.* Owens, 21 Cal. 11.

Illinois.— Woodman *v.* Stow, 11 Ill. App. 613.

Kentucky.—Goodwin *v.* Blake, 3 T. B. Mon. (Ky.) 106, 16 Am. Dec. 87.

Massachusetts.— Howe *v.* Litchfield, 3 Allen (Mass.) 443.

Michigan.— Tinker *v.* Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.

New Jersey.—Crossley *v.* Moore, 40 N. J. L. 27.

Texas.—Glober *v.* Bradley, 1 Tex. App. Civ. Cas. § 212.

United States.— Fenner *v.* Dickey, 1 Flipp. (U. S.) 34, 8 Fed. Cas. No. 4,729, 3 West. L. Month. 208.

Contra, Smith *v.* Zeigler, 17 N. Y. Suppl. 338, 44 N. Y. St. 50.

See 10 Cent. Dig. tit. "Compositions with Creditors," §§ 23 *et seq.*, 87 *et seq.*

seal; for in the latter case there is no moral obligation to pay the balance over the composition.[81]

b. Voluntary Payment. But a voluntary payment of the balance or part of the balance of the debt remaining unpaid after the composition, made after the composition and not in pursuance of any prior secret agreement or understanding, is not a fraud upon the other creditors;[82] although to permit the creditor to repudiate the composition with a grant of better terms will be treated as fraudulent.[83]

81. *Colorado.*— Rasmussen *v.* State Nat. Bank, 11 Colo. 301, 18 Pac. 28.

Kentucky.—Montgomery *v.* Lampton, 3 Metc. (Ky.) 519; Goodwin *v.* Blake, 3 T. B. Mon. (Ky.) 106, 16 Am. Dec. 87.

Maine.— Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229; Winn *v.* Thomas, 55 N. H. 294; Browne *v.* Stackpole, 9 N. H. 478.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499 [*reversing* on another point 47 Hun (N. Y.) 213, 13 N. Y. St. 349]; Robinson *v.* Striker, 47 Hun (N. Y.) 546, 15 N. Y. St. 420 [*affirmed* in 113 N. Y. 635, 20 N. E. 878, 22 N. Y. St. 994]; Carroll *v.* Shields, 4 E. D. Smith (N. Y.) 466; Coon *v.* Stoker, 2 N. Y. St. 626.

Ohio.— Way *v.* Langley, 15 Ohio St. 392.

Pennsylvania.—Callahan *v.* Ackley, 9 Phila. (Pa.) 99, 30 Leg. Int. (Pa.) 12.

Rhode Island.— Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

Tennessee.— Evans *v.* Bell, 15 Lea (Tenn.) 569.

England.— Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633; *Ex p.* Hall, Deac. 171, 4 L. J. Bankr. 91, 2 Mont. & A. 513, 38 E. C. L. 596; Cockshott *v.* Bennett, 2 T. R. 763, 1 Rev. Rep. 617.

Canada.— Samuel *v.* Fairgrieve, 21 Ont. App. 418 [*reversing* 24 Ont. 486, *reversed* on another point in Craig *v.* Samuel, 24 Can. Supreme Ct. 278]; Sinclair *v.* Henderson, 9 L. C. Jur. 306.

Contra, see Glober *v.* Bradley, 1 Tex. App. Civ. Cas. § 212; Fitch *v.* Sutton, 5 East 230, 1 Smith K. B. 415.

See 10 Cent. Dig. tit. "Compositions with Creditors," §§ 23 *et seq.*, 87 *et seq.*; 4 So. L. Rev. 833; 53 L. R. A. 363 note.

A parol promise made to all the creditors after the composition is effected, to pay more than the amount of the composition, is without consideration and will not support an action. Coon *v.* Stoker, 2 N. Y. St. 626.

Enforceable at law, although not in equity. — In Crossley *v.* Moore, 40 N. J. L. 27, it was held that a subsequent promise to pay the balance of the debt, if not fraudulent as a secret preference, was enforceable at law, although not in equity.

New consideration.—The surrender of a security held for the original debt is not a sufficient consideration for a new promise to pay made after the composition. Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633. And a fraudulent security will not supply the necessary consideration. Winn *v.* Thomas, 55 N. H. 294; Browne *v.* Stackpole, 9 N. H. 478; Cockshott *v.* Bennett, 2 T. R. 763, 1 Rev. Rep. 617. But a fresh advance by the creditor is a sufficient consideration. Samuel *v.* Fairgrieve, 21 Ont. App. 418 [*reversing* 24 Ont. 486, *reversed* on another point in Craig *v.* Samuel, 24 Can. Supreme Ct. 278]. And so is a discharge under a composition in insolvency proceedings. Trumball *v.* Tilton, 21 N. H. 128; Austin *v.* Gordon, 32 U. C. Q. B. 621.

82. *Maryland.*— Cheveront *v.* Textor, 53 Md. 295.

New Jersey.—Crossley *v.* Moore, 40 N. J. L. 27.

New York.— Smith *v.* Zeigler, 17 N. Y. Suppl. 338, 44 N. Y. St. 50.

United States.— *In re* Sturges, 8 Biss. (U. S.) 79, 23 Fed. Cas. No. 13,565, 10 Chic. Leg. N. 33, 16 Nat. Bankr. Reg. 304.

England.— Wilson *v.* Ray, 10 A. & E. 82, 3 Jur. 384, 8 L. J. Q. B. 224, 2 P. & D. 253, 37 E. C. L. 67; Took *v.* Tuck, 4 Bing. 224, 5 L. J. C. P. O. S. 156, 12 Moore C. P. 435, 13 E. C. L. 478 [*affirmed* in Tuck *v.* Tooke, 9 B. & C. 437, 7 L. J. K. B. O. S. 282, 4 M. & R. 393, 17 E. C. L. 200].

See 10 Cent. Dig. tit. "Compositions with Creditors," § 27.

When a note for a secret preference is given by a third party, without the knowledge of the debtor, a voluntary payment of that note by the debtor subsequently is not such a ratification of the fraud as will vitiate the composition. Babcock *v.* Dill, 43 Barb. (N. Y.) 577.

A composition, accepted with a proviso that no other creditor should receive better terms, will not be invalidated by a subsequent voluntary payment of others in full. *In re* Sturges, 8 Biss. (U. S.) 79, 23 Fed. Cas. No. 13,565, 10 Chic. Leg. N. 33, 16 Nat. Bankr. Reg. 304.

83. Howland *v.* Grant, 26 Can. Supreme Ct. 372. But in Hagen's Appeal, 11 Wkly. Notes Cas. (Pa.) 86, a creditor, who had accepted the composition notes, subsequently surrendered them, and took other and better security from the debtor instead. It was held that this was not a fraud upon the other creditors, unless it was done pursuant to an agreement with the debtor made prior to or contemporaneous with the execution of the deed.

XII. COMPOSITION THROUGH TRUSTEES.[84]

A. In General. When a composition is effected by an assignment to trustees all the debtor's property should be assigned unless otherwise agreed.[85] The deed will not be invalidated by the fact that some of the trustees have not executed it[86] or that the amount of a debt is not set opposite the creditor's name in the schedule;[87] but a covenant not to sue, if the trustees shall fairly account for the effects assigned, will not operate as a release if the trustees refuse to account.[88]

B. Powers and Duties of Trustees. The trustees are not the agents of either the debtor or the creditors;[89] and they cannot complete a contract by the debtor, in which his assigns are not named.[90] It is their duty to inform the creditors of the state of the trust fund and of the proceedings under the deed; and if they fail or refuse to do so, they must pay the costs of legal proceedings by the creditors to obtain such information.[91] When a trustee who is also a creditor executes a composition deed containing a general release, his debt will be extinguished and he cannot claim that he executed the deed only as trustee.[92] A trustee may buy in the trust property from a purchaser to whom he has *bona fide* sold it, especially if the creditors agree.[93] The trustees are of course responsible to the creditors for their management of the trust property;[94] and

84. **Assignment for benefit of creditors distinguished** from a composition with creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 128.

85. Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

86. Small *v.* Marwood, 9 B. & C. 300, 4 M. & R. 181, 17 E. C. L. 140.

87. And such an omission will be no defense to an action by a creditor against the trustee to enforce the deed, if the trustee had notice of the claim before action brought. Daniel *v.* Saunders, 2 Chit. 564, 18 E. C. L. 788.

88. Kesterton *v.* Sabery, 2 Chit. 541, 18 E. C. L. 777.

89. The trustees are mere stock-holders and not the servants of either party; and consequently, when the maker of composition notes delivers them to the trustees, notifying the latter not to give them to a particular creditor, that creditor cannot maintain an action of detinue against the maker, since the notes are not in his possession, either actually or constructively. Latter *v.* White, L. R. 5 H. L. 578, 41 L. J. Q. B. 342 [*affirming* 25 L. T. Rep. N. S. 658, 19 Wkly. Rep. 1149]. In Hunt *v.* Jessel, 18 Beav. 100, 2 Wkly. Rep. 219, a trading firm assigned their estate, stock, debts due to the firm, etc., to trustees, upon trust for sale and distribution, with power to carry on the business; but the trustees did not thereby undertake to discharge the liabilities of the firm. The deed of assignment contained a proviso, making it void if the firm became bankrupt before a certain day. The plaintiffs, who at the date of the assignment were creditors of the firm, afterward became indebted to the trustees, who continued to carry on the business. The firm became bankrupt before the day named. It was held that the plaintiffs had no right to a set-off, but that the result would have been different if the plaintiffs had been debtors instead of creditors at the date of the assignment, and had afterward become creditors of the trustees.

The trustee of a composition deed without a cessio bonorum is a mere trustee of the covenant to pay the composition and should not be made a party to a suit to ascertain the liability of the debtor on a note. Moye *v.* Sparrow, 22 L. T. Rep. N. S. 154, 18 Wkly. Rep. 400.

90. Knight *v.* Burgess, 33 L. J. Ch. 727, 10 Jur. N. S. 166, 10 L. T. Rep. N. S. 90.

91. *Ex p.* White, 13 L. T. Rep. N. S. 24; *Re* Edio, 13 Wkly. Rep. 1068.

92. Teede *v.* Johnson, 11 Exch. 840, 25 L. J. Exch. 110. And the creditor trustee cannot thereafter sue out a commission of bankruptcy against the debtor. Small *v.* Marwood, 9 B. & C. 300, 4 M. & R. 181, 17 E. C. L. 140.

93. In Dover *v.* Buck, 5 Giff. 57, a trustee for creditors under a deed of composition *bona fide* sold the property to a stranger, from whom he subsequently repurchased it at the same price. The sale was confirmed by all the creditors who executed the deed, and by two out of three of the assignors. A bill by the third assignor to set aside the sale was dismissed without costs.

94. In Albany Nat. Bank *v.* Moore, 21 Grant Ch. (U. C.) 269, a trader in insolvent circumstances made an assignment of his property to several of his principal creditors, in trust for the benefit of his creditors generally. Afterward it was agreed that the creditors should accept twenty per cent of their demands and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees reassigned the property to the debtor on his undertaking to pay the several cred-

will not be released until after they have accounted.[95] The attorney of the trustees may be allowed a reasonable fee out of the fund.[96]

C. Rights of Creditors. Private instructions given by the debtor to the trustees cannot render the terms of the deed ineffective.[97] But a creditor cannot enforce directly any right dependent upon the action of the trustees, but must take proper proceedings to compel them to act;[98] and one who is not a creditor at the date of the deed cannot enforce its trusts, unless by its terms it applies to creditors who may come in subsequently.[99]

XIII. COMPOSITION BY THIRD PARTY ON BEHALF OF DEBTOR.

A composition may be validly effected by a third party on behalf of the debtor, whether or not that third party has any interest in the debtor's estate or business and whether or not the debtor participates in the composition;[1] although of course the debtor will not be bound by a composition made without his assent, and may repudiate it if he chooses. A composition by a third party often takes the form of a purchase and sale of the claims of creditors; and it is sometimes difficult to decide whether such a transaction is a true composition or merely a sale of the claims to the third party, without the incidents of a composition. It would seem to be well settled, however, that the criterion by which to decide this question is, Was the third party really acting on behalf of the debtor? If so, the transaction is a composition;[2] otherwise a mere

itors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs. It was held that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to pay the amount of the composition agreed on; and that an inquiry as to this should be directed to a master if desired by the trustees.

95. Matter of Groencke, 10 Daly (N. Y.) 17; Matter of Dryer, 10 Daly (N. Y.) 8; Matter of Yeager, 10 Daly (N. Y.) 7.

96. Rouse *v.* Hughes, 1 Ky. L. Rep. 320.

97. Robbins *v.* Magee, 76 Ind. 381.

98. When a composition deed contained a clause that if default should be made in paying any instalment for twenty-one days, then it should be lawful for the trustees to declare the deed void by notice in writing, "and in such event the creditors shall be entitled to enforce their claims as if the said deed had never been made or executed." It was held that until trustees had given notice, a creditor under the deed was not entitled to serve a bankruptcy notice and present a petition on account of the debt due him. *In re* Clement, 3 Morr. Bankr. Rep. 153.

99. La Touche *v.* Lucan, 7 Cl. & F. 772, 7 Eng. Reprint 1262, 2 Dr. & Wal. 432, West. 477, 9 Eng. Reprint 570.

1. Falconbury *v.* Kendall, 76 Ind. 260; Eaton *v.* Lincoln, 13 Mass. 424; Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Williams *v.* Mostyn, 33 L. J. Ch. 54, 9 L. T. Rep. N. S. 476, 12 Wkly. Rep. 69; Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453.

2. *Massachusetts.*— Holton *v.* Bent, 122 Mass. 278.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229.

Ohio.— Brown *v.* Daugherty, 8 Ohio Dec. (Reprint) 371, 7 Cinc. L. Bul. 239.

Pennsylvania.— Patterson *v.* Boehm, 4 Pa. St. 507.

Vermont.— Bowen *v.* Holly, 38 Vt. 574.

See also Bastian *v.* Dreyer, 7 Mo. App. 332.

Illustration of such a composition.— In Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534, it appeared that a firm which had failed attempted to effect a compromise with its creditors and for that purpose, in pursuance of recommendations adopted at a creditors' meeting, an agreement was prepared, by the terms of which the creditors were to accept thirty-five per cent in full satisfaction of their claims, to be paid by notes satisfactorily indorsed, and all creditors were to become parties thereto. This agreement was signed by many of the creditors, including the firm of Cobb & Co., the plaintiffs in the suit; but as several of the larger creditors refused to sign the composition fell through and was abandoned. This fact, however, was not made known to the plaintiffs. After the abandonment of the composition the debtor firm executed an agreement with the defendant, John S. Fogg, a creditor, by the terms of which the latter was to settle the liabilities of the firm and its members "under a composition with their creditors," by selling the partnership property and reimbursing himself from the proceeds for all payments made by him for which he should become liable "under the terms of the composition." After this agreement was executed Fogg negotiated an agreement with the creditors, which was accepted and signed by a number of them, including the plaintiffs, and which recited that the

sale.[3] When a third party compounds, time is of the essence, and those who do not come in within the time limited cannot share in the benefits of the composition;[4] the creditor must rescind and restore before he can repudiate the composition because of the fraud of the debtor or others than the third party himself;[5] and the agreement between the debtor and the third party is evidence against the latter.[6]

XIV. COMPOSITION BY AND WITH PARTNERS.[7]

A. Composition of Debts Due Firm. A partner may compound a debt due to the firm so as to bind his fellow-partners, even by an agreement under seal;[8]

creditors signing it, "in consideration of thirty-five cents on the dollar of the said indebtedness of said firm to us respectively paid by John S. Fogg, . . . hereby sell and assign to the said John S. Fogg all claims, demands, and causes of action which we respectively have against said firm, or against any or either of the members thereof." The signature of the plaintiffs to this agreement was obtained by representations made by Fogg's agent that it was made in pursuance of the composition first attempted, that it was necessary to carry out the composition, and that it was one of the instruments which by the terms of that composition the plaintiffs were bound to sign. The defendant Fogg took an assignment of all the claims against the firm, paying for some of them more than thirty-five per cent, indorsed and delivered to some of the creditors, including the plaintiffs, the same notes which had been prepared to be indorsed under the composition agreement, managed and disposed of the property, reimbursed himself, transferred the balance in accordance with the agreement, and delivered up to the firm all the claims which had been assigned to him, except the promissory note which constituted the claim of the plaintiffs. On a bill in equity by the plaintiffs against Fogg and the members of the debtor firm to compel Fogg to deliver up the note and to obtain a decree against the firm for payment of the balance due on it, it was held that the facts warranted a finding that the transaction by which the plaintiffs surrendered their note was not a sale by them to Fogg but was part of a composition settlement.

3. Anstey *v.* Marden, 1 B. & P. N. R. 124, 2 Smith K. B. 426, 18 Rev. Rep. 713.

The following agreements have been held not to be compositions, but sales by the creditors of their demands to a third party: "We, the undersigned, agree with Robert G. Coleman, and with each other, to sell and assign to him, the said Coleman, all our respective claims and demands that we may have against the Farmers & Traders' Savings Institution of St. Louis, at and for the price of twenty-five per cent. of the face of said claims and demands respectively, provided payment thereof be made in cash on or before the fifteenth day of July, 1876. This offer to be open and irrevocable until that day." Bastian *v.* Dreyer, 7 Mo. App. 332, 334.

"We, the undersigned creditors of Hoffman & Weinberg, of Providence, Rhode Island, for valuable consideration, hereby agree with Messrs. Weinberg Brothers, of Worcester, Mass., and with each other to sell, assign and transfer unto them all our claims against the said Hoffman & Weinberg on their paying to us twenty-five per cent. thereof in cash, and their notes for twenty-five per cent. endorsed by the said Hoffman & Weinberg, at four and eight months, in equal instalments, bearing date the 1st of July, 1873. Witness our hands and seals, this 12th day of June, 1873." Goldenbergh *v.* Hoffman, 69 N. Y. 322, 323 [*affirming* 7 Hun (N. Y.) 324].

In Henry *v.* Murphy, 54 Ala. 246, J. R. Abrams, the surviving partner of an insolvent firm, offered to surrender the assets of the firm and his individual assets to the firm creditors, in order to obtain a discharge. Subsequently one S. J. Murphy, who was one of the largest creditors, and other creditors of the firm, met together and agreed in writing among themselves to accept from Murphy fifty cents on the dollar and release Abrams. This agreement was submitted by Murphy to all other creditors, and all joined in it except J. C. Caldwell, the plaintiffs' testator, who was a judgment creditor. Abrams then made a conveyance of his entire estate to Murphy upon the conditions set forth in the creditors' agreement, which were recited and assented to by him in the conveyance. It was held that the agreement and conveyance, strictly speaking, did not constitute a composition, but a sale and transfer by the debtor of his property in consideration that the creditor, to whom the conveyance was made, would release him from all his debts and pay a certain percentage of his liabilities.

4. Williams *v.* Mostyn, 33 L. J. Ch. 54, 9 L. T. Rep. N. S. 476, 12 Wkly. Rep. 69.

5. Babcock *v.* Dill, 43 Barb. (N. Y.) 577; Lewis *v.* Jones, 4 B. & C. 506, 8 D. & R. 567, 3 L. J. K. B. O. S. 270, 10 E. C. L. 679.

6. Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534.

7. See, generally, PARTNERSHIP.

8. *Louisiana.*— Shaw *v.* Canter, 8 Mart. N. S. (La.) 689.

Maryland.— Smith *v.* Stone, 4 Gill & J. (Md.) 310.

New Hampshire.— Allen *v.* Cheever, 61 N. H. 32.

and a surviving partner may *a fortiori* compound the claims of the firm.[9] But the intent to compound the claims of the firm must be clear, and a release by a partner of all actions, claims, and demands will not release a debt due the firm, if the partner had an individual debt.[10]

B. Composition of Claims Against Firm — 1. In General. One partner may compound with the firm creditors; and at common law, in the absence of an express reservation, such a composition will release all the members of the firm,[11] although the compounding creditor alone will be liable on the covenants in the deed.[12] But the creditors may reserve their remedies against the other partners,[13] and in several of the United States it is expressly provided by statute that a composition with one or more partners shall not release the rest.[14]

2. What Debts Not Discharged. A composition by or on behalf of a firm will not release the partners from their individual debts either to third parties [15] or to the firm,[16] or discharge a partner able to pay who conceals that fact.[17]

3. Effect of Fraud. The fraudulent representations or acts of one partner will invalidate a composition by the firm,[18] and the concealment of the existence of a partnership will vitiate a composition by one partner, and enable the creditor to sue the firm.[19]

4. Rights of Retiring Partner as Creditor. A retiring partner cannot claim a

New York.— Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311, 33 N. Y. St. 220 [*affirming* 55 Hun (N. Y.) 335, 8 N. Y. Suppl. 695, 29 N. Y. St. 258, under statute]; Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41; Wells *v.* Evans, 20 Wend. (N. Y.) 25 [*reversed* on another point in 22 Wend. (N. Y.) 324]; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58.

United States.— Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

England.—Hawkshaw *v.* Parkins, 2 Swanst. 539, 19 Rev. Rep. 125.

See also 4 So. L. Rev. 656; 17 Centr. L. J. 305.

But semble a partner cannot bind the firm by a mere agreement to accept a composition. Hawkshaw *v.* Parkins, 2 Swanst. 539, 19 Rev. Rep. 125.

9. Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

10. Bain *v.* Cooper, 1 Dowl. N. S. 11, 11 L. J. Exch. 325, 9 M. & W. 701.

11. Le Page *v.* McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; MacLean *v.* Stewart, 25 Can. Supreme Ct. 225; Molson's Bank *v.* Connolly, 17 L. C. Jur. 189, 4 Rev. Lég. 683. See also *supra*, VIII, A, 1, b, (I).

And when by special sealed agreement one partner authorizes the other to make a separate composition with creditors on his own behalf and promises to pay such balance as the other should not pay or seeure to them, payments thereafter made by the latter upon his composition arrangement will not keep alive the liability of the non-compounding partner on his special undertaking, as against the running of the statute of limitations. Sigler *v.* Platt, 16 Mich. 206.

12. Metcalfe *v.* Rycroft, 6 M. & S. 75.

13. See Clement *v.* Brush, 3 Johns. Cas. (N. Y.) 180, and see *supra*, VIII, A, 1, b, (II).

14. As for example R. I. Gen. Laws (1896), pp. 470, 471, §§ 1–7; Kan. Gen. Stat. (1899), §§ 4165–4169; Howell's Annot. Stat. Mich. (1882), §§ 7783–7787; 2 N. J. Gen. Stat. (1895), pp. 2338, 2339; 1 Ohio Rev. Stat. (1896), §§ 3162, 3166; 2 Brightly Purd. Dig. Pa. (12th ed.) 1648, pl. 13; 2 Pepper & L. Dig. Pa. 3400, pl. 13.

Contribution inter sese.—These statutes do not affect the liability of the partners to contribution *inter sese*. Kurtz *v.* Wigton, 34 Wkly. Notes Cas. (Pa.) 219.

15. European Cent. R. Co. *v.* Westall, L. R. 1 Q. B. 167, 6 B. & S. 970, 35 L. J. Q. B. 9, 14 Wkly. Rep. 177, 118 E. C. L. 970.

When one partner is released by a composition but the remedies against the others are reserved, a specialty for a firm debt given by the other partner in the firm name will not be discharged where one partner cannot bind another by seal, since it is the proper debt of the one who gave it. Clement *v.* Brush, 3 Johns. Cas. (N. Y.) 180.

16. MacLean *v.* Stewart, Judicial Committee P. C. [*reversing* 25 Can. Supreme Ct. 225]. See 1 Dig. Ont. Case L. (1902) 497.

17. Yager *v.* Greiss, 1 Ohio Cir. Ct. 531.

18. Smith *v.* Salmon, 7 Daly (N. Y.) 216. And see 4 So. L. Rev. 661. See Bean *v.* Amsinck, 10 Blatchf. (U. S.) 361, 2 Fed. Cas. No. 1,167, 7 Am. L. Reg. N. S. 379, 8 Nat. Bankr. Rep. 228, cited *supra*, note 34.

The statements of the partners are evidence against the firm and against each other on the question of fraud, although the others were not present when the statements were made. Pierce *v.* Wood, 23 N. H. 519; Baxter *v.* Hebberd, 5 N. Y. St. 854. But the fact that after composition by a firm one partner declared that the firm would make ten thousand dollars by the composition will not vitiate the agreement, if there was no misrepresentation or concealment of any material fact to induce the creditors to join. Renard *v.* Tuller, 4 Bosw. (N. Y.) 107.

19. Carter *v.* Connell, 1 Whart. (Pa.) 392.

composition as a creditor for the amount to be paid him on retiring, and a composition note given him for that amount will be void;[20] but when a partner withdraws, taking a mortgage on the firm property for a part of his interest in the firm, and a new firm is formed which makes payments upon the mortgage, the retired partner, on a composition by the new firm, may retain his mortgage, and compound for the balance of the sum due him for his interest in the old firm.[21]

XV. RESCISSION OF COMPOSITION.

In the absence of fraud, a composition, after it has once become a binding contract, cannot be revoked or rescinded without the consent of all other parties, either by the debtor[22] or by the creditors,[23] although it was entered into under a mistake of fact[24] or although the debtor may assign for the benefit of his credit-

20. Stephen *v.* Gavaza, 16 Nova Scotia 514.

21. Baxter *v.* Bell, 86 N. Y. 195 [*reversing* on another point 19 Hun (N. Y.) 367].

22. Towne *v.* Rublee, 51 Vt. 62; Harland *v.* Binks, 15 Q. B. 713, 14 Jur. 979, 20 L. J. Q. B. 126, 69 E. C. L. 713; Wilding *v.* Richards, 1 Coll. 655, 14 L. J. Ch. 211, 28 Eng. Ch. 655; Mackinnon *v.* Stewart, 20 L. J. Ch. 49, 1 Sim. N. S. 76, 40 Eng. Ch. 76.

23. Browne *v.* Stackpole, 9 N. H. 478; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 [*reversing* 8 Daly (N. Y.) 530, 58 How. Pr. (N. Y.) 267]; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294; Howland *v.* Grant, 26 Can. Supreme Ct. 372; Bank of Commerce *v.* Jenkins, 16 Ont. 215. See also 4 So. L. Rev. 657; 17 Centr. L. J. 305. In Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408, a judgment creditor, in a general composition between the debtor and creditors, accepted bonds secured by deed of trust in lieu of his judgment and gave an order to his attorney to satisfy the same, upon the faith of which other creditors surrendered their securities and also accepted bonds so secured, and the judgment creditor acquiesced in such exchange for about three years. In subsequent litigation where it was material to the interests of the other creditors that the transaction should stand, it was held that he was estopped from repudiating his action, and could not have it canceled merely on the ground that he did not understand the terms of the trust deed securing the bonds, and his judgment was set aside.

24. Jones *v.* Wright, 71 Ill. 61.

No creditor can, upon the ground of mistake as to the amount of his claim or the condition of the security therefor, avoid an agreement of composition, made upon consideration of the like agreement of the other creditors, although there has been no meeting of the creditors nor a formal promise to abide by the agreement. Johnson *v.* Parker, 34 Wis. 596, 665, where Dixon, C. J., said: "This court is of opinion that agreements of the kind cannot be impeached on such ground. We think that the principles of public policy forbid it; for it is manifest that all confidence in such arrangements, and all the benefits to be derived from them, would be destroyed if it were otherwise. No creditor could enter into them or into subsequent business transactions with the debtor, with any assurance of safety, if such grounds of impeachment were held to exist. The relations of confidence between the different compounding creditors are such, and their rights and interests have become so interwoven and bound together by the act of compromise, that each one should be and is estopped from denying the validity of the agreement for causes like this. For the peace and safety of all concerned, each one must be held concluded by his own mistakes so committed. It is a species of negligence on his part, more or less gross according to circumstances, and savoring somewhat of bad faith or a vicious indifference to the rights of others, for one creditor, not knowing the facts with regard to his own claim nor taking the trouble to ascertain them, to draw the other creditors into the composition in the belief that his claim is fully and truly represented and released; and such negligence ought to preclude him from afterwards showing his claims to have been different, or throwing doubt and suspicion upon the settlement on such grounds. It is indispensable to such settlements, and that any good may come from them, that this rule should be held and adhered to, with regard to the representations, express or implied, of the individual creditors, respecting the amounts of their several claims and the fact that such claims were extinguished by the compromise. One creditor has no right to cast the burden of his own mistakes upon the others, or to insist that they shall suffer loss, or their pecuniary rights or interests be put in jeopardy in consequence of such mistakes. And so strong and well-sustained, in our judgment, is this principle of public policy that we do not think the mistaken creditor should be permitted to come in at all with evidence to show his own mere mistake. We do not think the way should be open at all for him to enter and speculate as to whether other creditors may sustain loss or be injured by reason of his being allowed to correct or to take advantage of his own mistakes. The presumption, conclusive in its nature under the circumstances, is, that the other creditors will be so injured. To open the door for particular inquiry into the facts regarding the situation and rights of the other

ors;[25] and a rescission or repudiation will not be justified by the assent of some only of the others concerned.[26] But in case of fraud or misrepresentation,[27] or secret preference of another creditor,[28] the injured party may rescind; and when no time is fixed for performance by the debtor the creditor may rescind if the debtor delays performance for an unreasonable time.[29]

XVI. SPECIFIC PERFORMANCE OF COMPOSITION.[30]

A composition agreement, like a compromise, may be specifically enforced, if valid and subsisting,[31] at the suit of any one of the parties thereto[32] or of his personal representatives,[33] either by bill in equity, asking for affirmative

creditors, and to make the right of the mistaking creditor dependent on those facts, would lead to most tedious, complicated and expensive investigations and controversies; and sound public policy is clearly against it."

25. Robert *v.* Barnum, 80 Ky. 28; Coon *v.* Stoker, 2 N. Y. St. 626. But in Dale *v.* Fowler, 12 How. Pr. (N. Y.) 462, it was held that where some of the creditors had agreed to accept a composition, but the debtors subsequently assigned for the benefit of their creditors, that they thereby waived their right to the composition, and remitted themselves to their original indebtedness.

26. The debtor's assent to a rescission by one creditor and the grant of better terms to him would be a fraud upon the other creditors and as such inoperative and of no effect. Howland *v.* Grant, 26 Can. Supreme Ct. 372.

But before the composition is completed it seems that the debtor may permit a creditor to withdraw without the assent of the other creditors. Fellows *v.* Stevens, 24 Wend. (N. Y.) 294. And see 4 So. L. Rev. 657.

27. Packard *v.* Ober, 26 La. Ann. 424. See also *supra*, XI, A, 1, f. But in Irving *v.* Humphrey, Hopk. Ch. (N. Y.) 284, where a debtor overstated the amount of his confidential debts (which were to receive a preference) and the creditors received the benefit of the composition, it was held that a release given by the creditors should not be set aside except so far as to give them the benefit of the true value of the property which the debtor possessed when the agreement to compound was made.

28. See *supra*, XI, B, 3, b.

29. Bolt *v.* Lee, 16 Rev. Lég. 53.

30. See, generally, SPECIFIC PERFORMANCE.

31. Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073; Powles *v.* Hargreaves, 3 De G. M. & G. 430, 2 Eq. Rep. 162, 17 Jur. 1083, 23 L. J. Ch. 1, 2 Wkly. Rep. 21, 52 Eng. Ch. 336.

A bill will lie to enforce an agreement for the sale of a debt (Cutting *v.* Dana, 25 N. J. Eq. 265; Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 24 Rev. Rep. 254, 1 Eng. Ch. 607) and to enforce an agreement between a creditor and a third person, founded on a valuable consideration, to compromise the claim of the former against his debtor (Phillips *v.* Bergen, 8 Barb. (N. Y.) 527 [*affirming* 2 Barb. (N. Y.) 608]).

32. Synnot *v.* Simpson, 5 H. L. Cas. 121.

A devisee who has compounded with a creditor of his testator may enforce the agreement. Only *v.* Walker, 3 Atk. 407, 26 Eng. Reprint 1035.

A creditor can file a bill to carry the trusts of a composition deed into execution. Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600]; Field *v.* Donoughmore, 2 Dr. & Wal. 630; Synnot *v.* Simpson, 5 H. L. Cas. 121.

The debtor or those in privity of estate may compel the creditor to deliver up the evidences of his claim as agreed in the composition, on payment of the amount of the composition (Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; Only *v.* Walker, 3 Atk. 407, 26 Eng. Reprint 1035), unless they were passed away before the composition (Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]).

33. See Pollen *v.* Huband, 1 P. Wms. 751, 24 Eng. Reprint 598. In Matter of Leslie, 10 Daly (N. Y.) 76, after the filing of an assignment for the benefit of creditors, nearly all the creditors of the assignee executed an instrument empowering a committee of themselves to control and manage, compound and release their claims, and consenting that the business of the assignor might be continued by the committee themselves, or through the assignee or others. The business was carried on for a time by the assignee, and a dividend was paid by him to the creditors out of the proceeds. Subsequently an arrangement was entered into between the committee, on behalf of the creditors represented by them, and the assignor, for a composition, upon the payment by the assignor to those creditors of a specified percentage of the portion of their claims remaining unpaid. The agreement also contained provision for the transfer by the assignee of the assigned estate, upon certain conditions, to the assignor, and for the continuance by the latter, under certain restrictions, of his former business, for the purpose of obtaining thereby the means of paying the amount of the composition. The estate was not, however, so transferred to the assignor, and the business was continued by the assignee, with the assistance of the assignor, and dividends were paid to the creditors out of the proceeds; but before the dividends so paid had reached the amount

relief,[34] or by a bill for an injunction to prevent an attempted violation of the agreement for which there is no adequate remedy at law.[35] But a composition will not be enforced when made by an agent without authority[36] when the agreement does not comply with the requirements of the statute of frauds,[37] when all conditions are not complied with,[38] or when the debtor who seeks to enforce it has given a fraudulent preference to another creditor.[39] A separate agreement securing a secret advantage to some of the creditors will not be enforced.[40] A composition may be enforced after the death of the debtor by his personal representatives[41] but not by creditors who were not parties nor intended to be benefited by it.[42]

COMPOSITIO ULNARUM ET PERTICARUM. The statute of ells and perches. The title of an English statute establishing a standard of measures.[1]

COMPOS MENTIS. Sound of mind; having use and control of one's mental faculties.[2] (See, generally, INSANE PERSONS.)

COMPOS SUI. Having the use of one's limbs, or the powers of bodily motion.[3]

COMPOTARIUS. In old English law, a party accounting.[4]

COMPOUND. As a noun, the term signifies that which is compounded or formed by the union or mixture of elements, ingredients or parts,[5] composed of

of the composition, and before the expiration of its terms, the assignor died. It was held that his personal representatives, upon paying to the creditors the amounts required, in addition to the dividends already paid, to complete the payment of the composition, were entitled to be subrogated to the rights of the creditors; and that it was no objection to this, under the circumstances, that such dividends had been paid by the assignee instead of by the assignor, they having been in fact paid out of the fund contemplated by the agreement.

The executor of the debtor can enforce specific performance of the agreement of a third party to indemnify him against his creditors. Pollen *v.* Huband, 1 P. Wms. 751, 24 Eng. Reprint 598.

34. Lobdell *v.* Nauvoo State Bank, 120 Ill. 56, 54 N. E. 157 [*affirming* 78 Ill. App. 600]; Cutting *v.* Dana, 25 N. J. Eq. 265; Phillips *v.* Berger, 8 Barb. (N. Y.) 527 [*affirming* 2 Barb. (N. Y.) 608]; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046 [*affirming* 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540]; Only *v.* Walker, 3 Atk. 407, 26 Eng. Reprint 1035; Powles *v.* Hargreaves, 3 De G. M. & G. 430, 2 Eq. Rep. 162, 17 Jur. 1083, 23 L. J. Ch. 1, 2 Wkly. Rep. 21, 52 Eng. Ch. 336; Field *v.* Donoughmore, 2 Dr. & Wal. 630; Synnot *v.* Simpson, 5 H. L. Cas. 121; Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 24 Rev. Rep. 254, 1 Eng. Ch. 607; Pollen *v.* Huband, 1 P. Wms. 751, 24 Eng. Reprint 598.

35. Blodget *v.* Hogan, 10 La. Ann. 18; Gibbon *v.* Bellas, 2 Phila. (Pa.) 390, 14 Leg. Int. (Pa.) 327; Fawcett *v.* Gee, 3 Anstr. 910; Cecil *v.* Plaistow, 1 Anstr. 202; Spurret *v.* Spiller, 1 Atk. 105, 26 Eng. Reprint 69; Constantein *v.* Blache, 1 Cox Ch. 287; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229. See also *supra*, XI, B, 1, e.

36. Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453.

37. Emmet *v.* Dewhurst, 15 Jur. 1115, 21 L. J. Ch. 497, 3 Macn. & G. 587, 49 Eng. Ch. 453.

38. For example, where the deed contains a provision that it shall not be binding unless all the creditors execute it and some do not execute. Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

39. Child *v.* Danbridge, 2 Vern. 71.

40. Mawson *v.* Stock, 6 Ves. Jr. 300.

41. Matter of Leslie, 10 Daly (N. Y.) 76.

42. In Garrard *v.* Lauderdale, 2 Russ. & M. 451, 11 Eng. Ch. 451 [*affirming* 3 Sim. 1, 16 Eng. Ch. 1], a person by deed conveyed to trustees certain personal property, upon trust to sell the same, and after satisfying certain specified charges and claims out of the proceeds, to divide the residue among his scheduled creditors, none of whom were parties or privy to the execution of the deed. The trustees after partially executing the trusts by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts. It was held that after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor and vesting no right in the creditors.

1. Black L. Dict.

2. Black L. Dict.

3. Black L. Dict.

4. Black L. Dict.

5. Webster Dict. [*quoted* in Rose *v.* State, 5 Ohio Cir. Dec. 72, 74].

Compared with "mixture."—A fair interpretation of the meaning of the words "mix-

two or more elements, parts or ingredients, not simple.[6] As a verb, to mix or prepare;[7] to compromise; to effect a composition with a creditor; to obtain discharge from a debt by the payment of a smaller sum;[8] to abate a part, on receiving the residue.[9] (Compound: Interest, see INTEREST; USURY. Offense, see COMPOUND OFFENSE. See also, generally, ACCORD AND SATISFACTION; COMPOSITIONS WITH CREDITORS; COMPROMISE AND SETTLEMENT.)

COMPOUNDED. As employed in ordinary and common use in pharmacy the term indicates something formed by a mixture of ingredients without chemical union; mixed, put together, or prepared, according to any formula published or unpublished.[10]

COMPOUNDED DRUG. A drug made up of other articles, drugs or chemicals mixed together, by trituration, by rubbing together, or by dissolving, etc.[11]

COMPOUNDER. In Louisiana, the maker of a composition generally called the "amicable compounder."[12]

COMPOUNDING. Arranging, coming to terms;[13] an arranging with the creditor to his satisfaction.[14] (Compounding: Offense, see COMPOUNDING FELONY. With Creditor, see COMPOSITIONS WITH CREDITORS.)

ture and compound" in the statute, is something resulting from the putting together of parts or ingredients other than as nature has put them together in the fruits of the earth. Rose *v.* State, 5 Ohio Cir. Dec. 72, 74 [*construing* the act of March 20, 1884, as amended April 22, 1890, to provide against the adulteration of foods].

In chemistry, the term means a substance formed by a chemical union of its constituents, and never a simple mixture in which a chemical union of the ingredients does not occur. U. S. *v.* Stubbs, 91 Fed. 608, 609.

In pharmacy, on the other hand, a "compound" is merely a mixture of different ingredients, without reference to chemical union. U. S. *v.* Stubbs, 91 Fed. 608, 609.

6. Century Dict. [*quoted* in Rose *v.* State, 5 Ohio Cir. Dec. 72, 74].

7. U. S. *v.* Stubbs, 91 Fed. 608, 610.

To "compound" a prescription is to prepare it for use, or put together the different articles specified in the prescription so as to be fit for the patient; and this is the ordinary and common use of the word with druggists. U. S. *v.* Stubbs, 91 Fed. 608, 609.

8. Black L. Dict. [*quoted* in Idaho Bank *v.* Malheur Co., 30 Oreg. 420, 426, 45 Pac. 781, 35 L. R. A. 141].

9. Haskins *v.* Newcomb, 2 Johns. (N. Y.) 404, 407, where it is said: "To abandon the whole cannot, in any grammatical or common use of the word, be said, or considered to be a composition with the debtor."

10. U. S. *v.* Stubbs, 91 Fed. 608, 611.

"Compounded" and "uncompounded" unknown in chemistry.— In U. S. *v.* Stubbs, 91 Fed. 608, 609, the court said: "The evidence is very clear and convincing that while the term 'compound' is in common use in chemistry, as in such phrases as 'a chemical compound,' or 'a compound formed,' etc., etc., the words 'compounded' and 'uncompounded' are wholly unknown to chemical science, and are neither found in chemical text-books nor used in the chemical laboratory."

Construing the word "compounded" in the phrase "medical article compounded," etc., as used in section 20, of the war revenue act of 1898, the court said: "I cannot agree that it was employed in this act in a peculiar or technical sense. It does not appear to have, in the trade, any meaning other than 'mixed,' which is its common and ordinary one. It certainly has no special meaning with pharmacists which is generally understood and established, for those of them who have testified in this case have not agreed as to its proper application. It seems that they sometimes apply it to a medicine composed of several drugs, but not to a composite medicinal article, such as a plaster." J. Ellwood Lee Co. *v.* McClain, 106 Fed. 164, 166.

11. U. S. *v.* Stubbs, 91 Fed. 608, 609, where it is said: "Such an article is not a single definite chemical substance, but 'compounded' by the mere mixture of two or more chemical substances, each of which retains its own separate properties, which is not true of a chemical compound."

The terms "compounded," and "uncompounded medicinal drugs or chemicals," must be interpreted according to the common use of those terms in the business and among the persons referred to in the act, as shown by the context in the provisions in which they occur. U. S. *v.* Stubbs, 91 Fed. 608, 609.

12. Black L. Dict.

13. Wharton L. Lex.

14. Pennell *v.* Rhodes, 9 Q. B. 114, 129, 58 E. C. L. 114, where it is said: "If there is a binding arrangement for discharge of the debt, from which neither party can recede, and with which the creditor is satisfied, it is a compounding, though something still remains to be done."

COMPOUNDING FELONY

By Frank E. Jennings

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For General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

I. DEFINITION.

Compounding a felony is defined to be the offense of taking a reward for forbearing to prosecute a felony; as where the party robbed takes his goods again, or other amends upon an agreement not to prosecute.[1]

1. Burrill L. Dict. [*quoted* in Watson *v.* State, 29 Ark. 299, 301].

Other definitions are: "An agreement with the criminal not to prosecute him." Bishop Crim. L. § 648 [*cited* in Conderman *v.* Hicks, 3 Lans. (N. Y.) 108, 110].

"The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute." Black L. Dict. See also Bouvier L. Dict.; Haskins *v.* Newcomb, 2 Johns. (N. Y.) 405, 408.

"Compounding a felony is, at common-law, an offense of an equivalent nature [to the felony], and is, besides, an additional misdemeanor against public justice by contributing to make the laws odious." Anderson L. Dict. [*citing* 4 Bl. Comm. 136].

"In criminal law, to compound a felony is to enter into an agreement, for a valuable consideration, not to prosecute a person for felony, or to show him favor in a prosecution, as where a person takes back goods which have been stolen from him, upon agreement not to prosecute." Rapalje & L. L. Dict. See also Bothwell *v.* Brown, 51 Ill. 234.

"In any case of felony, the receiving of

II. NATURE AND ELEMENTS OF THE OFFENSE.

A. Perversion of Public Justice. The gravamen of this offense consists in the stifling of a public prosecution or in some way perverting public justice;[2] hence the bare retaking of one's own goods which have been stolen would not constitute the offense unless some favor be shown the offender, or the retaking be done with an intent to in some way aid him.[3]

B. Agreement to Compound — 1. In General. The agreement not to prosecute and the acceptance of a reward therefor complete the offense, notwithstanding the party entering into the agreement afterward either voluntarily or through coercion by process of court does prosecute.[4] It is also

amends upon an agreement not to prosecute, constitutes the compounding of the felony." Forshner *v.* Whitcomb, 44 N. H. 14, 16.

"To constitute that offence [compounding of felony] a man for a price or reward, paid or promised to him, must agree to stifle a public prosecution, or at least must agree not to be a complainant or prosecutor." Brittin *v.* Chegary, 20 N. J. L. 625, 630.

Distinguished from misprision of felony.— Misprision of felony consists in a mere concealment of the offense or a procuring of the concealment thereof, while in compounding of felony (or theft-bote) one takes his goods again or other amends not to prosecute. 1 Hawkins P. C. c. 59, § 5.

Synonymous with theft-bote.— At common law this offense was usually known as theft-bote. Com. *v.* Pease, 16 Mass. 96; Forshner *v.* Whitcomb, 44 N. H. 14; 1 Hawkins P. C. c. 59, § 5. "Theft bote, which is, where the party robbed not only knows the fellow, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called compounding of felony; and formerly was held to make a man an accessary; but it is now punished only with fine and imprisonment." 4 Bl. Comm. 133 [*quoted* in Watson *v.* State, 29 Ark. 299, 301].

2. Shaw *v.* Reed, 30 Me. 105; Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Com. *v.* Pease, 16 Mass. 91; Kier *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308; Windhill Local Bd. of Health *v.* Vint, 45 Ch. D. 351, 59 L. J. Ch. 608, 63 L. T. Rep. N. S. 366, 38 Wkly. Rep. 738; Beeley *v.* Wingfield, 11 East 46, 10 Rev. Rep. 431, holding that the offense therein shown did not stifle a public prosecution or elude the public's interests in bringing such an offender to justice by way of example to others, and therefore did not constitute this offense.

The underlying principle that the protection of public justice is the purpose of the law in punishing this offense is succinctly and tersely stated in Shaw *v.* Reed, 30 Me. 105, 109, where the court say: "If it be the duty of every man, it is more especially the duty of persons injured, who have caused criminal prosecutions to be commenced, to appear against offenders, and not to make bargains to allow them to escape conviction, if they or their friends will pay a sum of money to repair the injury. To decide that such bargains might be lawfully made, would be to lend a helping hand to make public justice venal. To procure a compensation to be made to the person injured, is a subordinate object to the State, in causing crimes to be punished. It causes crimes to be punished, that they may not be committed with impunity, and therefore, become more frequent; that the rights of property and the inviolability of the person may not become less secure; that persons may depend upon the execution of the laws, rather than resort to physical force for the preservation and protection of their rights."

Discharge of liability on bond.— The paying of money by a party to relieve himself from his liability on a bond for the appearance of a criminal would be unlawful as within the principle of the composition of a felony. Corley *v.* Williams, 1 Bailey (S. C.) 588.

The practice of advertising for returning goods stolen "no questions asked," was declared to be highly criminal as being a sort of compounding of felony, inasmuch as the goods by that means were returned to the right owner and a stop was put to the inquiry and prosecution of the felony, and thereby great encouragement was given to the commission of such offenses. 1 Hale P. C. 546 note. And by 25 Geo. II, c. 36, the making of an advertisement with these words or with words of the same purport subjected both the advertiser and the printer to a forfeiture of £50. Forshner *v.* Whitcomb, 44 N. H. 14. And see Anderson L. Dict.

3. Brittin *v.* Chegary, 20 N. J. L. 625; 1 Hale P. C. 546; 1 Hawkins P. C. c. 59, § 7.

4. State *v.* Dunhammel, 2 Harr. (Del.) 532; State *v.* Ash, 33 Oreg. 86, 54 Pac. 184 (where the offense was clearly defined by statute); Reg. *v.* Burgess, 16 Q. B. D. 141, 146, 15 Cox C. C. 779, 50 J. P. 520, 55 L. J. M. C. 97, 53 L. T. Rep. N. S. 918, 34 Wkly. Rep. 306 (where it is said: On the opposite view, the question as to the time of the completion of the offense would at once arise. "A man might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years and then might

immaterial to a prosecution for the offense that the compounding be done in good faith by the parties concerned.[5]

2. Consideration — a. Sufficiency. While the consideration for the compounding should be more than mere weak or compassionate motives it is not necessary that an actual pecuniary consideration should be exacted;[6] thus the acceptance of a promissory note from the guilty party would be a sufficient consideration.[7]

b. Necessity of Accrual to Defendant. It is not necessary that the consideration for the compounding should accrue to defendant. It may be taken for the benefit of another[8] or for the benefit of the public.[9]

C. Gravity of Offense Compounded. It is not necessary, to constitute this offense, that the offense compounded be a felony,[10] and although certain misdemeanors, chiefly affecting the individuals aggrieved and not the interest of the public, may be settled by private agreement,[11] the rule may be said to be now well settled[12] that the true test as to whether or not an offense may be com-

turn round and prosecute after all in breach of the agreement. According to the contention he could not be guilty of the offence because he did ultimately prosecute, and if so it is difficult to see when such an offence can be said to be complete"). *Compare* Rex *v.* Stone, 4 C. & P. 379, 19 E. C. L. 563, which seems to be decided on the theory that the offense against the public is not the taking of money from the offender, but the allowing of such offender to escape without punishment; and that, if it appears that after the alleged compounding the party charged did prosecute the offender to the conviction, the offense was not complete.

5. Windhill Local Bd. of Health *v.* Vint, 45 Ch. D. 351, 59 L. J. Ch. 608, 63 L. T. Rep. N. S. 366, 38 Wkly. Rep. 738.

6. Com. *v.* Pease, 16 Mass. 91.

7. Com. *v.* Pease, 16 Mass. 91. See also Fribly *v.* State, 42 Ohio St. 205, where a note constituted part of the consideration.

8. State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235.

9. Windhill Local Bd. of Health *v.* Vint, 45 Ch. D. 351, 365, 59 L. J. Ch. 608, 63 L. T. Rep. N. S. 366, 38 Wkly. Rep. 738, where the court say: "I do not think that the prosecutor is at liberty to weigh the advantage to the public in continuing the prosecution against the advantage of some sum of money being paid to the public or of something else being done for the public."

10. *Connecticut.*— McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67.

Georgia.— Chandler *v.* Johnson, 39 Ga. 85.

Massachusetts.— Com. *v.* Pease, 16 Mass. 91.

New Hampshire.— State *v.* Carver, 69 N. H. 216, 39 Atl. 973.

Pennsylvania.— Pearce *v.* Wilson, 111 Pa. St. 14, 23, 2 Atl. 99, 56 Am. Rep. 243 (where it is said: "Formerly a distinction existed in this respect between felonies and misdemeanors, but it is no longer recognized, except in a few minor offences, the prosecution of which is matter of little or no public interest. In many jurisdictions the distinction between felonies and misdemeanors is abolished, and in those where it still exists it is regarded as artificial. There are many misdemeanors, the compounding of which militates far more against the public welfare than does the compounding of some felonies. . . . To stifle their prosecution for a paltry pecuniary consideration is contrary to public policy, and a mere mockery of justice in her own temple"); Sharp *v.* Philadelphia Warehouse Co., 14 Phila. (Pa.) 513, 38 Leg. Int. (Pa.) 404.

11. McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Geier *v.* Shade, 109 Pa. St. 180.

For right of injured party to compromise misdemeanor see, generally, CRIMINAL LAW.

12. *Connecticut.*— McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67.

Massachusetts.— Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524.

New Hampshire.— State *v.* Carver, 69 N. H. 216, 218, 39 Atl. 973, where the court say: "Indeed, the absence of any statute upon the subject of the composition of misdemeanors sufficiently shows the general understanding in this state, for it cannot reasonably be supposed that so infamous an offence would have been permitted to go unpunished for want of statutory enactment unless it had been understood generally that under our common law none was necessary."

North Carolina.— Thompson *v.* Whitman, 49 N. C. 47, 51, where it is said: "It is a matter of public concern, that all violations of the criminal law should be detected and punished. So that any individual who knows that an indictable offence has been committed, and conceals it, thereby fails to discharge the duty of a good citizen. Upon this principle, the bare concealment of treason or felony is an indictable offence, and the offence is aggravated by compounding the felony."

Pennsylvania.— Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep 243; Sharp *v.* Philadelphia Warehouse Co., 14 Phila. (Pa.) 513, 38 Leg. Int. (Pa.) 404.

England.— Reg. *v.* Blakemore, 14 Q. B. 544, 68 E. C. L. 544; Keir *v.* Leeman, 9 Q. B. 371, 395, 10 Jur. 742, 15 L. J. Q. B. 359,

pounded depends not upon the technical or legal name by which it is known, either specifically or as a class, but upon the publicity of the same — upon the fact that the compounding would affect the public's interests.

D. Necessity of Actual Commission of Preceding Offense. The actual commission of a preceding crime would seem to be essential to the offense of compounding the same, and in the majority of jurisdictions this is the view taken,[13] although in some the rule is otherwise.[14] Again in some jurisdictions the alleged perpetrator of the original offense need not be first tried and convicted,[15] nor need the proof of his guilt be conclusive enough to warrant a conviction,[16] but in other jurisdictions his previous conviction is necessary.[17]

E. As Affected by Statute. In many jurisdictions the parties may, by virtue of statute, compromise or compound certain offenses by the consent of the court or public officials.[18] Such provisions are, however, permissive rather than imperative; the propriety of permitting the compounding resting within the discretion of the court.[19]

III. BY WHOM COMMITTED.

It has been argued, from the definition of this offense usually given by the

58 E. C. L. 371 (where it is said: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal. . . . If the matter were *res integra*, we should have no doubt on this point"); Windhill Local Bd. of Health *v.* Vint, 45 Ch. D. 351, 59 L. J. Ch. 608, 63 L. T. Rep. N. S. 366, 38 Wkly. Rep. 738; Edgecombe *v.* Rodd, 5 East 294, 1 Smith K. B. 515, 7 Rev. Rep. 700.

In certain old English cases the composition of public misdemeanors seems to have been allowed. Fallowes *v.* Taylor, Peake Add. Cas. 155, 7 T. R. 475 (where the compounding seems to have been allowed partly at least upon the ground that the main object of the prosecution had been attained); Johnson *v.* Ogilby, 3 P. Wms. 277 [*criticized* in Keir *v.* Leeman, 9 Q. B. 371, 10 Jur. 742, 15 L. J. Q. B. 359, 58 E. C. L. 371].

No injury to the public is absolutely essential as an element of this offense, inasmuch as the perpetration of the same takes the administration of the law out of the hands of those to whom it is or should be committed. "Stifle" means the prevention of a prosecution which had been instituted from being conducted in its ordinary course. Windhill Local Bd. of Health *v.* Vint, 45 Ch. D. 351, 59 L. J. Ch. 608, 63 L. T. Rep. N. S. 366, 38 Wkly. Rep. 738 [*citing* Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308 (*affirmed* in 9 Q. B. 371, 10 Jur. 742, 15 L. J. Q. B. 359, 58 E. C. L. 371)].

13. *Alabama.*— Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216.

California.— People *v.* Bryon, 103 Cal. 675, 37 Pac. 754.

Indiana.— State *v.* Henning, 33 Ind. 189.

Iowa.— Deere *v.* Wolff, 65 Iowa 32, 21 N. W. 168.

New Jersey.— State *v.* Leeds, (N. J. 1902) 52 Atl. 288, 289, where it is said: "It cannot be held that the public is injured by the refusal of a private person to present or prosecute a charge of crime, if in fact no crime has been perpetrated."

Pennsylvania.— Swope *v.* Jefferson F. Ins. Co., 93 Pa. St. 251.

See 10 Cent. Dig. tit. "Compounding Felony," § 1 *et seq.*

14. Chandler *v.* Johnson, 39 Ga. 85; State *v.* Carver, 69 N. H. 216, 39 Atl. 973; Fribly *v.* State, 42 Ohio St. 205.

15. Watt *v.* State, 97 Ala. 72, 11 So. 901.

16. Swope *v.* Jefferson F. Ins. Co., 93 Pa. St. 251, 254, where the court say: "The guilt of the party accused and an agreement not to prosecute are essential ingredients in the compounding of a felony. Though the proof of guilt need not be of that conclusive character that would be necessary to convict, there should be at least such preponderance of evidence as will justify the jury in finding that a felony was committed."

17. Deere *v.* Wolff, 65 Iowa 32, 21 N. W. 168.

18. *Georgia.*— Goolsby *v.* Bush, 53 Ga. 353; McDaniel *v.* State, 27 Ga. 197; Dunn *v.* State, 15 Ga. 418.

Louisiana.— State *v.* Hunter, 14 La. Ann. 71.

Massachusetts.— Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Com. *v.* Dowdican, 115 Mass. 133.

New York.— Bradway *v.* Le Worthy, 9 Johns. (N. Y.) 251.

England.— Brown *v.* Bailey, 4 Burr. 1929.

19. McDaniel *v.* State, 27 Ga. 197; State *v.* Hunter, 14 La. Ann. 71; Com. *v.* Dowdican, 115 Mass. 133.

The English courts at an early day made a rule that where they gave leave to compound a penal action they would require the payment of the amount which would likely accrue to the king. Brown *v.* Bailey, 4 Burr.

common-law writers,[20] that it could be committed only by an owner of goods who had received them from the felon. This view, however, was never adopted by the courts[21] or by the legislative bodies in defining the offense.[22]

IV. INDICTMENT OR INFORMATION.[23]

A. In General. The necessity of alleging in the indictment the actual commission of a preceding offense or a failure to prosecute depends of course upon whether or not these elements are considered as requisite parts of the offense.[24] If they are so considered it is necessary that they be distinctly alleged;[25] if not the rule is otherwise.[26]

B. Sufficiency.[27] Where a knowledge of the actual commission of a crime is made necessary by statute, an information stating the circumstances of its commission and defendant's knowledge thereof is sufficient, although the word "actual" be omitted.[28] An information alleging a certain offense to be a compounding of a felony, but which is in fact bribery, will not sustain a verdict for the former offense.[29]

V. DEFENSES.[30]

A. In General. The subsequent arrest and prosecution for the offense compounded will not as a rule constitute a defense.[31] So a party indicted for compounding a larceny and agreeing to withhold evidence cannot plead acquittal of the person charged with the larceny in bar of his own conviction.[32] Again the fact that defendant, being an officer, was amenable under a specific section of the statute is not a defense to his indictment and punishment for this offense under another section which provides generally for this offense.[33]

B. Direction or Consent of Superior. It is not a defense for an officer of the law, who for a reward agrees not to prosecute a guilty party, to show that he acted under the direction of a superior officer and that he gave him the entire

1929. See also Bradway *v.* Le Worthy, 9 Johns. (N. Y.) 251.

20. 1 Hale P. C. 546, 619; 1 Hawkins P. C. c. 59, § 6. And see *supra*, I.

21. Reg. *v.* Burgess, 16 Q. B. D. 141, 146, 15 Cox C. C. 779, 50 J. P. 520, 55 L. J. M. C. 97, 53 L. T. Rep. N. S. 918, 34 Wkly. Rep. 306, where the court, per Coleridge, C. J., says: "It seems to me, however, that when the writers in question so expressed themselves, it was probably because the question whether the offence could be committed by persons other than the owner of the goods was not then present to their minds, and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. . . . But it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offence can only be committed by the owner of the goods."

22. Watt *v.* State, 97 Ala. 72, 11 So. 901; People *v.* Bryon, 103 Cal. 675, 37 Pac. 754; Fribly *v.* State, 42 Ohio St. 205; State *v.* Ash, 33 Oreg. 86, 54 Pac. 184.

23. See, generally, INDICTMENTS AND INFORMATIONS.

24. See *supra*, II, A, 1; II, A, 3.

25. People *v.* Bryon, 103 Cal. 675, 37 Pac. 754; State *v.* Henning, 33 Ind. 189; State *v.* Leeds, (N. J. 1902) 52 Atl. 288.

26. Fribly *v.* State, 42 Ohio St. 205; Reg. *v.* Burgess, 16 Q. B. D. 141, 15 Cox C. C. 779, 50 J. P. 520, 55 L. J. M. C. 97, 53 L. T. Rep. N. S. 918, 34 Wkly. Rep. 306.

27. For forms of indictments or information in whole, in part, or in substance see Watt *v.* State, 97 Ala. 72, 11 So. 901; People *v.* Bryon, 103 Cal. 675, 37 Pac. 754; State *v.* Henning, 33 Ind. 189; Reg. *v.* Burgess, 16 Q. B. D. 141, 15 Cox C. C. 779, 50 J. P. 520, 55 L. J. M. C. 97, 53 L. T. Rep. N. S. 918, 34 Wkly. Rep. 306.

28. People *v.* Bryon, 103 Cal. 675, 37 Pac. 754.

Allegation of time of commission of offense.— An indictment for compounding a felony is insufficient if the offense is charged to have been committed on a date subsequent to the compounding thereof. State *v.* Dandy, 1 Brev. (S. C.) 395.

29. Watson *v.* State, 29 Ark. 299.

30. Ignorance of the law is no defense. State *v.* Carver, 69 N. H. 216, 39 Atl. 973. And see, generally, CRIMINAL LAW.

31. State *v.* Ash, 33 Oreg. 86, 54 Pac. 184. And see *supra*, II, A, 1.

32. People *v.* Buckland, 13 Wend. (N. Y.) 592.

33. State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235.

consideration.[34] Nor will it avail that the compromise of the prosecution was entered into with the unauthorized consent of the magistrate before whom the indictment was laid.[35]

VI. EVIDENCE.

A. Admissibility. On the trial of an indictment for compounding a crime and agreeing to withhold evidence the acquittal of the principal offender is not admissible evidence in favor of the defense.[36] But the record of the conviction of the person compounded with is admissible, and is *prima facie* although not conclusive evidence that a felony has been committed by him.[37]

B. Sufficiency. It is not sufficient to show a state of facts from which defendant's guilt may be presumed; there must be proof that defendant did in fact obstruct or delay the prosecution;[38] but it is not necessary to prove that the party in so many words promised that he would stifle the prosecution.[39]

VII. PUNISHMENT.

A statutory punishment is usually provided where the offense has been defined or modified by statute; at common law the punishment was by fine and imprisonment.[40]

COMPOUND OFFENSE. An offense committed when more than one offense is committed in the same transaction.[1] (See, generally, CRIMINAL LAW.)

COMPRA Y VENTA. In Spanish law, purchase and sale.[2]

COMPRESSOR. As used upon vessels, a somewhat recent device, placed a little forward of the windlass in the direction of each hawse-pipe, designed to keep the hawser in place, and to steady and relieve in some measure the strain on the windlass.[3]

COMPRINT. A surreptitious printing of another book-seller's copy of a work, to make gain thereby, which was contrary to common law, and is illegal.[4] (See, generally, COPYRIGHT.)

COMPRISED. That would have been comprehended in; that would have been an item in the account demanded.[5]

COMPRISING. Comprehending; including.[6]

34. State *v.* Ash, 33 Oreg. 86, 54 Pac. 184.

35. Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308.

36. People *v.* Buckland, 13 Wend. (N. Y.) 592.

37. State *v.* Duhammel, 2 Harr. (Del.) 532.

38. Stancel *v.* State, 50 Ga. 152, where the evidence showed that B had been arrested for an assault upon defendant; that M, a friend of B, applied to defendant to settle the case, which so far as the criminal prosecution was concerned he refused to do. Defendant's attorney, however, afterward, without any authority from him and in his absence, settled for the damages, it being distinctly stated and stipulated in the agreement that there was no settlement of the criminal prosecution. The written agreement, however, stated that defendant was satisfied, and suggested that such satisfaction be considered by the public officers. It was also shown that at the next term of court after the assault defendant was absent. It was held that the evidence was not sufficient to justify a verdict of guilty, as there was no proof that the prosecution was in fact discontinued, that defendant acted upon the proposals of M, or that the absence of defendant from court was in pursuance of any agreement that he should be absent.

39. Brittin *v.* Chegary, 20 N. J. L. 625.

40. 1 Hale P. C. 546, 619; 2 Hale c. 400; 1 Hawkins P. C. c. 59, § 6.

1. State *v.* Ridley, 48 Iowa 370, 375.

2. Black L. Dict.

3. The Alaska, 23 Fed. 597, 599.

4. Wharton L. Lex.

5. Knox *v.* Gye, L. R. 5 H. L. 656, 673, 42 L. J. Ch. 234.

6. Webster Dict. And see Steigerwald *v.* Winans, 17 Md. 62, 66, where it is said: "Although the word 'compromising,' does not under all circumstances, imply including only the things enumerated, yet, in the connection in which it is employed in the Code, we understand it as being used as determining what are the 'original papers,' which are only to be transmitted, and on which the decision of the court is to be given."

COMPRIVIGNI. In the civil law, children by a former marriage, (individually called "*privigni*" or "*privignæ*,") considered relatively to each other.[7]

COMPROMISE. To adjust by mutual concession;[8] to settle without resort to the law; to COMPOUND,[9] *q. v.* (See, generally, ACCORD AND SATISFACTION; COMPOSITIONS WITH CREDITORS; COMPROMISE AND SETTLEMENT; PAYMENT; RELEASE.)

7. Thus, the son of a husband by a former wife, and the daughter of a wife by a former husband, are the *comprivigni* of each other. Black L. Dict.

8. Attrill *v.* Patterson, 58 Md. 226, 245 (where it is said that to negotiate, means substantially the same thing); Webster Dict. [*quoted* in Rivers *v.* Blom, 163 Mo. 442, 446, 63 S. W. 812].

9. Webster Dict. [*quoted* in Rivers *v.* Blom, 163 Mo. 442, 446, 63 S. W. 812].

COMPROMISE AND SETTLEMENT

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I. DEFINITION.

A compromise is an agreement made between two or more parties as a settlement of matters in dispute.[1]

1. Smith *v.* Cantrell, (Tex. Civ. App. 1899) 50 S. W. 1081; Bouvier L. Dict. [*quoted* in Treitschke *v.* Western Grain Co., 10 Nebr. 358, 360, 6 N. W. 427].

Other definitions are: "An adjustment of such matters in dispute . . . by mutual concessions." Chilton *v.* Willford, 2 Wis. 1, 6, 40 Am. Dec. 399 [*quoting* Bouvier L. Dict.; Burrill L. Dict.].

"An agreement between the parties to a controversy, for a settlement of the same." Abbott L. Dict.

"A mutual agreement between two or more persons at difference, to put an end to such difference upon certain terms agreed upon." Burrill L. Dict.

"A settlement of differences by mutual concessions." Century Dict. [*quoted* in Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 312, 66 N. W. 606].

"The mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counter-claim." Anderson L. Dict. [*quoted* in Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 312, 66 N. W. 606]. See also Gregg *v.* Weathersfield, 55 Vt. 385.

"An agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon." Bouvier L. Dict. [*quoted* in Collins *v.* Welch, 58 Iowa 72, 74, 12 N. W. 121, 43 Am. Rep. 111, per Beck, J., in dissenting opinion].

"Where the parties to a dispute dispose of it by agreement between themselves, whether legal proceedings have been commenced or not." Sweet L. Dict.

"An agreement between two or more per-

II. WHO MAY MAKE

A. In General. A valid compromise may be made by any parties between whom a controversy as to their respective rights exists,[2] and who are not under any disability to contract.[3] No degree of mental or physical weakness which leaves a party legal competency to act is of itself sufficient to avoid a settlement made with him.[4]

B. Persons Duly Authorized or Whose Acts Are Ratified. A compromise may be effected by persons representing and acting under the authority of the parties to a controversy, express or implied from their relations;[5] but no such

sons, who for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." La. Rev. Civ. Code (1900), § 3071. See also Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530; Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321; Calhoun *v.* Lane, 39 La. Ann. 594, 2 So. 219; Shiff *v.* Shiff, 20 La. Ann. 269; Wright *v.* Temple, 13 La. Ann. 413; Sharp *v.* Knox, 4 La. 456; Oglesby *v.* Attrill, 105 U. S. 605, 26 L. ed. 1186.

Distinguished from composition with creditors see COMPOSITIONS WITH CREDITORS, *ante*, p. 409.

Distinguished from tender.— A tender admits absolutely the amount tendered as due; while an offer to compromise admits nothing, except that there is a dispute, and the party offering money by way of compromise may claim that nothing is due. Latham *v.* Hartford, 27 Kan. 249.

2. A county possesses the power by its proper officers to compromise pending litigation involving the title to its swamp-lands. Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66.

Parties having claims against the United States for labor or service, or for personal property or materials furnished, which are disputed by the officers authorized to adjust the accounts, may compromise such claims and may accept a smaller sum than the contract price; and where the claimant voluntarily enters into a compromise and accepts a smaller sum and executes a discharge in full for the whole claim he cannot subsequently recover in the court of claims for any part of the claim voluntarily relinquished in the compromise. Mason *v.* U. S., 17 Wall. (U. S.) 67, 21 L. ed. 564.

Effect of subsequent bankruptcy.— Parties entered into an agreement for compromising a suit, and, pending a reference to chambers, one of the parties became bankrupt, and afterward the court approved of the compromise. It was held that the compromise was binding on the bankrupt from the date thereof, subject to confirmation by the court. Bousfield *v.* Bousfield, 31 Beav. 591.

3. As to capacity to contract generally see CONTRACTS.

Compromises invalid for want of mental capacity to contract.— Miller *v.* Best, 36 Ill. App. 74; Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Stone *v.* Chicago, etc., R. Co., 66 Mich. 76, 33 N. W. 24; Cundell *v.* Haswell, (R. I. 1902) 51 Atl. 426. And see McLean *v.* U. S. Equitable L. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779.

Incapacity by reason of intoxication.— A party may show, in order to defeat a settlement made by him, that at the time he was incapable of contracting intelligently by reason of intoxication. Phelan *v.* Gardner, 43 Cal. 306; Murray *v.* Carlin, 67 Ill. 286; Lang *v.* Ingalls Zinc Co., (Tenn. Ch. 1898) 49 S. W. 288.

4. Mitchell *v.* Long, 5 Litt. (Ky.) 71; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Paris *v.* Dexter, 15 Vt. 379.

Ignorance of party does not incapacitate in the absence of fraud. Mitchell *v.* Long, 5 Litt. (Ky.) 71; Mosby *v.* Cleveland St. R. Co., 8 Ohio Cir. Dec. 375; Manby *v.* Bewicke, 3 Kay & J. 342.

Impaired health and depression of spirits of a party to a compromise, no unsoundness of mind being proved, is not ground for opening a settlement, in making which the parties dealt with each other at arm's length. Billingslea *v.* Ware, 32 Ala. 415.

5. O'Brien *v.* New York, 25 Misc. (N. Y.) 219, 55 N. Y. Suppl. 50.

As to compromise by assignee for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, VI, B [4 Cyc. 187]; XII, A, 2 [4 Cyc. 233].

As to compromise by attorney see ATTORNEY AND CLIENT, III, C, 3, a, (II), (D), (3) [4 Cyc. 945].

As to compromise by person acting in a fiduciary relation generally see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PRINCIPAL AND AGENT; TRUSTS.

Compromise by majority of members of church.— Where a church and society are an existing organized association acting in a collective quasi-corporate character, an agreement of compromise of a suit by a majority of the members is binding upon the minority. Horton *v.* Chester Baptist Church, 34 Vt. 309.

Delegation of power by directors to one of their number.— The articles of association of a company empowered the directors to delegate powers "to committees consisting of members of their body," and provided that in the construction of the articles words im-

compromise by a third person is binding in the absence of such authority,[6] or unless it be subsequently ratified either expressly or by such acts of the interested parties as clearly evidence their intention to accept such settlement,[7] as for instance by accepting the fruits of such compromise[8] or by abiding by and acting upon such compromise for a long period of time.[9]

III. REQUISITES.

A. In General. There must be mutuality of agreement between the parties

porting the plural number only should include the singular. It was held that the directors were at liberty to delegate their power to compromise claims to a single member of their body. *In re* Scottish Petroleum Co., 51 L. J. Ch. 841, 46 L. T. Rep. N. S. 880.

Presumption as to continuance of authority.— Where the contestees of a will authorized an agent to make a compromise with the contestant, and after contestant's refusal to accept the first proposition made by the agent, they revoked his authority, the case is one to which should be applied the rule that where an agent is appointed to do a thing it will be presumed his authority continues until it is revoked and those dealing with him concerning the subject-matter of the authority to be affected by the revocation must have notice of it. Wheeler *v.* Wheeler, 15 Ky. L. Rep. 539.

6. *Arkansas.*— Moore *v.* Cairo, etc., R. Co., 36 Ark. 262; Jacks *v.* Adair, 31 Ark. 616.

California.— Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297.

Iowa.— Everingham *v.* Lee, 78 Iowa 630, 43 N. W. 459.

Maryland.— Hamburger *v.* Paul, 51 Md. 219.

Michigan.— Delta Lumber Co. *v.* Williams, 73 Mich. 86; Hickey *v.* Hinsdale, 12 Mich. 99.

Missouri.— Griffin *v.* Wabash, etc., R. Co., 22 Mo. App. 621.

Ohio.— Standard Home, etc., Assoc. *v.* Jones, 64 Ohio St. 147, 59 N. E. 885.

Wisconsin.— Barker *v.* Ring, 97 Wis. 53, 72 N. W. 222.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 8; and *infra*, V, C, 3.

Possession by one of a note payable to another gives him implied authority to collect it, but not to make a settlement by compromise. Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567.

The settlement of an action, made without the consent of plaintiff, by which another person assumed the liabilities of defendant, may be avoided by plaintiff without proof of fraud. Kinney *v.* Kinney, 94 Iowa 672, 63 N. W. 452.

Burden of proving authority of agent to compromise.— Where a settlement is claimed to have been made with an agent authorized to make the same, and such authority is denied, the burden of showing such authority is upon the party asserting it. Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567. And see as to duty to ascertain attorney's authority to compromise Sonnebom *v.* Moore, 105 Ga. 497, 30 S. E. 947.

7. *Kentucky.*— Liggett *v.* Ashley, 5 Litt. (Ky.) 178. See also Merriwether *v.* Tucker, 3 Ky. L. Rep. 336.

Michigan.— Gemberling *v.* Spaulding, 104 Mich. 217, 62 N. W. 342.

Washington.— Denney *v.* Parker, 10 Wash. 218, 36 Pac. 1018.

Wisconsin.— Strasser *v.* Conklin, 54 Wis. 102, 11 N. W. 254; Beal *v.* Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719; Paine *v.* Wilcox, 16 Wis. 202; Reid *v.* Hibbard, 6 Wis. 175.

United States.— The Deer, 10 Ben. (U. S.) 628, 7 Fed. Cas. No. 3,738.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 9.

An infant may affirm a contract of settlement made for her benefit and may sue upon it as if originally a party thereto. Glover *v.* Patten, 165 U. S. 394, 17 S. Ct. 411, 41 L. ed. 760; and, generally, INFANTS.

Formal ratification unnecessary.— Pending a suit for divorce brought by a wife against her husband, the wife agreed that she would take certain lands of the husband in satisfaction of such judgment as might be rendered in her favor for alimony; and a deed was made and delivered to her agent accordingly. It was held that a formal ratification of the agreement, after judgment for alimony, was not necessary to render the compromise binding. Dutton *v.* Dutton, 30 Ind. 452.

Insufficient evidence of ratification.— A ratification of an unauthorized agreement of compromise of a claim in suit is not proved by the entry of such agreement on the minutes of the court in the cause to which it relates, in the presence of the party's attorney. Revis *v.* Wallace, 2 Heisk. (Tenn.) 658.

8. Strasser *v.* Conklin, 54 Wis. 102, 11 N. W. 254.

Ratification of settlement voidable for physical disability.— Where plaintiff agreed to a settlement of a claim for injuries while in a condition of physical pain which rendered the agreement voidable, and there was no evidence that the agreement was procured by fraud, an acceptance of the amount of such settlement by her attorney with her consent, at a time when she fully understood what she was doing, is a ratification of the settlement. Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116.

9. Abernathie *v.* Consolidated Virginia Min. Co., 16 Nev. 260.

— a meeting and concurrence of minds.[10] The parties should deal with each other on an equal footing,[11] and the agreement must have been fairly and reasonably made.[12] A compromise agreement, in order to take away the right of action on the original contract, must be an agreement, which is substituted for the pre-existing obligation and must bind both parties, so that suit may be maintained by either to enforce the same.[13]

B. Consideration — 1. Necessity. A compromise and settlement must, like all other contracts, be supported by a sufficient consideration or it cannot be enforced.[14]

2. Sufficiency — a. In General. The consideration will be sufficient if there is something of detriment to one party or benefit to the other, however slight.[15]

b. Family Settlements. Compromises for the settlement of family difficulties or family controversies if at all reasonable are especially favored both in

10. Southern Oil Co. *v.* Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429.

A settlement in the nature of a compromise must be made as such and so understood on both sides. Jennison *v.* Stone, 33 Mich. 99.

11. Barnawell *v.* Threadgill, 56 N. C. 50.

12. Norris *v.* Slaughter, 3 Greene (Iowa) 116.

13. Luce *v.* Springfield F. & M. Ins. Co., 1 Flipp. (U. S.) 281, 15 Fed. Cas. No. 8,589, 5 Chic. Leg. N. 303, 2 Ins. L. J. 443, 19 Myers Fed. Dec. 636.

A right of action for a tort is not extinguished by a "compromise settlement" in which a given sum is to be paid to the injured party, unless it be expressly agreed between the parties that the promise to pay the amount fixed by the settlement shall be accepted as a satisfaction of the original claim. Fouche *v.* Morris, 112 Ga. 143, 37 S. E. 182.

14. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632; Billingslea *v.* Ware, 32 Ala. 415.

California.— Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468.

Connecticut.— Hurlbut *v.* Phelps, 30 Conn. 42.

Indiana.— Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150; Olvey *v.* Jackson, 106 Ind. 286, 4 N. E. 149; Smith *v.* Boruff, 75 Ind. 412; Bright *v.* Coffman, 15 Ind. 371, 77 Am. Dec. 96; Jarvis *v.* Sutton, 3 Ind. 289; Spahr *v.* Hollingshead, 8 Blackf. (Ind.) 415.

Iowa.— Jennings *v.* Jennings, (Iowa 1901) 87 N. W. 726; Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66; Norris *v.* Slaughter, 3 Greene (Iowa) 116.

Kansas.— Finley *v.* Funk, 35 Kan. 668, 12 Pac. 15.

Kentucky.— Creutz *v.* Heil, 89 Ky. 429, 11 Ky. L. Rep. 652, 12 S. W. 926; Alves *v.* Henderson, 16 B. Mon. (Ky.) 131; Braydon *v.* Goulman, 1 T. B. Mon. (Ky.) 119; Higgs *v.* Smith, 3 A. K. Marsh. (Ky.) 338.

Maryland.— Emmittsburgh R. Co. *v.* Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Bosley *v.* McKim, 7 Harr. & J. (Md.) 468.

Massachusetts.— Hunt *v.* Brown, 146 Mass. 253, 15 N. E. 587; Goodnow *v.* Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600.

Minnesota.— Copley *v.* Hyland, 46 Minn. 205, 48 N. W. 777; Stearns *v.* Johnson, 17 Minn. 142.

Nebraska.— Boyce *v.* Berger, 11 Nebr. 399, 9 N. W. 545.

New York.— Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 26 Am. St. Rep. 457, 5 L. R. A. 623; Bunge *v.* Koop, 48 N. Y. 225, 8 Am. Rep. 546; Phillips *v.* Berger, 2 Barb. (N. Y.) 608; Bunn *v.* Bartlett, 5 Silv. Supreme (N. Y.) 83, 8 N. Y. Suppl. 160, 28 N. Y. St. 239; Lewis *v.* Donohue, 27 Misc. (N. Y.) 514, 58 N. Y. Suppl. 319; Popper *v.* Bingham, 20 Misc. (N. Y.) 1/3, 45 N. Y. Suppl. 820; Lawrence *v.* Church, 12 N. Y. Suppl. 420, 35 N. Y. St. 956; Van Nest *v.* Lott, 16 Abb. Pr. (N. Y.) 130; Rourke *v.* Duffy, 15 Abb. Pr. (N. Y. 340.

Ohio.— Lucas County Com'rs *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303.

Oregon.— Smith *v.* Farra, 21 Oreg. 395, 28 Pac. 241, 20 L. R. A. 115.

Pennsylvania.— Driesbach *v.* Keller, 2 Pa. St. 77; Maurer's Estate, 1 Woodw. Dec. (Pa.) 268.

South Carolina.— Kennedy *v.* Badgett, 19 S. C. 591.

Tennessee.— Aiken *v.* Taylor, (Tenn. Ch. 1900) 62 S. W. 200.

Virginia.— Mosby *v.* Leeds, 3 Call (Va.) 439.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Zimmer *v.* Becker, 66 Wis. 527, 29 N. W. 228.

United States.— Humphrey *v.* Thorp, 89 Fed. 66. And see Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 35.

An executed compromise will not be set aside for want of consideration but only for fraud. Copley *v.* Hyland, 46 Minn. 205, 48 N. W. 777.

Presumption of consideration.— As fraud is not to be presumed a mutual concession and remission of claims will be deemed in ordinary cases to have been made upon sufficient consideration. Doyle *v.* Donnelly, 56 Me. 26.

15. *Missouri.*— Henson *v.* Stever, 69 Mo. App. 136.

equity and in law,[16] and in such cases the court will go further to sustain the same than they would under ordinary circumstances.[17] The termination of such controversies is considered a valid and sufficient consideration for the agreement.[18]

c. Unliquidated, Disputed, and Doubtful Claims — (I) *In General.* The rule is well settled that an agreement of compromise is supported by a sufficient consideration where it is in settlement of a claim which is unliquidated,[19]

Pennsylvania.— Fink *v.* Farmers' Bank, 178 Pa. St. 154, 35 Atl. 636, 56 Am. St. Rep. 746.

Tennessee.— Palmer *v.* Bosley, (Tenn. Ch. 1900) 62 S. W. 195.

Texas.— Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415.

Wisconsin.— Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 35.

A settlement in which both parties yield some right or legal claim to prevent a litigation is founded on a good consideration. Stoelke *v.* Hahn, 55 Ill. App. 497 [*affirmed* in 158 Ill. 79, 42 N. E. 150].

16. *Alabama.*— Lee *v.* Sims, 65 Ala. 248.

Connecticut.— Hurlbut *v.* Phelps, 30 Conn. 42.

Georgia.— Bass *v.* Bass, 73 Ga. 134; Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761; Watkins *v.* Watkins, 24 Ga. 402.

Iowa.— Merkert *v.* Grobe, (Iowa 1902) 90 N. W. 490; Norris *v.* Slaughter, 3 Greene (Iowa) 116.

Kentucky.— Sieve *v.* Steinride, 8 Ky. L. Rep. 347, 1 S. W. 672.

Pennsylvania.— Heffner *v.* Sharp, 3 Pa. Super. Ct. 249, 39 Wkly. Notes Cas. (Pa.) 458.

South Carolina.— Gardner *v.* Gardner, 49 S. C. 62, 26 S. E. 1001.

Tennessee.— Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447.

United States.— Gratz *v.* Cohen, 11 How. (U. S.) 1, 13 L. ed. 579.

England.— Williams *v.* Williams, L. R. 2 Ch. 294, 16 L. T. Rep. N. S. 42, 15 Wkly. Rep. 657, 36 L. J. Ch. 419; Stapilton *v.* Stapilton, 1 Atk. 2, 26 Eng. Reprint 1; Wycherley *v.* Wycherley, 2 Eden 175, 28 Eng. Reprint 864; Baker *v.* Bradley, 7 De G. M. & G. 597, 2 Jur. N. S. 98, 25 L. J. Ch. 7, 4 Wkly. Rep. 78, 56 Eng. Ch. 597; Wakefield *v.* Gibbon, 1 Giff. 401, 3 Jur. N. S. 353, 26 L. J. Ch. 505, 5 Wkly. Rep. 479; Harrison *v.* Randall, 9 Hare 397, 16 Jur. 72, 21 L. J. Ch. 294, 41 Eng. Ch. 397; Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 471; Willoughby *v.* Brideoake, 11 Jur. N. S. 706, 13 L. T. Rep. N. S. 141, 13 Wkly. Rep. 1056; Houghton *v.* Lees, 1 Jur. N. S. 862, 3 Wkly. Rep. 135; Clifton *v.* Cockburn, 3 Myl. & K. 76, 10 Eng. Ch. 76; Penhall *v.* Elwin, 1 Smale & G. 258; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184; Westby *v.* Westby, 1 C. & L. 537, 2 Dr. & War. 502, 4 Ir. Eq. 585; Miller *v.* Harrison, Ir. R. 5 Eq. 324; Cory *v.* Cory, 1 Ves. 19, 27 Eng. Reprint 864; Gordon *v.* Gordon, 3 Swanst. 400, 19 Rev. Rep. 230; Davis *v.* Uphill, 1 Swanst. 129; Bellamy *v.* Sabine, 17 L. J. Ch. 105, 2 Phil. 425; Jodrell *v.* Jodrell, 9 Beav. 45, 9 Jur. 1022, 15 L. J. Ch. 17.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 35.

17. Norris *v.* Slaughter, 3 Greene (Iowa) 116.

Deeds in the nature of family arrangements are exempt from the rules applicable to other deeds, the consideration for the former being partly value and partly love and affection. Wiseman *v.* Roper, 1 Ch. Rep. 158; Persse *v.* Persse, 7 Cl. & F. 279, 7 Eng. Reprint 1073, 4 Jur. 358, West 110, 9 Eng. Reprint 439.

18. *Georgia.*— Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761; Watkins *v.* Watkins, 24 Ga. 402.

Iowa.— Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795.

New York.— Bunn *v.* Bartlett, 54 Hun (N. Y.) 639, 8 N. Y. Suppl. 160, 28 N. Y. St. 239; Cruger *v.* Douglas, 4 Edw. (N. Y.) 433.

Texas.— Taylor *v.* Taylor, (Tex. Civ. App. 1900) 54 S. W. 1039.

Vermont.— Paris *v.* Dexter, 15 Vt. 379.

Virginia.— Zane *v.* Zane, 6 Munf. (Va.) 406.

United States.— Gratz *v.* Cohen, 11 How. (U. S.) 1, 13 L. ed. 579.

England.— Westby *v.* Westby, 1 C. & L. 537, 2 Dr. & War. 502, 9 Ir. Eq. 585.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 35.

19. Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373; Heffelfinger *v.* Hummel, 90 Iowa 311, 57 N. W. 872; Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

"A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated." Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 [*quoted* in Emslie *v.* Livingstone, 34 N. Y. App. Div. 133, 54 N. Y. Suppl. 492].

Dispute as to amount of set-off.— A claim is unliquidated so as to be the subject of compromise, although the dispute is only as to whether damages to fire and sprinkling plugs was caused by plaintiff, where the latter did street sprinkling for defendant city under a contract that it should receive a certain amount therefor, but that from such sum there should be deducted any damages

where it is in settlement of a claim which is disputed,[20] or where it is in settlement of a claim which is doubtful.[21]

to the fire and sprinkling plugs caused by it. Pollman, etc., Coal, etc., Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563.

20. *Alabama.*— Wyatt *v.* Evins, 52 Ala. 285.

Arkansas.— Burton *v.* Baird, 44 Ark. 556; Mason *v.* Wilson, 43 Ark. 172; Snow *v.* Grace, 29 Ark. 131; Richardson *v.* Comstock, 21 Ark. 69.

California.— Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

District of Columbia.— Northern Liberty Market Co. *v.* Steubner, 4 Mackey (D. C.) 301.

Florida.— Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373.

Illinois.— Husband *v.* Epling, 81 Ill. 172, 25 Am. Rep. 273; Nichols *v.* Bradsby, 78 Ill. 44; Farmers', etc., Ins. Co. *v.* Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Overstreet *v.* Dunlap, 56 Ill. App. 486; Fred. W. Wolf Co. *v.* Salem, 33 Ill. App. 614; Gilek *v.* Stock, 33 Ill. App. 147.

Indiana.— American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; Proctor *v.* Heaton, 114 Ind. 250, 15 N. E. 21.

Iowa.— Heffelfinger *v.* Hummel, 90 Iowa 311, 57 N. W. 872; Potts *v.* Polk County, 80 Iowa 401, 45 N. W. 775; Richardson, etc., Co. *v.* Hampton Independent Dist., 70 Iowa 573, 31 N. W. 871; Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795; Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66.

Kansas.— Atchison, etc., R. Co. *v.* Starkweather, 21 Kan. 322.

Massachusetts.—Brown *v.* Ladd, 144 Mass. 310, 10 N. E. 839; Riggs *v.* Hawley, 116 Mass. 596; Easton *v.* Easton, 112 Mass. 438; Tuttle *v.* Tuttle, 12 Metc. (Mass.) 551, 46 Am. Dec. 701.

Michigan.— McKinney *v.* Jones, 89 Mich. 26, 50 N. W. 800; Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

Minnesota.— Neibles *v.* Minneapolis, etc., R. Co., 37 Minn. 151, 33 N. W. 332.

Mississippi.— Field *v.* Weir, 28 Miss. 56; Long *v.* Shackleford, 25 Miss. 559.

Missouri.— Livingston *v.* Dugan, 20 Mo. 102.

Nebraska.— Chicago, etc., R. Co. *v.* Buckstaff, (Nebr. 1902) 91 N. W. 426; Massillon Engine, etc., Co. *v.* Prouty, (Nebr. 1902) 91 N. W. 384.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

New York.— Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Babcock *v.* Bonnell, 80 N. Y. 244; Kromer *v.* Heim, 75 N. Y. 574, 31 Am. Rep. 491; Wilson *v.* Randall, 67 N. Y. 338; Wehrum *v.* Kuhn, 61 N. Y. 623; O'Brien *v.* New York, 40 N. Y. App. Div. 331, 57 N. Y. Suppl. 1039 [*affirmed* in 160 N. Y. 691, 55 N. E. 1098]; Housatonic Nat. Bank *v.* Foster, 85 Hun (N. Y.) 376, 32 N. Y. Suppl. 1031, 66 N. Y. St. 435; Lee *v.* Timken, 85 Hun (N. Y.) 309, 32 N. Y. Suppl. 1064, 66 N. Y. St. 417; O'Conor *v.* Philipsen, 74 Hun (N. Y.) 68, 26 N. Y. Suppl. 359, 56 N. Y. St. 176; Dunckel *v.* Failing, 52 Hun (N. Y.) 615, 5 N. Y. Suppl. 504, 24 N. Y. St. 374; Scott *v.* Warner, 2 Lans. (N. Y.) 49; Brooks *v.* Moore, 67 Barb. (N. Y.) 393; Beach *v.* Endress, 51 Barb. (N. Y.) 470; Dolcher *v.* Fry, 37 Barb. (N. Y.) 152; Taylor *v.* Nussbaum, 2 Duer (N. Y.) 302; Lesson *v.* Massachusetts Ben. Assoc., 3 Misc. (N. Y.) 415, 23 N. Y. Suppl. 294, 52 N. Y. St. 506.

North Dakota.— McGlynn *v.* Scott, 4 N. D. 18, 58 N. W. 460.

Oregon.— Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

Tennessee.—Reynolds *v.* Brandon, 12 Heisk. (Tenn.) 731, 3 Heisk. (Tenn.) 593.

Texas.— Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757; Adriance *v.* Crews, 38 Tex. 148; Taylor *v.* Taylor, (Tex. Civ. App. 1900) 54 S. W. 1039; Mulhall *v.* Dicks, 1 Tex. App. Civ. Cas. § 1206.

Vermont.— Gregg *v.* Wethersfield, 55 Vt. 385.

Wisconsin.— Pritzlaff Hardware Co. *v.* Carlson, 76 Wis. 33, 44 N. W. 849; Zimmer *v.* Becker, 66 Wis. 527, 29 N. W. 228; Bergenthal *v.* Frebrantz, 48 Wis. 435, 4 N. W. 89.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 840; Northern Liberty Market Co. *v.* Kelly, 113 U. S. 199, 5 S. Ct. 422, 28 L. ed. 948; Comstock *v.* U. S., 9 Ct. Cl. 141; Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. 546.

England.— Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 36.

21. *Alabama.*— Curry *v.* Davis, 44 Ala. 281.

Arkansas.— Lee *v.* Swilling, 68 Ark. 82, 56 S. W. 447; Burton *v.* Baird, 44 Ark. 556; Richardson *v.* Comstock, 21 Ark. 69.

Colorado.— Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125; Swem *v.* Green, 9 Colo. 358, 12 Pac. 202.

Connecticut.— North *v.* Forest, 15 Conn. 400; Stoddard *v.* Mix, 14 Conn. 12.

Georgia.— Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761.

Illinois.— Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150 [*affirming* 55 Ill. App. 497]; Pool *v.* Docker, 92 Ill. 501; Husband *v.* Epling, 81 Ill. 172, 26 Am. Rep. 273; Hund *v.* Geier, 72 Ill. 393; Miller *v.* Hawker, 66 Ill. 185; Cassell *v.* Ross, 33 Ill. 244, 25 Am. Dec. 270; Burnside *v.* Potts, 23 Ill. 411; McKinley *v.* Watkins, 13 Ill. 140; Frank *v.* Heaton, 56 Ill. App. 227; Lawrence *v.* Coddington, 52 Ill.

(II) *Degree of Doubt Necessary*—(A) *Actual Doubt.* There are cases to the effect that in order to support a compromise in avoidance of litigation the claim must be an actual one, founded upon a colorable right about which there is room for honest doubt and actual dispute, and with some legal or equitable foun-

App. 133; Knowles *v.* Knowles, 29 Ill. App. 124 [*affirmed* in 128 Ill. 110, 21 N. E. 196]; Daffin *v.* Roberts, 9 Ill. App. 103.

Indiana.— Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150; Miller *v.* Lilly, 84 Ind. 533; Smith *v.* Boruff, 75 Ind. 412; Coy *v.* Stucker, 31 Ind. 161; Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Jarvis *v.* Sutton, 3 Ind. 289; Spahr *v.* Hollingshead, 8 Blackf. (Ind.) 415.

Iowa.— Shaw *v.* Chicago R. Co., 82 Iowa 199, 47 N. W. 1004; Schaben *v.* Brunning, 74 Iowa 102, 36 N. W. 910; Richardson, etc., Co. *v.* Hampton Independent Dist., 70 Iowa 573, 31 N. W. 871; Drake *v.* Hill, 53 Iowa 37, 3 N. W. 811, 5 N. W. 745; Keefe *v.* Vogle, 36 Iowa 87; Sullivan *v.* Collins, 18 Iowa 228.

Kentucky.— Mills *v.* Lee, 6 T. B. Mon. (Ky.) 97, 17 Am. Dec. 118; Fisher *v.* May, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; Kennedy *v.* Davis, 2 Bibb (Ky.) 343; Taylor *v.* Patrick, 1 Bibb (Ky.) 168; Huffaker *v.* Jones, 13 Ky. L. Rep. 432.

Maine.— Read *v.* Hitchings, 71 Me. 590.

Maryland.— Emmittsburg R. Co. *v.* Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; St. John's College *v.* Purnell, 23 Md. 629.

Massachusetts.— Hunt *v.* Brown, 146 Mass. 253, 15 N. E. 587; Clark *v.* Gamwell, 125 Mass. 428; Barlow *v.* Ocean Ins. Co., 4 Metc. (Mass.) 270.

Michigan.— Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647; Gates *v.* Shutts, 7 Mich. 127; Van Dyke *v.* Davis, 2 Mich. 144; Weed *v.* Terry, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

Minnesota.— Demars *v.* Musser-Sauntry Land, etc., Co., 37 Minn. 418, 35 N. W. 1.

Mississippi.—Boone *v.* Boone, 58 Miss. 820.

Missouri.— Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385; Faust *v.* Birner, 30 Mo. 414; Stephens *v.* Spiers, 25 Mo. 386.

New Hampshire.— Hilliard *v.* Noyes, 58 N. H. 312; Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Kidder *v.* Blake, 45 N. H. 530; Burnham *v.* Dunn, 35 N. H. 556; Parker *v.* Way, 15 N. H. 45.

New Jersey.— Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157; Conover *v.* Stillwell, 34 N. J. L. 54.

New York.— Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Feeter *v.* Weber, 78 N. Y. 334; White *v.* Hoyt, 73 N. Y. 505; Kidder *v.* Horrobin, 72 N. Y. 159; Wehrum *v.* Kuhn, 61 N. Y. 623; Home Ins. Co. *v.* Watson, 59 N. Y. 390; Crans *v.* Hunter, 28 N. Y. 389; Adams *v.* Sage, 28 N. Y. 103; Sears *v.* Grand Lodge A. O. U. W., 24 N. Y. App. Div. 410, 48 N. Y. Suppl. 559; Housatonic Nat. Bank *v.* Foster, 85 Hun (N. Y.) 376, 32 N. Y. Suppl. 1031, 66 N. Y. St. 435; Struthers *v.* Smith, 85 Hun (N. Y.) 261, 32 N. Y. Suppl. 905, 66 N. Y. St. 209; Barnes *v.* Ryan, 66 Hun (N. Y.) 170, 21 N. Y. Suppl. 127, 49 N. Y. St. 152; St. Mark's Church *v.* Teed, 44 Hun (N. Y.) 349; Scott *v.* Warner, 2 Lans. (N. Y.) 49; Morey *v.* Newfane, 8 Barb. (N. Y.) 645; Organ *v.* Stewart, 3 Thomps. & C. (N. Y.) 598 [*modified* in 60 N. Y. 413]; U. S. Nat. Bank *v.* Homestead Bank, 18 N. Y. Suppl. 758, 46 N. Y. St. 173; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Stewart *v.* Ahrenfeldt, 4 Den. (N. Y.) 189; Russell *v.* Cook, 3 Hill (N. Y.) 504; Steele *v.* White, 2 Paige (N. Y.) 478; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1.

North Carolina.— Barnawell *v.* Threadgill, 56 N. C. 50; Mayo *v.* Gardner, 49 N. C. 359; Williams *v.* Alexander, 39 N. C. 207.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— *In re* Lennig, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 278; Fink *v.* Farmers' Bank, 178 Pa. St. 154, 35 Atl. 636, 56 Am. St. Rep. 746; Fleming *v.* Ramsey, 46 Pa. St. 252; Rice *v.* Bixler, 1 Watts & S. (Pa.) 445; Hoge *v.* Hoge, 1 Watts (Pa.) 163, 26 Am. Dec. 52.

Rhode Island.—Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Texas.— Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171; Gilliam *v.* Alford, 69 Tex. 267, 6 S. W. 757; Camoron *v.* Thurmond, 56 Tex. 22.

Vermont.— Ormsbee *v.* Howe, 54 Vt. 182, 41 Am. Rep. 841; Blake *v.* Peck, 11 Vt. 483.

Virginia.— Zane *v.* Zane, 6 Munf. (Va.) 406.

Wisconsin.— Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Zimmer *v.* Becker, 66 Wis. 527, 29 N. W. 228.

United States.— Bofinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Sweeney *v.* U. S., 5 Ct. Cl. 285.

England.— Crowther *v.* Farrer, 15 Q. B. 677, 15 Jur. 535, 20 L. J. Q. B. 298, 69 E. C. L. 677; Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Stapilton *v.* Stapilton, 1 Atk. 2, 26 Eng. Reprint 1; Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Leonard *v.* Leonard, 2 Ball & B. 171; Burke *v.* Crosbie, 1 Ball & B. 504; Roche *v.* O'Brien, 1 Ball & B. 354; Richardson *v.* Mellish, 2 Bing. 229, 9 E. C. L. 557, 1 C. & P. 241, 12 E. C. L. 145, 3 L. J. C. P. O. S. 265, 9 Moore C. P. 435, R. & M. 66, 21 E. C. L. 703, 27 Rev. Rep. 603; Cooper *v.* Parker, 14 C. B. 118, 78 E. C. L. 118; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112; Naylor *v.* Winch, 2 L. J. Ch. O. S. 132, 7 L. J. Ch. O. S. 6, 1 Sim. & St. 555, 24 Rev. Rep. 227, 1 Eng. Ch. 555; Attwood *v.* ——, 1 Russ. 353, 46 Eng. Ch. 314.

dation,[22] and not one which is without foundation,[23] and is known to be so,[24] or is

See 10 Cent. Dig. tit. "Compromise and Settlement," § 37.

22. *Alabama.*— Ware *v.* Morgan, 67 Ala. 461; Allen *v.* Prater, 35 Ala. 169; Stewart *v.* Bradford, 26 Ala. 410; Prater *v.* Miller, 25 Ala. 320, 60 Am. Dec. 521.

Illinois.— McKinley *v.* Watkins, 13 Ill. 140; Bates *v.* Sandy, 27 Ill. App. 552.

Indiana.— Moon *v.* Martin, 122 Ind. 211, 23 N. E. 668; Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150; American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Warey *v.* Forst, 102 Ind. 205, 26 N. E. 87; Smith *v.* Boruff, 75 Ind. 412; Sweitzer *v.* Heasley, 13 Ind. App. 567, 41 N. E. 1064; Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711.

Iowa.— Sullivan *v.* Collins, 18 Iowa 228.

Kansas.—Atchison, etc., R. Co. *v.* Starkweather, 21 Kan. 322.

Kentucky.— Taylor *v.* Patrick, 1 Bibb (Ky.) 168; Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

Michigan.— Holland *v.* Hoyt, 14 Mich. 238.

Minnesota.— Demars *v.* Musser-Sauntry Land, etc., Co., 37 Minn. 418, 35 N. W. 1; Neibles *v.* Minnesota, etc., R. Co., 37 Minn. 151, 33 N. W. 332.

Mississippi.— Gunning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350.

New York.— Feeter *v.* Weber, 73 N. Y. 334; Dolcher *v.* Fry, 37 Barb. (N. Y.) 152; Sherman *v.* Barnard, 19 Barb. (N. Y.) 291; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Russell *v.* Cook, 3 Hill (N. Y.) 504.

Ohio.— Grasselli *v.* Lowden, 11 Ohio St. 349.

Oklahoma.— Duck *v.* Antle, 5 Okla. 152, 47 Pac. 1056.

Oregon.— Smith *v.* Farra, 21 Oreg. 395, 28 Pac. 241, 20 L. R. A. 115.

Rhode Island.—Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Vermont.— Bellows *v.* Sowles, 55 Vt. 391, 45 Am. Rep. 291.

United States.— Hennessy *v.* Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. ed. 605; Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Memphis *v.* Brown, 1 Flipp. (U. S.) 188, 16 Fed. Cas. No. 9,415, 11 Am. L. Reg. N. S. 629, 5 Am. L. T. Rep. 424, 6 West. Jur. 495. See also Comstock *v.* U. S., 9 Ct. Cl. 141.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 38.

The question must be not only one about which the parties differ but about which well-informed lawyers and judges might easily differ. Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

Distinction between settlements of pending litigation and compromises before suit.— There is a distinction between settlements of pending litigation and compromises of claims upon which no suit has been commenced; and the former are generally sustained without reference to the merits of the controversy, unless the circumstances are very peculiar, and this on the ground that an alteration in the position of the parties may of itself be an advantage and therefore a sufficient consideration. Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647. And see Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

23. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632; Ernst *v.* Hollis, 86 Ala. 511, 6 So. 85; Prince *v.* Prince, 67 Ala. 565.

Indiana.— Moon *v.* Martin, 122 Ind. 211, 23 N. E. 668; Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150; U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Jarvis *v.* Sutton, 3 Ind. 289; Spahr *v.* Hollingshead, 8 Blackf. (Ind.) 415.

Iowa.— Jennings *v.* Jennings, (Iowa 1901) 87 N. W. 726; Tucker *v.* Ronk, 43 Iowa 80 [*following* Sullivan *v.* Collins, 18 Iowa 228].

Kentucky.— Creutz *v.* Heil, 89 Ky. 429, 11 Ky. L. Rep. 652, 12 S. W. 926; Cline *v.* Templeton, 78 Ky. 550.

Maine.— Read *v.* Hitchings, 71 Me. 590; Doyle *v.* Donnelly, 56 Me. 26.

Nebraska.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

New Hampshire.— Kidder *v.* Blake, 45 N. H. 530.

New York.— Morey *v.* Newfane, 8 Barb. (N. Y.) 645.

Tennessee.— Winslow *v.* Harriman Iron Co., (Tenn. Ch. 1897) 42 S. W. 698.

England.— Wade *v.* Simeon, 2 C. B. 548, 52 E. C. L. 548.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 40.

24. *California.*— Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521.

Indiana.— Spahr *v.* Hollingshead, 8 Blackf. (Ind.) 415.

Iowa.— Tucker *v.* Ronk, 43 Iowa 80; Sullivan *v.* Collins, 18 Iowa 228.

Kentucky.— Creutz *v.* Heil, 89 Ky. 429, 11 Ky. L. Rep. 652, 12 S. W. 926.

Maine.— Read *v.* Hitchings, 71 Me. 590.

Maryland.— Busby *v.* Conoway, 8 Md. 55, 63 Am. Dec. 688.

Massachusetts.— Palfrey *v.* Portland, etc., R. Co., 4 Allen (Mass.) 55.

Mississippi.— Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

Missouri.— Stephens *v.* Spiers, 25 Mo. 386.

New Hampshire.— Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218 [*following* Kidder *v.* Blake, 45 N. H. 530].

New Jersey.—Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.

New York.— Crosby *v.* Wood, 6 N. Y. 369.

in its nature an illegal claim out of which no cause of action can arise in favor of the person asserting it.[25]

(B) *Good Faith as a Test.* The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties *bona fide* considered it so, and that the compromise of a disputed claim made *bona fide* is upon a sufficient consideration,[26] without regard to whether the claim

North Dakota.— McGlynn *v.* Scott, 4 N. D. 18, 58 N. W. 460.

Rhode Island.—Authony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Vermont.— Ormsbee *v.* Howe, 54 Vt. 182, 41 Am. Rep. 841.

Wisconsin.— Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600; Everingham *v.* Meighan, 54 Wis. 354, 13 N. W. 269.

England.— Edwards *v.* Baugh, 1 D. & L. 304, 7 Jur. 607, 12 L. J. Exch. 426, 11 M. & W. 641; Toley *v.* Windham, 2 Leon. 105.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 40.

25. Read *v.* Hitchings, 71 Me. 590.

26. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632; Prince *v.* Prince, 67 Ala. 565.

Arkansas.— Lee *v.* Swilling, 68 Ark. 82, 56 S. W. 447; Burton *v.* Baird, 44 Ark. 556.

Colorado.— Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125. See also Russell *v.* Daniels, 5 Colo. App. 224, 37 Pac. 726.

Illinois.— Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Sigsworth *v.* Coulter, 18 Ill. 204.

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 3 N. E. 29; Thompson *v.* Nelson, 28 Ind. 431; Sweitzer *v.* Heasley, 13 Ind. App. 567, 41 N. E. 1064.

Iowa.— Everts *v.* Rose Grove Dist. Tp., 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264.

Kansas.— Brooks *v.* Hall, 36 Kan. 697, 14 Pac. 236; Finley *v.* Funck, 35 Kan. 668, 12 Pac. 15.

Kentucky.— Mills *v.* Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; Frowman *v.* Gordon, Litt. Sel. Cas. (Ky.) 193; Mitchell *v.* Long, 5 Litt. (Ky.) 71; McIntire *v.* Johnson, 4 Bibb (Ky.) 48; Fisher *v.* May, 2 Bibb (Ky.) 448, 5 Am. Dec. 628; Taylor *v.* Patrick, 1 Bibb (Ky.) 168; Hunt *v.* Duncan, 12 Ky. L. Rep. 45.

Massachusetts.— Kerr *v.* Lucas, 1 Allen (Mass.) 279.

Michigan.— Schulz *v.* Schulz, 113 Mich. 502, 71 N. W. 854; Nash *v.* Manistee Lumber Co., 75 Mich. 346, 42 N. W. 840; Hull *v.* Swarthout, 29 Mich. 249; Weed *v.* Terry, Walk. (Mich.) 501 [*affirmed* in 2 Dougl. (Mich.) 344, 45 Am. Dec. 257].

Minnesota.— Hall *v.* Wheeler, 37 Minn. 522, 35 N. W. 377; Demars *v.* Musser-Sauntry Land, etc., Co., 37 Minn. 418, 35 N. W. 1; Neibles *v.* Minneapolis, etc., R. Co., 37 Minn. 151, 33 N. W. 332; Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115.

Missouri.— Marshall *v.* Larkin, 82 Mo. App. 635.

Nevada.— Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

New York.— Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499; Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 5 L. R. A. 623; Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Wehrum *v.* Kuhn, 61 N. Y. 623; Crans *v.* Hunter, 28 N. Y. 389; O'Brien *v.* New York, 40 N. Y. App. Div. 331, 57 N. Y. Suppl. 1039 [*affirming* 25 Misc. (N. Y.) 219, 55 N. Y. Suppl. 50, and *quoting* Orleans County *v.* Bowen, 4 Lans. (N. Y.) 24]; Scott *v.* Warner, 2 Lans. (N. Y.) 49; Brooks *v.* Moore, 67 Barb. (N. Y.) 393; Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 641; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Foersch *v.* Blackwell, 14 Barb. (N. Y.) 607; Taylor *v.* Nussbaum, 2 Duer (N. Y. 302; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Palmerton *v.* Huxford, 4 Den. (N. Y.) 166; Russell *v.* Cook, 3 Hill (N. Y.) 504; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1.

Oregon.— Smith *v.* Farra, 21 Oreg. 395, 28 Pac. 241, 20 L. R. A. 115; Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

Pennsylvania.— Cavode *v.* McKelvey, Add. (Pa.) 56.

South Carolina.— Whaley *v.* Duncan, 47 S. C. 139, 25 S. E. 54.

Tennessee.— Walton *v.* Newson, 1 Humphr. (Tenn.) 140; Tellico Mfg. Co. *v.* Williams, (Tenn. Ch. 1900) 59 S. W. 1075; Roth *v.* Holmes, (Tenn. Ch. 1899) 52 S. W. 699.

Texas.— Little *v.* Allen, 56 Tex. 133; Franklin L. Ins. Co. *v.* Villeneuve, (Tex. Civ. App. 1902) 68 S. W. 203.

Vermont.— Connecticut River Lumber Co. *v.* Brown, 68 Vt. 239, 35 Atl. 56; Gardner *v.* Rogers, 11 Vt. 334.

Virginia.— Moore *v.* Fitzwater, 2 Rand. (Va.) 442; Zane *v.* Zane, 6 Munf. (Va.) 406.

West Virginia.— Jarrett *v.* Luddington, 9 W. Va. 333.

Wisconsin.— Pritzlaff Hardware Co. *v.* Carlson, 76 Wis. 33, 44 N. W. 849.

United States.— Hennessy *v.* Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. ed. 605; Bofinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649; St. Louis *v.* U. S., 92 U. S. 462, 23 L. ed. 731; U. S. *v.* Child, 12 Wall. (U. S.) 232, 20 L. ed. 360; Renwick *v.* Wheeler, 48 Fed. 431.

England.— Dixon *v.* Evans, L. R. 5 H. L. 606, 42 L. J. Ch. 139; Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Cook *v.* Wright, 1

be in suit or not.[27] The law favors the avoidance or settlement of litigation,[28] and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration,[29] without regard to the merits of the controversy or the

B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669; Matter of Midland Union, etc., R. Co., 4 DeG. M. & G. 356, 17 Jur. 1143, 22 L. J. Ch. 732, 53 Eng. Ch. 279; Trigge *v.* Lavallee, 9 Jur. N. S. 261, 8 L. T. Rep. N. S. 154, 15 Moore P. C. 270, 1 New Rep. 454, 11 Wkly. Rep. 404, 15 Eng. Reprint 497; Ockford *v.* Barelli, 25 L. T. Rep. N. S. 504, 20 Wkly. Rep. 116; Attwood *v.* ——, 5 Russ. 149, 5 Eng. Ch. 149.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 38.

27. Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

28. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632; Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Prince *v.* Prince, 67 Ala. 565; Lee *v.* Sims, 65 Ala. 248 [*citing* Curry *v.* Davis, 44 Ala. 281].

Arkansas.— St. Louis, etc., R. Co. *v.* Selman, 62 Ark. 342, 35 S. W. 531; Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217; Burton *v.* Baird, 44 Ark. 556.

California.— McClure *v.* McClure, 100 Cal. 339, 34 Pac. 822.

Colorado.— Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125.

Georgia.— Jones *v.* Fulwood, 12 Ga. 121.

Illinois.— McDole *v.* Kingsley, 163 Ill. 433, 45 N. E. 281; Hall *v.* Hall, 125 Ill. 95, 16 N. E. 896; Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Sigsworth *v.* Coulter, 18 Ill. 204; Frank *v.* Heaton, 56 Ill. App. 227; Graff *v.* Smolensky, 35 Ill. App. 264.

Indiana.— Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387 [*citing* Home Ins. Co. *v.* McRichards, 121 Ind. 121, 22 N. E. 875; Smith *v.* Smith, 106 Ind. 43, 5 N. E. 411; Wray *v.* Chandler, 64 Ind. 146; Thompson *v.* Nelson, 28 Ind. 431].

Iowa.— Merkert *v.* Grobe, (Iowa 1902) 90 N. W. 490; Sloan *v.* Davis, 105 Iowa 97, 74 N. W. 922; Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105.

Kansas.— Latham *v.* Hartford, 27 Kan. 249.

Kentucky.— Mitchell *v.* Long, 5 Litt. (Ky.) 71.

Maine.— Doyle *v.* Donnelly, 56 Me. 26.

Michigan.— Pratt *v.* Castle, 91 Mich. 484, 487, 52 N. W. 52; Dailey *v.* King, 79 Mich. 568, 44 N. W. 959; Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381; Weeks *v.* Wayne Cir. Judges, 73 Mich. 256, 41 N. W. 269.

Missouri.— Mateer *v.* Missouri Pac. R. Co., 105 Mo. 320, 16 S. W. 839; Gens *v.* Hargadine, 56 Mo. App. 245.

New York.— Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 5 L. R. A. 623.

Oregon.— Smith *v.* Farra, 21 Oreg. 395, 28 Pac. 241, 20 L. R. A. 115; Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

United States.— French *v.* Shoemaker, 14 Wall. (U. S.) 314, 20 L. ed. 852; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Chicago, etc., R. Co. *v.* Green, 114 Fed. 676; Battle *v.* McArthur, 49 Fed. 715; Sweeney *v.* U. S., 5 Ct. Cl. 285.

England.— Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Thornton *v.* Fairlie, 2 Moore C. P. 397, 8 Taunt. 354, 4 E. C. L. 180; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 39.

An agreement not to appeal from a judgment is a sufficient consideration to support an agreement to compromise a claim against the judgment creditor, if a right of appeal exists or if there are sufficient grounds for a belief in its existence.

Colorado.—Russell *v.* Daniels, 5 Colo. App. 224, 37 Pac. 726.

Illinois.— Miller *v.* Hawker, 66 Ill. 185.

Iowa.— Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66.

Kansas.— Walrath *v.* Walrath, 27 Kan. 395; Clay *v.* Hoysradt, 8 Kan. 74.

New Jersey.—Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

New York.— St. Mark's Church *v.* Teed, 120 N. Y. 583, 24 N. E. 1014, 31 N. Y. St. 908; Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143.

Pennsylvania.— Baldwin *v.* Jeffries, 2 Del. Co. (Pa.) 221.

Vermont.— Bellows *v.* Sowles, 55 Vt. 391, 45 Am. Rep. 291.

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884.

United States.— Bofinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649.

England.— Buck *v.* Fawcett, 3 P. Wms. 242, 24 Eng. Reprint 1046.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 43.

29. *Iowa.*— Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105.

Kansas.—Marsant *v.* Marsant, (Kan. 1899) 57 Pac. 958.

Kentucky.— Pepper *v.* Aiken, 2 Bush (Ky.) 251; Donallen *v.* Lennox, 6 Dana (Ky.) 89.

Louisiana.— Archinard *v.* Boyce, 26 La. Ann. 292.

Massachusetts.— Polson *v.* Stewart, 167 Mass. 211, 45 N. E. 737, 57 Am. St. Rep. 452, 36 L. R. A. 771; James *v.* Worcester, 141 Mass. 361, 5 N. E. 826.

Michigan.— Schulz *v.* Schulz, 113 Mich. 502, 71 N. W. 854; Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888; Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

character or validity of the claims of the parties,[80] and even though a subsequent judicial decision may show the rights of the parties to have been different from

Mississippi.— Field *v.* Weir, 28 Miss. 56.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834; Boyce *v.* Berger, 11 Nebr. 399, 9 N. W. 545; Treitschke *v.* Western Grain Co., 10 Nebr. 358, 6 N. W. 427.

New Hampshire.— Flannagan *v.* Kilcome, 58 N. H. 443.

New Jersey.— Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222; Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

New York.—Shank *v.* Shoemaker, 18 N. Y. 489; Coon *v.* Knap, 8 N. Y. 402, 59 Am. Dec. 502; Cornell *v.* Masten, 35 Barb. (N. Y.) 157; Magee *v.* Badger, 30 Barb. (N. Y.) 246; Palmerton *v.* Huxford, 4 Den. (N. Y.) 166; Potter *v.* Smith, 14 Johns. (N. Y.) 444; Steele *v.* White, 2 Paige (N. Y.) 478; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533.

Ohio.— Bloomer *v.* Cist, 7 Ohio Dec. 337.

Pennsylvania.— Collins *v.* Barnes, 83 Pa. St. 15.

Tennessee.—Warren *v.* Williamson, 8 Baxt. (Tenn.) 427; Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593; Robertson *v.* Branch, 3 Sneed (Tenn.) 506. See also Evans *v.* Bell, 15 Lea (Tenn.) 569.

Texas.— Little *v.* Allen, 56 Tex. 133; Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415.

Vermont.— Bellows *v.* Sowles, 55 Vt. 391, 45 Am. Rep. 291; Lamson *v.* Lamson, 52 Vt. 595; Horton *v.* Chester Baptist Church, etc., 34 Vt. 309; Holcomb *v.* Stimpson, 8 Vt. 141.

England.— Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Stephens *v.* Bateman, 1 Bro. Ch. 22, 28 Eng. Reprint 962; Cook *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; Griffith *v.* Sheffield, 1 Eden. 73, 28 Eng. Reprint 611; Partridge *v.* Smith, 9 Jur. N. S. 742, 8 L. T. Rep. N. S. 530, 11 Wkly. Rep. 714; Thornton *v.* Fairlie, 2 Moore C. P. 397, 8 Taunt. 354, 4 E. C. L. 180; Penn *v.* Baltimore, 1 Ves. 444; Smith *v.* Mogford, 21 Wkly. Rep. 472.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 39.

30. *Arkansas.*— Mason *v.* Wilson, 43 Ark. 172.

Colorado.— Swem *v.* Green, 9 Colo. 358, 12 Pac. 202; Berdell *v.* Bissell, 6 Colo. 162.

Connecticut.— Smith *v.* Richards, 29 Conn. 232.

Georgia.— City Electric R. Co. *v.* Floyd County, 115 Ga. 655, 42 S. E. 45; Morris *v.* Munroe, 30 Ga. 636.

Illinois.— Honeyman *v.* Jarvis, 79 Ill. 318; Miller *v.* Hawker, 66 Ill. 185; Sigsworth *v.* Coulter, 18 Ill. 204; McKinley *v.* Watkins, 13 Ill. 140.

Indiana.— Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

Kansas.— Schmidt *v.* Demple, (Kan. 1898) 52 Pac. 906.

Kentucky.— Mills *v.* Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; Fisher *v.* May, 2 Bibb (Ky.) 448, 5 Am. Dec. 626.

Louisiana.— Peirce *v.* New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448.

Maine.— Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556.

Maryland.— McClellan *v.* Kennedy, 8 Md. 230.

Massachusetts.— Riggs *v.* Hawley, 116 Mass. 596; Easton *v.* Easton, 112 Mass. 438.

Michigan.— Dailey *v.* King, 79 Mich. 568, 44 N. W. 959; Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647; Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136; Gates *v.* Shutts, 7 Mich. 127.

Nebraska.— Carter White Lead Co. *v.* Kinlin, 47 Nebr. 409, 66 N. W. 536.

New Hampshire.— Flannagan *v.* Kilcome, 58 N. H. 443.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

New York.— Beran *v.* Tradesmen's Nat. Bank, 137 N. Y. 450, 33 N. E. 593, 51 N. Y. St. 170 [*reversing* 18 N. Y. Suppl. 567, 45 N. Y. St. 807]; Andrews *v.* Brewster, 124 N. Y. 433, 26 N. E. 1024, 36 N. Y. St. 412; White *v.* Hoyt, 73 N. Y. 505; Crans *v.* Hunter, 28 N. Y. 389; Dovale *v.* Ackermann, 2 N. Y. App. Div. 404, 37 N. Y. Suppl. 959, 73 N. Y. St. 7 [*affirming* 11 Misc. (N. Y.) 245, 33 N. Y. Suppl. 13, 66 N. Y. St. 513]; Barnes *v.* Ryan, 66 Hun (N. Y.) 170, 21 N. Y. Suppl. 127, 49 N. Y. St. 152; Brown *v.* Rich, 40 Barb. (N. Y.) 28; Dolcher *v.* Fry, 37 Barb. (N. Y.) 152; Morey *v.* Newfane, 8 Barb. (N. Y.) 645; Feeter *v.* Weber, 44 N. Y. Super. Ct. 255; Williams *v.* Irving, 47 How. Pr. (N. Y.) 440; Russell *v.* Cook, 3 Hill (N. Y.) 504; Seaman *v.* Seaman, 12 Wend. (N. Y.) 381; Steele *v.* White, 2 Paige (N. Y.) 478; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1.

Oklahoma.— Duck *v.* Antle, 5 Okla. 152, 47 Pac. 1056.

Pennsylvania.— Fink *v.* Farmers' Bank, 178 Pa. St. 154, 35 Atl. 636, 56 Am. St. Rep. 746; Bennet *v.* Paine, 5 Watts (Pa.) 259; O'Keson *v.* Barclay, 2 Penr. & W. (Pa.) 531.

Tennessee.— Warren *v.* Williamson, 8 Baxt. (Tenn.) 427; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447.

Vermont.—Holcomb *v.* Stimpson, 8 Vt. 141.

West Virginia.— Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812.

Wisconsin.— Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Griswold *v.* Wright, 61 Wis. 195, 21 N. W. 44.

England.—Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Cock *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; Cooper *v.* Parker, 14 C. B. 118, 78 E. C. L.

what they at the time supposed.[31] The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute.[32]

3. Inadequacy of Consideration. Although the want of consideration for a compromise may be inquired into, the adequacy thereof cannot be,[33] and a compromise made in good faith will not be set aside for mere inadequacy of consideration.[34]

C. Form of Agreement — 1. In General. In the absence of statutory requirement no particular form of agreement is essential to the validity of a compromise.[35] The agreement should, however, clearly indicate the subject-

118, 15 C. B. 822, 3 C. L. R. 710, 1 Jur. N. S. 281, 24 L. J. C. P. 68, 3 Wkly. Rep. 245, 80 E. C. L. 822; Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669; Edwards *v.* Baugh, 1 D. & L. 304, 7 Jur. 607, 12 L. J. Exch. 426, 11 M. & W. 641; Ockford *v.* Barelli, 25 L. T. Rep. N. S. 504, 20 Wkly. Rep. 116.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 39.

31. *Colorado.*— Swem *v.* Green, 9 Colo. 358, 12 Pac. 202.

Iowa.— Rowe *v.* Barnes, 101 Iowa 302, 70 N. W. 197; French *v.* French, 84 Iowa 655, 51 N. W. 145, 15 L. R. A. 300. See also Keefe *v.* Vogle, 36 Iowa 87.

Kentucky.—Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 17 Ky. L. Rep. 385, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478; Fisher *v.* May, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; Taylor *v.* Patrick, 1 Bibb (Ky.) 168.

Maryland.— McClellan *v.* Kennedy, 8 Md. 230.

Minnesota.—Hall *v.* Wheeler, 37 Minn. 522, 35 N. W. 377 [*following* Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115].

Nebraska.— Milis *v.* Miller, 2 Nebr. 299.

New York.—Agate *v.* House, 81 Hun (N. Y.) 586, 30 N. Y. Suppl. 1119, 63 N. Y. St. 256 [*affirmed* in 146 N. Y. 367, 41 N. E. 88]; Russell *v.* Cook, 3 Hill (N. Y.) 504.

Oklahoma.— Duck *v.* Antle, 5 Okla. 152, 47 Pac. 1056.

Pennsylvania.— *In re* Lenning, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 378; O'Keson *v.* Barclay, 2 Penr. & W. (Pa.) 531.

Texas.— Camoron *v.* Thurmond, 56 Tex. 22; Taylor *v.* Taylor, (Tex. Civ. App. 1900) 54 S. W. 1039.

Virginia.— Moore *v.* Fitzwater, 2 Rand. (Va.) 442.

United States.— Hennessy *v.* Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. ed. 605 [*affirming* 35 Fed. 174]; Mills County *v.* Burlington, etc., R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. ed. 578.

England.— Lawton *v.* Campion, 18 Beav. 87, 18 Jur. 88, 23 L. J. Ch. 505, 2 Wkly. Rep. 209; Partridge *v.* Smith, 9 Jur. N. S. 742, 8 L. T. Rep. N. S. 530, 11 Wkly. Rep. 714.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 39.

The understanding of the law at the time of the settlement of a controversy, although erroneous, will govern the settlement, and the subsequent determination of the question of law by judicial decision to the contrary does not create such a mistake of law as the courts will rectify, nor have a retroactive effect to overturn the settlement which was legal and valid when made. Cooley *v.* Calaveras County, 121 Cal. 482, 53 Pac. 1075; Lyon *v.* Richmond, 2 Johns. Ch. (N. Y.) 51.

32. Demars *v.* Musser-Sauntry Land, etc., Co., 37 Minn. 418, 35 N. W. 1; McGlynn *v.* Scott, 4 N. D. 18, 58 N. W. 460.

33. Creutz *v.* Heil, 89 Ky. 429, 12 S. W. 926.

34. *Alabama.*— Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Motley *v.* Motley, 45 Ala. 555.

Kentucky.—Breckinridge *v.* Waters, 4 Dana (Ky.) 620; Bates *v.* Todd, 4 Litt. (Ky.) 177.

Louisiana.— Antoine *v.* Smith, 40 La. Ann. 568, 4 So. 561; Adle *v.* Prudhomme, 16 La. Ann. 343; Long *v.* Robinson, 5 La. Ann. 627.

Massachusetts.— Leach *v.* Fobes, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

Mississippi.— Petrie *v.* Wright, 6 Sm. & M. (Miss.) 647.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; Phillips *v.* Pullen, 45 N. J. Eq. 830, 18 Atl. 849.

North Carolina.— Barnawell *v.* Threadgill, 56 N. C. 50.

Texas.— Camoron *v.* Thurmond, 56 Tex. 22.

Wisconsin.— Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

United States.— Chicago, etc., R. Co. *v.* Green, 114 Fed. 676.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 50.

35. Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321, in which it was held that an instrument could not be rejected as not evidencing a compromise because it did not contain the formal words "for presenting or putting an end to a lawsuit."

Omission to state name of person to whom obligation of contract due.—A contract which

matter[36] and be in such form as to preclude all future controversy as to its true import.[37]

2. Necessity of Writing. In the absence of statutory provisions requiring it,[38] a compromise agreement need not be in writing. A parol agreement will be of equal effect with one in writing.[39]

D. Offer and Acceptance — 1. Necessity. There must be not only an actual offer to compromise,[40] but an acceptance thereof in order to constitute a valid contract of compromise and settlement.[41] A proposition made by way of settlement or compromise of a claim, unless accepted as made, is not binding on either party.[42] It does not even operate as an admission of liabil-

recites the pendency of litigation and a settlement thereof between the parties, they being named, defendant undertaking by such contract to pay given sums at fixed times in execution of the agreement of settlement, is not void because of the omission by the draftsman of such agreement to state the name of the person to whom the obligation of the contract is due. McLeod *v.* Adams, 102 Ga. 533, 27 S. E. 680.

36. Failure to mention suit intended to be compromised.— An agreement to compromise a pending suit will not be enforced, where the writing makes no mention of the suit, but simply releases all claims against defendant. Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530.

37. Humphreys *v.* McCloud, 3 Head (Tenn.) 235, in which it was held, however, that neglect to do so could not be made a ground to invoke the active interference of a court of equity. See also Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530, holding that a compromise is a contract, and to have the force of things adjudged it must be perfect and complete in itself, with nothing left for ascertainment by parol proof.

A verbal agreement made before the hearing of an action with regard to the settlement, but not embodied in the terms of the settlement at the hearing, which terms are made an order of the court, does not bind the parties. Faber *v.* Lathom, 77 L. T. Rep. N. S. 168.

38. In Louisiana a contract of compromise for preventing or putting an end to a lawsuit must be reduced to writing. La. Rev. Civ. Code (1900), § 3071; Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530; Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321; Orr *v.* Hamilton, 36 La. Ann. 790.

39. Boyce *v.* Berger, 11 Nebr. 399, 9 N. W. 545; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189; Merritt *v.* Seacord, 1 How. Pr. (N. Y.) 95; Miles *v.* Arp, 9 S. D. 625, 70 N. W. 1050. But see Moritz *v.* Koenig, 1 Misc. (N. Y.) 186, 21 N. Y. Suppl. 5, 48 N. Y. St. 693, holding that a parol settlement by the parties to a ten years' lease under seal of difficulties in which they became involved in regard to the amount of rent due is of no effect. See also Locher *v.* Rice, 8 Pa. Dist. 404, holding that an agreement to compromise an action before a justice will not be sustained unless in writing and signed by the party.

40. An offer to pay a debt in property instead of money or to take up one note by giving another is in no sense an offer of compromise. Ferry *v.* Taylor, 33 Mo. 323.

A mere conversation between defendant and plaintiff's agent while the action was pending, in which defendant denied that he owed plaintiff anything and refused to pay, but said it would be all right if the costs should be paid, and in which plaintiff's agent urged a settlement and offered to settle for a less sum than the amount claimed if defendant would pay the costs did not amount to an offer to compromise. Carver *v.* Louthain, 38 Ind. 530.

41. Walker *v.* Freeman, 94 Ill. App. 357; King *v.* Phillips, 94 N. C. 555.

Revocation of offer by commencement of suit.— An offer from plaintiff to defendant made before the commencement of the action to take the principal of the note in settlement of the demand, if not then accepted, is revoked by the commencement of the action to foreclose the mortgage for principal and interest: and a notice of acceptance of the offer given after the commencement of the action is too late and is not admissible in evidence. Peachy *v.* Witter, 131 Cal. 316, 63 Pac. 468.

42. *Alabama.*— Calloway *v.* McElroy, 3 Ala. 406.

Florida.— Clark *v.* Pope, 29 Fla. 238, 10 So. 586.

Illinois.— Walker *v.* Freeman, 94 Ill. App. 357.

Maryland.— Groff *v.* Hansel, 33 Md. 161.

Mississippi.— Read *v.* McLemore, 34 Miss. 110.

Missouri.— Cook *v.* Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438.

New Jersey.— Union Locomotive, etc., Co. *v.* Erie R. Co., 37 N. J. L. 23; Miller *v.* Halsey, 14 N. J. L. 48.

North Carolina.— King *v.* Phillips, 94 N. C. 555; Daniel *v.* Wilkerson, 35 N. C. 329; Poteat *v.* Badget, 20 N. C. 349.

Pennsylvania.— Spence *v.* Spence, 4 Watts (Pa.) 165.

South Carolina.— Chandler *v.* Geraty, 10 S. C. 304.

Tennessee.— Morgan *v.* Snell, 3 Baxt. (Tenn.) 382.

Texas.— Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268; White *v.* Shepperd, 16 Tex. 163.

ity,[43] and the rights of the parties are not affected, but remain precisely as they were before the offer was made.[44]

2. Sufficiency — a. In General. As a general rule[45] no formal acceptance is necessary. It will be sufficient if the party to whom an offer of compromise is made clearly gives evidence of his intention to accept the offer as made, as a settlement of the disputed claim. Such intention may be shown either by word or letter,[46] or it may be constructive and implied from the acts of the party to whom

Vermont.— Hoyt *v.* Cate, 67 Vt. 559, 32 Atl. 488.

Virginia.— Williams *v.* Price, 5 Munf. (Va.) 507; Baird *v.* Rice, 1 Call (Va.) 18, 1 Am. Dec. 497.

Wisconsin.— Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104; Winkler *v.* Patten, 57 Wis. 405, 15 N. W. 380; Tenney *v.* State, 27 Wis. 387.

United States.— New York Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868.

England.— Collingham *v.* Sloper, [1894] 3 Ch. 716, 64 L. J. Ch. 149, 71 L. T. Rep. N. S. 456, 12 Reports 87; Sherwood *v.* Walker, 13 L. J. Ch. 258.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 12.

43. *Alabama.*— Jackson *v.* Clopton, 66 Ala. 29; Courtland *v.* Tarlton, 8 Ala. 532.

California.— Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

Kansas.— Latham *v.* Hartford, 27 Kan. 249.

Michigan.— Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Steers *v.* Holmes, 79 Mich. 430, 44 N. W. 922.

Mississippi.— Read *v.* McLemore, 34 Miss. 110.

Nebraska.— Olson *v.* Peterson, 33 Nebr. 358, 50 N. W. 155.

New York.— Mazanec *v.* Manhattan Invest., etc., Co., 2 N. Y. App. Div. 489, 38 N. Y. Suppl. 20, 74 N. Y. St. 448; Heaton *v.* Leonard, 69 Hun (N. Y.) 423, 23 N. Y. Suppl. 469, 52 N. Y. St. 629.

Tennessee.— Morgan *v.* Snell, 3 Baxt. (Tenn.) 382.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 14.

As to effect of offer on right to costs see Costs.

As to evidence of offer as admission see Evidence.

44. Jackson *v.* Clopton, 66 Ala. 29; McCallion *v.* Hibernia Sav., etc., Soc., 70 Cal. 163, 12 Pac. 114; Ward *v.* Munson, 105 Mich. 647, 63 N. W. 498; Hedrick *v.* Wagoner, 53 N. C. 360; Poteat *v.* Badget, 20 N. C. 349.

Does not estop from any defense or the assertion of any right.—An offer of compromise does not estop the party making it from setting up any legal defense or from asserting any right to which such offer relates. Read *v.* McLemore, 34 Miss. 110; Cook *v.* Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438; McDaniel's Appeal, (Pa. 1888) 12 Atl. 154.

Will not preclude equitable relief.—An offer of compromise unaccepted will not preclude relief in equity, although payment may subsequently be made by an agreement between the parties by giving notes due from others. Calloway *v.* McElroy, 3 Ala. 406.

Will not prevent plaintiff from recovering a larger sum.— The fact that a plaintiff offered to accept a certain amount before the commencement of suit will not preclude him from recovering a larger sum than that contemplated by his offer. Brush *v.* S., etc., R. Co., 43 Iowa 554; Perkins *v.* Hasbrouck, 155 Pa. St. 494, 26 Atl. 695.

45. Cal. Code Civ. Proc. § 997, after providing for an offer of compromise, proceeds as follows: "If the plaintiff accepts the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." This section requires no affirmative action on the part of a plaintiff, unless he elects to accept the offer; and then he must give and file a notice of acceptance. There is no provision for an affirmative refusal to accept, and he may give and file the notice at any time within five days. The offer therefore has no effect whatever until after the expiration of five days, unless before that plaintiff accepts in the mode provided. Scammon *v.* Denio, 72 Cal. 393, 14 Pac. 98.

46. **Letters evidencing acceptance.**— Plaintiffs having a disputed claim against defendant for services rendered as his attorneys, finally made by letter an offer of compromise to the effect that defendant should pay them five hundred dollars in cash, should give them two notes for one thousand two hundred and fifty dollars each, and a further sum of one thousand dollars on the successful termination of the appeal in a suit then pending. Defendant, replying by letter, expressed satisfaction with the proposition, and said: "I will endeavor to send $500 this month and my notes for the balance." At different times thereafter, in response to communications from plaintiffs, defendant stated he would settle up the matter as soon as he could and asked further indulgence. It was held that the facts showed a binding acceptance by defendant of plaintiff's offer of compromise. Cunningham *v.* Patrick, 136 Mo. 621, 37 S. W. 817. A was the administrator of an estate, to one third of which each of his brothers, C and D, was entitled. A wrote to B and C, offering to pay each one thousand pounds as

the offer was made, as where he receives and retains the amount which to his knowledge was offered on condition of its being accepted as a compromise.[47] Where one in good faith objects to a bill presented for payment and makes out a new bill for a reduced amount, which amount is received, and such new bill receipted, this sufficiently shows a settlement of a disputed claim binding on the parties.[48]

b. Acceptance Under Protest. Where a tender is made on condition that it be received in settlement of a disputed claim, it is the duty of the party to whom it is made either to refuse it or to accept it on the terms as made. He has no right to accept the tender and prescribe the terms of his acceptance.[49] Where a tender thus made is accepted it is binding, although the acceptance is under protest[50] or with the express declaration that it is received in part satisfaction only.[51] The mere fact, however, that one accepts less than the amount of his claim, although knowing that the one offering it claims it to be the whole of his indebtedness, will not necessarily operate as an agreement of compromise and settlement barring the original right of action in the absence of an express condition in the tender that it be accepted if at all in full settlement of the claim.[52]

his share. B accepted the offer and C wrote that whatever B determined "would meet with his approbation." A and B acted on the contract as complete, and C never repudiated it for seventeen years. It was held that C had acquiesced and was bound by the contract. Cood *v.* Cood, 33 Beav. 314, 9 Jur. N. S. 1335, 33 L. J. Ch. 273, 2 New Rep. 275.

47. Presumption of acceptance from retention of check or draft.— Where check or draft is sent upon the condition that it is in full satisfaction of a claim or indebtedness, and the creditor retains the same and converts it into money, he is presumed to have assented to the condition and to have accepted the compromise offer.

Georgia.— Hamilton *v.* Stewart, 105 Ga. 300, 31 S. E. 184, 108 Ga. 472, 34 S. E. 123.

Illinois.— Critchell *v.* Loftis, 100 Ill. App. 196.

Kansas.— Hutchinson, etc., R. Co. *v.* Wallace, 7 Kan. App. 612, 52 Pac. 458.

Michigan.— See Hale *v.* Holmes, 8 Mich. 37.

New York.— Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785.

North Carolina.— Petit *v.* Woodlief, 115 N. C. 120. 20 S. E. 208.

Pennsylvania.— Washington Natural Gas Co. *v.* Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Christman *v.* Martin, 7 Pa. Super. Ct. 568, 42 Wkly. Notes Cas. (Pa.) 573.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 12.

Assent inferred where proposition beneficial.— Ryder *v.* Frost, 3 La. Ann. 523.

One who accepts a draft for a less sum in full settlement of a claim against a railroad company for damages for stock killed and gives a receipt reciting such settlement cannot repudiate the settlement and sue for what he claims to be the value of his stock, although by mistake of the company the receipt and draft included an additional sum in excess of his claim as payment for other stock killed belonging to a person of similar name, which sum the claimant was compelled to refund. St. Louis Southwestern R. Co. *v.* Selman, 62 Ark. 342, 35 S. W. 531.

48. Union Pac. R. Co. *v.* Anderson, 11 Colo. 293, 18 Pac. 24.

A defendant having availed himself of a written compromise signed only by one of the parties to the suit in which certain rights were reserved to the party who signed and having had the suit dismissed is as much bound as if he had signed the same. Bonner *v.* Beard, 43 La. Ann. 1036, 10 So. 373.

49. Pollman, etc., Coal, etc., Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563; Adams *v.* Helm, 55 Mo. 468; Perkins *v.* Headley, 49 Mo. App. 556; Deutmann *v.* Kilpatrick, 46 Mo. App. 624.

50. *Arkansas.*— Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217.

Massachusetts.— Donohue *v.* Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777.

Missouri.— Pollman, etc., Coal, etc., Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563.

Nebraska.— Treat *v.* Price, 47 Nebr. 875, 66 N. W. 834.

New York.— Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 52 N. Y. St. 342, 20 L. R. A. 785; Reynolds *v.* Empire Lumber Co., 85 Hun (N. Y.) 470, 33 N. Y. Suppl. 111, 66 N. Y. St. 712.

Vermont.— McDaniels *v.* Lapham, 21 Vt. 222.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 13.

51. Berdell *v.* Bissell, 6 Colo. 162; Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373; McDaniels *v.* Latham, 21 Vt. 222.

52. Rockford, etc., R. Co. *v.* Rose, 72 Ill. 183; Tompkins *v.* Hill, 145 Mass. 379, 14 N. E. 177. See also ACCORD AND SATISFACTION, V, A, 2, b [1 Cyc. 331].

Accepting payment under protest.—Where, on an attempt to adjust and settle an ac-

IV. CONSTRUCTION OF AGREEMENT.

In construing a compromise agreement the ultimate object is to arrive at the intention of the parties, which intention is to be determined from the contract itself, and not from previous statements, understandings, or agreements.[53] The compromise agreement is to be considered as ascertaining their respective rights and will in equity as between the parties furnish the basis for settling their rights.[54]

V. EFFECT OF AGREEMENT.[55]

A. As Merger and Bar of Original Causes of Action and Defenses —

1. As Merger and Bar of Causes of Action. A compromise and settlement when full and complete and fairly made operates as a merger of, and bars all right to, recovery on all claims and causes of action included therein.[56]

count, defendant allowed plaintiff such items and sums as he supposed to be right, wholly ignoring plaintiff's other claims, and paid plaintiff on defendant's own views of what was just and proper, which was received under protestation that it was not enough, without giving any release or discharge, it was held that this was not a final settlement and that the acceptance of the money offered could not operate as an estoppel upon plaintiff and thus preclude him from suing for and recovering any balance that might be shown to be due him. Western Union R. Co. *v.* Smith, 75 Ill. 496.

Retention of money paid under mistake.— If a debtor pays money to a creditor under the belief that it is in compromise of a debt and the creditor retains the money after notice of the erroneous belief under which the payment was made and an offer of rescission by the party paying he does not thereby affirm the correctness of the party's belief and is not precluded from the collection of his debt. Steiner *v.* Ballard, 42 Ala. 153.

53. Miltimore *v.* Ferry, 171 Ill. 219, 14 N. E. 219 [*affirming* 64 Ill. App. 557]; Warnier *v.* Boessneck, 5 N. Y. App. Div. 240, 39 N. Y. Suppl. 141; Swepson *v.* Summey, 64 N. C. 293; Farmer *v.* Barnes, 56 N. C. 109; *Ex p.* Felder, 61 S. C. 523, 39 S. E. 737.

Entire agreement to be considered.— In interpreting a compromise agreement all provisions of the agreement may be considered, and if it shall be found on such examination that the interpretation claimed is repugnant to the scheme of the settlement and to other parts of the instrument, and is opposed to the paramount intention, as disclosed by the arrangement as a whole, then the court is to seek an interpretation which shall reconcile the particular clause with such general purpose. Spofford *v.* Pearsall, 138 N. Y. 57, 33 N. E. 834, 51 N. Y. St. 668 [*affirming* 63 Hun (N. Y.) 630, 18 N. Y. Suppl. 73, 44 N. Y. St. 442].

54. Pinkard *v.* Ingersol, 11 Ala. 9.

55. As to effect of compromise on lien of attorney see ATTORNEY AND CLIENT, VI, H, 3 [4 Cyc. 1019].

56. *Alabama.*— Baker *v.* Kennon, 88 Ala. 428, 6 So. 926.

Arkansas.— Reynolds *v.* Jones, 63 Ark. 259, 38 S. W. 151.

California.— Adams *v.* Hopkins, (Cal. 1902) 69 Pac. 228; Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820.

Connecticut.— Rogers Silver Plate Co. *v.* Jennings, 67 Conn. 400, 35 Atl. 281.

Georgia.— Parker *v.* Riley, 21 Ga. 427.

Indiana.— Whisnand *v.* Small, 65 Ind. 120.

Iowa.— Kelleher *v.* Chicago, etc., R. Co., 97 Iowa 144, 66 N. W. 94; Gall *v.* Dickey, 91 Iowa 126, 58 N. W. 1075; Baldwin *v.* Davis, 63 Iowa 231, 18 N. W. 897; Robertson *v.* Central R. Co., 57 Iowa 376, 10 N. W. 728; Kohn *v.* Zimmerman, 34 Iowa 544.

Kansas.— Lanphear *v.* Ketcham, 53 Kan. 799, 37 Pac. 119.

Kentucky.— Main Jellico Mountain Coal Co. *v.* Lotspeich, 14 Ky. L. Rep. 595, 20 S. W. 377; May *v.* Marrs, 9 Ky. L. Rep. 867, 7 S. W. 250.

Louisiana.— Chapman *v.* First African Baptist Church, 52 La. Ann. 1508, 27 So. 952; Williams *v.* Drew, 47 La. Ann. 1622, 18 So. 623; Taylor *v.* Prestidge, 33 La. Ann. 41; Bee *v.* Carlin, 28 La. Ann. 648; Kreider *v.* New Orleans, 26 La. Ann. 342; Thompson *v.* Chretien, 3 La. Ann. 116.

Maryland.— Rappanier *v.* Bannon, (Md. 1887) 8 Atl. 555.

Massachusetts.— Stimpson *v.* Poole, 141 Mass. 502, 6 N. E. 705; Alvord *v.* Marsh, 12 Allen (Mass.) 603; Stevens *v.* Miller, 13 Gray (Mass.) 283.

Michigan.— Escanaba Boom Co. *v.* Two Rivers Mfg. Co., 118 Mich. 454, 76 N. W. 989; Hicks *v.* Leaton, 67 Mich. 371, 34 N. W. 880; Campbell *v.* Skinner, 30 Mich. 32.

Missouri.— Mitchell *v.* Henley, 110 Mo. 598, 19 S. W. 993; St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431; Riley *v.* Kershaw, 52 Mo. 224; Tumilty *v.* Tumilty, 13 Mo. App. 444.

Nebraska.— Home F. Ins. Co. *v.* Bredehoft, 49 Nebr. 152, 68 N. W. 400; Slade *v.* Swedeburg Elevator Co., 39 Nebr. 600, 58 N. W. 191.

New Hampshire.— Hilliard *v.* Noyes, 58 N. H. 312.

New York.— Parr *v.* Greenbush, 112 N. Y. 246, 19 N. E. 684, 20 N. Y. St. 725 [*reversing*

2. As Waiver of Defenses to Compromised Claim. A party having a good defense to an original claim or cause of action will by a compromise in good faith be estopped from setting up such defense.[57]

3. Estoppel to Plead Set-Off or Counter-Claim. A party to a compromise is estopped from afterward urging matter constituting a set-off or counter-claim existing at the time of making the compromise.[58] If, however, such matter was

42 Hun (N. Y.) 232]; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189; O'Beirne *v.* Lloyd, 43 N. Y. 248; Mann *v.* Palmer, 3 Abb. Dec. (N. Y.) 162, 2 Keyes (N. Y.) 177; Garrett *v.* Wood, 55 N. Y. App. Div. 281, 67 N. Y. Suppl. 122; Emslie *v.* Livingston, 34 N. Y. App. Div. 133, 54 N. Y. Suppl. 492; Spaulding *v.* American Wood Board Co., 26 N. Y. App. Div. 237, 50 N. Y. Suppl. 23; Mollenbrock *v.* Meinhard, 53 Hun (N. Y.) 635, 6 N. Y. Suppl. 151, 24 N. Y. St. 995; Kinney *v.* Kiernan, 2 Lans. (N. Y.) 492 [*reversed* in 49 N. Y. 164]; Nelson *v.* Blanchfield, 54 Barb. (N. Y.) 630; Dibble *v.* New York, etc., R. Co., 25 Barb. (N. Y.) 183; Fondavila *v.* Jourgensen, 52 N. Y. Super. Ct. 403; Short *v.* Scutt, 51 N. Y. Suppl. 865; James *v.* New York, 4 N. Y. St. 86.

North Carolina.— Wittkowsky *v.* Baruch, 126 N. C. 747, 36 S. E. 156, 37 S. E. 449; Pruden *v.* Asheboro, etc., R. Co., 121 N. C. 509, 28 S. E. 349; Elam *v.* Barnes, 110 N. C. 73, 14 S. E. 621; Hall *v.* Short, 81 N. C. 273.

Ohio.— Solar Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581.

Pennsylvania.— Williams *v.* Crystal Lake Water Co., 191 Pa. St. 98, 43 Atl. 206; Jones *v.* Pennsylvania R. Co., 143 Pa. St. 374, 28 Wkly. Notes Cas. (Pa.) 375, 22 Atl. 883; Billings *v.* Billings, 135 Pa. St. 199, 19 Atl. 891; Hendel *v.* Berks, etc., Turnpike Road, 16 Serg. & R. (Pa.) 92.

Tennessee.— State *v.* Tomlin, (Tenn. Ch. App. 1896) 36 S. W. 952.

Virginia.— Tait *v.* Tait, 6 Leigh (Va.) 154; Betts *v.* Cralle, 1 Munf. (Va.) 238.

West Virginia.— Caperton *v.* Caperton, 36 W. Va. 635, 15 S. E. 149; Renick *v.* Ludington, 14 W. Va. 367.

Wisconsin.— Northern Chief Iron Co. *v.* Hosmer, 80 Wis. 77, 49 N. W. 115.

Wyoming.— Farrell *v.* Alsop, 2 Wyo. 135.

United States.— Philadelphia, etc., R. Co. *v.* U. S., 103 U. S. 703, 26 L. ed. 454; U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246; Sweeny *v.* U. S. 17 Wall. (U. S.) 75, 21 L. ed. 575; Cornier *v.* Sawyer, Crabbe (U. S.) 281, 6 Fed. Cas. No. 3,245; North Carolina *v.* Dewey, 2 Fed. Cas. No. 897, 19 Nat. Bankr. Reg. 314; Andrews *v.* U. S., 16 Ct. Cl. 265. *Compare* St. Louis, etc., R. Co. *v.* Clark, 51 Fed. 483, 10 U. S. App. 66, 2 C. C. A. 331.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 54.

Bar to action against joint tort feasor.— A settlement in full satisfaction of a personal injury, received through the negligence or misconduct of one, is a bar to an action against another who would otherwise have been liable for the same injury. Goss *v.* Ellison, 136 Mass. 503; Curley *v.* Harris, 11 Allen (Mass.) 112; Stone *v.* Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727, 7 Allen (Mass.) 26; Brown *v.* Cambridge, 3 Allen (Mass.) 474.

Effect on right of claimant of interest to intervene.— A voluntary agreement between the parties to an action, by which their respective claims are adjusted and the controversy settled, has the effect of a verdict and nothing remains but final judgment to determine the action, and when such an agreement has been made a third party, claiming an interest in the subject of the litigation, cannot intervene. Henry *v.* Cass County Mill, etc., Co., 42 Iowa 33.

Right to set up new grounds of recovery.— Plaintiff agreed to dismiss his action for damages for flowage of his land caused by defendant's bridge, if defendant would build a proper bridge, which he did. It was held that plaintiff could not thereafter maintain the action by amending and setting up new grounds of recovery for the same injury and growing out of the original wrongful act complained of. Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469. So where a party compromised on the basis that the property in question belonged to the succession of his grandmother, and recovered an interest therein, he cannot recover a second time part of the same property as coming to him from his grandfather's estate. Cochran *v.* Cochran, 46 La. Ann. 536, 15 So. 57.

57. *Louisiana.*— Calhoun *v.* Lane, 39 La. Ann. 594, 2 So. 219; Sentell *v.* Stark, 37 La. Ann. 679.

Massachusetts.— Cobb *v.* Arnold, 8 Metc. (Mass.) 403.

Missouri.— Draper *v.* Owsley, 15 Mo. 613, 57 Am. Dec. 218.

New York.— Zeobisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499; Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 459, 5 L. R. A. 623; Feeter *v.* Weber, 78 N. Y. 334.

Pennsylvania.— Chamberlain *v.* McClurg, 8 Watts & S. (Pa.) 31; Bennet *v.* Paine, 5 Watts (Pa.) 259; Payne *v.* Bennet, 2 Watts (Pa.) 427.

Tennessee.— Grayson *v.* Harrison, (Tenn. Ch. 1900) 59 S. W. 438.

Texas.— Dunbar *v.* Tirey, (Tex. App. 1891) 17 S. W. 1116.

Wisconsin.— Speck *v.* Jarvis, 59 Wis. 585, 18 N. W. 478.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 63.

58. *Illinois.*— Hill *v.* Parsons, 110 Ill. 107.

not in fact intended to be settled the settlement will be no bar to a recovery thereon.[59]

B. As Warranty of Ownership. Where property wholly outside of the differences between the parties is given in payment on a settlement, there is an implied warranty that the person giving the property in payment is the owner thercof.[60]

C. Conclusiveness of Agreement — 1. In General. Numerous authorities support the doctrine that a compromise and settlement of a controversy based on a sufficient consideration[61] is, as between the parties thereto[62] and as to the matters embraced therein,[63] binding and conclusive where fairly made.[64]

Kentucky.— Wood *v.* O'Nan, 14 Ky. L. Rep. 863.

Michigan.— Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872.

Missouri.— Rivers *v.* Blom, 163 Mo. 442, 63 S. W. 812.

New York.— Mount *v.* Ellingwood, 2 Thomps. & C. (N. Y.) 527.

See, generally, Recoupment, Set-Off, and Counter-Claim; and 10 Cent. Dig. tit. "Compromise and Settlement," § 65.

59. Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 33 N. W. 622.

Counter-claim not allowable.— When an action in which a counter-claim was pleaded is discontinued by stipulation of the parties and the cause of action is settled but no reference is made in the stipulation to the counter-claim, and the latter was of such a nature that it could not have been allowed in that action, it is not discharged by the settlement of the action. Clancy *v.* Losey, 20 N. Y. Suppl. 383, 48 N. Y. St. 191.

60. Gaylord *v.* Copes, 4 Woods (U. S.) 158, 16 Fed. 49.

61. **As to sufficiency of consideration** see *supra*, III, B, 2.

62. **As to persons concluded** see *infra*, V, C, 3.

63. **As to matters concluded** see *infra*, V, C, 2.

64. *Alabama.*— Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Dec. 718; Bell *v.* Lawrence, 51 Ala. 160; Jeter *v.* Jeter, 36 Ala. 391; Billingslea *v.* Ware, 32 Ala. 415; Adams *v.* McKenzie, 18 Ala. 698; Hudnall *v.* Scott, 2 Ala. 569.

Arkansas.— Shirey *v.* Beard, 62 Ark. 621, 37 S. W. 309; St. Louis S. W. R. Co. *v.* Selman, 62 Ark. 342, 35 S. W. 531; Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217.

California.— Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Downing *v.* Murray, 113 Cal. 455, 45 Pac. 869; Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820; Witmer Bros. Co. *v.* Weid, 108 Cal. 569, 41 Pac. 491; McClure *v.* McClure, 100 Cal. 339, 34 Pac. 822; Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Crossman *v.* Davis, 79 Cal. 603, 21 Pac. 963; Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385.

Colorado.— Berdell *v.* Bissell, 6 Colo. 162; Baldwin *v.* Central Sav. Bank, (Colo. App. 1901) 67 Pac. 179.

Florida.— Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356; White *v.* Walker, 5 Fla. 478.

Georgia.— Hamilton *v.* Stewart, 108 Ga. 472, 34 S. E. 123; Bullard *v.* Jones, 68 Ga. 472; Wood *v.* Isom, 68 Ga. 417; Milledgeville Mfg. Co. *v.* Rives, 44 Ga. 479; Ham *v.* Hamilton, 29 Ga. 40; Parker *v.* Riley, 21 Ga. 427.

Illinois.— Case *v.* Phillips, 182 Ill. 187, 55 N. E. 66 [*affirming* 82 Ill. App. 231]; Miller's Nat. Ins. Co. *v.* Kinneard, 136 Ill. 199, 26 N. E. 368; Bennett *v.* Walker, 100 Ill. 525; Jenkins *v.* Greenbaum, 95 Ill. 11; Stempel *v.* Thomas, 89 Ill. 146; Haworth *v.* Huling, 87 Ill. 23; Farmers', etc., Ins. Co. *v.* Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Warren *v.* Kerr, 93 Ill. App. 172; Coyne *v.* Avery, 91 Ill. App. 347 [*affirmed* in 189 Ill. 378, 59 N. E. 788]; Stice *v.* Smith, 56 Ill. App. 96; Diebold Safe, etc., Co. *v.* Barnes, 53 Ill. App. 144; Knowles *v.* Knowles, 29 Ill. App. 124 [*affirmed* in 128 Ill. 110, 21 N. E. 196]; Moline Water Power Co. *v.* Waters, 10 Ill. App. 159.

Indiana.— Moon *v.* Martin, 122 Ind. 211, 23 N. E. 668; Home Ins. Co. *v.* McRichards, 121 Ind. 121, 22 N. E. 875; Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 103; Sowle *v.* Holdredge, 17 Ind. 236; Phelps *v.* Younger, 4 Ind. 450; German F. Ins. Co. *v.* Seibert, 24 Ind. App. 279; Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492.

Iowa.— Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105; Shaw *v.* Chicago, R. I., etc., R. Co., 82 Iowa 199, 47 N. W. 1004; Baldwin *v.* Davis, 63 Iowa 231, 18 N. W. 897; Huntington *v.* Risdon, 43 Iowa 517; Henry *v.* Cass County Mill, etc., Co., 42 Iowa 33; Clarke *v.* Bancroft, 13 Iowa 320.

Kansas.— Brooks *v.* Hall, 36 Kan. 697, 14 Pac. 236; Commissioners *v.* Elliott, 27 Kan. 606; Atkinson, etc., R. Co. *v.* Stucker, 21 Kan. 322; Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285; Schmidt *v.* Demple, (Kan. App. 1898) 52 Pac. 906.

Kentucky.— Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 17 Ky. L. Rep. 385, 31 S. W. 127, 43 Am. St. Rep. 426, 28 L. R. A. 578; Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292, 15 Ky. L. Rep. 129, 22 S. W. 323; Bell *v.* Henshaw, 91 Ky. 430, 12 Ky. L. Rep. 674, 15 S. W. 3; Thompson *v.* Sawyer, 12 Ky. L. Rep. 620, 14 S. W. 909; Hahn *v.* Hart, 12 B. Mon. (Ky.) 426; Larue *v.* White, 8 Dana (Ky.) 45; Butler *v.* Triplett, 1 Dana (Ky.)

Such agreements can be impeached and set aside only on grounds hereinafter

154, 25 Am. Dec. 136; Bradshaw *v.* Craycraft, 3 J. J. Marsh. (Ky.) 77; Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506; Mills *v.* Lee, 6 T. B. Mon. (Ky.) 98, 17 Am. Dec. 118; Jones *v.* Chappell, 5 T. B. Mon. (Ky.) 422; Bates *v.* Todd, 4 Litt. (Ky.) 177; Carr *v.* Callaghan, 3 Litt. (Ky.) 365; Taylor *v.* Patrick, 1 Bibb (Ky.) 168; Mason *v.* Byars, 24 Ky. L. Rep. 344, 68 S. W. 444; Cunningham *v.* Belknap, 22 Ky. L. Rep. 1580, 60 S. W. 838; Home Ben. Soc. *v.* Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520, 22 Ky. L. Rep. 1264, 60 S. W. 371; Hughes *v.* Smith, 7 Ky. L. Rep. 40. And see Rogers *v.* McMachan, 4 J. J. Marsh. (Ky.) 37.

Louisiana.— Comer *v.* Illinois Car, etc., Co., 108 La. 179, 32 So. 380; Delogny *v.* Creditors, 48 La Ann. 488, 19 So. 614; Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321; Calhoun *v.* Lane, 39 La. Ann. 594, 2 So. 219; Keough *v.* Foreman, 33 La. Ann. 1434; Archinard *v.* Boyce, 26 La. Ann. 292; Adle *v.* Prudhomme, 16 La. Ann. 343; Wright *v.* Temple, 13 La. Ann. 413; Williamson *v.* Amilton, 13 La. Ann. 387; Davis *v.* Robertson, 11 La. Ann. 752; Long *v.* Robinson, 5 La. Ann. 628; Thompson *v.* Chretien, 3 La. Ann. 116; Bach *v.* Slidell, 1 La. Ann. 375; Grounx *v.* Abat, 7 La. 17.

Maine.— Doyle *v.* Donnelly, 56 Me. 26; Dole *v.* Hayden, 1 Me. 152.

Maryland.— St. John's College *v.* Purnell, 23 Md. 629; McClellan *v.* Kennedy, 8 Md. 230; Stiles *v.* Brown, 1 Gill (Md.) 350.

Massachusetts.—Bent *v.* Weston, 167 Mass. 529, 46 N. E. 386; Riggs *v.* Hawley, 116 Mass. 596; Curley *v.* Harris, 11 Allen (Mass.) 112; Flint *v.* Hubbard, 1 Allen (Mass.) 252; Barlow *v.* Ocean Ins. Co., 4 Metc. (Mass.) 270; Allis *v.* Billings, 2 Cush. (Mass.) 190.

Michigan.— Ruloff *v.* Hazen, 124 Mich. 570, 83 N. W. 370; Davis, etc., Mach. Tool Co. *v.* Souvenir Wheel Co., 114 Mich. 615, 72 N. W. 616; Lauzon *v.* Belleheumer, 108 Mich. 444, 66 N. W. 345; Chittock *v.* Chittock, 101 Mich. 367, 59 N. W. 655; Rayl *v.* Hammond, 100 Mich. 140, 58 N. W. 654 [*quoting* Lewless *v.* Detroit, G. H., etc., R. Co., 65 Mich. 292, 32 N. W. 790]; Pratt *v.* Castle, 91 Mich. 484, 487, 52 N. W. 52; Dailey *v.* King, 79 Mich. 568, 44 N. W. 959; Nash *v.* Manistee Lumber Co., 75 Mich. 346, 42 N. W. 840; Hart *v.* Gould, 62 Mich. 262, 28 N. W. 831; Prichard *v.* Sharp, 51 Mich. 432, 16 N. W. 798; Browning *v.* Crouse, 43 Mich. 489, 5 N. W. 664; Craig *v.* Bradley, 26 Mich. 353; Hale *v.* Holmes, 8 Mich. 37.

Minnesota.— Hall *v.* Wheeler, 37 Minn. 522, 35 N. W. 377. [*following* Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115].

Mississippi.— Darrill *v.* Dobbs, 78 Miss. 912, 30 So. 4; Long *v.* Schackleford, 25 Miss. 559.

Missouri.— Pollman, etc., Coal, etc., Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563; State *v.* Ewing, 116 Mo. 129, 22 S. W. 476; Mateer *v.* Missouri Pac. R. Co., 105 Mo. 354, 16 S. W. 939; Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295; Hannibal First Nat. Bank *v.* North Missouri Coal, etc., Co., 86 Mo. 125; St. Louis Gaslight Co. *v.* St. Louis, 84 Mo. 202; Nesbit *v.* Neill, 67 Mo. 275; Kronenberger *v.* Binz, 56 Mo. 121; Draper *v.* Owsley, 15 Mo. 613, 57 Am. Dec. 218; Marshall *v.* Larkin, 82 Mo. App. 635; Dengler *v.* Auer, 55 Mo. App. 548; Maack *v.* Schneider, 51 Mo. App. 92; De Hatre *v.* De Hatre, 50 Mo. App. 1; Todd *v.* Terry, 26 Mo. App. 598; Buffington *v.* South Missouri Land Co., 25 Mo. App. 492; Pickel *v.* St. Louis Chamber of Commerce Assoc., 10 Mo. App. 191.

Nebraska.— Omaha Home F. Ins. Co. *v.* Bredehoft, 49 Nebr. 152, 68 N. W. 400; Hamley *v.* Doe, 36 Nebr. 398, 54 N. W. 673; Treitschke *v.* Western Grain Co., 10 Nebr. 358, 6 N. W. 427.

Nevada.— Soderberg *v.* Crockett, 17 Nev. 409, 30 Pac. 826; Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

New Jersey.— Benezet *v.* Yourison, (N. J. 1893) 27 Atl. 431; Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157; Ackerman *v.* Ackerman, 44 N. J. L. 173.

New York.— Roberts *v.* Ellwood, 116 N. Y. 651, 22 N. E. 453, 26 N. Y. St. 727; Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 5 L. R. A. 623; Gould *v.* Cayuga County Nat. Bank, 99 N. Y. 333, 2 N. E. 16; Vosburgh *v.* Teator, 32 N. Y. 561; Szymanski *v.* Chapman, 45 N. Y. App. Div. 369, 61 N. Y. Suppl. 310; Sears *v.* Grand Lodge A. O. U. W., 24 N. Y. App. Div. 410, 48 N. Y. Suppl. 559; Lee *v.* Timken, 85 Hun (N. Y.) 309, 32 N. Y. Suppl. 1064, 66 N. Y. St. 417; Powell *v.* Jones, 44 Barb. (N. Y.) 521; Morton *v.* Ostrom, 33 Barb. (N. Y.) 256; Martin *v.* Guindon, 22 Misc. (N. Y.) 141, 48 N. Y. Suppl. 694; Steele *v.* White, 2 Paige (N. Y.) 478; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. (N. Y.) 1.

North Carolina.—Pruden *v.* Asheboro, etc., R. Co., 121 N. C. 509, 28 S. E. 349; James *v.* Mathews, 40 N. C. 28; Sutton *v.* Robeson, 31 N. C. 380.

North Dakota.— Canfield *v.* Robertson, 8 N. D. 603, 80 N. W. 764.

Ohio.— Emerick *v.* Armstrong, 1 Ohio 513; Solar Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581; Mosby *v.* Cleveland St. R. Co., 15 Ohio Cir. Ct. 501, 8 Ohio Cir. Dec. 375.

Oregon.— Powell *v.* Heisler, 16 Oreg. 412, 19 Pac. 109; Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 88.

Pennsylvania.— Flynn *v.* Hurlock, 194 Pa. St. 462, 45 Atl. 312; MacDonald *v.* Piper, 193 Pa. St. 312, 44 Atl. 455; Fink *v.* Harrisburg Farmers' Bank, 178 Pa. St. 154, 35 Atl. 636, 56 Am. St. Rep. 746; Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162, 33 Wkly. Notes Cas. (Pa.) 29; Reeser's Appeal, 100 Pa. St. 79; Sherwood *v.* Yeomans, 98 Pa. St. 453; Paist *v.* Caldwell, 75 Pa. St. 161; Kelly *v.* Perseverance Bldg. Assoc., 39 Pa. St. 148;

indicated.[65] They will not be opened merely to inquire into the equities between the parties.[66]

2. MATTERS CONCLUDED.[67] Numerous authorities hold that compromises regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties[68] and the necessary consequences

In re Worrall, 5 Watts & S. (Pa.) 111; Heffner *v.* Sharp, 3 Pa. Super. Ct. 249, 39 Wkly. Notes Cas. (Pa.) 458.

South Carolina.— Dickerson *v.* Smith, 17 S. C. 289; Gibbes *v.* Greenville, etc., R. Co., 15 S. C. 224; Durham *v.* Wadlington, 2 Strobh. Eq. (S. C.) 258.

Tennessee.— Boyd *v.* Robinson, 93 Tenn. 1, 23 S. W. 72; Evans *v.* Bell, 15 Lea (Tenn.) 569; Patton *v.* Conel, 1 Lea (Tenn.) 14; Andrews *v.* Andrews, 7 Heisk. (Tenn.) 234; Williams *v.* Sneed, 3 Coldw. (Tenn.) 533; Summers *v.* Wilson, 2 Coldw. (Tenn.) 469; Woodward *v.* Winfrey, 1 Coldw. (Tenn.) 478; Humphries *v.* McLoud, 3 Head (Tenn.) 235; Owen *v.* Hancock, 1 Head (Tenn.) 563; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447; Palmer *v.* Bosley, (Tenn. Ch. 1900) 62 S. W. 195; Wright *v.* Durrett, (Tenn. Ch. 1899) 52 S. W. 710; Dillon *v.* Davis, 3 Tenn. Ch. 386.

Texas.— Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 171; Ellis *v.* Mills, 28 Tex. 584; Austin *v.* Talk, 20 Tex. 164; Dunman *v.* Hartwell, 9 Tex. 495, 60 Am. Dec. 176; Taylor *v.* Taylor, (Tex. Civ. App. 1900) 54 S. W. 1039; Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415; Dignowity *v.* Elmendorf, (Tex. Civ. App. 1897) 40 S. W. 1005; Williams *v.* Dean, (Tex. Civ. App. 1897) 38 S. W. 1024; Ximenes *v.* Wilson County, (Tex. Civ. App. 1896) 36 S. W. 127; Irwin *v.* Huey, (Tex. Civ. App. 1893) 23 S. W. 324.

Utah.— White *v.* Pacific States Sav., etc., Co., 21 Utah 23, 59 Pac. 527.

Vermont.— Tupper *v.* Rider, 61 Vt. 69, 17 Atl. 47; Ashley *v.* Hendee, 56 Vt. 209; Paris *v.* Dexter, 15 Vt. 379; Holcomb *v.* Stimpson, 8 Vt. 141; Darling *v.* Hall, 5 Vt. 91.

Virginia.— Gold *v.* Marshall, 76 Va. 668; Smith *v.* Penn, 22 Gratt. (Va.) 402; Shugart *v.* Thompson, 10 Leigh (Va.) 434; Moore *v.* Fitzwater, 2 Rand. (Va.) 442; Daniel *v.* Maclin, 6 Munf. (Va.) 61; Pollard *v.* Patterson, 3 Hen. & M. (Va.) 67.

Washington.— Perkins *v.* North End Bank, 17 Wash. 100, 49 Pac. 241.

West Virginia.— Korne *v.* Korne, 30 W. Va. 1, 3 S. E. 17; Currey *v.* Lawler, 29 W. Va. 111, 11 S. E. 897; Calwell *v.* Caperton, 27 W. Va. 397; Jarrett *v.* Ludington, 9 W. Va. 333.

Wisconsin.— Meinecke *v.* Sweet, 106 Wis. 21, 81 N. W. 986; Galusha *v.* Sherman, (Wis. 1900) 81 N. W. 495; Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769; Zimmer *v.* Becker, 66 Wis. 527, 29 N. W. 228; Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893; Kercheval *v.* Doty, 31 Wis. 476.

United States.— Chicago, etc., R. Co. *v.* Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. ed. 1099; Mackall *v.* Casilear, 137 U. S. 556, 11 S. Ct. 178, 34 L. ed. 776; Idaho, etc., Land Imp. Co. *v.* Bradbury, 132 U. S. 509, 10 S. Ct. 177, 33 L. ed. 433; Merrick *v.* Giddings, 115 U. S. 300, 6 S. Ct. 65, 29 L. ed. 403; Dakota County *v.* Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. ed. 981; Oglesby *v.* Attrill, 105 U. S. 605, 26 L. ed. 1186; Murphy *v.* U. S., 104 U. S. 464, 26 L. ed. 833; Mason *v.* U. S., 17 Wall. (U. S.) 67, 21 L. ed. 564; May *v.* Le Claire, 11 Wall. (U. S.) 217, 20 L. ed. 50; New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155; Hager *v.* Thompson, 1 Black (U. S.) 80, 17 L. ed. 41; Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961; Clarke *v.* White, 12 Pet. (U. S.) 178, 9 L. ed. 1046; Chicago, etc., R. Co. *v.* Green, 114 Fed. 676; The Katie M. Hagan, 98 Fed. 995; Kilgour *v.* Scott, 86 Fed. 39; Courtright *v.* Burnes, 48 Fed. 501; Sargent *v.* Larned, 2 Curt. (U. S.) 340, 21 Fed. Cas. No. 12,364; Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305.

England.— Pullen *v.* Ready, 2 Atk. 587, 26 Eng. Reprint 751; Leonard *v.* Leonard, 2 Ball & B. 171; Davis *v.* Davis, 13 Ch. D. 861, 49 L. J. Ch. 241, 41 L. T. Rep. N. S. 790, 28 Wkly. Rep. 345; Roach *v.* Trood, 3 Ch. D. 429, 34 L. T. Rep. N. S. 105, 24 Wkly. Rep. 803; Goodman *v.* Sayers, 2 Jac. & W. 249, 22 Rev. Rep. 112; Peto *v.* Peto, 13 Jur. 646, 16 Sim. 590, 39 Eng. Ch. 590; Neale *v.* Neale, 1 Keen 672, 15 Eng. Ch. 672; Naylor *v.* Winch, 2 L. J. Ch. O. S. 132, 7 L. J. Ch. O. S. 6, 1 Sim. & St. 564, 24 Rev. Rep. 227, 1 Eng. Ch. 555; Smith *v.* Shirley, 44 L. J. Exch. 29, 32 L. T. Rep. N. S. 234; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520.

Canada.— Mason *v.* Scott, 20 Grant Ch. (U. C.) 84.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 66.

65. See *infra*, VI, B, 1.

66. Jennison *v.* Stone, 33 Mich. 99; Lewis *v.* Cooper, Cooke (Tenn.) 467.

67. As to presumption as to matters included see *infra*, X, A, 2.

68. Cochran *v.* Cochran, 46 La. Ann. 536, 15 So. 57; Perret *v.* Keill, 1 Rob. (La.) 307; Gaylor *v.* Copes, 4 Woods (U. S.) 158, 16 Fed. 49. And see Deering *v.* Sechler, (S. D. 1898) 76 N. W. 311.

Conclusiveness as to items not excepted.— A settlement evidenced by the execution of mutual receipts of "one dollar, in full for all debts, dues, and demands to this date," except as to certain specified items, is conclusive, in the absence of fraud or mistake,

thereof,[69] and do not extend to matters which the parties never intended to include therein,[70] although existing at the time.[71] The renunciation which is made in such agreements to all rights, claims, and pretensions extends only to what relates to the differences on which the compromise arises;[72] and causes of action or claims arising subsequent to the settlement, except such as were in a legal sense in the contemplation of the party assenting to the settlement,[73] are not settled or barred thereby.[74]

as to all prior dealings between the parties not covered by the excepted items. Pratt *v.* Castle, 91 Mich. 484, 52 N. W. 52.

69. Hodge *v.* Leeds, 5 Rob. (La.) 322; Perret *v.* Keill, 1 Rob. (La.) 307; Gaylor *v.* Copes, 4 Woods (U. S.) 158, 16 Fed. 49. And see Muirhead *v.* Ft. Worth City Nat. Bank, (Tex. Civ. App. 1895) 33 S. W. 552.

Claims are included, although not specially mentioned, where it appears that the parties intended to embrace all matters of difference between them. Coburn *v.* Cedar Valley Land, etc., Co., 138 U. S. 196, 11 S. Ct. 258, 34 L. ed. 876 [*affirming* 29 Fed. 584]. See also Clarke *v.* Jenkins, 3 Rich. Eq. (S. C.) 318.

Inclusion of claims for extra services.— Where a person is employed at a certain price per month to work on a farm and his employment contemplates certain work to be done by him on Sunday, and he afterward makes a final settlement without claiming additional pay for his Sunday work he cannot then recover for such work. Lowe *v.* Marlow, 4 Ill. App. 420. So if a servant voluntarily performs extra services and settles with his master under the original contract, making no further claim, he cannot afterward set up a further claim. East Tennessee, etc., R. Co. *v.* McKnight, 15 Lea (Tenn.) 336.

70. *Georgia.*— State *v.* Southwestern R. Co., 70 Ga. 11. See also Parker *v.* Fulton L., etc., Assoc., 46 Ga. 116.

Illinois.— Bassett *v.* Lawrence, 94 Ill. App. 591.

Louisiana.— Cochran *v.* Cochran, 46 La. Ann. 536, 15 So. 57; Phelps *v.* Hughes, 1 La. Ann. 320.

Missouri.— Schneider *v.* Kirkpatrick, 80 Mo. App. 145.

New York.— Ballard *v.* Beveridge, 171 N. Y. 194, 63 N. E. 960; Davis Provision Co. *v.* Fowler, 163 N. Y. 580, 57 N. E. 1108.

North Carolina.— Lucas *v.* Carolina Cent. R. Co., 122 N. C. 937, 29 S. E. 414.

Tennessee.— Alexander *v.* Brummett, (Tenn. Ch. 1896) 42 S. W. 63; Hayes *v.* Lewisburg Bank, (Tenn. Ch. 1897) 39 S. W. 753.

Wisconsin.— Garvin *v.* Gates, 73 Wis. 513, 41 N. W. 621.

United States.— New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102 [*modifying* 43 Fed. 215].

See 10 Cent. Dig. tit. "Compromise and Settlement," § 55.

An agreement to sever a demand and compromise a part, allowing the residue to stand, is valid and will be no bar to demands not actually satisfied or settled. O'Beirne *v.* Lloyd, 43 N. Y. 248 [*affirming* 31 N. Y. Super. Ct. 19].

Demands of which one party had no knowledge.— Brown *v.* Drake, 28 Nebr. 695, 45 N. W. 47; Baker *v.* Spencer, 47 N. Y. 562.

Items expressly disallowed or excepted.— Bright *v.* Coffman, 15 Ind. 371, 77 Am. Dec. 96; Perry *v.* Erb, 22 Misc. (N. Y.) 6, 48 N. Y. Suppl. 447; U. S. National Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 68 Am. St. Rep. 830, 38 L. R. A. 837; Williams *v.* Hitchings, 10 Lea (Tenn.) 326.

71. Nichols *v.* Scott, 12 Vt. 47.

Assertion that the claim compromised is the only one.— The compromise of a claim upon plaintiff's assertion that it is the only one will not of itself form an equitable defense to another claim, the right to recover in respect of which is not otherwise contested. King *v.* Miller, 22 U. C. C. P. 450.

72. Wallace *v.* Homestead Co., (Iowa 1902) 90 N. W. 835; Powell *v.* Burroughs, 54 Pa. St. 329; Gaylor *v.* Cope, 4 Woods (U. S.) 158, 16 Fed. 49.

A settlement "in full of an account and demand sued upon in this action" does not embrace any matter not embraced in the controversy as disclosed by the pleadings therein. Bates *v.* Cobb, 5 Bosw. (N. Y.) 29.

Payment for discontinuance not settlement of cause of action and plaintiff may bring another action thereon. Terrill *v.* Deavitt, 73 Vt. 188, 50 Atl. 801.

73. Thorn Wire Hedge Co. *v.* Washburn & Moen Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205.

74. *Illinois.*—Wickenkamp *v.* Wickenkamp, 77 Ill. 92.

Missouri.— Chapman *v.* Kansas City, etc., R. Co., (Mo. 1898) 48 S. W. 646.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. 1030.

New York.— Smith *v.* Holland, 61 Barb. (N. Y.) 333; Nichols *v.* Tracy, 1 Sandf. (N. Y.) 278.

Pennsylvania.— Bennet *v.* Paine, 5 Watts (Pa.) 259.

United States.— Pickering *v.* Phillips, 2 Ban. & A. (U. S.) 417, 4 Cliff. (U. S.) 383, 19 Fed. Cas. No. 11,122, 10 Official Gaz. 420.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 59.

Assertion of after-acquired rights.— A and B, being in litigation with regard to a tract of land, entered into articles of compromise, by which it was agreed that B should "have full possession of the land," reserving to A

3. PERSONS CONCLUDED.[75] The parties and those who claim under them with notice cannot go behind a compromise made in good faith as a settlement of prior disputes but are bound thereby,[76] as are those who by their acts adopt and approve and make such agreement their own;[77] but such an agreement is not binding upon those not parties thereto.[78]

"the one half of a mill site." It was held that these articles of agreement conveyed to B no title and did not estop A from asserting any subsequently acquired rights against B or any purchaser from him. Walton *v.* Newsom, 1 Humphr. (Tenn.) 140.

Claim for services subsequently rendered. — Where plaintiff sued to recover for services rendered at an agreed rate of compensation, and defendant settled the suit by paying a certain sum, such settlement was not conclusive as respects the value of plaintiff's services thereafter. Briggs *v.* Smith, 4 Daly (N. Y.) 110.

Damages subsequently accruing from same cause.—Where a suit brought for damages to plaintiff's land, caused by the diversion of a stream of water from its natural channel, is compromised and discontinued, such settlement is no bar to another suit for damages subsequently accruing from the same cause. Wright *v.* Syracuse B., etc., R. Co., 49 Hun (N. Y.) 445, 3 N. Y. Suppl. 480, 23 N. Y. St. 78.

75. As to effect of compromise on lien of attorney see ATTORNEY AND CLIENT, VI, H, 3 [4 Cyc. 1019].

76. *Iowa.*— Stewart *v.* Chadwick, 8 Iowa 463.

Michigan.— Bowen *v.* Lockwood, 26 Mich. 441.

Missouri.— Murphy *v.* Smith, 86 Mo. 333.

Ohio.— Eells *v.* Shea, 20 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 304.

Tennessee.—Reynolds *v.* Brandon, 12 Heisk. (Tenn.) 731.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 69.

Binding on administrators and heirs of parties.— Jones *v.* Tallant, 90 Cal. 386, 27 Pac. 305; Bowen *v.* Lockwood, 26 Mich. 441; Lewis *v.* American L. Ins. Co., 7 Mo. App. 112; Solar Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581.

Persons taking subject to equities of original parties.—Where an award of arbitrators has been made, a compromise of the claim before the time to appeal from the award has expired will be enforced, as against a third party, who, after the award had matured into a judgment, had the same marked to him, as he took it subject to the equities between the original parties. Baldwin *v.* Jeffries, 2 Del. Co. (Pa.) 221.

77. An heir not named in the will who accepts the settlement made by the legatees rather than contest the will is bound by the terms of settlement and the probate of the will in accordance therewith. Wilkins *v.* Hukill, 115 Mich. 594, 73 N. W. 898.

Husband approving of settlement by wife. — A compromise and settlement by a married woman whereby she agreed with a bank which had suspended business to accept a specified sum in cash and notes in full settlement of all indebtedness by reason of a deposit of money which was her separate property is binding on both the husband and wife, where he advised and approved of the settlement, although he did not sign it. Robbins *v.* Island City Sav. Bank, 3 Tex. App. Civ. Cas. § 247.

Wife bound by husband's settlement.— Defendant was employed as agent to carry on a drug store. Afterward, on settlement, an allowance for clerk hire claimed by defendant was disputed by his principal, and defendant finally consented to a reduction of his claim, in order that he might continue the business. It was held that the wife of defendant, who had given a mortgage on her separate property to secure the performance of a contract by the husband, was bound by such settlement, although there was no express provision for the hiring of a clerk at the expense of the petitioners. Tupper *v.* Rider, 61 Vt. 69, 17 Atl. 47.

Cannot adopt in part only.— One not a party to a compromise cannot adopt such part of it as is favorable to him and reject that part which makes against him. Hiland *v.* U. S., 20 Ct. Cl. 410.

78. *Georgia.*— Seabrook *v.* Brady, 47 Ga. 650.

Indiana.— Whisnand *v.* Small, 65 Ind. 120.

Louisiana.— Clinton, etc., R. Co. *v.* Lee, 22 La. Ann. 287.

Ohio.— Eells *v.* Shea, 20 Ohio Cir. Ct. 527, 11 Ohio Cir. Dec. 304.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

England.— Heasman *v.* Pearse, 29 L. T. Rep. N. S. 171.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 69; and *supra*, II, B.

Action by subsequent owner of land for damage for flowing.— A parol agreement for settlement of past and future damages occasioned by the flowing of land for mill purposes, accompanied by a payment of the gross sum, will not bar a subsequent owner of the land flowed from maintaining an action for damages. Snow *v.* Moses, 53 Me. 546.

Compromise with some of several defendants.— Where a decree is rendered against several defendants a compromise by the complainant with a part will not release the other defendants. Molyneaux *v.* Marsh, 1 Woods (U. S.) 452, 17 Fed. Cas. No. 9,703.

One not a party to a suit by actual or constructive service of process, although named

VI. IMPEACHMENT.

A. Opening and Correcting — 1. IN GENERAL. Equity has jurisdiction to open, reform, and correct a compromise and settlement upon the showing of proper grounds for such relief.[79]

2. PLEADING AND PROOF. The party to a settlement who seeks to reopen the same must distinctly allege his grounds therefor,[80] and must prove the existence of the same by clear and convincing evidence.[81]

B. Vacating or Setting Aside[82] — 1. GROUNDS — a. In General. Agreements of compromise may be impeached for any cause sufficient in equity to invalidate a contract.[83]

b. Duress. Duress if proved is sufficient to relieve a party from the effect of a compromise which is procured by such means.[84] To establish duress, however,

in the pleadings, is not affected by a compromise and settlement of the controversy. Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458.

79. Hall *v.* Clagett, 2 Md. Ch. 151; Spurlock *v.* Brown, 91 Tenn. 261, 91 S. W. 241; Lang *v.* Ingalls Zinc Co., (Tenn. Ch. 1898) 49 S. W. 288; Graham *v.* Guinn, (Tenn. Ch. 1897) 43 S. W. 749; Dunbar *v.* Miller, 1 Brock. (U. S.) 85, 7 Fed. Cas. No. 4,130.

As to reformation of instruments generally see REFORMATION OF INSTRUMENTS.

Corrected as against sureties after death of principal.— Where a bill in equity was brought to impeach a settlement of accounts for fraud or mistake, it was held that a mistake in such settlement might be corrected as against the sureties of one of the parties, notwithstanding the death and insolvency of their principal. Lee *v.* Reed, 4 Dana (Ky.) 109.

A mistake in a settlement of a suit pending in court, before it is entered of record and made the judgment of the court, is always open to investigation and correction, and if it vitiates, the settlement as a whole should not be made the judgment of the court at all. State *v.* Southwestern R. Co., 66 Ga. 403.

80. Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 78; Kronenberger *v.* Binz, 56 Mo. 121; Currey *v.* Lawler, 29 W. Va. 111, 11 S. E. 897; Calwell *v.* Caperton, 27 W. Va. 397; Mahnke *v.* Neale, 23 W. Va. 57; Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50. See also Wright *v.* Wilson, 60 Ga. 614.

Reformation must be asked for in complaint.— Where plaintiff executed an agreement "in settlement of all matters of difference" between herself and defendant, a naked averment of mistake, without seeking a reformation of the contract, cannot avoid the defense created by the agreement, and such reformation should be asked for in the complaint, and not by reply to an answer setting up the settlement. Mason *v.* Mason, 102 Ind. 38, 26 N. E. 124 [*citing* King *v.* Enterprise Ins. Co., 45 Ind. 43].

81. Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60; Nevian *v.* New Albany Ice Co., 24 Ky. L. Rep. 400, 68 S. W. 647; Calwell *v.* Caperton, 27 W. Va. 397; Mahnke *v.* Neale, 23 W. Va. 57; Chicago, etc., R. Co. *v.* Green, 114 Fed. 676.

Necessity for showing mistake and data for correction.— A party who seeks to open a settlement of accounts on the ground of mistake assumes the burden of proving distinctly wherein the mistake consisted and of furnishing the data by which it may be corrected. Chubbuck *v.* Vernam, 42 N. Y. 432.

82. As to cancellation of instruments generally see CANCELLATION OF INSTRUMENTS [6 Cyc. 282].

83. Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

As to incapacity of party to contract see *supra*, II, A.

84. *Alabama.*— Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651.

Georgia.— Swint *v.* Carr, 76 Ga. 322, 2 Am. St. Rep. 44; Bass *v.* Bass, 73 Ga. 134.

Illinois.— Overstreet *v.* Dunlap, 56 Ill. App. 486.

Iowa.— King *v.* Williams, 65 Iowa 167, 21 N. W. 502.

Louisiana.— Adle *v.* Prudhomme, 16 La. Ann. 343.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525; Foss *v.* Hildreth, 10 Allen (Mass.) 572.

Michigan.—Boydan *v.* Haberstumpf, (Mich. 1901) 88 N. W. 386; Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438; Chittock *v.* Chittock, 101 Mich. 367, 59 N. W. 655; Vyne *v.* Glenn, 41 Mich. 112, 1 N. W. 997; Briggs *v.* Withey, 24 Mich. 136; Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105; Gates *v.* Shutts, 7 Mich. 127.

Nebraska.— David City First Nat. Bank *v.* Sargent, (Nebr. 1902) 91 N. W. 595; Boatright *v.* Enewold, 49 Nebr. 254, 68 N. W. 472; Home F. Ins. Co. *v.* Bredehoft, 49 Nebr. 152, 68 N. W. 400.

New Hampshire.— Burnham *v.* Spooner, 10 N. H. 532; Alexander *v.* Pierce, 10 N. H. 494.

Pennsylvania.— Union Nat. Bank *v.* Dersham, 4 Pennyp. (Pa.) 467, 15 Wkly. Notes Cas. (Pa.) 541; Williams *v.* Dresher, 14 Wkly. Notes Cas. (Pa.) 211, 17 Phila. (Pa.) 231, 41 Leg. Int. (Pa.) 5.

the evidence must show facts reasonably adequate to overcome the will of the party making the compromise.[85]

c. Error or Mistake — (I) *Of Fact* — (A) *In General.* A mistake or ignorance of facts is a proper subject of relief only where it constitutes a material ingredient in the contract of the parties and disappoints their intentions by a mutual error,[86] or where it is inconsistent with good faith and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party.[87] But when such party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for interference.[88]

Rhode Island.— Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Tennessee.—Lynn *v.* Beatty, 2 Baxt. (Tenn.) 475; Roth *v.* Holmes, (Tenn. Ch. 1899) 52 S. W. 699; Barrow *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1898) 48 S. W. 736; Milnor *v.* People's Bldg., etc., Assoc., (Tenn. Ch. 1898) 48 S. W. 732.

Texas.— Obert *v.* Landa, 59 Tex. 475; Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415; Alexander *v.* S. A. Trufant Commission Co., (Tex. Civ. App. 1895) 34 S. W. 182; Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

Vermont.— Hoyt *v.* Dewey, 50 Vt. 465.

United States.— Mason *v.* U. S., 17 Wall. (U. S.) 67, 21 L. ed. 564; Lowndes *v.* The Ernest M. Munn, 61 Fed. 694.

England.— Scott *v.* Scott, 11 Ir. Eq. 487.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 21.

85. Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73. See also Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

Duress not inferred.— A settlement made without duress will not be set aside, and from an unmeaning phrase in the order upon which settlement was made duress will not be inferred. Ritchie *v.* Cherest, 8 Ill. App. 534.

For evidence held insufficient to show duress see the following cases:

Iowa.— King *v.* Williams, 65 Iowa 167, 21 N. W. 502.

Michigan.— Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105.

Nebraska.— Boatright *v.* Enewold, 49 Nebr. 254, 68 N. W. 472.

Pennsylvania.— Williams *v.* Dresher, 14 Wkly. Notes Cas. (Pa.) 211, 17 Phila. (Pa.) 231, 41 Leg. Int. (Pa.) 5.

Texas.— Shelton *v.* Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415; Alexander *v.* S. A. Trufant Commission Co., (Tex. Civ. App. 1895) 34 S. W. 182.

86. A compromise made under a mistake or in ignorance of a material fact is voidable and relievable.

Connecticut.— Newell *v.* Smith, 53 Conn. 72, 3 Atl. 674.

Illinois.— Aultman *v.* Graham, 29 Ill. App. 77.

Indiana.— Peter *v.* Wright, 6 Ind. 183.

Kentucky.— Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Liggett *v.* Ashley, 5 Litt. (Ky.) 178; Anderson *v.* Bacon, 1 A. K. Marsh. (Ky.) 48.

Louisiana.— Packard *v.* Ober, 26 La. Ann. 424; Adle *v.* Prudhomme, 16 La. Ann. 343; Le Blanc *v.* Bertant, 16 La. Ann. 294; Robertson *v.* Wilcox, 3 La. Ann. 94.

Maryland.— Hall *v.* Clagett, 2 Md. Ch. 151.

Mississippi.— Nabours *v.* Cocke, 24 Miss. 44.

New Hampshire.— Wiswall *v.* Harriman, 62 N. H. 671.

Tennessee.— Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868.

Virginia.— Epes *v.* Williams, 89 Va. 794, 17 S. E. 235; Ross *v.* McLauchlan, 7 Gratt. (Va.) 86; Mosby *v.* Leeds, 3 Call (Va.) 439.

Wisconsin.— Meinecke *v.* Sweet, 106 Wis. 21, 81 N. W. 986 [*following* De Voin *v.* De Voin, 76 Wis. 66, 44 N. W. 839].

See 10 Cent. Dig. tit. "Compromise and Settlement," § 25.

The fact must be material to the contract, essential to its character, and an efficient cause of its making, and if the compromise is not materially affected thereby it will not constitute ground for relief. Wilson *v.* Frisbie, 57 Ga. 269; Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76; Currie *v.* Steele, 2 Sandf. (N. Y.) 542; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447. The courts will not correct upon a mistake alone unless such as will form a basis of equitable relief (Smith *v.* Paris, 53 Mo. 274), and the party seeking relief must show that, with the mistake corrected, he is entitled to a more favorable result than that fixed by the settlement (Hughes *v.* Smith, 7 Ky. L. Rep. 40). A settlement will not be opened for clerical errors which had no influence on the result. Wilson *v.* Frisbie, 57 Ga. 269.

87. Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447; Graham *v.* Guinn, (Tenn. Ch. 1897) 43 S. W. 749.

88. Per Turley, J., in Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447 [*quoting* Story Eq. Jur. § 151]. See also Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426; Soper *v.* Atlantic Mut. F. & M. Ins. Co., 120 Mass. 267; Durham *v.* Wadlington, 2 Strobh. Eq. (S. C.) 258; Blackmer *v.* Wright, 12 Vt. 377.

Error in calculation.— If two parties having, or supposing that they have, claims upon each other, agree to compromise those claims,

(B) *Concealment of Facts.* Although fraudulent and unfair concealment of facts may constitute a ground for relief against a compromise,[89] yet every omission to communicate facts although material is not necessarily fraudulent;[90] and the mere failure of a party, voluntarily and unasked, to put the other in possession of all the facts within his own knowledge bearing upon the transaction is not such concealment where he does nothing to mislead.[91] To constitute a non-disclosure a fraudulent concealment the party must have known or have had cause to presume that his adversary was ignorant of the facts, and the suppression must as a rule have been intentional.[92]

and thereupon make a settlement of their matters in dispute, and they act at the time in good faith, stand on an equal footing, and have equal means of knowledge as to the facts, the settlement is binding; and it is not enough to invalidate it that one of the parties made an error in the calculation of the items of his claim. Brooks *v.* Hall, 36 Kan. 697, 14 Pac. 236. See, however, Adle *v.* Prudhomme, 16 La. Ann. 343, holding that a mistake in calculation is ground for setting aside a compromise.

Mistake as to extent of injuries.— Where one whose horse has been injured by a train of cars compromises with the railroad company and accepts a certain sum in settlement of his claim the mere fact that he underestimated the extent of the horse's injuries cannot annul the settlement so as to entitle him to recover an additional sum. Louisville, etc., R. Co. *v.* King, 12 Ky. L. Rep. 637.

Recovery of property given under mistake. — If during a controversy a chattel be given up by way of compromise it cannot be afterward recovered in an action of trover on the ground that it was given up by mistake. Jones *v.* Fulwood, 12 Ga. 121.

89. *Alabama.*— Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

Iowa.— Howard *v.* McMillen, 101 Iowa 453, 70 N. W. 623.

Kentucky.— Pepper *v.* Aiken, 2 Bush (Ky.) 251; Mills *v.* Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118.

New York.— Feeter *v.* Weber, 78 N. Y. 334; Stewart *v.* Ahrenfeldt, 4 Den. (N. Y.) 189.

England.— Leonard *v.* Leonard, 2 Ball & B. 171; Brooke *v.* Mostyn, 33 Beav. 457, 2 De G. J. & S. 373, 10 Jur. N. S. 1114, 34 L. J. Ch. 65, 11 L. T. Rep. N. S. 392, 13 Wkly. Rep. 1115, 67 Eng. Ch. 292.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 26.

90. Cowan *v.* Sapp, 81 Ala. 525, 8 So. 212; Pepper *v.* Aiken, 2 Bush (Ky.) 251.

Failure to give information which might have been acquired.— Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them and acts exclusively on the advice of her own personal friends and advisers, specially selected by her to make investigations and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skilful search. Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

91. Mills *v.* Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; McMichael *v.* Kilmer, 76 N. Y. 36 [*reversing* 12 Hun (N. Y.) 336]; Hennessy *v.* Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. ed. 605 [*affirming* 35 Fed. 174]; Chapman *v.* Wilson, 4 Woods (U. S.) 30, 3 Fed. 305.

Failure of debtor to disclose financial condition.— In arranging a compromise between them the debtor and creditor have the right to use each his own skill, foresight, and knowledge, and such compromise may not be assailed on the ground that the debtor omitted to disclose his financial condition. Where he is not questioned in regard thereto and does nothing to mislead he is not bound to make any such disclosure. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143 [*affirming* 33 Hun (N. Y.) 489].

Party not bound to state defects in his defense.— A settlement of a suit for a penalty pending appeal from a judgment for plaintiff, by defendant agreeing to pay the costs and plaintiff remitting the penalty, is not invalidated by the fact that plaintiff did not inform defendant that the statute giving the penalty was repealed after judgment, nor is it invalid as in fraud of the right of defendant's attorney to recover his costs, there being no judgment on which he had a lien. Shank *v.* Shoemaker, 18 N. Y. 489.

92. Cowan *v.* Sapp, 81 Ala. 525, 8 So. 212 [*citing* Jorden *v.* Pickett, 78 Ala. 331]; Grounn *v.* Abat, 7 La. 17.

Concealment avoiding settlement although not fraudulent.— Where a secretary of an association collected, retained, and paid out moneys of the association in direct violation of the by-laws, which required the moneys to be paid to the treasurer and paid out on his order, and thereafter made a settlement with the association on his own report, knowing, but not imparting, to the association facts in regard to certain bills paid by him which were doubtful claims against the association, the settlement as to such bills may be avoided, even though no fraud was practised. North Nebraska Fair, etc., Assoc. *v.* Box, 57 Nebr. 302, 77 N. W. 770.

Where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full informa-

(c) *Effect of Opportunity For Information.* A fair compromise will be sustained by the courts, notwithstanding errors of law or mistake of facts of which the party complaining could by reasonable diligence have informed himself.[93] Equal opportunities for information, although not availed of, make such a compromise as conclusive as actual information.[94] This has been held to be the rule even in the case of false statements by one party as to matters equally open to the knowledge or inquiry of the other, where the parties sustain no fiduciary relation to each other.[95]

(II) *Of Law.* A voluntary compromise and settlement of doubtful claims will not be disturbed or set aside merely because of a mistake as to the law,[96] unless it appears that the opposite party was in some way instrumental in producing the result.[97] It has been held, however, that relief will be granted against a com-

tion to the other the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had. Cleaveland *v.* Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. ed. 384.

93. Smith *v.* Paris, 53 Mo. 274.

94. *Alabama.*— Carlisle *v.* Barker, 57 Ala. 267; Motley *v.* Motley, 45 Ala. 555.

California.— Otto *v.* Long, 127 Cal. 471, 59 Pac. 895.

Georgia.— Pattison *v.* Albany Bldg., etc., Assoc., 63 Ga. 373.

Michigan.— Harrison *v.* Dewey, 46 Mich. 173, 9 N. W. 152.

Vermont.— Judd *v.* Blake, 14 Vt. 410.

United States.— Hennessy *v.* Bacon, 137 U. S. 78, 11 S. Ct. 17, 34 L. ed. 605; Hager *v.* Thompson, 1 Black (U. S.) 80, 17 L. ed. 41.

England.— Pullen *v.* Ready, 2 Atk. 587, 26 Eng. Reprint 751; Bainbrigge *v.* Moss, 3 Jur. N. S. 58.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 27.

If the error or ignorance resulted from the gross negligence of complainant he is not entitled to relief. Foot *v.* Foot, 1 Root (Conn.) 308; Keough *v.* Foreman, 33 La. Ann. 1434.

95. Massachusetts Mut. L. Ins. Co. *v.* Hayes, 21 Ill. App. 258; Durkee *v.* Stringham, 8 Wis. 1.

As to character of false representations which will invalidate see *infra*, VI, B, 1, d, (II), (B).

Party bound with knowledge.— A compromise cannot be set aside as having been procured by false representations, where the false representations were as to matters of law or as to facts which the party was bound to know. Dunn *v.* Commonwealth Ins. Co., 3 Flipp. (U. S.) 379, 8 Fed. Cas. No. 4,174, 3 Ins. L. J. 631.

96. *Alabama.*— Georgia Home Ins. Co. *v.* Warten, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129; Bell *v.* Lawrence, 51 Ala. 160.

Georgia.— City Electric R. Co. *v.* Floyd County, 115 Ga. 655, 42 S. E. 45; Bass *v.* Bass, 72 Ga. 134; Spriggs *v.* Bromhlett, 54 Ga. 348; Morris *v.* Munroe, 30 Ga. 630.

Illinois.— Stover *v.* Mitchell, 45 Ill. 213; Siegel *v.* Schueck, 67 Ill. App. 296; Percy *v.* Hollister, 66 Ill. App. 594; Gilek *v.* Stock, 33 Ill. App. 147.

Indiana.— Bennett *v.* Ford, 47 Ind. 264.

Kentucky.— Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 17 Ky. L. Rep. 385, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478; Breckinridge *v.* Waters, 4 Dana (Ky.) 620; Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Kennedy *v.* Campbell, Litt. Sel. Cas. (Ky.) 41; Fisher *v.* Kay, 2 Bibb (Ky.) 434.

Louisiana.— Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321; Adle *v.* Prudhomme, 16 La. Ann. 343; Millaudon *v.* Worsley, 6 Rob. (La.) 274.

Mississippi.— Nabours *v.* Cooke, 24 Miss. 44.

Missouri.— Reisenleiter *v.* Evangelische Lutherische Gnaden Kirche, 29 Mo. App. 291.

New York.— Ludington *v.* Miller, 38 N. Y. Super. Ct. 478.

Pennsylvania.— Gormly *v.* Gormly, 130 Pa. St. 467, 18 Atl. 727.

Tennessee.— Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447.

England.— Heald *v.* Walls, 39 L. J. Ch. 217, 21 L. T. Rep. N. S. 705, 18 Wkly. Rep. 398; Marshall *v.* Collett, 1 Y. & C. Exch. 232.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 31.

Principal affected by knowledge of agent. — Widow and other kin of an intestate agreed, by advice of their law agent, to compromise their respective claims by taking equal shares. The widow, after receiving her share, brought an action to rescind the agreement on the ground of ignorance of her legal rights and the erroneous advice of her law agent. It was held that, although the fair inference was that she was ignorant of her legal rights, yet as there was no proof of fraud on the part of the agent she was bound by his acts and affected by the knowledge which he was presumed to have of her rights. Stewart *v.* Stewart, 6 Cl. & F. 911, 7 Eng. Reprint 940, Macl. & R. 401, 9 Eng. Reprint 147.

97. Kennedy *v.* Campbell, Litt. Sel. Cas. (Ky.) 41; Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868; Warren *v.* Williamson, 8 Baxt.

promise not made merely under the impression that the law is doubtful and uncertain with a view of bringing peace, but made under an entire and thorough mistake of law,[98] as for instance where the agreement is made in ignorance of the existence of a right or title.[99]

(III) *MISTAKE AS TO EFFECT OF COMPROMISE.* A party to a contract of compromise cannot avoid it on the ground that he had a mistaken conception of its effect.[1] It has been held, however, that it is in the discretion of the court to relieve parties from agreements relating to the prosecution or discontinuance of a pending action, if not too late to place them *in statu quo*, where it appears that either has inadvertently, unadvisedly, or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing work to his prejudice.[2]

d. Fraud — (I) *IN GENERAL.* An agreement of compromise is, if procured

(Tenn.) 427; Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447.

Fraudulent misrepresentation as to rights. — "It is true that the ignorance relied upon is an ignorance of law rather than of facts, and that this is not always, or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform, but, in our opinion, the weight of authority and the decisions of this court would now forbid that a party, who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has willfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the general doctrine that a mere mistake of law affords no ground for relief. This view seems to be upheld by many, if not all, of the modern text writers, who are recognized as authority on the question." Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 570, 17 Ky. L. Rep. 385, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478.

98. Jones *v.* Munroe, 32 Ga. 181; Peter *v.* Wright, 6 Ind. 183; Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Baddley *v.* Oliver, 1 Cr. & M. 219, 1 Dowl. P. C. 398, 2 L. J. Exch. 76, 3 Tyrw. 145; Harvey *v.* Cooke, 6 L. J. Ch. O. S. 84, 4 Russ. 34, 4 Eng. Ch. 34; Lansdown *v.* Lansdown, Mosely 364, 25 Eng. Reprint 441; Bingham *v.* Bingham, 1 Ves. 126, 27 Eng. Reprint 934; Story Eq. Jur. § 131.

A compromise made by a guardian of a baseless claim against his wards, under a mistake as to his legal liability, should not be enforced against the wards or guardian. Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407.

If a party, ignorant of a plain and settled principle of law, is induced to yield a portion of his indisputable right, equity will relieve; but where the title is disputable and he enters into a compromise no relief will be given. Naylor *v.* Winch, 2 L. J. Ch. O. S. 132, 7 L. J. Ch. O. S. 6, 1 Sim. & St. 555, 24 Rev. Rep. 227, 1 Eng. Ch. 555.

99. Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447; Cann *v.* Cann, 1 P. Wms. 567, 24 Eng. Reprint 520; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184.

In such a case the mistake may be deemed a mistake of fact as well as of law. Trigg *v.* Read, 5 Humphr. (Tenn.) 529, 42 Am. Dec. 447. And see Story Eq. Jur. §§ 122, 130.

1. Miller *v.* Chippewa County, 58 Wis. 630, 17 N. W. 535; Jenner *v.* Jenner, 2 De G. F. & J. 359, 6 Jur. N. S. 314, 30 L. J. Ch. 201, 3 L. T. Rep. N. S. 488, 9 Wkly. Rep. 109, 63 Eng. Ch. 280.

Mistake as to effect of deed. — By a voluntary deed two sisters and their brothers directed annual payments to be made during their respective lives for the benefit of another brother, his wife, and children. The payments were made during the life of the brother. Upon his death the two sisters claimed to be relieved from the deed, upon the ground that they believed that the provision was for the life of the brother only. The court refused to grant any relief. Bentley *v.* Mackay, 8 Jur. N. S. 1001, 7 L. T. Rep. N. S. 143, 10 Wkly. Rep. 873.

2. Van Nuys *v.* Titsworth, 57 Hun (N. Y.) 5, 10 N. Y. Suppl. 507, 32 N. Y. St. 737, where it was held that where plaintiff unadvisedly entered into an agreement for the settlement of matters in controversy for the sole purpose of escaping the injurious effects to his health which would be caused by protracted litigation, and it immediately thereafter appeared that such settlement would result in a series of future onerous litigation, it was within the discretion of the court, if not too late to place the parties *in statu quo*, to set aside the agreement and subsequent stipulations made in pursuance thereof.

It is not necessary in such case to show fraud, deceit, mutual mistake, or undue influence. Barry *v.* New York Mut. L. Ins. Co., 53 N. Y. 536; Van Nuys *v.* Titsworth, 57 Hun (N. Y.) 5, 10 N. Y. Suppl. 507, 32 N. Y. St. 737 [*citing* Becker *v.* Lamont, 13 How. Pr. (N. Y.) 23].

by fraud, invalid and may be avoided on such ground,[3] except where the party injured knew of the facts at the time.[4]

(II) *FALSE REPRESENTATIONS* — (A) *In General.* False representations inducing the making of a compromise will constitute a good defense to, or ground for, impeaching the same.[5]

3. *Alabama.*—McKewan *v.* Woodstock Iron Co., 83 Ala. 286, 3 So. 314; Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

Colorado.— Collins *v.* McClurg, 1 Colo. App. 348, 29 Pac. 299.

Georgia.— Bass *v.* Bass. 73 Ga. 134.

Illinois.— Murray *v.* Carlin, 67 Ill. 286; Coyne *v.* Avery, 91 Ill. App. 347 [*affirmed* in 189 Ill. 378, 59 N. E. 788].

Indiana.— Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 103; Peter *v.* Wright, 6 Ind. 183; Spahr *v.* Hollingshead, 8 Blackf. (Ind.) 415.

Iowa.— Springfield Engine, etc., Co. *v.* Van Brunt, 77 Iowa 82, 41 N. W. 578; Mitchell *v.* Donahey, 62 Iowa 376, 17 N. W. 641; Mills County *v.* Burlington, etc., R. Co., 47 Iowa 66; Dyer *v.* Jessup, 11 Iowa 118.

Kentucky.— Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 17 Ky. L. Rep. 385, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478; Hahn *v.* Hart, 12 B. Mon. (Ky.) 426; Fox *v.* Miller, 7 B. Mon. (Ky.) 125; Underwood *v.* Brockman, 4 Dana (Ky.) 309, 29 Am. Rep. 407; Home Ben. Soc. *v.* Muehl, 22 Ky. L. Rep. 1264, 60 S. W. 371, 22 Ky. L. Rep. 1378, 59 S. W. 520.

Louisiana.— Packard *v.* Ober, 26 La. Ann. 424; Adle *v.* Proudhomme, 16 La. Ann. 343; Jamison *v.* Ludlow, 3 La. Ann. 492.

Maine.— Frankfort Bank *v.* Johnson, 24 Me. 490.

Massachusetts.— Snailham *v.* Isherwood, 151 Mass. 317, 23 N. E. 1135; Foss *v.* Hildreth, 10 Allen (Mass.) 76.

Missouri.— Evans *v.* Evans, (Mo. 1899) 52 S. W. 12; Morgan *v.* Joy, 121 Mo. 677, 26 S. W. 670; Stephens *v.* Spiers, 25 Mo. 386.

Nebraska.— North Nebraska Fair, etc., Assoc. *v.* Box, 57 Nebr. 302, 77 N. W. 770; Home F. Ins. Co. *v.* Bredehoft, 49 Nebr. 152, 68 N. W. 400.

New York.— Newman *v.* Curiel, 75 Hun (N. Y.) 31, 26 N. Y. Suppl. 977, 58 N. Y. St. 174; Stewart *v.* Ahrenfehlt, 4 Den. (N. Y.) 189; Hall *v.* Perkins, 3 Wend. (N. Y.) 626.

North Carolina.— Barnawell *v.* Threadgill, 56 N. C. 50.

Ohio.— Kezartee *v.* Cartmell, 31 Ohio St. 522.

Oregon.— Falconio *v.* Larsen, 31 Oreg. 137, 48 Pac. 703, 37 L. R. A. 254.

Rhode Island.— Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

South Carolina.— Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665; Dickerson *v.* Smith, 17 S. C. 289.

South Dakota.— Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856.

Tennessee.— Ross *v.* Seaver, (Tenn. Ch. 1899) 52 S. W. 903.

Texas.— Ellis *v.* Mills, 28 Tex. 584.

Virginia.— Francis *v.* Cline, 96 Va. 201, 31 S. E. 10.

Wisconsin.— Kercheval *v.* Doty, 31 Wis. 476; Courtney *v.* McGavock, 23 Wis. 619.

United States.— Oglesby *v.* Attrill, 105 U. S. 605, 26 L. ed. 1186; Gladish *v.* Pennsylvania Co., 107 Fed. 61, 46 C. C. A. 150; St. Louis, etc., R. Co. *v.* Clark, 51 Fed. 483, 2 C. C. A. 331; Magoric *v.* Little, 23 Blatchf. (U. S.) 399, 25 Fed. 627.

England.— Brooke *v.* Mostyn, 33 Beav. 457, 2 De G. J. & S. 373, 10 Jur. N. S. 1114, 34 L. J. Ch. 65, 11 L. T. Rep. N. S. 392, 13 Wkly. Rep. 1115, 67 Eng. Ch. 292; Stainton *v.* Carron Co., 10 Jur. N. S. 783, 30 L. J. Ch. 713, 4 L. T. Rep. N. S. 659, 12 Wkly. Rep. 1120; Trigge *v.* Lavallee, 9 Jur. N. S. 261, 8 L. T. Rep. N. S. 154, 15 Moore P. C. 270, 1 New Rep. 454, 11 Wkly. Rep. 404, 15 Eng. Reprint 497; Gordon *v.* Gordon, 3 Swanst. 400, 19 Rev. Rep. 230; Gossain *v.* Gossain, 8 Wkly. Rep. 196.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 19.

Fraud invalidates preliminary agreement intended as basis for settlement.— Where a settlement between plaintiff and defendant has been procured by defendant's fraud he cannot retain the benefit of a preliminary agreement merely intended as a basis for the settlement, but the whole settlement will be set aside. Snailham *v.* Isherwood, 151 Mass. 317, 23 N. E. 1135.

A suspicion of the want of good faith is not sufficient to justify a decree setting aside, upon the ground of fraud, a compromise, especially where the party to be affected by such decree has become incapable from impairment of intellect to present his side of the question. Hoffman *v.* Overbey, 137 U. S. 465, 11 S. Ct. 157, 34 L. ed. 754. See also Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

It is the duty of the court when a settlement is sought to be avoided for fraud to explain to the jury what they can consider in determining the question and what will constitute such fraud as will authorize a rescission. Lewless *v.* Detroit, etc., R. Co., 65 Mich. 292, 32 N. W. 790. See also Stearns *v.* Johnson, 17 Minn. 142.

4. McCoy *v.* Quigley, 55 Iowa 315, 7 N. W. 633; Lee *v.* Timken, 85 Hun (N. Y.) 309, 32 N. Y. Suppl. 1064, 66 N. Y. St. 417.

5. *Alabama.*— Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

Illinois.— May *v.* Magee, 66 Ill. 112; Wolsey *v.* Price, 98 Ill. App. 503; Davis *v.* Gurney, 38 Ill. App. 520.

Indiana.— Olvey *v.* Jackson, 106 Ind. 286,

(B) *Character of Representations Which Will Invalidate.*[6] To constitute a ground of impeachment it must appear that the representations were false[7] as to a material matter,[8] that the maker knew them to be false,[9] that they were made for the purpose of inducing and did induce the other party to make the contract,[10] that the latter had the right to rely upon the same,[11] and that he was ignorant of

4 N. E. 149; McLean *v.* U. S. Equitable L. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779; Worley *v.* Moore, 77 Ind. 567.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 107 Iowa 1, 77 N. W. 476.

Kentucky.— Jones *v.* Chappell, 5 T. B. Mon. (Ky.) 422.

Michigan.— Headley *v.* Hackley, 50 Mich. 43, 14 N. W. 693; Hanold *v.* Bacon, 36 Mich. 1; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230.

New York.— Crans *v.* Hunter, 28 N. Y. 38; King *v.* Leighton, 22 Hun (N. Y.) 419 [*affirmed* in 100 N. Y. 386, 3 N. E. 594]; Whiteside *v.* Hyman, 10 Hun (N. Y.) 218; Spence *v.* Baldwin, 59 How. Pr. (N. Y.) 375.

Pennsylvania.— Hoge *v.* Hoge, 1 Watts (Pa.) 163, 26 Am. Dec. 52.

South Carolina.— Dickerson *v.* Smith, 17 S. C. 289.

Texas.— Baggs *v.* Hale, 25 Tex. Civ. App. 309, 61 S. W. 525.

Vermont.— Town *v.* Waldo, 62 Vt. 118, 20 Atl. 325.

Wisconsin.— Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769.

United States.— Mentzer *v.* Armour, 5 McCrary (U. S.) 617, 18 Fed. 373; Dunn *v.* Commonwealth Ins. Co., 1 Flipp. (U. S.) 379, 8 Fed. Cas. No. 4,174, 3 Ins. L. J. 631.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 23.

A family settlement obtained by misrepresentation as to the value of the estate is invalid. Hewitt *v.* Crane, 6 N. J. Eq. 159.

False and fraudulent representations to attorney of complainant.— Evidence by the attorney of complainant that he was induced by fraud and the suppression of the truth by defendant to agree to the compromise and to advise its acceptance, and that he would not have agreed to or recommended it had it not been for the representations made by defendant is sufficient to warrant setting the compromise aside; and it need not be shown by complainant himself that he would not have accepted it if he had known the truth, as the fraud practised on the attorney was in fact and in law a fraud practised on complainant. Ross *v.* Seaver, (Tenn. Ch. 1899) 52 S. W. 903.

6. See, generally, FRAUD.

7. Johnson *v.* Chicago, etc., R. Co., 107 Iowa 1, 77 N. W. 476.

8. American Ins. Co. *v.* Crawford, 7 Ill. App. 29.

9. *Alabama.*— Lehman *v.* Bibb, 55 Ala. 411.

Illinois.— St. Louis, etc., R. Co. *v.* Rice, 85 Ill. 406; Walker *v.* Hough, 59 Ill. 375.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 107 Iowa 1, 77 N. W. 476.

Kentucky.— Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 17 Ky. L. Rep. 385, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478.

Michigan.— Headley *v.* Hackley, 50 Mich. 43, 14 N. W. 693.

New York.— *Compare* Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 43 N. Y. St. 400, 28 Am. St. Rep. 548, holding that a compromise of a claim will be set aside for fraud, where it was procured by false representations, although the party making them acted in good faith.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 23.

A representation by a physician to plaintiff in good faith and without intention to influence as to the extent of injuries for which the latter executed a compromise will not invalidate the contract if otherwise free from fraud, although such representation turned out to be false. Louisville, etc., R. Co. *v.* Carter, 23 Ky. L. Rep. 2017, 66 S. W. 508.

Principal's knowledge of falsity of representation.— Where an insolvent husband, knowing his wife to be dead, and that he had thereby become entitled to a beneficial interest in her estate, which considerably changes his financial standing, permitted an attorney whom he and his wife had employed, but who purported to act for the wife, to compromise and purchase a judgment against him, on representations as to the wife's good health, etc.— the agent not knowing her to be dead at the time — such husband is chargeable with the fraud, and hence the judgment continued a lien against his property. Van Campen *v.* Bruns, 54 N. Y. App. Div. 86, 66 N. Y. Suppl. 344.

10. Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; May *v.* Magee, 66 Ill. 112; Johnson *v.* Chicago, etc., R. Co., 107 Iowa 1, 77 N. W. 476; Meguiar *v.* Fesler, 19 Ky. L. Rep. 1126, 42 S. W. 920. *Compare* Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799, holding that it was not essential to a recovery to show that the alleged fraudulent representations were the exclusive cause inducing plaintiff to assent to the settlement; that if she would not have made it except for the representations there was such a reliance thereon as entitled her to maintain the action.

Representations must be relied on.— Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651; Louisville, etc., R. Co. *v.* Carter, 23 Ky. L. Rep. 2017, 66 S. W. 508.

11. American Ins. Co. *v.* Crawford, 7 Ill. App. 29 [*citing* Tuck *v.* Downing, 76 Ill. 71; Banta *v.* Palmer, 47 Ill. 99].

Expression of opinion.— Whether a plaintiff can get no more or is likely to recover no more by an action at law for loss of her property than is offered to her in settlement,

the truth.[12] In the absence of such a showing on the part of complainant the agreement is binding.

e. Illegality. A contract of compromise may be set aside where it is against public policy,[13] is of an immoral character,[14] or is in settlement of an illegal transaction.[15]

f. Necessitous Circumstances. A compromise agreement will not as a rule be set aside merely on the ground that a party was induced to enter into it on account of his necessitous circumstances and the pressure of pecuniary difficulty.[16]

g. Undue Influence. Where it appears that a party to a compromise was ignorant and liable to imposition, acted without legal advice, and was unduly influenced to make such compromise to his disadvantage, this may constitute ground for setting aside the contract.[17]

h. Usurious Claims. Where a usurious debt or claim has been settled after

although made in the form of a positive representation, is after all but the mere expression of opinion and is not a representation upon which the party has a right to rely. American Ins. Co. *v.* Crawford, 7 Ill. App. 29. And see as to effect of expression of opinion as distinct from misrepresentation Franklin Ins. Co. *v.* Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014; Ft. Worth City Nat. Bank *v.* Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. ed. 752; Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305.

12. Meguiar *v.* Fesler, 19 Ky. 1126, 42 S. W. 920; Quinlan *v.* Keiser, 66 Mo. 603 [*reversing* 2 Mo. App. 597]; Ordway *v.* Continental Ins. Co., 35 Mo. App. 426. See also Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143.

Knowledge of falsity.— A party cannot avoid a contract of settlement on the ground of fraudulent representations if he did not believe them or knew that they were false when they were made. Webb *v.* Harris, 1 Tex. App. Civ. Cas. § 1289. So where fraud has been committed by misrepresentation and false statements, and the aggrieved party, with knowledge of the facts constituting the fraud, makes a compromise of the matter, the compromise should be held valid in law, although the party committing the fraud may reiterate such misrepresentations and false statements, and affirm and reaffirm his integrity in the matter, in order to effect the compromise, and the aggrieved party may thereby be induced to make the compromise. Adams *v.* Sage, 28 N. Y. 103.

13. Wilson *v.* Bozeman, 48 Ala. 71; Moher *v.* O'Grady, 4 L. R. Ir. 54.

14. Wheeler *v.* Wheeler, 15 Ky. L. Rep. 539, holding, however, that the fact that it was agreed that the case should stand on the docket for the time being, in order to prevent plaintiff's creditors from learning of the compromise and intercepting the money he was to receive, was not of such an immoral character as to vitiate the whole proceeding.

A contract to settle an action of criminal conversation is not founded on an immoral consideration. Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.

15. Fort Edward *v.* Fish, 156 N. Y. 363, 50 N. E. 973 (compromise by village officers of illegal claim against village); Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269 (gambling grain contract).

Allowance of account for liquor sold on credit.— An account for liquor sold on credit by a tavern-keeper being void by statute, the allowance of it, in a settlement of accounts, is no bar to an action. Driesbach *v.* Keller, 2 Pa. St. 77.

16. Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217; Gage *v.* Parmelee, 87 Ill. 329; Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511 [*distinguishing* Vyne *v.* Glenn, 41 Mich. 112, 1 N. W. 997]; Craig *v.* Bradley, 26 Mich. 353; French *v.* Shoemaker, 14 Wall. (U. S.) 314, 20 L. ed. 852; U. S. *v.* Child, 12 Wall. (U. S.) 232, 20 L. ed. 360.

17. Flummerfelt *v.* Flummerfelt, 51 N. J. Eq. 432, 26 Atl. 857; Perea *v.* Barela, 6 N. M. 239, 27 Pac. 507; Ellis *v.* Barker, L. R. 7 Ch. 104, 25 L. T. Rep. N. S. 688; Hoghton *v.* Hoghton, 15 Beav. 278, 17 Jur. 99, 21 L. J. Ch. 482; Dunnage *v.* White, 1 Swanst. 137, 1 Wils. C. P. 67, 18 Rev. Rep. 33.

In determining whether unconscionable advantage was taken of one party by the other, in the negotiation of a compromise between them the question must be considered not in the light of subsequent events, but upon the circumstances existing at the time of the negotiation and execution of the contract, and if it appears in view of these circumstances that no advantage was taken the contract will not be set aside (Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Wood *v.* Isom, 68 Ga. 417; Hotchkiss *v.* Dickson, 2 Bligh 304, 4 Eng. Reprint 340), even though brought about by the use of influence, provided such influence was not for the benefit of the party exerting it (Ingwaldson *v.* Skrivseth, 7 N. D. 388, 75 N. W. 772).

Influence of scriptural injunction.— A compromise whereby one parts with land claimed in good faith by another may be valid, although the party relinquishing the land did so solely because guided by the scriptural injunction to give up property rather than to go to law, no fraud, deceit, or concealment being practised. Wood *v.* Isom, 68 Ga. 417.

full opportunity of examination, the transaction will not be opened and the settlement avoided merely on the ground of the usury.[18]

2. Return of Benefit or Consideration — a. In General. Where a party to a compromise desires to set aside or avoid the same and be remitted to his original rights, he must place the other party *in statu quo* by returning or tendering the return of whatever has been received by him under such compromise,[19] if of any value,[20] and so far as possible any right lost by the other party in consequence thereof,[21] and should in his pleadings allege the fact of such return or tender.[22] This rule obtains, even though the contract was induced by the fraud or false

18. Adams *v.* McKenzie, 18 Ala. 698; Pattison *v.* Albany Bldg., etc., Assoc., 63 Ga. 373.

19. *Arkansas.*— Harkey *v.* Mechanics, etc., Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295.

California.— Dunn *v.* Long Beach Land, etc., Co., 114 Cal. 605, 46 Pac. 607; Hellings *v.* Heydenfeldt, 107 Cal. 577, 40 Pac. 1026.

Georgia.— Western, etc., Co. *v.* Burke, 97 Ga. 560, 25 S. E. 498 [*following* East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558, 10 S. E. 350]. See also Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668.

Illinois.— Moriarty *v.* Slafferan, 89 Ill. 528; Warren *v.* Tyler, 81 Ill. 15; Carroll *v.* Holmes, 24 Ill. App. 453; Schermerhorn *v.* Cassem, 9 Ill. App. 156.

Indiana.— Home Ins. Co. *v.* McRichards, 121 Ind. 121, 22 N. E. 875; Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 103.

Kansas.—Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285.

Kentucky.— Cunningham *v.* Belknap, 22 Ky. L. Rep. 1580, 60 S. W. 837; Huffaker *v.* Jones, 13 Ky. L. Rep. 432.

Maryland.— Western Bank *v.* Kyle, 6 Gill (Md.) 343.

Massachusetts.— Moore *v.* Massachusetts Ben. Assoc., 165 Mass. 517, 43 N. E. 298; Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116; Brown *v.* Hartford F. Ins. Co., 117 Mass. 479.

Michigan.— Canton Bridge Co. *v.* Eaton Rapids, 113 Mich. 328, 71 N. W. 635; Galvin *v.* O'Brien, 96 Mich. 483, 56 N. W. 85; Pangborn *v.* Continental Ins. Co., 67 Mich. 683, 35 N. W. 814; Hart *v.* Gould, 62 Mich. 262, 28 N. W. 831; Headley *v.* Hackley, 50 Mich. 43, 14 N. W. 693; Walsh *v.* Sisson, 49 Mich. 423, 13 N. W. 802; Crippen *v.* Hope, 38 Mich. 344; Jewett *v.* Petit, 4 Mich. 508.

Mississippi.— Coxwell *v.* Prince, (Miss. 1896) 19 So. 237.

Missouri.— Evans *v.* Evans, (Mo. 1899) 52 S. W. 12; Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66.

New Hampshire.— Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76; Burnham *v.* Spooner, 10 N. H. 532.

New York.— Harbeck *v.* Pupin, 145 N. Y. 70, 39 N. E. 722, 64 N. Y. St. 528 [*affirming* 73 Hun (N. Y.) 1, 25 N. Y. Suppl. 952, 56 N. Y. St. 67]; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143 [*affirming* 33 Hun (N. Y.) 489]; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75 [*affirming* 21 Hun (N. Y.) 293]; McMichael *v.* Kilmer, 76 N. Y. 36; Cobb *v.* Hatfield, 46 N. Y. 533; Doyle *v.* New York, etc., R. Co., 66 N. Y. App. Div. 398, 72 N. Y. Suppl. 936; Martin *v.* Adams, 81 Hun (N. Y.) 9, 30 N. Y. Suppl. 523; Newman *v.* Stuckey, 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 760; Magee *v.* Badger, 30 Barb. (N. Y.) 246; Davidson *v.* Sumner, 57 N. Y. Super. Ct. 29, 5 N. Y. Suppl. 12; Ludington *v.* Miller, 38 N. Y. Super. Ct. 478.

Oregon.— Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

Pennsylvania.— See Arthurs *v.* Bridgewater Gas Co., 171 Pa. St. 532, 33 Atl. 88.

Texas.— Stewart *v.* Houston, etc., R. Co., 62 Tex. 246; Ellis *v.* Mills, 28 Tex. 584.

Vermont.— Town *v.* Waldo, 62 Vt. 118, 20 Atl. 325.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

United States.— McLean *v.* Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. ed. 804; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 81.

The tender must be without qualifications or conditions. East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558, 10 S. E. 350; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75.

Time for tender.— Where a settlement of a pending suit is obtained from plaintiff by duress, a tender back of the money received is in time if made before defendant has by a proper plea set up the settlement as a defense. Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438.

20. Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; Cobb *v.* Hatfield, 46 N. Y. 533.

Unnecessary where nothing substantial passed.— It is no objection to the setting aside of a compromise that the parties cannot now be placed *in statu quo*, unless it appears that something substantial passed from such party in the compromise. Alves *v.* Henderson, 16 B. Mon. (Ky.) 131. See also Cook *v.* Sherman, 4 McCrary (U. S.) 20, 20 Fed. 167.

21. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143 [*affirming* 33 Hun (N. Y.) 489].

Tender of all advantages given.— A party seeking to repudiate a settlement must tender all the advantages it may have given him. Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

22. New York Home Ben. Soc. *v.* Muehl, 22 Ky. L. Rep. 1264, 60 S. W. 371.

representations of the other party,[23] or was made under a mistake of fact[24] or as to the law;[25] and until this is done the settlement will constitute a good defense.[26] By electing to retain the property, a party must be held to be bound by the settlement.[27]

b. When Unnecessary. A return or tender of the amount received under a settlement is not necessary, where plaintiff is entitled to retain the benefits received thereunder either by virtue of such settlement,[28] or of defendant's original liability,[29] or where the payment was a gratuity or related to a part only of the cause of action.[30] An offer to return is also unnecessary if the judgment asked for will accomplish that result.[31]

c. Retaining Benefit and Suing For Damages. One injured by a fraudulent compromise may, instead of restoring the benefit received and suing at law or in equity to rescind and for equitable relief, retain what he has received and sue whoever may be liable for the consequences of the deceit, by which the compromise was obtained, and recover whatever damages resulted therefrom.[32]

23. Harkey *v.* Mechanics, etc., Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295; Western, etc., R. Co. *v.* Burke, 97 Ga. 560, 25 S. E. 498; East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558, 10 S. E. 350; Cunningham *v.* Belknap, 22 Ky. L. Rep. 1580, 60 S. W. 837.

24. Huffaker *v.* Jones, 13 Ky. L. Rep. 432.

25. Ludington *v.* Miller, 38 N. Y. Super. Ct. 478.

26. Harkey *v.* Mechanics, etc., Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295; Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 103; Brown *v.* Hartford F. Ins. Co., 117 Mass. 479; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

27. Hart *v.* Gould, 62 Mich. 262, 28 N. W. 831; Coxwell *v.* Prince, (Miss. 1896) 19 So. 237; Grabenheimer *v.* Blum, 63 Tex. 369.

Estoppel or waiver by enjoying benefits.— Where one has enjoyed the benefits of a compromise agreement he cannot thereafter repudiate it.

Louisiana.— Stewart *v.* Haas, 23 La. Ann. 783.

Michigan.— Wales *v.* Newbould, 9 Mich. 45.

New York.— Steinway *v.* Steinway, 24 N. Y. App. Div. 104, 48 N. Y. Suppl. 1046.

Tennessee.— Star Sav., etc., Assoc. *v.* Woods, 100 Tenn. 121, 42 S. W. 872.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

Right to rescind lost by subsequent act.— If a party makes a compromise in ignorance of facts, and after the facts are known receives without objection the balance due him by the compromise, he thereby waives the rights he might otherwise have had. Bryant *v.* Proctor, 14 B. Mon. (Ky.) 451.

28. O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425.

Express agreement as to right to sue for balance.— An indorsee of a note agreed to take secured notes in compromise of an indorser's liability, the indorsee to have the right, if the compromise notes were not paid when due, to sue the indorser for the balance remaining due on the original notes after applying thereon partial payments made on the compromise notes and the proceeds of the security accompanying the latter. It was held that the compromise notes not having been paid when due the indorsee did not waive his right to sue on the original notes by failing to tender back the compromise notes or the security given therefor. Humphreys *v.* Cincinnati Third Nat. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538.

29. O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Evans *v.* Evans, (Mo. 1899) 52 S. W. 12. See also Burnham *v.* Spooner, 10 N. H. 532.

Where amount due in any event.—Restoration is not necessary where the money received by the party was due him in any event and if returned could be recovered back. Howard *v.* McMillen, 101 Iowa 453, 70 N. W. 623; McClung *v.* Lyster, 3 Greene (Iowa) 182; Pierce *v.* Wood, 23 N. H. 519. See also Star Acc. Co. *v.* Sibley, 57 Ill. App. 315.

30. Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349. See also O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58; Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747.

31. O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215; Allerton *v.* Allerton, 50 N. Y. 670.

32. Home Ins. Co. *v.* Howard, 111 Ind. 547, 13 N. E. 103; Page *v.* Wells, 37 Mich. 415; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Ballard *v.* Beveridge, 6 N. Y. App. Div. 349, 39 N. Y. Suppl. 566; Grabenheimer *v.* Blum, 63 Tex. 369.

Measure of damages.— When a creditor sues to recover damages for fraud, retaining what he has received in the compromise about which the fraud was practised, he thereby affirms the compromise and the damages which he is entitled to recover is the amount he would have received had no fraudulent concealment been made. Grabenheimer *v.* Blum, 63 Tex. 369.

3. Parties. A settlement cannot be impeached in an action to which all the parties to the agreement are not parties.[33]

4. Pleading and Proof. Where it is sought to set aside or avoid a compromise the pleadings for that purpose, whether bill, petition, plea, answer, or reply, must specifically set forth the fraud, mistake, or other ground relied upon,[34] and such allegations must be clearly and fully proved.[35]

C. Laches. The rule that a party injured or defrauded is bound to exercise diligence and to make no avoidable delay in complaining applies to proceedings to correct or set aside contracts of compromise and settlement.[36] Courts do not encourage the overturning of settlements voluntarily made and long acquiesced in.[37] Such acquiescence may be taken as an election to

33. Hannibal First Nat. Bank *v.* North Missouri Coal, etc., Co., 86 Mo. 125.

34. *Alabama.*— McKewan *v.* Woodstock Iron Co., 83 Ala. 286, 3 So. 314; Bell *v.* Lawrence, 51 Ala. 160.

Illinois.— Jackson *v.* Miner, 101 Ill. 550. See also May *v.* Magee, 66 Ill. 112.

Iowa.— Johnson *v.* Chicago, etc., R. Co., 107 Iowa 1, 77 N. W. 476.

Texas.— Williams *v.* Dean, (Tex. Civ. App. 1897) 38 S. W. 1024.

Washington.— Perkins *v.* North End Bank, 17 Wash. 100, 49 Pac. 241.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 75.

Necessity for specific prayer to set aside.— In proceedings to set aside a settlement because of alleged fraud where facts are stated entitling plaintiff to such relief, and there is a general prayer for judgment and other proper relief, a bill, petition, or complaint will be sufficient, even though it does not contain a specific prayer that the settlement be set aside. McIntosh *v.* Zaring, 150 Ind. 588, 49 N. E. 164.

35. *Alabama.*— McKewan *v.* Woodstock Iron Co., 83 Ala. 286, 3 So. 314; Bell *v.* Lawrence, 51 Ala. 160; Langdon *v.* Roane, 6 Ala. 518, 41 Am. St. Rep. 60.

Kentucky.—Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292, 15 Ky. L. Rep. 129, 22 S. W. 323; Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506; Cunningham *v.* Belknap, 22 Ky. L. Rep. 1580, 60 S. W. 837.

Louisiana.— Keough *v.* Foreman, 33 La. Ann. 1434; Long *v.* Robinson, 5 La. Ann. 627.

Maryland.— Hall *v.* Clagett, 2 Md. Ch. 151.

Massachusetts.— Curley *v.* Harris, 11 Allen (Mass.) 112.

Nebraska.— Omaha Home F. Ins. Co. *v.* Bredehoft, 49 Nebr. 152, 68 N. W. 400.

New York.—Chubbuck *v.* Vernam, 42 N. Y. 432.

Pennsylvania.— MacDonald *v.* Piper, 193 Pa. St. 312, 44 Atl. 455; Cummins *v.* Hurlbutt, 92 Pa. St. 165; Emmons *v.* Stahlnecker, 11 Pa. St. 366.

South Carolina.— Barton *v.* Dunlap, 2 Mill (S. C.) 140.

Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

West Virginia.—Curry *v.* Lawler, 29 W. Va. 111, 11 S. E. 897; Calwell *v.* Caperton, 27 W. Va. 397.

United States.— Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 41 L. ed. 205; Mason *v.* U. S., 17 Wall. (U. S.) 67, 21 L. ed. 564; Chicago, etc., R. Co. *v.* Green, 114 Fed. 676; The Katie M. Hagan, 98 Fed. 995.

Canada.— Rowe *v.* Grand Trunk R. Co., 16 U. C. C. P. 500.

36. *California.*— Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

Michigan.— Northrup *v.* Gray, 122 Mich. 700, 81 N. W. 961; Rayl *v.* Hammond, 100 Mich. 140, 58 N. W. 654; Lewless *v.* Detroit, etc., R. Co., 65 Mich. 292, 32 N. W. 790; Stewart *v.* Milliken, 30 Mich. 503.

New York.— Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Schiffer *v.* Dietz, 83 N. Y. 300.

Pennsylvania.—Emmons *v.* Stahlnecker, 11 Pa. St. 366; Barton *v.* Wells, 5 Whart. (Pa.) 225; Randel *v.* Ely, 3 Brewst. (Pa.) 270.

Tennessee.— Boyd *v.* Robinson, 93 Tenn. 1, 23 S. W. 72; Patton *v.* Cone, 1 Lea (Tenn.) 14; Graham *v.* Guinn, (Tenn. Ch. 1897) 43 S. W. 749.

United States.— Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; Hoffman *v.* Overbey, 137 U. S. 465, 11 S. Ct. 157, 34 L. ed. 754; New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155; Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305; Sweeney *v.* U. S., 5 Ct. Cl. 285.

See 10 Cent. Dig. tit. "Compromise and Settlement," §§ 74, 79.

Delay of three days immaterial.— Where the adverse party upon rescission is entitled only to a refunding of money, and no action or right is otherwise involved, a delay of only three days, even with the fullest knowledge, would be immaterial, as bearing upon the question of acquiescence or of waiver of fraud. Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

37. *Illinois.*— Groenendyke *v.* Coffeen, 109 Ill. 325.

Indiana.— Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

Kansas.— Yeamans *v.* James, 29 Kan. 373.

New Jersey.— Swayze *v.* Swayze, 37 N. J. Eq. 180.

affirm,[38] and will be a ground for refusal to open the settlement except upon the clearest and most satisfactory evidence.[39]

VII. RESCISSION OR ABANDONMENT BY PARTIES.

The parties to a compromise agreement may by mutual consent rescind or abandon it, and where this is done it is not binding, and the parties are restored to the position occupied before such compromise.[40]

VIII. PERFORMANCE OR BREACH OF AGREEMENT.

A. Necessity of Performance. One relying on a contract of compromise and settlement calling for the performance by him of certain acts must show a performance of the conditions imposed upon him by such agreement[41] or he

South Carolina.— Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250.

Wisconsin.— Kercheval *v.* Doty, 31 Wis. 476.

See 10 Cent. Dig. tit. "Compromise and Settlement," §§ 74, 79.

38. Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Johnston *v.* Furnier, 69 Pa. St. 449; The Deer, 10 Ben. (U. S.) 628, 7 Fed. Cas. No. 3,738; Head *v.* Godlee, Johns. 536, 6 Jur. N. S. 499, 8 Wkly. Rep. 147, 29 L. J. Ch. 633.

39. *Indiana.*— Proctor *v.* Heaton, 114 Ind. 250, 15 N. E. 21.

Kansas.— Yeamans *v.* James, 29 Kan. 373.

Kentucky.— Honore *v.* Colmesnil, 1 J. J. Marsh. (Ky.) 506; Mason *v.* Byars, 24 Ky. L. Rep. 344, 68 S. W. 444.

Louisiana.— Keough *v.* Foreman, 33 La. Ann. 1434.

Massachusetts.—Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

Missouri.— Mateer *v.* Missouri Pac. R. Co., 105 Mo. 320, 16 S. W. 839.

Pennsylvania.— Barber *v.* Benner, 5 Pa. Dist. 63, 17 Pa. Co. Ct. 376.

Virginia.— Epes *v.* Williams, (Va. 1897) 27 S. E. 427; Ross *v.* McLauchlan, 7 Gratt. (Va.) 86.

Wisconsin.— Kercheval *v.* Doty, 31 Wis. 476.

United States.— Mayer *v.* Foulkrod, 4 Wash. (U. S.) 503, 16 Fed. Cas. No. 9,342; Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305.

See 10 Cent. Dig. tit. "Compromise and Settlement," §§ 74, 79.

Any delay which is not reasonably necessary under the circumstances is fatal. Lewless *v.* Detroit, etc., R. Co., 65 Mich. 292, 32 N. W. 790; Turner *v.* Collins, L. R. 7 Ch. 329, 25 L. T. Rep. N. S. 374.

40. Perry *v.* Little Rock, etc., R. Co., 44 Ark. 383; Flegel *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162; Spence *v.* Spence, 4 Watts (Pa.) 165; Andrews *v.* Winkler, 27 Tex. 170.

Consent to rescind need not be expressed as an agreement. If either party without right claims to rescind the contract, the other party need not object, and if he permit it to be rescinded it will be held to have been as by mutual consent. Robinson *v.* O'Brien, 22 Ky. L. Rep. 769, 58 S. W. 820, in which case it was held that the intention to rescind might be inferred from acts of the opposite party as by refusing to accept certain machinery as provided in a compromise agreement.

After the execution of an agreement for the settlement of an action, the fact that plaintiff's attorney noticed the suit for trial will not justify a finding that the agreement had been rescinded or abandoned, in the absence of proof of express authority to that effect or a mutual rescission and abandonment of the agreement. Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.

41. *District of Columbia.*— Spofford *v.* Brown, MacArthur (D. C.) 223.

Georgia.— Davison *v.* Broach, 61 Ga. 201.

Iowa.— Hart *v.* National Masonic, etc., Assoc., 105 Iowa 717, 75 N. W. 508; Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730.

Kentucky.— Woolfolk *v.* Woolfolk, 4 Dana (Ky.) 535; Louisville Bank *v.* Wheat, 4 Ky. L. Rep. 443.

Louisiana.— Armistead *v.* Shreveport, etc., R. Co., 108 La. 171, 32 So. 456; Barrett *v.* Hard, 23 La. Ann. 712.

Maine.— Little *v.* Hobbs, 34 Me. 357.

Massachusetts.— Emerson *v.* Atkinson, 159 Mass. 356, 34 N. E. 516; Makepeace *v.* Harvard College, 10 Pick. (Mass.) 298.

Missouri.— Dalrymple *v.* Craig, 70 Mo. App. 149.

New Jersey.— Gardner *v.* Short, 19 N. J. Eq. 341.

New York.— Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189; Sizer *v.* Miller, 2 How. Pr. (N. Y.) 44.

North Carolina.— Hunt *v.* Wheeler, 116 N. C. 422, 21 S. E. 915; Quarles *v.* Jenkins, 98 N. C. 258, 3 S. E. 395.

Pennsylvania.—Maurer's Estate, 1 Woodw. (Pa.) 268.

South Carolina.— Hyams *v.* Levy, 1 Speers (S. C.) 368.

Tennessee.— Thompson *v.* McMillan, 89 Tenn. 110, 14 S. W. 439.

United States.— Brown *v.* Spofford, 95 U. S. 474, 24 L. ed. 508.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 84.

must show a valid excuse on his part for the non-performance of the conditions thus imposed.[42]

B. Rights of Parties on Breach — 1. In General. Upon a breach of the terms of a compromise agreement or abandonment by one party thereto, the other party may treat the agreement as a nullity and be remitted to his original claim or cause of action.[43]

2. Waiver of Breach. The right to be remitted to his original cause of action is for the benefit of the other party to the compromise and he may, if he so desire, waive the breach and proceed upon the compromise.[44]

C. Enforcement of Agreement — 1. In General. A performance of a con-

Dismissal of suit sufficient, although stipulation to dismiss not filed as agreed.— One agreeing with another to sign a compromise agreement on the latter's agreement to dismiss a pending suit is not prejudiced by the latter's failure to file a stipulation to dismiss that both had executed, where the suit is dismissed according to agreement. Hamill *v.* Copeland, 26 Colo. 178, 56 Pac. 901.

Part performance.— Where two parties claim land under conflicting titles and agree to compromise and divide the land a delivery of possession under such agreement is an act of part performance. Weed *v.* Terry, Walk. (Mich.) 501 [*affirmed* in 2 Dougl. (Mich.) 344, 45 Am. Dec. 257]. But upon an agreement for compromise and division of estates by arbitration, acts done by the arbitrators toward the execution of their duty cannot be considered as part performance. Cooth *v.* Jackson, 6 Ves. Jr. 12. See Innes *v.* Jackson, 10 Rev. Rep. 190.

42. Strobridge Lithographing Co. *v.* Randall, 78 Mich. 195, 44 N. W. 134; Bantle *v.* Kriebs, 13 N. Y. St. 353; May *v.* Le Claire, 11 Wall. (U. S.) 217, 20 L. ed. 50.

The failure of complainant to carry out his portion of a compromise is no ground for refusing to enforce such agreement where he is not bound so to do until performance by defendant. Mitchell *v.* Long, 5 Litt. (Ky.) 71, which was an agreement for a mutual conveyance of land between the parties.

Where an agreement of compromise cannot be specifically performed, the original rights of the parties remain. Playford *v.* Playford, 4 Hare 546, 30 Eng. Ch. 546.

43. *Iowa.*— McClung *v.* Lyster, 3 Greene (Iowa) 182.

Kansas.— Barkley *v.* Clark, 43 Kan. 43, 22 Pac. 1025.

Louisiana.— Citizens Bank *v.* Jorda, 45 La. Ann. 184, 11 So. 876.

Maryland.— Western Bank *v.* Kyle, 6 Gill (Md.) 343.

New York.— Clews *v.* Rielly, 53 Hun (N. Y.) 636, 6 N. Y. Suppl. 640, 24 N. Y. St. 774; Conkling *v.* King, 10 Barb. (N. Y.) 372.

Texas.— Tomson *v.* Heidenheimer, 16 Tex. Civ. App. 114, 40 S. W. 425.

United States.— McElrath *v.* U. S., 102 U. S. 426, 26 L. ed. 189.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 88.

Refunding part payment.— Unless there is some express stipulation to the contrary money paid on a compromise is held to be a payment *pro tanto* upon the debt, and a failure to carry out the compromise by the party making such payment does not give him any claim or right to have the money so paid refunded. Abercrombie *v.* Skinner, 42 Ala. 633; McClung *v.* Lyster, 3 Greene (Iowa) 182.

Stipulation as to deficiency.— A controversy between plaintiff, defendant, and others was compromised; the agreement stipulating that if the money thereby agreed to be paid by others than defendant to plaintiff was not fully paid the status of the parties was to remain unchanged as to the deficiency. It was held that plaintiff could not maintain an action against defendants for such deficiency on the contract of compromise, but must rely on his rights as they existed prior to the attempted compromise. Louisville Bank *v.* Wheat, 4 Ky. L. Rep. 443.

Substantial performance.— Although there has only been a partial performance of the compromise agreement, yet if the creditor has obtained the substance of everything stipulated for therein, he cannot abandon the compromise agreement and sue to recover the original debt, but his proper action is for breach of the agreement. Love *v.* Van Every, 91 Mo. 575, 4 S. W. 272.

44. Jones *v.* Pullen, 66 Ala. 306; Western Bank *v.* Kyle, 6 Gill (Md.) 343; Conkling *v.* King, 10 Barb. (N. Y.) 372.

A forfeiture for non-payment at an appointed day is waived by subsequently accepting a payment upon the demand. Conkling *v.* King, 10 Barb. (N. Y.) 372. But see Humphreys *v.* Cincinnati Third Nat. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538, wherein it appeared that an indorsee of a note agreed to receive, in compromise of an indorser's liability thereon, secured notes for a less amount, the indorsee to have the right if the compromise notes were not paid when due to sue the indorser for the balance remaining due on the original notes after applying thereon the partial payments made on the compromise notes and the proceeds of the security given therefor. It was held that the indorsee did not, by receiving part payments on the compromise notes after their maturity, waive the right to sue the indorser on the original note.

tract of compromise and settlement may in a proper case be enforced.[45] The courts will generally enforce the agreement as made where the party seeking performance has acted fairly, and especially where there has been a part performance.[46] Specific performances will not be decreed, however, where the contract is founded in a mistake[47] of one of the parties as to the existence of the material facts, of which the party seeking performance is informed and did not disclose; nor where the contract is not strictly equitable or fair and just in all its parts; nor where it unjustly or materially affects the rights of the other party and is not founded on an adequate consideration.[48]

2. Manner of Enforcement. Where a compromise can be enforced in the original action and the agreement is filed with the papers in the cause no further pleading would seem to be necessary than a petition or motion merely stating and praying that the stipulation may be enforced,[49] unless perhaps some fact affecting the decree to be rendered may have occurred after the agreement was executed.[50]

45. Hall *v.* Clagett, 2 Md. Ch. 151; Massillon Engine, etc., Co. *v.* Prouty, (Nebr. 1902) 91 N. W. 384; Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593; Stapilton *v.* Stapilton, 1 Atk. 2, 26 Eng. Reprint 1; Hart *v.* Hart, 18 Ch. D. 670, 50 L. J. Ch. 697, 45 L. T. Rep. N. S. 13, 30 Wkly. Rep. 82; Richardson *v.* Eyton, 2 De G. M. & G. 79, 51 Eng. Ch. 62; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184.

As to specific performance of contracts generally see Specific Performance.

Conditions precedent.— To justify the specific performance of a compromise agreement the fact of the existence of such agreement must appear, and where part performance of an oral agreement is relied upon such part performance must be clearly attributable to the contract sought to be enforced. Senior *v.* Anderson, 115 Cal. 496, 41 Pac. 454.

Restraining enforcement against partner of judgment against firm.— Where a compromise has been made between a debtor and creditor of claims against the debtor, both as an individual and as a member of a partnership, and the debtor has paid the consideration, a court of equity will give effect to the compromise by restraining the enforcement against the debtor of a judgment upon the partnership claim. Smalley *v.* Line, 28 N. J. Eq. 348.

46. Weed *v.* Terry, Walk. (Mich.) 501 [*affirmed* in 2 Dougl. (Mich.) 344, 45 Am. Dec. 257].

Specific performance will be decreed of a parol agreement as to land, made as a family compromise, where there has been part performance by possession and improvements and acquiescence, for nearly nineteen years. Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184. See also Stapilton *v.* Stapilton, 1 Atk. 2, 26 Eng. Reprint 1.

47. **As to mistake as ground for impeachment** of compromise see *supra*, VI, B, 1, c.

48. Furniture Caster Assoc. *v.* Toler, 84 Fed. 995; Playford *v.* Playford, 4 Hare 546, 30 Eng. Ch. 546. And see Low *v.* Blackburn, 2 Nev. 70; Southern Oil Co. *v.* Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429.

As to sufficiency of consideration see *supra*, III, B, 2.

Compromise of debt by creditor in ignorance of a judgment, execution, and levy.— Where creditors were ignorant that when they made the compromise of a debt land had been levied on of sufficient value to pay the debt, a court of equity will not decree satisfaction of the judgment and set aside the sale of the land, which would be equivalent to specific performance of the compromise; but it will first require the debtor to pay the debt, interest, and costs, the amount paid on the compromise being allowed as part payment. Cowan *v.* Sapp, 81 Ala. 525, 8 So. 212.

49. Ward *v.* Wilson, 92 Tex. 22, 45 S. W. 8.

In England it was formerly held that an agreement to compromise a suit containing a stipulation that it might be made a rule of court might be enforced in equity on petition supported by affidavit, where the whole matter was before the court (Dawson *v.* Newsome, 2 Giff. 272), but that the court had no jurisdiction to enforce an agreement which had been privately come to by parties out of court and had not been made rule of court (Forsyth *v.* Manton, 5 Madd. 78, 21 Rev. Rep. 283). Under the judicature act of 1873, § 24, an agreement between the parties to an action to stay proceedings upon terms can be enforced in the action. Eden *v.* Naish, 7 Ch. D. 781, 47 L. J. Ch. 325, 26 Wkly. Rep. 392. See also Smythe *v.* Smythe, 18 Q. B. D. 544, 56 L. J. Q. B. 217, 56 L. T. Rep. N. S. 197, 35 Wkly. Rep. 346.

Amendment of record and enforcement by attachment.— A court cannot strike out an entry of compromise in a suit and order it for trial because it was imperfectly entered or because it has not been performed. The record should be amended *nunc pro tunc* and then the performance of the compromise should be enforced by rules upon the respective parties or by attachment if need be. Cox *v.* Cox, 53 N. C. 487.

50. Ward *v.* Wilson, 92 Tex. 22, 45 S. W. 8.

Effect of mistake in original bill as to plaintiff's title.— A tenant for life of a coal mine filed a bill which showed the state of

Where, however, the performance of an agreement for compromise is beyond the scope of the suit and involves details which cannot be the subject of an order in the suit the proper proceeding is to file a fresh bill for specific performance.[51]

3. PARTIES. It lies upon the party seeking performance to take the steps necessary to enforce it.[52]

IX. PLEADING.[53]

A. Plea of Compromise — 1. NECESSITY. A compromise made *pendente lite* must be specially pleaded to be available as a defense.[54]

2. SUFFICIENCY. A plea of compromise and settlement should show the terms of the settlement relied on,[55] and that it is in fact a defense to plaintiff's suit.[56]

his title, but by mistake alleged that he was tenant in tail. After an interim order was obtained, the suit which was to restrain an adjoining mine lessee from trespassing and for an account was compromised under an agreement. It was held that the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it as would prevent a court of equity from enforcing the agreement for compromise. Richardson *v.* Eyton, 2 De G. M. & G. 79, 51 Eng. Ch. 62.

51. Pryer *v.* Gribble, L. R. 10 Ch. 532, 44 L. J. Ch. 676, 32 L. T. Rep. N. S. 238, 28 Wkly. Rep. 642; Richardson *v.* Eyton, 2 De G. M. & G. 79, 51 Eng. Ch. 62; Askew *v.* Millington, 9 Hare 65, 15 Jur. 532, 20 L. J. Ch. 508, 41 Eng. Ch. 65; Plumley *v.* Horrell, 20 L. T. Rep. N. S. 473.

52. Wood *v.* Rowe, 2 Bligh 595, 21 Rev. Rep. 119, 4 Eng. Reprint 459.

Necessary parties.— Where a compromise contract is so drawn that what is to be done by one party is the consideration for that which is to be done by the other, specific performance of any portion of it cannot be had without bringing all the parties in interest before the court so as to give opportunity for disposing of the whole controversy. Baldwin *v.* Fletcher, 48 Mich. 604, 12 N. W. 872. But where several persons have made a compromise as to their disputed rights and one of them has refused to carry out the contract it is not necessary that those against whom no relief is sought should be made parties to a bill to enforce the agreement. French *v.* Shoemaker, 14 Wall. (U. S.) 314, 20 L. ed. 852.

53. As to pleadings in proceedings to impeach compromise see *supra*, VI, A, 2; VI, B, 4.

54. *Kentucky.*— Gregory *v.* Powers, 3 Litt. (Ky.) 339.

Massachusetts.— Wolcott *v.* Root, 2 Allen (Mass.) 194.

Missouri.—Ming *v.* Suggett, 34 Mo. 364, 86 Am. Dec. 112.

Pennsylvania.— Meurer's Appeal, 119 Pa. St. 115, 12 Atl. 868.

Tennessee.— Covert *v.* Vonhardtmutt, 103 Tenn. 463, 53 S. W. 730; Aiken *v.* Taylor, (Tenn. Ch. 1900) 62 S. W. 200.

Vermont.— Horton *v.* Chester Baptist Church, etc., 34 Vt. 309.

Wisconsin.— Barker *v.* Ring, 97 Wis. 53, 72 N. W. 222.

England.— Bristow *v.* Bristow, 12 Ir. Eq. 329.

Canada.— Carr *v.* Tannahill, 30 U. C. Q. B. 217.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 90.

Must be pleaded in bar of further maintenance of the suit and not in bar of the action generally. Jaques *v.* Denehie, 7 Blackf. (Ind.) 40. It cannot be presented by a motion to dismiss. George *v.* Chicago, etc., R. Co., 85 Iowa 590, 52 N. W. 512.

Under general issue.— In Schwartz *v.* Southerland, 51 Ill. App. 175, it was held that the existence of a compromise agreement is a defense which may be raised under the general issue. See also Ellis *v.* Mills, 28 Tex. 584, holding that under the general issue in an action of trespass to try title, evidence of a compromise of a like suit between the same parties on the same subject-matter is admissible, and the judgment on such compromise constitutes a good defense.

Waiver of objection.— Although a settlement of a pending suit should usually be brought before the court by a cross-bill or supplemental answer, yet a decree establishing such a settlement may be rendered upon petition only, where no objection was raised to this course until after the decree was rendered, and where both parties appeared in the matter of the petition and contested as to the extent of the settlement. Coburn *v.* Cedar Valley Land, etc., Co., 138 U. S. 196, 11 S. Ct. 258, 34 L. ed. 876 [*affirming* 29 Fed. 584].

55. Jaques *v.* Denehie, 7 Blackf. (Ind.) 40.

Where the plea is sufficient in substance but wanting in form or completeness the remedy is by a motion for a more specific statement. Forbes *v.* Petty, 37 Nebr. 899, 56 N. W. 730.

56. Parkison *v.* Boddiker, 10 Colo. 503, 15 Pac. 806, holding that an allegation in an answer to an action on a note that there had been a settlement of all matters between the maker and the payee is not good where it does not appear from such allegation, but that upon such settlement it was found that defendant was indebted to the payee of the note in a sum equal to the amount of the note in question, and that such indebtedness

3. Court in Which Agreement May Be Pleaded. An appellate court has no authority to institute an original inquiry as to the existence or validity of an alleged contract of compromise of the subject-matter of litigation.[57]

B. Replication or Reply to Plea. Where a compromise and settlement is pleaded as a defense plaintiff may reply thereto by a general denial,[58] under which he may introduce facts showing that he never made any compromise or settlement,[59] or he may set up matter in avoidance.[60]

X. EVIDENCE.

A. Presumptions and Burden of Proof — 1. As to Existence of Agreement. Where a party alleges the existence of an agreement of compromise of the matter in controversy, the burden of proof devolves upon him to establish the same.[61]

2. As to Matters Included — a. In General. It will be presumed that a general settlement includes all matters in controversy and all demands existing at the time between the parties;[62] and while this presumption is not conclusive in

was due and owing at the time the note was given.

Upon demurrer to such plea the only question raised is whether the plea discloses a defense to the case made by plaintiff, and if it does it must be held sufficient, although it may appear defective as to the manner in which the defense is stated. Schwartz *v.* B. C. Evans Co., 75 Tex. 198, 12 S. W. 863.

57. Parks *v.* Doty, 13 Bush (Ky.) 727; Winhoum *v.* Winhoum, 7 Ky. L. Rep. 216; Newport *v.* Woods, 5 Ky. L. Rep. 926; Neal *v.* Cowles, 71 N. C. 266. But see New Orleans *v.* Metropolitan Bank, 44 La. Ann. 698, 11 So. 146; Dakota County *v.* Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. ed. 981, which cases hold that where, after rendition of a judgment sought to be reversed, it has been compromised, evidence outside the record may be admitted to prove the compromise. See also Appeal and Error, XIII, M, 2, b [3 Cyc. 178].

58. Solar Refining Co. *v.* Elliott, 15 Ohio Cir. Ct. 581.

A settlement may be held to be denied by operation of law, although plaintiff has filed no pleadings in avoidance of a settlement set up in the action, where plaintiff's testimony shows that such settlement was not made in satisfaction of his right to sue. Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841.

59. Moulton *v.* Aldrich, 28 Kan. 300, in which it was held competent for plaintiff to show that at the time the compromise was alleged to have taken place he was delirious and unconscious.

60. Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651; Wright *v.* Wilson, 60 Ga. 614; Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; New York Home Ben. Soc. *v.* Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520.

61. Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88; Blodgett *v.* Vogel, (Mich. 1902) 90 N. W. 277; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912.

62. *Colorado.*— Lothrop *v.* Evans, 8 Colo. App. 171, 45 Pac. 235.

Georgia.— Wright *v.* Wilson, 60 Ga. 614.

Illinois.— Case *v.* Phillips, 182 Ill. 187, 55 N. E. 66 [*affirming* 82 Ill. App. 231]; Straubher *v.* Mohler, 80 Ill. 21; Norman *v.* Hudleston, 64 Ill. 11; Robinson *v.* Webb, 73 Ill. App. 569.

Indiana.— Dodds *v.* Dodds, 57 Ind. 293.

Iowa.— Tank *v.* Bohweder, 98 Iowa 154, 67 N. W. 106; Thompson *v.* Maxwell, 74 Iowa 415, 38 N. W. 125; Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 63 N. W. 622.

Kentucky.—Ward *v.* Grayson, 9 Dana (Ky.) 280.

Louisiana.— Hedrick *v.* Bannister, 12 La. Ann. 373.

Michigan.— Hicks *v.* Leaton, 67 Mich. 371, 34 N. W. 880; Mason *v.* Peter, 58 Mich. 554, 25 N. W. 513.

Missouri.— Burnham *v.* Rosenberger, 110 Mo. 468, 19 S. W. 732; Perry *v.* Roberts, 17 Mo. 36; Marshall *v.* Larkin, 82 Mo. App. 635; Tumilty *v.* Tumilty, 13 Mo. App. 444. See also Wade *v.* Hardy, 75 Mo. 394.

New Jersey.— Enyard *v.* Nevius, (N. J. 1889) 18 Atl. 192; State *v.* Wills, 44 N. J. L. 584.

North Carolina.— Angel *v.* Angel, 127 N. C. 451, 37 S. E. 479; Farmer *v.* Barnes, 56 N. C. 109; Kennedy *v.* Williamson, 50 N. C. 284.

Texas.— Barkley *v.* Tarrant County, 53 Tex. 251.

Vermont.— Nichols *v.* Scott, 12 Vt. 47; Darling *v.* Hall, 5 Vt. 91.

United States.— Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; Devenny *v.* The Mascotte, 72 Fed. 684; Coburn *v.* Cedar Valley Land, etc., Co., 29 Fed. 584.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 91.

Presumption of inclusion of agent's expenses and commissions in settlement of suits against him by principal.— The payment of money by an agent, in settlement of a suit brought against him by his principal to re-

its character[63] it imposes upon the party claiming that certain items were not included in the settlement the burden of establishing such fact by a fair preponderance of the evidence.[64]

b. Delivery of Bill, Note, Bond, Due-Bill, Etc. The execution and delivery of a bill or note is *prima facie* evidence of the settlement of all existing demands between the parties up to date.[65] A receipt in full is likewise *prima facie* evidence of a settlement,[66] as is the giving of a due-bill,[67] the execution of a bond and mortgage,[68] or a bond for the payment of money, stating that it is the amount of the promisor's indebtedness on a final settlement.[69] This presumption is not conclusive, however, but may be rebutted by evidence clearly showing the contrary,[70]

cover the value of property intrusted to him to be sold or exchanged, does not create a legal presumption that the agent's expenses and commissions for services were included in such settlement, although the principal received the money with that belief and understanding; but that is a defense the burden of which is on the principal. Walton *v.* Eldridge, 1 Allen (Mass.) 203.

63. Nichols *v.* Scott, 12 Vt. 47.

The words "on settlement up to date," added to a promise to pay for value received, are only *prima facie* evidence that the settlement embraced all subsisting matters of account and may be explained or contradicted by extrinsic evidence. Wheeler *v.* Alexander, 1 Strobh. (S. C.) 61.

64. *Colorado.*— Lothrop *v.* Evans, 8 Colo. App. 171, 45 Pac. 235.

Illinois.— Straubher *v.* Mohler, 80 Ill. 21; McElhaney *v.* People, 1 Ill. App. 550.

Indiana.— Boswell *v.* Williams, 86 Ind. 375.

Iowa.— Sewell *v.* Mead, 85 Iowa 343, 52 N. W. 227.

North Carolina.— Angel *v.* Angel, 127 N. C. 451, 37 S. E. 479; Rodgers *v.* Davenport, 47 N. C. 138.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 91.

65. *Alabama.*— Alabama, etc., R. Co. *v.* Sanford, 36 Ala. 703; Maynard *v.* Johnson, 4 Ala. 116.

Arkansas.— Carlton *v.* Buckner, 28 Ark. 66.

Georgia.— Broughton *v.* Thornton, 50 Ga. 568; Mills *v.* Mercer, Dudley (Ga.) 158.

Illinois.— Rosencrantz *v.* Mason, 85 Ill. 262; Crabtree *v.* Rowand, 33 Ill. 421; Heffron *v.* Chapin, 35 Ill. App. 565. *Compare* Ankeny *v.* Pierce, 1 Ill. 289, 12 Am. Dec. 174.

Indiana.— Bishop *v.* Welch, 35 Ind. 521; Kirchner *v.* Lewis, 27 Ind. 22; Gaskin *v.* Wells, 15 Ind. 253; Thornton *v.* Williams, 14 Ind. 518; Boffandick *v.* Raleigh, 11 Ind. 136; Campbell *v.* Hays, 1 Ind. 547, Smith (Ind.) 355.

Iowa.— Clement *v.* Houck, 113 Iowa 504, 85 N. W. 765; Lindsey *v.* Moore, 101 Iowa 592, 70 N. W. 695; Smith *v.* Bissell, 2 Greene (Iowa) 379.

Kentucky.— Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178; Greenwade *v.* Greenwade, 3 Dana (Ky.) 495; Rogers *v.* McMachan, 4 J. J. Marsh. (Ky.) 37.

Missouri.— Kinman *v.* Cannefax, 34 Mo. 147; Perry *v.* Roberts, 17 Mo. 36.

Nebraska.— Wagner *v.* Ladd, 38 Nebr. 161, 56 N. W. 891.

New York.— Sheldon *v.* Sheldon, 133 N. Y. 1, 30 N. E. 730, 44 N. Y. St. 260; Sperry *v.* Miller, 16 N. Y. 407; Lake *v.* Tysen, 6 N. Y. 461; Dimmers *v.* Armitage, 33 N. Y. App. Div. 626, 53 N. Y. Suppl. 357; Wright *v.* Wright, 74 Hun (N. Y.) 138, 26 N. Y. Suppl. 238, 56 N. Y. St. 305; Sherman *v.* McIntyre, 7 Hun (N. Y.) 592; Dutcher *v.* Porter, 63 Barb. (N. Y.) 15; Blake *v.* Krom, 59 N. Y. Super. Ct. 574, 13 N. Y. Suppl. 335; Campbell Printing Press, etc., Co. *v.* Yorkston, 11 Misc. (N. Y.) 340, 32 N. Y. Suppl. 263, 65 N. Y. St. 457; Treadwell *v.* Abrams, 15 How. Pr. (N. Y.) 219; De Freest *v.* Bloomingdale, 5 Den. (N. Y.) 304.

North Carolina.— Smathers *v.* Shook, 90 N. C. 484.

South Carolina.— Loan, etc., Bank *v.* Miller, 39 S. C. 175, 17 S. E. 592.

Tennessee.— Robertson *v.* Branch, 3 Sneed (Tenn.) 506.

Wisconsin.— Weille *v.* Reinhard, 108 Wis. 72, 83 N. W. 1098; Atchison *v.* Davidson, 2 Pinn. (Wis.) 48.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 92.

"The rule is, that the giving of a note is *prima facie* evidence of the settlement of all previous accounts between the parties; but no such presumption arises as to notes previously given." Tisdale *v.* Maxwell, 58 Ala. 40.

A receipt dated prior to a settlement of accounts between the parties on which one gives his note to the other for a balance due should be deemed merged in such settlement. Levi *v.* Carter, 21 La. Ann. 459.

66. MacDonald *v.* Piper, 193 Pa. St. 312, 44 Atl. 455; Harris *v.* Hay, 111 Pa. St. 562, 4 Atl. 715. See also Slater *v.* Drescher, 72 Hun (N. Y.) 425, 25 N. Y. Suppl. 153, 55 N. Y. St. 172.

67. Spencer *v.* Chrisman, 15 Ind. 215; Boffandick *v.* Raleigh, 11 Ind. 136; Gue *v.* Kline, 13 Pa. St. 60; Weille *v.* Reinhard, 108 Wis. 72, 83 N. W. 1098.

68. Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; Chewning *v.* Proctor, 2 McCord Eq. (S. C.) 11.

69. Jack *v.* McKee, 9 Pa. St. 235.

70. *Alabama.*— Maynard *v.* Johnson, 4 Ala. 116.

as that the claim in question was not included in the settlement, or that the note was given upon another and different consideration.[71]

3. As to Validity of Agreement. A settlement being once shown every presumption is indulged in favor of its fairness and correctness.[72]

B. Admissibility. Where an agreement of compromise is whole and complete, parol evidence is inadmissible to contradict or vary its terms.[73] Where, however, it appears on the face of the stipulation that it is incomplete as an agreement settling the action, and was not intended by the parties to be a complete statement of the terms upon which the action was settled,[74] or where there is doubt as to whether or not certain items or claims are included, such evidence is competent.[75] The circumstances attending the making of the compromise,[76]

Indiana.— Spencer *v.* Chrisman, 15 Ind. 215.

Iowa.—Thompson *v.* Maxwell, 74 Iowa 415, 38 N. W. 125.

Pennsylvania.— MacDonald *v.* Piper, 193 Pa. St. 312, 44 Atl. 455; Gue *v.* Kline, 13 Pa. St. 60.

South Carolina.— Chewning *v.* Proctor, 2 McCord Eq. (S. C.) 11.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 92.

71. Bishop *v.* Welch, 35 Ind. 521.

72. *Georgia.*— Moses *v.* Moses, 50 Ga. 9.

Illinois.— Bennett *v.* Walker, 100 Ill. 525.

New York.— Brewster *v.* Gelston, 11 Johns. (N. Y.) 390.

Texas.— Williams *v.* Nolan, 58 Tex. 708.

West Virginia.— Calwell *v.* Caperton, 27 W. Va. 397.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 91.

Fraud not imputed.— Where a debtor accepts from the personal representative of his creditor, by way of compromise, a release of his bond in a settlement between them, paying no consideration therefor, and there is no proof of imposition, undue influence, accident, or mistake, the court will not impute fraud to such debtor. Paxton *v.* Wood, 77 N. C. 11.

Error not presumed from alleged improbability and unreasonableness.— In an action to open a parol settlement as made by mistake the answer explicitly denied the existence of the errors in the settlement. The only witness examined sustained the statement of the answer. It was held that the settlement would not be presumed erroneous simply because of the alleged improbability and unreasonableness thereof. Hall *v.* Clagett, 2 Md. Ch. 151.

73. *California.*— Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666.

Georgia.— Wright *v.* Wilson, 60 Ga. 614.

Michigan.— Pratt *v.* Castle, 91 Mich. 484, 487, 52 N. W. 52; Freeman *v.* Freeman, 68 Mich. 28, 35 N. W. 897.

Minnesota.— Southwick *v.* Herring, 82 Minn. 302, 84 N. W. 1013.

Ohio.— Bird *v.* Hueston, 10 Ohio St. 418.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 93.

A party to a compromise cannot be permitted to testify to his intentions or to the meaning or legal effect of the writing. Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666.

74. Southwick *v.* Herring, 82 Minn. 302, 84 N. W. 1013.

If it be clear upon the whole evidence that the instrument relied upon or involved did not contain the whole agreement, and a distinct collateral contract was proved, not inconsistent with the written one, the law will not prohibit the enforcement of such a collateral undertaking. Jones *v.* Jones, 18 Hun (N. Y.) 438; Ward *v.* Cowdrey, 5 N. Y. Suppl. 282, 21 N. Y. St. 372. See also Dorsheimer *v.* Nichols, 1 Abb. Dec. (N. Y.) 519.

75. Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50; Hemenway *v.* Bassell, 13 Gray (Mass.) 378; Hicks *v.* Leaton, 67 Mich. 371, 34 N. W. 880; O'Beirne *v.* Lloyd, 1 Sweeny (N. Y.) 19. See also Duflo *v.* Juif, 63 Mich. 513, 30 N. W. 105.

Correctness of abstract of account on which settlement based.— In McLendon *v.* Wilson, 57 Ga. 438, it was held that where a settlement was made on the basis of an abstract of account taken from plaintiffs' books, and not by reference to the books themselves, one of the plaintiffs may testify that such abstract was correct.

76. Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666; City Electric R. Co. *v.* Floyd County, 115 Ga. 655, 42 S. E. 45; Conde *v.* Hall, 92 Hun (N. Y.) 335, 37 N. Y. Suppl. 411, 72 N. Y. St. 708; Alderson *v.* Aiken, (Tenn. Ch. 1899) 52 S. W. 741.

Evidence of the transaction compromised is proper to show the foundation of, and the circumstances surrounding, the agreement to settle. Frank *v.* Heaton, 56 Ill. App. 227. But see Berks, etc., Turnpike Co. *v.* Hendel, 11 Serg. & R. (Pa.) 123, holding that where a dispute has been settled by agreement of the parties it is not competent for one of them, in an action upon the agreement, to give evidence which relates exclusively to the subject-matter of the original dispute.

Where a settlement is relied upon, a paper executed by one of the parties making certain acknowledgments as to a settlement of controversies between the parties, and bearing date at a period which, with other evidence, may serve to connect the same with the matter on which suit is brought as

and the arrangement in fact made by the parties[77] may also be introduced in evidence.

C. Sufficiency.[78] A preponderance of evidence is necessary to establish the existence of an agreement of compromise.[79]

XI. TRIAL.

A. Province of Court and Jury — 1. PROVINCE OF COURT. Where there is no dispute as to the facts relating to a mutual compromise of an action, the effect of the arrangement is a question of law for the court.[80]

2. PROVINCE OF JURY. Where a compromise is alleged, the consideration of all questions of fact connected therewith is for the determination of the jury under proper instructions by the court. Thus questions as to the existence of such an agreement,[81] whether the parties intended it to be final,[82] its extent,[83] whether or not certain matters are included therein,[84] the existence of a

proof of a settlement thereof, is proper evidence for the consideration of the jury. Smith *v.* Atwood, 14 Ga. 402. So evidence tending to show that there was in fact no reasonable ground of controversy is competent. Allen *v.* Prater, 35 Ala. 169. See also Overstreet *v.* Dunlap, 56 Ill. App. 486.

77. Conde *v.* Hall, 92 Hun (N. Y.) 335, 37 N. Y. Suppl. 411, 72 N. Y. St. 708.

A judgment of a competent court of record predicated on a compromise and a resulting consent between the parties is admissible in proof of a compromise. Orr *v.* Hamilton, 36 La. Ann. 790.

78. As to sufficiency of evidence to impeach compromise see *supra*, VI, A, 2; VI, B, 4.

79. *Colorado.*— See Collins *v.* McClurg, 1 Colo. App. 348, 29 Pac. 299.

Iowa.— Grove *v.* Bush, 86 Iowa 94, 33 N. W. 88.

Michigan.— People's Sav. Bank *v.* Galvin, 81 Mich. 11, 45 N. W. 353; Hicks *v.* Leaton, 67 Mich. 371, 34 N. W. 880.

New York.—Hart *v.* Hart, 22 Barb. (N. Y.) 606; Roberts *v.* Dahut, 27 Misc. (N. Y.) 795, 58 N. Y. Suppl. 304.

Tennessee.— Chadbourn *v.* Henderson, 2 Baxt. (Tenn.) 460.

Wisconsin.— Blewett *v.* Gaynor, 77 Wis. 378, 46 N. W. 547.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 94.

For evidence held to establish a settlement see the following cases:

Colorado.— Union Pac. R. Co. *v.* Anderson, 11 Colo. 293, 18 Pac. 24.

Iowa.— Mains *v.* Mintle, 86 Iowa 742, 53 N. W. 256.

Kentucky.— Burns *v.* Ross, 16 Ky. L. Rep. 181, 30 S. W. 641.

Massachusetts.— Howland *v.* Rooke, 158 Mass. 590, 33 N. E. 652.

Michigan.— Davis *v.* Hammond, 75 Mich. 1, 42 N. W. 690.

New York.— Parker *v.* Collins, 57 Hun (N. Y.) 590, 11 N. Y. Suppl. 109, 32 N. Y. St. 1107.

North Dakota.— Canfield *v.* Robertson, 8 N. D. 603, 80 N. W. 764.

United States.— Sweeney *v.* U. S., 5 Ct. Cl. 285.

80. Vedder *v.* Vedder, 1 Den. (N. Y.) 257. See also Terry *v.* Shively, 64 Ind. 106, holding that where, in an action on an account, one ground of defense set up is settlement, and that plaintiff had given his note to defendant for the balance found due on such settlement, it is error for the court to instruct the jury to determine the legal effect of such note, that being a question of law solely for the court.

81. *Illinois.*— Schwartz *v.* Southerland, 51 Ill. App. 175.

Maine.— Doyle *v.* Donnelly, 56 Me. 26.

Michigan.— Robinson *v.* Detroit L., etc., R. Co., 84 Mich. 658, 48 N. W. 205. And see Schulz *v.* Schulz, 113 Mich. 502, 71 N. W. 854.

New York.— McAllister *v.* Sexton, 4 E. D. Smith (N. Y.) 41; Walton *v.* Kane, 4 Misc. (N. Y.) 296, 23 N. Y. Suppl. 1029, 53 N. Y. St. 429.

Pennsylvania.— McGrann *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 171, 2 Atl. 872.

West Virginia.— Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 95.

82. Hobart *v.* McCoy, 3 Pa. St. 419.

83. Rogan *v.* Montana Cent. R. Co., 20 Mont. 503, 52 Pac. 206.

84. *Michigan.*— Hicks *v.* Leaton, 67 Mich. 371, 34 N. W. 880.

Minnesota.— Southwick *v.* Herring, (Minn. 1901) 84 N. W. 1013.

New York.— Antony *v.* Dickel, 167 N. Y. 539, 60 N. E. 1106 [*affirming* 40 N. Y. App. Div. 624, 57 N. Y. Suppl. 1090, 29 N. Y. Civ. Proc. 219].

Pennsylvania.— Jack *v.* McKee, 9 Pa. St. 235.

Canada.— Young *v.* Taylor, 25 U. C. Q. B. 583.

See 10 Cent. Dig. tit. "Compromise and Settlement," § 95.

consideration,[85] the mental capacity of a party when signing,[86] and whether a party knowingly settled his claim[87]—should all be submitted to the jury. The good faith of a party in asserting his claim as well as the inquiry whether there was any reasonable ground for such claim should also be left to the jury,[88] as should the question whether the agreement has been carried out or whether there has been a breach thereof, and if the latter be true the damage suffered thereby if any.[89]

B. Findings. Where a compromise is set up in defense, and is met by a claim of fraud in the compromise, the fact of fraud must be directly found, and not merely a recital of the facts relied upon as tending to prove it.[90]

COMPTE ARRETE. In the civil law, an account stated in writing, and acknowledged to be correct on its face by the party against whom it is stated.[1] (See, generally, ACCOUNTS AND ACCOUNTING.)

COMPTER. In Scotch law, an accounting party.[2]

COMPTROLLER. A public officer charged with certain duties in relation to fiscal affairs.[3] (Comptroller: In Bankruptcy, see COMPTROLLER IN BANKRUPTCY. Of City, see MUNICIPAL CORPORATIONS. Of Currency, see BANKS AND BANKING. Of State, see STATES. Of United States, see UNITED STATES.)

COMPTROLLER IN BANKRUPTCY. An officer in England, whose duty it is to receive from the trustee in each bankruptcy his accounts and periodical statements showing the proceedings in the bankruptcy, and also to call the trustee to account for any misfeasance, neglect, or omission in the discharge of his duties.[4]

COMPULSION. COERCION, *q. v.*; constraint;[5] objective necessity; forcible inducement to the commission of an act.[6] (See COERCION.)

COMPULSORY. Obligatory; enjoined by authority; necessary; due to COMPULSION,[7] *q. v.* In ecclesiastical procedure, a kind of writ to compel the attendance of a witness, to undergo examination.[8] (Compulsory: Partition, see PARTITION. Payment, see PAYMENT. Process, see PROCESS; WITNESSES. Reference, see REFERENCES.)

COMPULSORY PURCHASE. A term used to define the exercise of the right of eminent domain.[9] (See, generally, EMINENT DOMAIN.)

85. Franklin Ins. Co. *v.* Villeneuve, (Tex. Civ. App. 1901) 60 S. W. 1014.

86. Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266, 22 S. W. 928.

87. Abrahams *v.* Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216.

88. Ware *v.* Morgan, 67 Ala. 461.

Where there was evidence that a settlement was made under mistake and coercion, the question as to its conclusiveness between the parties is properly left to the jury. Meyer *v.* Marshall, 34 W. Va. 42, 11 S. E. 730.

89. Schwartz *v.* Southerland, 51 Ill. App. 175.

90. Sheldén *v.* Dutcher, 35 Mich. 10.

Failure to find.—Where a special finding does not show that the claim in suit was compromised and settled between the parties, it must be assumed that no such compromise and settlement was made, the failure to find for the party having the burden of an issue is equivalent to a finding against him. Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316.

1. Chevalier *v.* Hyams, 9 La. Ann. 484, 485.

The words "account acknowledged" in article 3503 of the Civil Code, are "compte arrete" in the French text. Chevalier *v.* Hyams, 9 La. Ann. 484, 485.

2. Black L. Dict.

3. Black L. Dict.

4. Black L. Dict.

5. Black L. Dict.

"Compulsion" and "constraint" are synonyms when used in reference to extrinsic power, force, or influence, as when exercised by one person on another. Gates *v.* Hester, 81 Ala. 357, 360, 1 So. 848.

6. Black L. Dict.

7. Webster Dict.

8. Black L. Dict. [*citing* Phillimore Eccl. L. 1258].

9. *In re* Barre Water Co., 62 Vt. 27, 31, 20 Atl. 109, 9 L. R. A. 195, where it is said that a "compulsory purchase" "is much like the ancient prerogative of purveyance, which at one time prevailed pretty generally throughout Europe, and was regulated in England by Magna Charta, but is now abolished there, whereby the crown enjoyed the right of buying up provisions and other necessaries for the use of the royal household at an appraised valuation and in preference to all others, even without the consent of the owner."

COMPURGATOR. One of several neighbors of a person accused of a crime, or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath.[10]

COMPUTATION. The act of computing, numbering, reckoning, or estimating; the account or estimation of time by rule of law, as distinguished from any arbitrary construction of the parties.[11] (Computation: Of Annuity, see ANNUITIES. Of Balance on Account, see ACCOUNTS AND ACCOUNTING. Of Damages, see DAMAGES. Of Dividends on Claims, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. Of Interest, see INTEREST. Of Period of Limitation, see ADVERSE POSSESSION; LIMITATIONS OF ACTIONS. Of Time, see TIME.)

CON. A form of *CUM* (*q. v.*) in compound words; an abbreviation of *CONTRA* (*q. v.*) and of CONVERSATION, *q. v.*[12]

CONACRE. In Irish practice, the payment of wages in land, the rent being worked out in labor at a money valuation.[13]

CON BUENA FE. In Spanish law, with (or in) good faith.[14]

CONCEAL.[15] To hide;[16] to withdraw from observation;[17] to cover or keep from sight;[18] to secrete;[19] to keep secret;[20] to disguise;[21] to screen;[22] to cover;[23] to cover up;[24] to withhold from utterance or declaration;[25] to withhold, or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation;[26] to dispose of.[27]

10. Black L. Dict. [*citing* 3 Bl. Comm. 341].
11. Black L. Dict.
12. Anderson L. Dict.
13. Wharton L. Lex.
14. Black L. Dict.
15. **"Harbor" or "conceal" not synonymous.**— Under an act which rendered it an offense to harbor or conceal a fugitive from labor, the court said: "The act of congress, by using the terms 'harbour or conceal' assumed, I think, that the terms are not synonymous, and that there might be a harbouring without concealment." Van Metre *v.* Mitchell, 2 Wall. Jr. (U. S.) 311, 28 Fed. Cas. No. 16,865, 7 Pa. L. J. 115, 4 Pa. L. J. 111. And to the same effect see McElhaney *v.* State, 24 Ala. 71, 72.
16. State *v.* Julien, 48 Iowa 445, 447; Williams *v.* Com., 18 Ky. L. Rep. 663, 664, 37 S. W. 680; Taylor *v.* Bruscup, 27 Md. 219, 226; Webster Dict. [*quoted* in Dale County *v.* Gunter, 46 Ala. 118, 142; Rhoton *v.* Mendenhall, 17 Oreg. 199, 202, 20 Pac. 49; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25]; Worcester Dict. [*quoted* in Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25].

Not used in a technical sense.— As used in a statute it was held to include all acts done which render the discovery or identification of the property more difficult. State *v.* Ward, 49 Conn. 429, 442.

17. Taylor *v.* Bruscup, 27 Md. 219, 226; Webster Dict. [*quoted* in Dale County *v.* Gunter, 46 Ala. 118, 142; Rhoton *v.* Mendenhall, 17 Oreg. 199, 202, 20 Pac. 49; Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25].
18. State *v.* Julien, 48 Iowa 445, 447; Taylor *v.* Bruscup, 27 Md. 219, 226; Webster Dict. [*quoted* in Rhoton *v.* Mendenhall, 17 Oreg. 199, 202, 20 Pac. 49; Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25].
19. Jurgens *v.* Tum Suden, 32 N. Y. App. Div. 1, 3, 52 N. Y. Suppl. 662; Worcester Dict. [*quoted* in Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529].

Implies something more than a mere failure to disclose.—Bartholomew *v.* Warner, 32 Conn. 98, 103, 85 Am. Dec. 251, where it is said: "We do not in general speak of a person's concealing a thing, unless he is in some way called upon to produce it."

Signifies both to harbor and to hide.—Cook *v.* State, 26 Ga. 593, 603.

20. Worcester Dict. [*quoted* in Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25].
21. Worcester Dict. [*quoted* in Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529; Driskill *v.* Parrish, 3 McLean (U. S.) 631, 641, 7 Fed. Cas. No. 4,089, 5 West. L. J. 25].
22. Williams *v.* Com., 18 Ky. L. Rep. 663, 664, 37 S. W. 680.
23. Williams *v.* Com., 18 Ky. L. Rep. 663, 664, 37 S. W. 680; Worcester Dict. [*quoted* in Ray *v.* Donnell, 4 McLean (U. S.) 504, 514, 20 Fed. Cas. No. 11,590, 6 West. L. J. 529].
24. State *v.* Julien, 48 Iowa 445, 447.
25. Webster Dict. [*quoted* in Dale County *v.* Gunter, 46 Ala. 118, 142, where it is said: "The synonims of conceal are, to hide; disguise, dissemble; secrete. To hide, is generic; conceal, is simply not to make known what we wish to secrete; disguise, or dissemble, is to conceal by assuming some false appearance; to secrete, is to hide in some place of secresy"].
26. Gerry *v.* Dunham, 57 Me. 334, 339.
27. Horsman *v.* Bruce, 1 Mich. N. P. 255.

CONCEALED.[28] Willfully or knowingly covered, or kept from sight;[29] hidden.[30] (Concealed: Fraud, see CONCEALED FRAUD. Weapons, see WEAPONS.)

CONCEALED FRAUD. A case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold.[31]

CONCEALING. A term which conveys the idea of not letting come to observation.[32]

CONCEALMENT. The improper suppression or disguising of a fact, circumstance, or qualification which rests within the knowledge of one only of the parties to a contract, but one which ought in fairness and good faith to be communicated to the other, whereby the party so concealing draws the other into an engagement which he would not make but for his ignorance of the fact concealed.[33] In respect to insurance, the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter;[34] facts which the insurer had a right to know, and which the insured was under a duty to disclose.[35] As used in a statute, the term has been held to mean something more than mere silence or general declaration on the part of the person liable.[36] In statutes relating to attachment concealment is but a phase of absconding.[37] (Concealment: Affecting Limitation of Actions, see LIMITATIONS OF ACTIONS. As Ground — For Avoidance of Contract, see CONTRACTS; DEEDS; FRAUDULENT CONVEYANCES; SALES; VENDOR AND PURCHASER; Of Attachment, see ATTACHMENT; Of Estoppel, see ESTOPPEL; Of Liability, see FRAUD. Of Assets — By Assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; By Bankrupt, see BANKRUPTCY; By Insolvent, see INSOLVENCY. Of Birth or Death of Infant, see CONCEALMENT OF BIRTH OR DEATH. Of Dutiable Goods, see CUSTOMS DUTIES. Of Facts From Surety, see PRINCIPAL AND SURETY. Of Stolen Goods, see LARCENY. Of Taxable Property, see TAXATION.)

28. **Not synonymous with "lying in wait."** — If a person conceals himself for the purpose of shooting another unawares, he is lying in wait; but a person may, while concealed, shoot another without committing the crime of murder. People *v.* Miles, 55 Cal. 207.

29. Owen *v.* State, 31 Ala. 387, 389.

30. A thing concealed is a thing hidden, and therefore one might be correct in saying if it is not hidden or is visible, then it is not concealed. State *v.* Bias, 37 La. Ann. 259, 260.

31. Petre *v.* Petre, 1 Drew. 371 [*quoted* in *In re* McCallum, [1901] 1 Ch. 143, 160], as used within the meaning of the Real Property Limitation Act (1833), § 26.

32. Crabb Syn. [*quoted* in Tygard *v.* Falor, 163 Mo. 234, 242, 63 S. W. 672].

33. Black L. Dict. And see Page *v.* Parker, 43 N. H. 363, 367, 80 Am. Dec. 172.

A neglect to communicate that which a party knows, and ought to communicate, is called a "concealment." Black L. Dict. [*citing* Cal Civ. Code, § 2561].

34. Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 425, 59 Am. Dec. 192 [*quoted* in Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 440, 37 U. S. App. 692, 19 C. C. A. 286, 38 L. R. A. 33, 70].

35. 5 Lawson Rights, Rem. & Prac. § 2060 [*quoted* in American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. (N. Y.) 114, 20 N. Y. Suppl. 646, 48 N. Y. St. 653]. And see Bates *v.* Hewitt, L. R. 2 Q. B. 595, 13 L. J. Q. B. 282, 15 Wkly. Rep. 1172.

36. Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772 [*citing* Miller *v.* Powers, 119 Ind. 79, 89, 21 N. E. 455, 4 L. R. A. 483; Stone *v.* Brown, 116 Ind. 78, 81, 18 N. E. 392] where it is said: "It has reference to something of an affirmative character; something said or done, some trick or artifice employed, to prevent inquiry or elude investigation, or calculated to mislead and hinder the party entitled from obtaining knowledge by the use of ordinary diligence." And see Boyd *v.* Boyd, 27 Ind. 429, 430, where it is said "that the concealment contemplated by the statute must be something more than mere silence; that it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character."

37. Stafford *v.* Mills, 57 N. J. L. 574, 579, 32 Atl. 7 [*citing* Gibson *v.* McLaughlin, 1 Browne (Pa.) 292; Bennett *v.* Avant, 2 Sneed (Tenn.) 152; Drake Attach. (6th ed.), §§ 48, 53]. See also Frey *v.* Aultman, 30 Kan. 181, 182, 2 Pac. 168; Hoggett *v.* Emerson, 8 Kan. 262 [*quoted* in Myers *v.* Center, 47 Kan. 324, 327, 27 Pac. 978]; Kneeland Attach. § 215 [*quoted* in Garson *v.* Brumberg, 75 Hun (N. Y.) 336, 339, 26 N. Y. Suppl. 1003, 58 N. Y. St. 209]; and, generally, ATTACHMENT, 4 Cyc. 368.

CONCEALMENT OF BIRTH OR DEATH

By Frank E. Jennings

I. Origin of Offense, 545
II. Nature and Elements, 545
A. *Birth Alive*, 545
B. *Illegitimacy of Child*, 546
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CROSS-REFERENCES

For Matters Relating to:
Homicide, see Homicide.
Illegitimacy, see Bastards.
For General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

I. Origin of Offense.

The original statute creating this offense was that of 21 Jac. I, c. 27.[1] This statute was subsequently superseded by other statutes in England.[2] And while our statutes upon the subject are in many respects analogous to those of England, it would perhaps be incorrect to designate any particular statute as a foundation for our enactments.[3]

II. Nature and Elements.

A. Birth Alive. The real offense being an attempt to conceal the birth or death so that it cannot be known whether or not the child[4] was murdered,[5] it

1. 2 Hale P. C. 288.

2. It was because of the uncertainty of the true sense and meaning of 21 Jac. I, c. 27, and the Irish act of 6 Anne that they were repealed, and 43 Geo. III, c. 58, § 3, was enacted. Rex *v.* Cornwall, R. & R. 250 note. This latter statute was repealed by 9 Geo. IV, c. 31, § 14. See Rex *v.* Higley, 4 C. & P. 366, 19 E. C. L. 556, where the statute is set out in full. This was in turn repealed by 24 & 25 Vict. c. 100, which enacts that "if any woman shall be delivered of a child, any person who shall by any secret disposition of the dead body of the said child . . . endeavour to conceal the birth thereof, shall be guilty of a misdemeanour." Reg. *v.* Brown, L. R. 1 C. C. 244, 245, 11 Cox C. C. 517, 39 L. J. M. C. 94, 22 L. T. Rep. N. S. 484, 18 Wkly. Rep. 792.

3. State *v.* Kirby, 57 Me. 30; Com. *v.* Clark, 2 Ashm. (Pa.) 105. See also Dunn *v.* State, 57 Ark. 560, 22 S. W. 212 (where it is said that the foundation of statutory enactments in that state is evidently that of 21 Jac. I, c. 27); and Bishop Stat. Crimes, § 768.

4. What constitutes a "child" within the statute.— A fœtus not bigger than a man's finger, but having the shape of a child, has been held to be a "child" within the statute. Reg. *v.* Colmer, 9 Cox C. C. 506. But see Reg. *v.* Hewitt, 4 F. & F. 1101, wherein it was left to the jury to say whether an offspring six or seven months after conception had so far matured as to become a child or was still only a fœtus. See also Reg. *v.* Berriman, 6 Cox C. C. 388.

5. The different statutes creating this offense do not preclude an indictment for murder if the evidence is sufficient. Sullivan *v.* State, 36 Ark. 64 [*cited* in State *v.* Kirby, 57 Me. 30]. And see Wade *v.* Com., 1 Ky. L. Rep. 408, where it is said that although an action of murder would lie for the death of the child, yet when the death was probably caused without guilty intent, the action should be brought under the statute.

Where the punishment is the same as for manslaughter it is error for the court to treat the indictment as charging the latter offense and for the jury to return their ver-

would seem to be an immaterial matter whether the child be born dead or alive.[6]

B. Illegitimacy of Child. Inasmuch as concealment was usually attempted only by a mother desiring to conceal or destroy evidence of her shame or to escape punishment,[7] it was, by the earlier statutes of England,[8] and is in the majority[9] of the jurisdictions in this country necessary that the child be, or if born alive would have been, a bastard.[10]

C. Concealment — 1. Intent to Conceal. The authorities are all agreed that there must be an actual intent to conceal the child.[11] Hence where the child slips from the mother into a privy vault, the mother being there for another purpose,[12] or where, although the child was found among the feathers in a bed at the house of the mother's father, it was proved that the mother had prepared clothes for the child and sent for a surgeon at the time of her confinement,[13] she would not be guilty of the offense. On the other hand it is not necessary in proving this intent to show that the body had been put in a place of final deposit.[14]

dict in accordance therewith. So held in Dunn *v.* State, 57 Ark. 560, 22 S. W. 212.

6. *Arkansas.*— State *v.* Ellis, 43 Ark. 93.
Kentucky.—Com. *v.* Hopkins, 9 Ky. L. Rep. 432, 5 S. W. 392.
Missouri.— State *v.* White, 76 Mo. 96.
Pennsylvania.— Douglass *v.* Com., 8 Watts (Pa.) 535.
England.— Reg. *v.* Wright, 9 C. & P. 754, 38 E. C. L. 437; Rex *v.* Poulton, 5 C. & P. 329, 24 E. C. L. 590; Rex *v.* Cornwall, R. & R. 250. And see 9 Geo. IV, c. 31, § 14, set out in full in Rex *v.* Higley, 4 C. & P. 366, 19 E. C. L. 556.
See 6 Cent. Dig. tit. "Bastards," § 28 *et seq.*
Contra.— State *v.* Kirby, 57 Me. 30 (where the court, after review of the different statutes, concluded that the phrase "so that it is not known" means not known at any time past or present whether the child was born dead; and that if on the trial it can be shown that the child was still-born the mother should be acquitted); State *v.* Joiner, 11 N. C. 350; State *v.* Love, 1 Bay (S. C.) 167.
The original statute (21 Jac. I, c. 27) absolved the mother from liability, if upon trial she could show that the child was born dead. 2 Hale P. C. 288.
Instruction.— In a jurisdiction where it is immaterial whether or not the child be born alive or dead, an instruction that if by examination or test the condition or status of the child at birth can be determined the mother must be found not guilty is error. Com. *v.* Hopkins, 9 Ky. L. Rep. 432, 5 S. W. 392.

7. State *v.* Kirby, 57 Me. 30.

8. 21 Jac. I, c. 27; 43 Geo. III, c. 58, § 3. But the later statutes, 9 Geo. IV, c. 31, § 14 [*cited* in Rex *v.* Douglas, 7 C. & P. 644, 1 Moody C. C. 480, 32 E. C. L. 801], and 24 & 25 Vict. c. 100 [*given* in Reg. *v.* Brown, L. R. 1 C. C. 244, 11 Cox C. C. 517, 39 L. J. M. C. 94, 22 L. T. Rep. N. S. 484, 18 Wkly. Rep. 792] include any child.

9. But in some jurisdictions the offense is not thus limited. State *v.* Ihrig, 106 Mo. 267, 17 S. W. 300; State *v.* White, 76 Mo. 96; State *v.* Stewart, 93 N. C. 539.

10. *Arkansas.*— Sullivan *v.* State, 36 Ark. 64.
Kentucky.— Wade *v.* Com., 1 Ky. L. Rep. 408.
Maine.— State *v.* Kirby, 57 Me. 30.
New Hampshire.— State *v.* Hill, 58 N. H. 475.
New Jersey.— State *v.* Conover, 4 Crim. L. Mag. 233.
Pennsylvania.—Boyles *v.* Com., 2 Serg. & R. (Pa.) 40 (where a verdict was held bad for omitting to find that the child was a bastard); Com. *v.* Clark, 2 Ashm. (Pa.) 105.
Rhode Island.— State *v.* Sprague, 4 R. I. 257.
South Carolina.— See State *v.* Love, 1 Bay (S. C.) 167.
See 6 Cent. Dig. tit. "Bastards," § 28 *et seq.*

11. Although the concealment need not be from everyone. Thus a conviction was sustained where a woman was present at the birth and was requested to keep the matter silent. State *v.* Hill, 58 N. H. 475. See also Rex *v.* Cornwall, R. & R. 250.
Motive for concealment.— The endeavor to conceal must not proceed alone from a desire to escape individual observation or anger. Where therefore it appeared that the body of the child would have been buried by the prisoner in the churchyard, but for her fear to provoke her father, and because of such fear she conveyed it to a pond, the case was held not to fall within the statute. Reg. *v.* Morris, 2 Cox C. C. 489.

12. State *v.* Conover, 4 Crim. L. Mag. 233; Reg. *v.* Coxhead, 1 C. & K. 623, 47 E. C. L. 623. And this is true notwithstanding her denial of the birth of the child. Reg. *v.* Turner, 8 C. & P. 755, 34 E. C. L. 1003.

13. Rex *v.* Higley, 4 C. & P. 366, 19 E. C. L. 556. *Compare* Rex *v.* Poulton, 5 C. & P. 329, 24 E. C. L. 590, where it was held that slight evidence of the mother having previously spoken to others concerning diapers for the child was insufficient, in connection with the manner of concealment, to show a lack of intent to conceal.

14. Reg. *v.* Perry, 3 C. L. R. 691, 6 Cox C. C. 531, Dears. C. C. 471, 1 Jur. N. S. 408, 24

2. What Constitutes Concealment. To constitute a concealment, it is necessary that the child be placed where it is not likely to be found.[15] For that reason if the mother be found with the child in her possession, although about to conceal it, she cannot be convicted.[16] On the other hand as what constitutes a concealment would depend upon the circumstances of each case,[17] a most complete exposure of the body might be a concealment.[18]

III. Accomplices.

It seems that some of the statutory provisions contemplate no crime unless the mother be a participator therein;[19] but if the mother be indicted therefor others may be held as aiders or abettors.[20] Under the present English statute any one may alone be guilty of the offense.[21]

IV. Indictment.[22]

The indictment must set out the acts constituting the offense.[23] While the

L. J. M. C. 137, 3 Wkly. Rep. 404. And see Reg. *v.* Goldthorpe, C. & M. 335, 2 Moody C. C. 244, 41 E. C. L. 186; Reg. *v.* Farnham, 1 Cox C. C. 349.

15. Thus placing it in an open box in the mother's bedroom, and afterward, on inquiry of the physician, telling him that the child was in the box (Reg. *v.* Sleep, 9 Cox C. C. 559), or leaving the dead body in two boxes, closed, but not locked or fastened, one being placed inside the other, in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room (Reg. *v.* George, 11 Cox C. C. 41) has been held not to be a secret disposition within 24 & 25 Vict. c. 100. See also Reg. *v.* Goode, 6 Cox C. C. 318.

16. Rex *v.* Snell, 2 M. & Rob. 44.

Time of concealment.— It is not the concealment of death of a bastard child by its mother years after its birth, which the statutes contemplate. It is a concealment which is intended to prevent it coming to light whether or not the child was born dead or alive or whether it was murdered. Per King, J., in Com. *v.* Clark, 2 Ashm. (Pa.) 105.

17. Question for jury.— The question of the intent of the party in disposing of the body is for the jury. Reg. *v.* Clarke, 4 F. & F. 1040, in which case it is also held that the question of whether or not the disposition was in such a place that the offense could have been committed (and a dust-bin was held to be such a place) was for the court.

18. As for instance if the body were placed in the middle of a moor in the winter, on the top of a mountain, or in any other secluded spot. Reg. *v.* Brown, L. R. 1 C. C. 244, 11 Cox C. C. 517, 39 L. J. M. C. 94, 22 L. T. Rep. N. S. 484, 18 Wkly. Rep. 792.

Child dead at time of concealment.— Under 24 & 25 Vict. c. 100, § 60, it was necessary that the child be dead at the time it is sought to conceal it. Thus if the woman leave the child while alive in the corner of a field and it subsequently dies from exposure she cannot be convicted under the statute. Reg. *v.* May, 10 Cox C. C. 448, 16 L. T. Rep. N. S. 362, 15 Wkly. Rep. 751.

19. State *v.* Sprague, 4 R. I. 257.

20. State *v.* Sprague, 4 R. I. 257.

Under Geo. IV, c. 31, § 14, if the mother, concurring with her paramour, endeavored to conceal the birth, and he, in consequence of her persuasion, took the child and buried it, she could be convicted of endeavoring to conceal the birth and he as an accomplice. Reg. *v.* Bird, 2 C. & K. 817, 61 E. C. L. 817. And see Rex *v.* Douglas, 7 C. & P. 644, 1 Moody C. C. 480, 32 E. C. L. 801. But it should be clear, not only that she wished to conceal the birth, but that there was a common design — an agency — between her and the man. Reg. *v.* Skelton, 3 C. & K. 119.

21. 24 & 25 Vict. c. 100, reads that "every person who shall, by any secret disposition, etc." See Reg. *v.* Brown, L. R. 1 C. C. 244, 11 Cox C. C. 517, 39 L. J. M. C. 94, 22 L. T. Rep. N. S. 484, 18 Wkly. Rep. 792.

If the indictment be for child murder it has been held that no one but the mother could be convicted of concealment should it appear that the child was born dead. Reg. *v.* Wright, 9 C. & P. 754, 38 E. C. L. 437.

22. See, generally, Indictments and Informations.

23. Reg. *v.* Hounsell, 2 M. & Rob. 292. Thus an allegation that the accused "did feloniously conceal the birth of a bastard child, the issue of her body, by secreting the said child, so that it might not be known whether or not it had been born alive, said child being dead when found," is but the statement of a conclusion of law and is insufficient. Foster *v.* Com., 12 Bush (Ky.) 373, 374. *Compare* State *v.* Ellis, 43 Ark. 93; Boyles *v.* Com., 2 Serg. & R. (Pa.) 40.

Allegation that child is a bastard.— In those jurisdictions where the offense can be committed only if the child be a bastard an allegation of bastardy is essential. Sullivan *v.* State, 36 Ark. 64. But if not so restricted the allegation is of course unnecessary. Rex *v.* Douglas, 7 C. & P. 644, 1 Moody C. C. 480, 32 E. C. L. 801.

death of the child must of course be alleged[24] the intent or motive in the concealing need not, by perhaps the better authority, be stated.[25]

V. EVIDENCE.

The evidence in order to authorize a conviction must be sufficient to show the existence of every essential element of the offense.[26] And in order to avoid variance the evidence must correspond with the allegations in the indictment.[27]

Allegation that child was born alive.— In those jurisdictions where it is immaterial whether or not the child be born alive the indictment need not allege that it was alive when born. Reg. *v.* Coxhead, 1 C. & K. 623, 47 E. C. L. 623. And see State *v.* White, 76 Mo. 96.

For forms of indictment in whole, in part, or in substance, see the following cases:

Arkansas.— Sullivan *v.* State, 36 Ark. 64.

Missouri.— State *v.* White 76 Mo. 96.

North Carolina.— State *v.* Stewart, 93 N. C. 539.

Pennsylvania.— Com. *v.* Clark, 2 Ashm. (Pa.) 105.

England.— Reg. *v.* Coxhead, 1 C. & K. 623, 47 E. C. L. 623, 624, where it is held that an indictment which charges that the defendant did cast and throw the dead body of the child into the soil in a certain privy, "and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof" sufficiently charges the endeavor to conceal the birth, as the word "thereby" applies to the endeavor as well as to the disposing of the dead body.

24. State *v.* Ellis, 43 Ark. 93; Douglass *v.* Com., 8 Watts (Pa.) 535; Rex *v.* Davis, 1 Russell Crimes 779 [*cited* in 3 Jacob Fisher Dig. col. 3127].

Sufficient allegation of death.— An allegation in an indictment that Sarah "the said infant having, on the day and year, &c., died, did endeavor, privately, to conceal the death of the said infant" is a sufficient allegation of its death. Boyles *v.* Com., 2 Serg. & R. (Pa.) 40, 43.

25. State *v.* Ihrig, 106 Mo. 267, 17 S. W. 300; State *v.* White, 76 Mo. 96. And see Bishop Stat. Crimes, § 778. *Contra*, Com. *v.* Clark, 2 Ashm. (Pa.) 105.

26. State *v.* Ihrig, 106 Mo. 267, 17 S. W. 300; Com. *v.* Clark, 2 Ashm. (Pa.) 105; Reg. *v.* Brown, L. R. 1 C. C. 244, 11 Cox C. C. 517, 39 L. J. M. C. 94, 22 L. T. Rep. N. S. 484, 18 Wkly. Rep. 792; Reg. *v.* Cook, 11 Cox C. C. 542, 21 L. T. Rep. N. S. 216; Reg. *v.* Opie, 8 Cox C. C. 332.

The child was born alive.— See Com. *v.* McKee, Add. (Pa.) 1; Com. *v.* Clark, 2 Ashm. (Pa.) 105; Rex *v.* Poulton, 5 C. & P. 329, 24 E. C. L. 590. See *supra*, II, A.

Legitimacy of child.— Com. *v.* Clark, 2 Ashm. (Pa.) 105. See *supra*, II, B.

Intention to conceal.— Com. *v.* Clark, 2 Ashm. (Pa.) 105. Where the death of the child is undisputed the evidence must show an intent to conceal, the sufficiency of which will depend upon the circumstances attending each particular case. Thus where the body of the child was found a few hours after its birth on the floor of an attic in the house where the mother lived as a domestic servant, the head severed from the body and both lying on sheets which had been removed from the bedroom below, in which there was evidence that the birth had taken place, but it was doubtful whether the severance of the head from the body was effected there or in the attic, it was held that there was no evidence to warrant the jury in finding a verdict for the statutory misdemeanor of endeavoring to conceal the birth. Reg. *v.* Goode, 6 Cox C. C. 318. But the act of throwing a bastard child down the privy was evidence of an endeavor to conceal the birth within 43 Geo. III, c. 58, § 3. Rex *v.* Cornwall, R. & R. 250. See *supra*, II, C, 1.

Concealment.— Mere proof that a woman was delivered of a child and allowed two others to take its body away was held to be sufficient to sustain an indictment against her for concealment of its birth. Reg. *v.* Bate, 11 Cox C. C. 686. And under the Pennsylvania statute of 1718, concealment of the death was evidence that the child was born alive and killed by the mother; but under the statutes of 1786, 1790, concealment alone was not sufficient to convict the mother; presumptive proof that the child was born alive being required. While by the statute of 1794 attendant circumstances in conjunction with concealment was necessary. Com. *v.* McKee, Add. (Pa.) 1. See *supra*, II, C.

That child was dead when concealed.—Evidence failing to prove the death of the child would be insufficient. Reg. *v.* Bell, Ir. R. 8 C. L. 541, 542. And it has been held necessary in order to convict one of this offense that the dead body of the child be found and identified. Reg. *v.* Williams, 11 Cox C. C. 684. And see Com. *v.* Clark, 2 Ashm. (Pa.) 105.

27. Thus where the indictment alleged the concealment to have been in and among a certain heap of carrots, and the evidence was that the body was laid upon the heap but behind it so that it was hidden from the passer-by by the upper part of the heap, it was held that the evidence did not support the indictment. Reg. *v.* ——, 6 Cox C. C. 391.

Proof of name of child.— Where one count of an indictment described the child as "Harriet Stroud," and the second count as "a female of tender age, whose name is to the

CONCEDER. A French word meaning to grant.[1]

CONCEDERE. To grant.[2]

CONCEDO. I grant.[3]

CONCEIVE. To think, to understand, to have a complete idea of;[4] to believe, suppose, form a notion, or think.[5] The term is synonymous with think, believe, apprehend, imagine, understand.[6]

CONCENTRATED MOLASSES. Sugar in a green state.[7]

CONCEPTUM. In the civil law, a theft (*furtum*), when the thing stolen was searched for and found upon some other person in the presence of witnesses.[8]

CONCERN. That which relates or pertains to one; matter of concernment; business; affair.[9]

CONCERNED. Interested;[10] participating.[11]

jurors aforesaid unknown," and the only evidence was that the child was baptized "Harriet," and was so called, but there was no evidence that it had been called "Harriet Stroud," it was held that a conviction could not be sustained on either of these counts, as the variance in the first was fatal, and to sustain the second there must have been evidence showing that the name could not reasonably have been supposed to be known to the grand jury. Reg. *v.* Stroud, 1 C. & K. 187, 2 Moody C. C. 270, 47 E. C. L. 187. But if the only count in the indictment is an allegation that the "name is unknown" to the jurors, evidence that the mother had said she wished the child to be given a certain name, and on two occasions had called it such name, is not a sufficient variance to avoid the conviction. Rex *v.* Smith, 6 C. & P. 151, 1 Moody C. C. 402, 25 E. C. L. 368. And see Reg. *v.* Evans, 8 C. & P. 765, 34 E. C. L. 1009, holding that evidence that a child six weeks old was baptized on a Sunday, and from that day to the following Tuesday was called by its name of baptism and its mother's surname, was sufficient to warrant the jury in finding that it was properly described by those names in the indictment. To a similar effect see Rex *v.* Sheen, 2 C. & P. 634, 12 E. C. L. 776.

The evidence must also sustain the conjunctive requirements of the statute, if such a provision be made. Thus where the offense consisted in the mother's concealment of her pregnancy "and" the birth of her bastard child, the defendant must be acquitted where it appears that, prior to her confinement, she had informed her mother and her paramour of her pregnancy. State *v.* Conover, 4 Crim. L. Mag. 233.

1. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 427 note, 9 L. ed. 1137.

2. Burrill L. Dict.

3. A word used in old Anglo-Saxon grants, and in statutes merchant. Black L. Dict.

4. Webster Dict. [*quoted* in Hays *v.* Paul, 51 Pa. St. 134, 143, 88 Am. Dec. 569].

5. Century Dict. [*quoted* in State *v.* Wheeler, 97 Wis. 96, 100, 72 N. W. 225].

6. Webster Dict. [*quoted* in State *v.* Wheeler, 97 Wis. 96, 100, 72 N. W. 225].

Means the same as "consider."— That the two terms, "conceive" and "consider," mean substantially one and the same thing, there is no room for serious discussion. State *v.* Wheeler, 97 Wis. 96, 100, 72 N. W. 225 [*citing* People *v.* Highway Com'rs, 8 N. Y. 476].

"Conceives himself aggrieved."— In People *v.* Champion, 16 Johns. (N. Y.) 61 [*quoted* in State *v.* Wheeler, 97 Wis. 96, 100, 72 N. W. 225], it was held that the words "conceives himself aggrieved" should be given their plain and natural signification; that it satisfies the statute if the person seeking to appeal "conceives himself aggrieved," whether he be in fact aggrieved or not.

7. Belcher *v.* Linn, 24 How. (U. S.) 508, 16 L. ed. 754, where it is said: "The concentrated molasses is not susceptible of being guaged, which is another evidence that its proper classification is sugar."

8. Black L. Dict.

9. Century Dict.

"The words 'concerns' and 'accounts' are mercantile terms, and have an appropriate technical import. The subject-matter, in this case, in reference to which they are used, was the merchandize on consignment, and they mean in this instance, nothing more nor less, than the ordinary incidents to a sale of consigned goods. They should not be perverted so as to include any other right or interest, or duty, than such as are incidental to the sale on commission of the goods, in relation to which, the orders were drawn and accepted." Bruce *v.* Burdet, 1 J. J. Marsh. (Ky.) 80, 82.

10. In insurance matters, as persons interested in the loss. McRossie *v.* Provincial Ins. Co., 34 U. C. Q. B. 55, 59.

11. State *v.* Bach Liquor Co., 67 Ark. 163, 55 S. W. 854, where it is said the word was used in the statute in the sense of "participants."

"Being concerned in" is not a legal term or conclusion which needs a specification of facts for completeness of description. It is a colloquial expression, equivalent to "being engaged in," or "taking part in," and sufficiently informs the defendant of what the government intends to ve. U. S. *v.* Scott, 74 Fed. 213, 217.

CONCERNING. Pertaining to; having relation to.[12]

CONCERT. Agreement in a design or plan; union formed by mutual communication of opinions and views;[13] a public performance of music in which several singers or instrumentalists or both participate.[14] (See, generally, THEATERS AND SHOWS.)

CONCESSI. I have granted.[15]

CONCESSIMUS. We have granted.[16]

CONCESSIO. One of the old COMMON ASSURANCES, *q. v.*, or forms of conveyance.[17]

CONCESSION. A grant; ordinarily applied to the grant of specific privileges by a government; French and Spanish grants in Louisiana.[18] (See, generally, PUBLIC LANDS.)

CONCESSIT. Granted; allowed; agreed; concurred.[19]

CONCESSIT SOLVERE. Literally, he granted and agreed to pay. In English law, an action of debt upon a simple contract.[20]

CONCESSUM. Accorded; conceded.[21]

CONCILIATION. In French law, the formality to which intending litigants are subjected in cases brought before the *juge de paix*. The judge convenes the parties and endeavors to reconcile them. Should he not succeed, the case proceeds. In criminal and commercial cases, the preliminary of conciliation does not take place.[22]

CONCILIUM. A council; also argument in a cause, or the sitting of the court to hear argument; a day allowed to a defendant to present his argument; an imparlance.[23]

CONCILIUM REGIS. An ancient English tribunal, existing during the reigns of Edward I and Edward II, to which was referred cases of extraordinary difficulty.[24]

CONCISELY. Briefly, succinctly, and comprehensively.[25]

CONCLUDE. To finish; determine; to estop; to prevent.[26]

CONCLUDED. Ended; determined; estopped; prevented from.[27] As applied to public international treaties, the term means that the agreement, as understood by them, has received its last form by being signed and duly executed, by the ministers of the respective nations.[28]

12. U. S. *v.* Fulkerson, 74 Fed. 631, 632.

13. Webster Dict. [*quoted* in Davids *v.* People, 192 Ill. 176, 196, 61 N. E. 537].

14. Buffalo *v.* Smith, 8 Misc. (N. Y.) 348, 349, 28 N. Y. Suppl. 690, 59 N. Y. St. 581, where it is said: "The two words 'concert' and 'entertainment,' as used in the ordinance, are, as we think, intended to describe the same thing."

15. At common law, in a feoffment or estate of inheritance, this word does not imply a warranty; it only creates a covenant in a lease for years. Black L. Dict. [*citing* Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 194, 2 Am. Dec. 228].

16. A term used in conveyances, the effect of which was to create a joint covenant on the part of the grantors. Black L. Dict.

17. Black L. Dict.

Concessio per regem fieri debet de certitudine.— A grant by the king ought to be made from certainty. Black L. Dict.

Concessio versus concedentem latam interpretationem habere debet.— A grant ought to have a broad interpretation (to be liberally interpreted) against the grantor. Black L. Dict.

18. Black L. Dict.

19. A common term in the old reports. Burrill L. Dict.

20. Black L. Dict.

21. This term, frequently used in the old reports, signifies that the court admitted or assented to a point or proposition made on the argument. Black L. Dict.

22. Black L. Dict.

23. Black L. Dict.

24. Black L. Dict.

25. Bertolet's Election, 13 Pa. Co. Ct. 353, 355, where it is said: "Its use in this statute indicates, as a requisite of the partition, only that precision of averment which is indispensable to inform the court of the probable existence and nature of such grounds of contest as will give it jurisdiction of the case. This conclusion is also demanded by a reference to the spirit and purpose of the enactment."

26. Black L. Dict.

27. Black L. Dict.

28. Hylton *v.* Brown, 1 Wash. (U. S.) 343, 351, 12 Fed. Cas. No. 6,982, where it is said: "It is this which concludes all agreements, whether made by nations or by in-

CONCLUSION. The end; the termination; the act of finishing or bringing to a close;[29] also a bar or estoppel.[30] (Conclusion: Of Argument, see TRIAL. Of Indictment or Information, see INDICTMENTS AND INFORMATIONS. Of Law and, Fact, see APPEAL AND ERROR; ARBITRATION AND AWARD; TRIAL. Of Pleading see PLEADING. Of Witness as Evidence, see CRIMINAL LAW; EVIDENCE.)

CONCLUSIVE. Shutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final;[31] decisive; putting an end to debate or question; leading to a conclusion or decision.[32] (Conclusive: Evidence, see EVIDENCE; CRIMINAL LAW.)

CONCLUSIVE IN LAW. That of which from its nature the law allow no contradiction or explanation; an inference which the law makes as peremptory, that it will not allow it to be overthrown by any contrary proof, however strong.[33]

CONCLUSIVELY. Decisively, with final determination;[34] a word which carries with it the idea of finality, and implies, necessarily, that the presumption is of such a character that no evidence may be considered to rebut it.[35]

CONCORD. In the old process of levying a fine of lands, the concord was an agreement between the parties (real or feigned) in which the deforciant (or he who keeps the other out of possession) acknowledged that the lands in question are the right of complainant; and, from the acknowledgment or admission of right thus made, the party who levies the fine is called the "cognizor," and the person to whom it is levied the "cognizee."[36] Also an agreement between two persons, one of whom has a right of action against the other, settling what amends shall be made for the breach or wrong; a compromise or an accord.[37] (See, generally, ACCORD AND SATISFACTION; COMMON RECOVERY; COMPROMISE AND SETTLEMENT.)

CONCORDARE LEGES LEGIBUS EST OPTIMUS INTERPRETANDI MODUS. A maxim meaning "To make laws agree with laws is the best mode of interpreting them."[38]

CONCORDAT. In public law, a compact or convention between two or more

dividuals. That this is the meaning of the word concluded, is plain from the above quotation from Vattel, and from other expressions used by him in bk. 3, c. 16, p. 238, speaking of truces, where he uses the words as importing a signature, either by the sovereign, or by his general. But it goes on, and says: 'And Great Britain shall be ready to conclude the same.' Now, when the treaty was signed by her ministers, she had shown her readiness to conclude it."

29. Black L. Dict.

30. Black L. Dict.

31. Black L. Dict.

32. Hoadley *v.* Hammond, 63 Iowa 599, 602, 19 N. W. 794.

"Conclusive upon all parties."— Where the statute provides that a final order shall be "conclusive upon all parties," the court said: "The word 'conclusive,' as here used, means simply that while it stands unreversed it binds all parties to the proceeding, just as a judgment is 'conclusive' because it binds all parties to the action." Commercial Bank *v.* McAuliffe, 92 Wis. 242, 244, 66 N. W. 110. Again, where the statute provided that "the final settlement of the accounts of executors, shall be conclusive on all parties," etc., it was said: "The word conclusive, here made use of, I apprehend to be in contradistinction to the imperfect or inconclusive accounts sometimes formerly made without notice or citation." Burroughs *v.* Mickle, 3 N. J. L. 913, 916.

"The words 'conclusive evidence of the regularity of all other proceedings,' as used in the section, refer, and were intended by the framers of the provision to refer, to the acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of a tax deed, and not, as in this case, to something required to be done by the applicant for the deed." Miller *v.* Miller, 96 Cal. 376, 379, 31 Pac. 247, 31 Am. St. Rep. 229, construing Cal. Pol. Code, § 3787.

33. Webster Dict. [*quoted* in Joslyn *v.* Pulver, 59 Hun (N. Y.) 129, 140, 13 N. Y. Suppl. 311, 35 N. Y. St. 888, per Mayham, J., in dissenting opinion].

34. Webster Dict. [*quoted* in Hilliard *v.* Beattie, 58 N. H. 112 (*citing* Cochecho R. Co. *v.* Farrington, 26 N. H. 428, 445)].

35. Anderson L. Dict. [*quoted* in Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479].

36. Black L. Dict.

37. Black L. Dict.

In old practice, an agreement between two or more, upon a trespass committed, by way of amends or satisfaction for it. Black L. Dict.

38. Black L. Dict.

independent governments;[39] also an agreement made by a temporal sovereign with the pope, relative to ecclesiastical matters.[40] In French law, a compromise effected by a bankrupt with his creditors, by virtue of which he engages to pay within a certain time a certain proportion of his debts, and by which the creditors agree to discharge the whole of their claims in consideration of the same.[41] (See, generally, TREATIES.)

CONCORDES. Agreed, as a jury upon their verdict.[42]

CONCORDIA. In old English law, an agreement, or CONCORD,[43] *q. v.*

CONCORDIA DISCORDANTIUM CANONUM. The harmony of the discordant canons; a collection of ecclesiastical constitutions made by Gratian, an Italian monk, A. D. 1151; more commonly known by the name of *DECRETUM GRATIANI*,[44] *q. v.*

CONCORDIA PARVÆ RES CRESCUNT ET OPULENTIA LITES. A maxim meaning "Small means increase by concord and litigations by opulence."[45]

CONCUBINAGE.[46] The COHABITING (*q. v.*) of a man and a woman who are not legally married; the state of being a CONCUBINE,[47] *q. v.*; the COHABITATION (*q. v.*) of a man with a woman to whom he is not united by marriage;[48] the act or practice of COHABITING (*q. v.*) in sexual intercourse without the authority of a legal marriage;[49] a comprehensive term, covering any illicit intercourse;[50] a species of loose, informal marriage which took place among the ancients, and which is yet in use in some countries.[51] (See, generally, ABDUCTION; FORNICATION; LEWDNESS; PROSTITUTION.)

CONCUBINATUS. In Roman law, an informal, unsanctioned, or "natural" marriage, as contradistinguished from the *justæ nuptiæ*, or *justum matrimonium*, the civil marriage.[52]

CONCUBINE. A woman who cohabits with a man without being his wife;[53] a sort of inferior wife, among the Romans, upon whom the husband did not confer his rank or quality.[54] (See CONCUBINAGE.)

CONCUR. In common parlance to run together; to meet.[55] In Louisiana,

39. Black L. Dict.
40. Black L. Dict.
41. Black L. Dict.
42. Burrill L. Dict.
43. Burrill L. Dict.
44. Burrill L. Dict.
45. Black L. Dict. [*citing* 4 Inst. 74].
46. **The word has no settled common-law meaning.**— People *v.* Bristol, 23 Mich. 118, 127. And see People *v.* Cummons, 56 Mich. 544, 545, 23 N. W. 215, where the court, in considering the words "concubinage" and "prostitution," said: "The last two were evidently intended to cover all cases of lewd intercourse. Neither of these words has any common-law meaning, but both are popular phrases, either of which might be made to cover the crime here shown without any change from general usage." But see State *v.* Feasel, 74 Mo. 524, 526 [*quoted* in State *v.* Gibson, 111 Mo. 92, 105, 19 S. W. 980].
Distinguished from "prostitution."— See Henderson *v.* People, 124 Ill. 607, 615, 17 N. E. 68, 7 Am. St. Rep. 391; State *v.* Gibson, 111 Mo. 92, 97, 19 S. W. 980.
47. Webster Dict. [*quoted* in State *v.* Gibson, 111 Mo. 92, 96, 19 S. W. 980].
48. Burrill L. Dict. [*quoted* in State *v.* Feasel, 74 Mo. 524, 526, where it is said: "The above is the accepted meaning of the word at common law, and was, we think, used by the legislature in that sense"].
49. Bouvier L. Dict. [*quoted* in State *v.* Overstreet, 43 Kan. 299, 305, 23 Pac. 572; State *v.* Gibson, 111 Mo. 92, 105, 19 S. W. 980, per Thomas, J., in dissenting opinion; State *v.* Feasel, 74 Mo. 524, 526]; Webster Dict. [*quoted* in State *v.* Gibson, 111 Mo. 92, 105, 19 S. W. 980, per Thomas, J., in dissenting opinion].
50. People *v.* Bristol, 23 Mich. 118, 127.
51. Black L. Dict.; Bouvier L. Dict.; Wharton L. Lex. [*quoted* in State *v.* Gibson, 111 Mo. 92, 96, 19 S. W. 980].
52. Black L. Dict.
53. Webster Dict. [*quoted* in State *v.* Gibson, 111 Mo. 92, 96, 19 S. W. 980].
When a woman becomes a "concubine."— When a single woman consents to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commences cohabiting with him in pursuance of that understanding, she becomes his concubine, or, as it is usually expressed in modern times, "his kept mistress," which amounts to the same thing. Henderson *v.* People, 124 Ill. 607, 616, 17 N. E. 68, 7 Am. St. Rep. 391.
54. Black L. Dict.
55. Webster Dict.
Something more than mere acquiescence or silent submission. Dillon *v.* Scofield, 11 Nebr. 419, 9 N. W. 554.

the term means to join with other claimants in presenting a demand against an insolvent estate.[56]

CONCURATOR. In the civil law, a joint or co-curator, or guardian.[57]

CONCURRENCE. Joint approval or action.[58] In French law, the possession, by two or more persons, of equal rights or privileges over the same subject-matter.[59] (See CONSENT.)

CONCURRENCE DISLOYALE. A word used among French speaking nations to designate the offense of infringement of trade-marks. This term may be fairly anglicized as a dishonest, treacherous, perfidious rivalry in trade.[60] (See, generally, TRADE-MARKS AND TRADE-NAMES.)

CONCURRENT. Having the same authority; acting in conjunction; agreeing in the same act; contributing to the same event; contemporaneous;[61] running together;[62] co-operating; contributing to the same effect;[63] acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying; conjoined; associate; concomitant; joint and equal; existing together, and operating on the same objects.[64] (Concurrent: Conditions, see SALES. Covenants, see CONTRACTS; COVENANTS. Insurance, see FIRE INSURANCE. Jurisdiction, see COURTS. Negligence, see NEGLIGENCE. Remedies, see ADMIRALTY; ELECTION OF REMEDIES.)

CONCURRENT LEASE. One granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises, made to another person, or, in other words, an assignment of a part of the reversion, entitling the lessee to all the rents accruing upon the previous lease after the date of his lease, and all the remedies against the tenant under the prior lease, which his lessor would have had, except for the assignment.[65]

CONCURRENT WRITS. Duplicate originals, or several writs running at the same time or for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action.[66]

CONCURSO. A remedy provided by state laws, to enable creditors to enforce their claims against a debtor.[67]

CONCURSUS. In the civil law, (1) a running together; a collision, as *concursus creditorum*, a conflict among creditors; (2) a concurrence, or meeting, as *concursus actionum*, concurrence of actions.[68] (See, generally, INTERPLEADER.)

56. Black L. Dict.
57. Black L. Dict.
58. Century Dict.
59. Black L. Dict.
60. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84, 130, 23 S. W. 165, where it is said: "In the German Imperial Court of Colmar, in 1873, the Court said that current jurisprudence understands by *concurrence deloyale* all maneuvers that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose. It implies a fraudulent intention, while, on the contrary, an enjoinable infringement of a technical trade-mark may be the result of accident or misunderstanding, without actual fraud being an element."
61. Black L. Dict.
62. Worcester Dict. [*quoted* in East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 663, 13 S. W. 572].
63. Worcester Dict. [*quoted* in East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 663, 13 S. W. 572].

The expression "concurrent remedies" manifestly implies a restrictive reference to the information, as a known remedy, not less than to the indictment, each within its proper sphere. One or the other must be used in every case. *Ex p.* Thomas, 10 Mo. App. 24, 26.

64. Webster Dict. [*quoted* in Washburn-Halligan Coffee Co. *v.* Merchants' Brick Mut. F. Ins. Co., 110 Iowa 423, 432, 81 N. W. 707, 80 Am. St. Rep. 311; Corkery *v.* Security F. Ins. Co., 99 Iowa 382, 390, 68 N. W. 792; East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 663, 13 S. W. 572].
65. Cargill *v.* Thompson, 57 Minn. 534, 550, 59 N. W. 638, where it is said, per Canty, J., in dissenting opinion: "But, unless under seal, it does not have this effect, because it does not come within the provisions of St. 32 Hen. VIII, ch. 34."
66. Black L. Dict.
67. Schroeder *v.* Nicholson, 2 La. 350, 355.
68. Black L. Dict.

CONCUSS. In Scotch law, to COERCE,[69] *q. v.*

CONCUSSIO. In the civil law, the offense of extortion by threats of violence.[70] (See, generally, EXTORTION.)

CONCUSSION. In the civil law, the unlawful forcing of another by threats of violence to give something of value:[71]

CONDEDIT. In ecclesiastical law, the name of a plea entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind.[72]

CONDEMN. To find or adjudge guilty; to adjudge or sentence;[73] to deem, think or judge any one, to be guilty, to be criminal — to give judgment, or sentence, or doom of guilt; to adjudge or declare the penalty or punishment;[74] to adjudge (as an admiralty court) that a vessel is a prize, or that she is unfit for service;[75] to set apart or expropriate property for public use, in the exercise of the power of eminent domain.[76] (See, generally, CONDEMNATION; CRIMINAL LAW; EMINENT DOMAIN.)

CONDEMNATION. The act of condemning.[77] In the civil law, a sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.[78] (Condemnation: Of Prize, see ADMIRALTY; WAR. Of Property, see CUSTOMS DUTIES; EMINENT DOMAIN; FORFEITURES; INTERNAL REVENUE; NEUTRALITY LAWS; SHIPPING; WAR.)

CONDEMNATION MONEY. The damages which the party failing in an action is adjudged or condemned to pay; sometimes simply called the "condemnation";[79] the damages that should be awarded against the appellant, by the judgment of the court.[80]

CONDESCENDENCE. In Scotch law, a part of the proceedings in a cause, setting forth the facts of the case on the part of the pursuer or plaintiff.[81]

CONDICTIO. In Roman law, a general term for actions of a personal nature, founded upon an obligation to give or do a certain and defined thing or service.[82]

CONDICTIO REI FURTIVÆ, QUIA REI HABET PERSECUTIONEM, HÆREDEM QUOQUE FURIS OBLIGAT. A maxim meaning "The appointment of an action on a certain day relating to stolen goods, since it implies the production of the goods, binds the heir of the thief also."[83]

69. Black L. Dict.

70. Black L. Dict.

71. It differs from robbery, in this: that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Black L. Dict.

72. Black L. Dict.

73. Black L. Dict.

74. Richardson Dict. [*quoted* in Blaufus *v.* People, 69 N. Y. 107, 111, 25 Am. Rep. 148, where it is said: "'Judge not, that ye be not judged,' of our New Testament, is 'Nyle ye deme, that ghe be not demed,' of Wicliffe"].

75. Black L. Dict. [*citing* Hayman *v.* Molton, 5 Esp. 65, 8 Rev. Rep. 837; 1 Kent Comm. 102].

76. Black L. Dict.

77. Century Dict.

78. Bouvier L. Dict. [*quoted* in Lockwood *v.* Saffold, 1 Ga. 72, 74].

79. Black L. Dict.

80. Doe *v.* Daniels, 6 Blackf. (Ind.) 8, 9, where it is said: "It does not embrace damages not included in the judgment."

The "eventual condemnation money," then, is that which the law sentences the party to pay; expressed by the judgment of the court, the legitimate organ of the law. Lockwood *v.* Saffold, 1 Ga. 72, 74.

81. Black L. Dict.

82. It is distinguished from *vindicatio rei*, which is an action to vindicate one's right of property in a thing by regaining (or retaining) possession of it against the adverse claim of the other party. Black L. Dict.

Condictio certi.— In the civil law, it is an action which lies upon a promise to do a thing, where such promise or stipulation is certain, (*si certa sit stipulatio*). Black L. Dict.

Condictio ex lege.—In the civil law, an action arising where the law gave a remedy, but provided no appropriate form of action. Black L. Dict.

Condictio indebitati.— In the civil law, an action which lay to recover anything which the plaintiff had given or paid to the defendant, by mistake, and which he was not bound to give or pay, either in fact or in law. Black L. Dict.

Condictio rei furtivæ.— In the civil law, an action which lay to recover a thing stolen, against the thief himself, or his heir. Black L. Dict.

Condictio sine causa.—In the civil law, an action which lay in favor of a person who had given or promised a thing without consideration, (*causa*). Black L. Dict.

83. Morgan Leg. Max.

CONDITIO. A CONDITION,[84] *q. v.*

CONDITIO AD LIBERUM TENEMENTUM AUFERENDUM NON NISI EX FACTO PLACITARI DEBET. A maxim meaning "An argument for taking away a free tenure ought not to be pleaded, except from the deed."[85]

CONDITIO BENEFICIALIS, QUÆ STATUM CONSTRUIT, BENIGNÈ SECUNDUM VERBORUM INTENTIONEM EST INTERPRETANDA; ODIOSA AUTEM QUÆ STATUM DESTRUIT, STRICTE SECUNDUM VERBORUM PROPRIETATEM ACCIPIENDA. A maxim meaning "A beneficial condition, which creates an estate, ought to be construed favorably, according to the intention of the words; but a condition which destroys an estate is odious, and ought to be construed strictly according to the letter of the words."[86]

CONDITIO DICITUR CUM QUID IN CASUM INCERTUM QUI POTEST TENDERE AD ESSE AUT NON ESSE CONFERTUR. A maxim meaning "It is called a condition when something is given on an uncertain event, which may or may not come to pass."[87]

CONDITIO EX PARTE EXTINCTA EX TOTO EXTINGUITUR. A maxim meaning "An agreement extinguished in part is wholly extinguished."[88]

CONDITIO ILLICITA HABETUR PRO NON ADJECTÂ. A maxim meaning "An unlawful condition is deemed as not annexed."[89]

CONDITIO LIBERUM TENEMENTUM CASSANS NON PER NUDA VERBA SINE CHARTA VALEBIT. A maxim meaning "A condition making void a free tenement will be of no value by bare words without writing."[90]

CONDITION. Mode, or state of being;[91] state or situation with regard to external circumstances;[92] essential quality; property, attribute;[93] something to be done;[94] something annexed to the grant;[95] an agreement or stipulation in regard to some uncertain future event, not of the essential nature of the transaction, but annexed to it by the parties, providing for a change or modification of their legal relations upon its occurrence;[96] a clause in an agreement which has

84. Black L. Dict.

85. Morgan Leg. Max.

86. Black L. Dict. And see Lowe *v.* Hyde, 39 Wis. 345, 356; Fraunces' Case, 8 Coke 89*b*, 90*b*.

87. Morgan Leg. Max.

88. Morgan Leg. Max.

89. Black L. Dict.

90. Peloubet Leg. Max.

91. Webster Dict. [*quoted* in State *v.* Jacksonville St. R. Co., 29 Fla. 590, 613, 10 So. 590].

92. Webster Dict. [*quoted* in State *v.* Jacksonville, etc., R. Co., 29 Fla. 590, 613, 10 So. 590; Fromherz *v.* Yankton F. Ins. Co., 7 S. D. 187, 196, 63 N. W. 784, where it is said: "In this respect it means more than the location; it means location and environment"].

The terms, "condition in life" and "situation in life" are synonymic, and may be used interchangeably. Ross *v.* Kansas City, 48 Mo. App. 440, 447 [*citing* Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Thomas *v.* Wabash, etc., R. Co., 20 Mo. App. 485].

93. Webster Dict. [*quoted* in State *v.* Jacksonville St. R. Co., 29 Fla. 590, 613, 10 So. 590].

94. Worcester Dict. [*quoted* in Fenn *v.* Gulf, etc., R. Co., 76 Tex. 380, 382, 13 S. W. 273, where it is said: "And in that sense when plural is synonymous with 'terms'"].

95. State *v.* Board of Public Works, 42 Ohio St. 607, 615. See also Cleveland, etc., R. Co. *v.* Cincinnati, Ohio Prob. 269, 278, where the word as used in a statute was defined to be a stipulation precedent to the enjoyment of the grant.

96. Black L. Dict.

Conditions known to the common law are defined under their appropriate names in the following titles: Conditions are either express or implied. They are express when they appear in the contract; they are implied whenever they result from the operation of law, from the nature of the contract, or from the presumed intent of the parties. They are possible or impossible; the former when they admit of performance in the ordinary course of events; the latter when it is contrary to the course of nature or human limitations that they should ever be performed. They are lawful or unlawful; the former when their character is not in violation of any rule, principle, or policy of law; the latter when they are such as the law will not allow to be made. They are consistent or repugnant; the former when they are in harmony and concord with the other parts of the transaction; the latter when they contradict, annul, or neutralize the main purpose of the contract. Repugnant conditions are also called "insensible." They are independent, dependent, or mutual; the first when each of the two conditions must be performed without any reference to the other; the second when the performance of one is not obligatory until

for its object to suspend, to rescind, or to modify the principal obligation; or, in a will, to suspend, revoke, or modify the devise or bequest;[97] a *modus* or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event;[98] a qualification or restriction annexed to conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do, or omit to do, a particular act, an estate shall commence, be enlarged or be defeated.[99] Also at common law as well as in the civil law, the rank, situation, or degree of a particular person in some one of the different orders of society.[1] (Condition: Acceptance of, see APPEAL AND ERROR. Express, see CONTRACTS; DEEDS. Implied, see CONTRACTS; DEEDS. In Acceptance of Offer, see CONTRACTS; SALES; VENDOR AND PURCHASER. In Bill or Note, see COMMERCIAL PAPER. In Contract, see CONTRACTS. In Deed, see COVENANTS; DEEDS. In Insurance Policy, see ACCIDENT INSURANCE; FIRE INSURANCE; INSURANCE; LIFE INSURANCE. In Lease, see LANDLORD AND TENANT. In Mortgage, see CHATTEL MORTGAGES; MORTGAGES. In Promise to Pay, see LIMITATIONS OF ACTIONS. In Ticket, see CARRIERS. In Will, see WILLS. Of Gift, see GIFTS. Of Guaranty, see GUARANTY. Of Subscription, see SUBSCRIPTIONS. On

the actual performance of the other; the third when neither party need perform his condition unless the other is ready and willing to perform his. Black L. Dict.

In civil law, conditions are of the following several kinds: The "casual condition" is that which depends on chance, and is in no way in the power either of the creditor or of the debtor. A "mixed condition" is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event. The "potestative condition" is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder. A "resolutory condition" is one which destroys or releases an obligation already vested, as soon as the condition is fulfilled. A "suspensive condition" is one which postpones the obligation until the happening of a future and uncertain event, or a present but unknown event. Black L. Dict. [*citing* La. Civ. Code (1900), arts. 2023 *et seq.*].

In French law, the following peculiar distinctions are made: (1) A condition is *casualle* when it depends on a chance or hazard; (2) a condition is *potestative* when it depends on the accomplishment of something which is in the power of the party to accomplish; (3) a condition is *mixte* when it depends partly on the will of the party and partly on the will of others; (4) a condition is *suspensive* when it is a future and uncertain event, or present but unknown event, upon which an obligation takes or fails to take effect; (5) a condition is *resolutoire* when it is the event which undoes an obligation, which has already had effect as such. Black L. Dict. [*citing* Brown L. Dict.].

97. 1 Bouvier Inst. No. 730.

Qualities annexed to personal contracts and agreements are frequently called conditions, and these must be interpreted according to the real intention of the parties. Selden *v.* Pringle, 17 Barb. (N. Y.) 458, 466 [*citing* Bacon Abr. tit. Conditions].

98. Black L. Dict. [*citing* Coke Litt. 201*a*].

99. Heaston *v.* Randolph County, 20 Ind. 398, 403 [*citing* 2 Greenleaf Cruise 2].

A condition is created by inserting the very words "condition" or "on condition" in the agreement. Warner *v.* Bennett, 31 Conn. 468, 475 [*citing* 1 Bouvier Inst. 285].

Distinguished from other terms.— A "condition" is to be distinguished from a "limitation," in that the latter may be to or for the benefit of a stranger, who may then take advantage of its determination, while only the grantor, or those who stand in his place, can take advantage of a condition; and in that a limitation ends the estate without entry or claim, which is not true of a condition. It also differs from a "conditional limitation"; for in the latter the estate is limited over to a third person, while in case of a simple condition it reverts to the grantor, or his heirs or devisees. It differs also from a "covenant," which can be made either by a grantor or grantee, while only the grantor can make a condition. A charge is a devise of land with a bequest out of the subject-matter, and a charge upon the devisee personally, in respect of the estate devised, gives him an estate on condition. A condition also differs from a "remainder"; for, while the former may operate to defeat the estate before its natural termination, the latter cannot take effect until the completion of the preceding estate. Black L. Dict. [*citing* Stearns *v.* Godfrey, 16 Me. 158; 1 Cok Litt. 70].

The words usually employed to create a condition are, "on condition." But the phrases, "so that," "provided," "if it shall happen," are of the same import. "Provided, always," may constitute a condition, limitation or covenant, according to circumstances. Heaston *v.* Randolph County, 20 Ind. 398, 403.

1. Black L. Dict.

Affirmance, see APPEAL AND ERROR. On Allowance of Amendment, see PLEADING. On Allowance or Denial of Dismissal or Nonsuit, see DISMISSAL AND NONSUIT. On Granting Continuance, see CONTINUANCES. On Granting New Trial, see CRIMINAL LAW; NEW TRIAL. On Tender, see TENDER. On Vacating Judgment, see JUDGMENTS.)

CONDITION AFFIRMATIVE. A CONDITION (*q. v.*) which consists in doing a thing; as provided that the lessee shall pay rent, etc.[2]

CONDITIONAL. To which is dependent upon or granted subject to a CONDITION,[3] *q. v.* (Conditional: Contract, see CONTRACTS. Fee, see DEEDS; ESTATES; WILLS. Limitation, see DEEDS; ESTATES; WILLS. Sale, see SALES. See also CONDITION.)

CONDITION COLLATERAL. A CONDITION (*q. v.*) where the act to be done is a collateral act.[4]

CONDITION COMPULSORY. A CONDITION (*q. v.*) expressly requiring a thing to be done.[5]

CONDITION CONSISTENT. A CONDITION (*q. v.*) which agrees with all other parts of the contract, or which by a just construction can be reconciled with every other part.[6]

2. Black L. Dict.

3. Black L. Dict.

Conditional acceptance is a new offer, which requires acceptance in its turn to close the bargain. Stotesburg *v.* Massengale, 13 Mo. App. 221, 226.

Conditional contract is an executory contract, the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do, or not to do, something; but it is a contract whose very existence and performance depends upon a contingency and condition. Story Contr. [*quoted* in Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574, 584]. See, generally, CONTRACTS.

Conditional conveyance is one which is restricted and limited by some condition, the non-performance of which will hinder it from operation and effect, if it be a condition precedent. Falconer *v.* Buffalo, etc., R. Co., 69 N. Y. 491, 498.

Conditional creditor, in the civil law, is a creditor having a future right of action, or having a right of action in expectancy. Black L. Dict.

A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated. Black L. Dict. See, generally, WILLS.

Conditional fee is a fee restrained to some particular heirs, exclusive of others; "as, to the heirs of a man's body," by which only his lineal descendants are admitted, in exclusion of collateral heirs. Simmons *v.* Augustin, 3 Port. (Ala.) 69, 96; Kirk *v.* Furgerson, 6 Coldw. (Tenn.) 479, 483.

It was called a "conditional fee," by reason of the condition expressed or implied in the donation of it that, if the donee died without such particular heirs, the land should revert to the donor. Black L. Dict. See, generally, ESTATES.

Conditional legacy is one which is liable to take effect or to be defeated according to the occurrence or non-occurrence of some uncertain event. Black L. Dict. See, generally, WILLS.

Conditional limitation is a condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it. Black L. Dict. See, generally, ESTATES. A conditional limitation is where an estate is so expressly defined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. Between conditional limitations and estates depending on conditions subsequent there is this difference: that in the former the estate determines as soon as the contingency happens; but in the latter it endures until the grantor or his heirs take advantage of the breach. 1 Stephen Comm. 309, 310 [*quoted* in Black L. Dict.].

Conditional obligation, in the civil law, is one which is made to depend upon an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition. Moss *v.* Smoker, 2 La. Ann. 909, 991, where it is said: "It is certainly usual in agreements, as Domat has well said, for the parties to foresee accidents that may produce some change which they are willing to guard against; they therefore, said he, regulate what shall be done if those cases do happen." The Lousiana code defines conditional obligations as those which result from the operation of law, from the nature of the contract, or from the presumed intent of the parties. Moss *v.* Smoker, 2 La. Ann. 989, 991.

Conditional stipulation, in the civil law, is a stipulation to do a thing upon condition, as the happening of any event. Black L. Dict.

4. Black L. Dict.

5. As that a lessee shall pay £10 such a day, or his lease shall be void. Black L. Dict.

6. 1 Bouvier Inst. No. 752.

CONDITION COPULATIVE. A CONDITION (*q. v.*) to do divers things.[7]

CONDITION DISJUNCTIVE. A CONDITION (*q. v.*) requiring one of several things to be done.[8]

CONDITIONEM TESTIUM TUNC INSPICERE DEBEMUS CUM SIGNAREM, NON MORTIS TEMPORE. A mamim meaning "The condition of witnesses when they sign, and not when they die, is to be considered."[9]

CONDITIO NENINEM JUVABIT NISI QUI PARS FUERIT AUT PRIVUS. A maxim meaning "An agreement shall avail no one unless he shall have been a party or privy to it."[10]

CONDITIONES PRÆCEDENTAS AD NORMAM LEGIS SEVERE EXIGENDÆ; ALITER DE SUBSEQUENTIBUS UBI ÆQUITATI LICET DAMNUM REI INFECTÆ PENSARE. A maxim meaning "Preceding agreements must be rigorously exacted according to the rules of law; but it is otherwise concerning subsequent agreements, where equity is allowed to make up for the loss incurred by the failure."[11]

CONDITIONES QUÆLIBET ODIOSÆ; MAXIME AUTEM CONTRA MATRIMONIUM ET COMMERCIUM. A maxim meaning "Any conditions are odious, but especially those which are against [in restraint of] marriage and commerce."[12]

CONDITION EXPRESSED. A CONDITION (*q. v.*) annexed, by express words, to any feoffment, lease, or grant.[13] (See, generally, CONTRACTS; DEEDS; LANDLORD AND TENANT.)

CONDITION IMPLIED. A CONDITION (*q. v.*) which the law infers or presumes, from the nature of the transaction or the conduct of the parties, to have been tacitly understood between them as a part of the agreement, although not expressly mentioned.[14] (See, generally, CONTRACTS; DEEDS.)

CONDITION IN DEED. A CONDITION (*q. v.*) expressed in a deed, (as a feoffment, lease, or grant,) in plain words, or legal terms of law.[15] (See, generally, DEEDS; LANDLORD AND TENANT.)

CONDITION INHERENT. A CONDITION (*q. v.*) annexed to the rent reserved out of the land whereof the estate is made; or rather to the estate in the land, in respect of rent, etc.[16]

CONDITION IN LAW. A CONDITION (*q. v.*) tacitly created or annexed to a grant, by law, without any words used by the party.[17]

CONDITION NEGATIVE. A CONDITION (*q. v.*) which consists in not doing a thing; as provided that the lessee shall not alien, etc.[18]

CONDITION POSITIVE. A CONDITION (*q. v.*) which requires that an event shall happen or an act be done.[19]

CONDITION PRECEDENT. A CONDITION (*q. v.*) which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect.[20] (See CONDITION

7. Black L. Dict.
8. Black L. Dict.
9. Morgan Leg. Max.
10. Morgan Leg. Max.
11. Morgan Leg. Max.
12. Black L. Dict.
13. Black L. Dict.
14. Black L. Dict.
15. Black L. Dict.
16. Black L. Dict.
17. Black L. Dict.
18. Black L. Dict.
19. Black L. Dict.
20. Redman *v.* Ætna Ins. Co., 49 Wis. 431, 439, 4 N. W. 591.

A condition precedent doth get and gain the thing or estate made upon condition, by the performance of it; as a condition subsequent keeps and continues the estate by the performance of the condition. Jacob L. Dict. [*quoted* in Redman *v.* Ætna Ins. Co., 49 Wis. 431, 439, 4 N. W. 591].

Conditions may be precedent or subsequent. — In the former, the condition must be performed before the contract becomes absolute and obligatory upon the other party. In the latter, the breach of the conditions may destroy the party's rights under the contract, or may give a right to damages to the other party according to a true construction of the intention of the parties. Black L. Dict. [*citing* Ga. Code, § 2722].

Conditions have no idiom. — Whether they be precedent or subsequent is a question purely of intent; and the intention must be determined by considering not only the words

SUBSEQUENT. Condition Precedent: In General, see CONTRACTS; DEEDS; and the like. To Action or Proceeding, see ACTIONS; CONTRACTS; COUNTIES; COVENANTS; CUSTOMS DUTIES; EJECTMENT; EMINENT DOMAIN; EQUITY; EXECUTIONS; FALSE IMPRISONMENT; FORCIBLE ENTRY AND DETAINER; FRAUD; FRAUDULENT CONVEYANCES; GARNISHMENT; INJUNCTIONS; INTOXICATING LIQUORS; LANDLORD AND TENANT; LIBEL AND SLANDER; MALICIOUS PROSECUTION; MANDAMUS; MASTER AND SERVANT; MORTGAGES; PARTITION; PATENTS; PAYMENT; PENALTIES; QUIETING TITLE; QUO WARRANTO; RAILROADS; RECEIVERS; REPLEVIN; SALES; SPECIFIC PERFORMANCE; TAXATION; TELEGRAPHS AND TELEPHONES; TRADE-MARKS AND TRADE-NAMES; TRESPASS; TOWNS; TROVER AND CONVERSION; USURY; VENDOR AND PURCHASER; and like special titles.)

CONDITION RESTRICTIVE. A CONDITION (*q. v.*) for not doing a thing; as that the lessee shall not alien or do waste, or the like.[21]

CONDITIONS CONCURRENT. Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.[22]

CONDITION SINGLE. A CONDITION (*q. v.*) to do one thing only.[23]

CONDITIONS OF SALE. The terms upon which sales are made at auction; usually written or printed and exposed in the auction room at the time of sale.[24] (See, generally, AUCTIONS AND AUCTIONEERS.)

CONDITION SUBSEQUENT. A CONDITION (*q. v.*) which follows the performance of the contract, and operates to defeat and annul it upon the subsequent failure of either party to comply with the conditions.[25] (See CONDITION PRECEDENT; CONTRACTS.)

CONDITIO PRÆCEDENS ADIMPLERI DEBET PRIUS QUAM SEQUATUR EFFECTUS. A maxim meaning "A condition precedent must be fulfilled before the effect can follow."[26]

CONDOMINIA. In the civil law, co-ownerships or limited ownerships, such as *emphyteusis*, *superficies*, *pignus*, *hypotheca*, *ususfructus*, *usus*, and *habitatio*. These were more than mere *jura in re aliená*, being portion of the *dominium* itself, although they are commonly distinguished from the *dominium* strictly so called.[27]

CONDONACION. In Spanish law, the remission of a debt, either expressly or tacitly.[28]

CONDONARE. In old English law, to forgive; to remit.[29]

CONDONATION.[30] A pardon or forgiveness of a past wrong, fault, or deficiency which has occasioned a breach of some duty or obligation;[31] the forgiveness, either express or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, as adultery;[32] a remission or pardon of

of the particular clause, but also the language of the whole contract as well as the nature of the act required, and the subject-matter to which it relates. Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295, 299.

21. Black L. Dict.
22. Black L. Dict.
23. Black L. Dict.
24. Black L. Dict.
25. Story Contr. [*quoted* in Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574, 584].
26. Black L. Dict.
27. Black L. Dict.
28. Black L. Dict.
29. Burrill L. Dict.
30. **A strictly technical word.**—Dent v. Dent, 34 L. J. M. C. 118, 13 L. T. Rep. N. S. 252, 4 Sw. & Tr. 105, 107.

Essentially different from "connivance."—Turton *v.* Turton, 3 Hagg. Eccl. 338, 350.

"Condoned" is defined as follows: "Forgiveness by the husband of his wife, or by the wife of the husband, of acts committed, with the implied condition that the injury should not be repeated, and that the other party should be treated with conjugal kindness." Bouvier L. Dict. [*quoted* in Callen *v.* Callen, 44 Kan. 370, 373, 24 Pac. 360].

31. Leatherberry *v.* Odell, 7 Fed. 641, 648.
32. Webster Dict. [*quoted* in Sullivan *v.* Sullivan, 34 Ind. 368, 369].

It may be express, or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her. Beeby *v.* Beeby, 1 Hagg. Eccl. 789, 793.

"Condonation" is not an absolute term, which can be applied alike to all circumstances. Its application will vary as the offense said to have been condoned may vary. If the offense be adultery, then knowledge of the fact of the defendant, followed by co-

the offense;[33] forgiveness legally releasing the injury;[34] connubial intercourse with full knowledge of all the facts;[35] a blotting out of an offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed;[36] a conditional forgiveness,[37] founded on a full knowledge of all antecedent guilt,[38] with an implied condition that the offense shall not be repeated,[39] and that the other party shall thereafter be treated with conjugal kindness.[40] The term necessarily includes that operation of the mind, evinced by words or acts, known as forgiveness; the free, voluntary and full forgiveness and remission of a matrimonial offense.[41] (See, generally, ADULTERY; DIVORCE; HUSBAND AND WIFE.)

habitation, is *ipso facto* condonation. McClanahan *v.* McClanahan, 104 Tenn. 217, 228, 56 S. W. 858.

The intention of forgiving the offense must be shown. Ellis *v.* Ellis, (N. J. 1887) 9 Atl. 884, 887.

33. Delliber *v.* Delliber, 9 Conn. 233, 234; Pain *v.* Pain, 37 Mo. App. 110, 115 [*citing* 2 Bishop Marr. & Div. (6th ed.), § 33]; Johnson *v.* Johnson, 14 Wend. (N. Y.) 637, 642.

34. Beeby *v.* Beeby, 1 Hagg. Eccl. 789, 793 [*quoted* in Keats *v.* Keats, 5 Jur. N. S. 176, 28 L. J. M. C. 57, 1 Sw. & Tr. 334, 7 Wkly. Rep. 377].

It is a conclusion of fact, not of law. Stroud Jud. Dict. [*quoted* in Bavin *v.* Bavin, 27 Ont. 571, 579].

To found a legal condonation, there must be a complete knowledge of all the adulterous connection, and a condonation subsequent to it. Turton *v.* Turton, 3 Hagg. Eccl. 338, 351 [*citing* Durant *v.* Durant, 1 Hagg. Eccl. 733].

35. Campbell *v.* Campbell, Deane & S. 285, 288, 3 Jur. N. S. 845, 5 Wkly. Rep. 519 [*quoted* in Polson *v.* Polson, 140 Ind. 310, 313, 39 N. E. 498].

Is inferred from the fact of sexual intercourse after knowledge of guilt. Graham *v.* Graham, 50 N. J. Eq. 701, 706, 25 Atl. 358.

There can be no condonation which is not followed by "conjugal cohabitation." Keats *v.* Keats, 5 Jur. N. S. 176, 178, 28 L. J. M. C. 57, 1 Sw. & Tr. 334, 7 Wkly. Rep. 377 [*citing* Campbell *v.* Campbell, Deane & S. 285, 288, 3 Jur. N. S. 845, 5 Wkly. Rep. 519].

36. Keats *v.* Keats, 5 Jur. N. S. 176, 28 L. J. M. C. 57, 1 Sw. & Tr. 334, 346, 7 Wkly. Rep. 377, where it is said: "It is like releasing a debt; it makes the debt as if it had never existed."

It takes place where, after the injury, the parties have become reconciled, and have lived together, or cohabited as husband and wife. Phillips *v.* Phillips, 27 Wis. 252, 253.

37. Burr *v.* Burr, 10 Paige (N. Y.) 20, 24; Crichton *v.* Crichton, 73 Wis. 59, 64, 40 N. W. 638; Dent *v.* Dent, 34 L. J. M. C. 118, 13 L. T. Rep. N. S. 252, 4 Sw. & Tr. 105; Keats *v.* Keats, 5 Jur. N. S. 176, 177, 28 L. J. M. C. 57, 1 Sw. & Tr. 334, 7 Wkly. Rep. 377.

All condonations by operation of law are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional forgiveness. D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 781 [*quoted* in Bavin *v.* Bavin, 27 Ont. 571, 575]. But see Collins *v.* Collins, 9 App. Cas. 205, 32 Wkly. Rep. 500 [*quoted* in Bavin *v.* Bavin, 27 Ont. 571, 579], where it was held that by the law of Scotland full condonation of adultery (remission expressly or by implication, in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a *remissio injuriæ* absolute and unconditional.

38. Odom *v.* Odom, 36 Ga. 286, 318; Eggerth *v.* Eggerth, 15 Oreg. 626, 628, 16 Pac. 650; Bramwell *v.* Bramwell, 3 Hagg. Eccl. 618 [*quoted* in Odom *v.* Odom, 36 Ga. 286, 318].

39. Sullivan *v.* Sullivan, 34 Ind. 368, 369 [*quoting* Webster Dict.]; Heist *v.* Heist, 48 Nebr. 794, 796, 67 N. W. 790 (where it is said: "It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned"); Eggerth *v.* Eggerth, 15 Oreg. 626, 628, 16 Pac. 650; Bavin *v.* Bavin, 27 Ont. 571, 579 [*citing* Blandford *v.* Blandford, 52 L. J. P. 17, 48 L. T. Rep. N. S. 238, 8 P. D. 19, 31 Wkly. Rep. 508]; Aldrich *v.* Aldrich, 21 Ont. 447, 449.

40. *California.*—Andrews *v.* Andrews, 120 Cal. 184, 189, 52 Pac. 298.

Illinois.— Sharp *v.* Sharp, 116 Ill. 509, 517, 6 N. E. 15; Farnham *v.* Farnham, 73 Ill. 497, 500 [*citing* Davis *v.* Davis, 19 Ill. 334].

Indiana.— Sullivan *v.* Sullivan, 34 Ind. 368, 370 [*quoting* Bouvier L. Dict.].

Missouri.— Pain *v.* Pain, 37 Mo. App. 110, 115 [*citing* 2 Bishop Marr. & Div. (6th ed.), § 33].

Nebraska.—Heist *v.* Heist, 48 Nebr. 794, 797, 67 N. W. 790 [*citing* Farnham *v.* Farnham, 73 Ill. 497].

New York.— Burr *v.* Burr, 10 Paige (N. Y.) 20, 24.

Virginia.— Owens *v.* Owens, 96 Va. 191, 195, 31 S. E. 72 [*citing* 2 Bishop Marr. & Div. § 269].

Wisconsin.— Crichton *v.* Crichton, 73 Wis. 59, 64, 40 N. W. 638 [*citing* Phillips *v.* Phillips, 27 Wis. 252].

Canada.— Bavin *v.* Bavin, 27 Ont. 571, 581.

41. Betz *v.* Betz, 2 Rob. (N. Y.) 694, 696. And see Hope *v.* Hope, 4 Jur. N. S. 515, 517, 27 L. J. M. C. 43, 1 Sw. & Tr. 94, 6 Wkly. Rep. 585, where it is said: "As to condonation. it is reasonable to say that an offence

CONDONE. To make condonation of.[42]

CONDUCERE. In the civil law, to hire.[43]

CONDUCT. As a noun, personal deportment; mode of action, and behavior;[44] words, acts, silence, or negative omission to do anything.[45] As a verb, to carry on; to manage; to regulate.[46] (Conduct: Disorderly, see DISORDERLY CONDUCT. Estoppel by, see ESTOPPEL. Good, see PRISONS. Lewd, see LEWDNESS. Of Trial, see CRIMINAL LAW; TRIAL.)

CONDUCTI ACTIO. In the civil law, an action which the hirer (*conductor*) of a thing might have against the letter (*locator*).[47]

CONDUCTIO. In the civil law, a hiring.[48] (See, generally, BAILMENTS.)

CONDUCT MONEY. In English practice, money paid to a witness who has been subpœnaed on a trial, sufficient to defray the reasonable expenses of going to, staying at, and returning from the place of trial.[49]

CONDUCTOR. A director or manager in general.[50] In the civil law, a hirer.[51] (See, generally, CARRIERS; MASTER AND SERVANT.)

CONDUCTOR OPERARUM. In the civil law, a person who engages to perform a piece of work for another, at a stated price.[52]

CONDUCTUS. A thing hired.[53]

CONDUIT. A general word which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe, or any kind of aqueduct;[54] either a channel or a pipe.[55] (See, generally, DRAINS; MUNICIPAL CORPORATIONS; WATERS.)

CONFECTIO. The making and completion of a written instrument.[56]

CONFECTIONERY. A generic word, which includes a great variety of kinds of articles usually sold in a confectioner's shop;[57] a place where sweetmeats and similar things are made and sold.[58]

CONFEDERACY. In criminal law, where two or more combine together to do any damage or injury to another, or to do any unlawful act.[59] In equity pleading, an improper combination alleged to have been entered into between the defendants to a bill in equity.[60] In international law, a league or agreement between two or more independent states whereby they unite for their mutual welfare and the furtherance of their common aim.[61]

which has been blotted out by forgiveness shall not afterwards be made the subject-matter of accusation."

42. Black L. Dict.

43. Burrill L. Dict.

44. Adams *v.* Salina, 58 Kan. 246, 249, 48 Pac. 918.

45. Hallowell Nat. Bank *v.* Marston, 85 Me. 488, 494, 27 Atl. 529.

46. Worcester Dict. [*quoted* in Harvey *v.* Vandegrift, 89 Pa. St. 346, 352].

"Conducted."— Conduct of an election does not literally include a declaration of the result, but the word "conducted" in the local option law had a wider meaning, and in its application to a city was intended to embrace also a declaration of the result. Blake *v.* Walker, 23 S. C. 517.

47. Black L. Dict.

48. Used generally in connection with the term *locatio*, a letting. *Locatio et conductio*, (sometimes united as a compound word, "*locatio-conductio*,") a letting and hiring. Black L. Dict.

49. Black L. Dict.

50. Century Dict.

51. Black L. Dict.

52. Black L. Dict.

53. Black L. Dict.

54. Sefton *v.* Prentice, 103 Cal. 670, 673, 37 Pac. 641.

55. Cheyney *v.* Atlantic City Water Works Co., 55 N. J. L. 235, 237, 26 Atl. 95.

56. Black L. Dict. [*citing* Clayton's Case, 5 Coke 1].

57. Com. *v.* Chase, 125 Mass. 202, 203.

Distinguished from "chocolate."— Arthur *v.* Stephani, 96 U. S. 125, 128, 24 L. ed. 771.

58. Webster Dict. [*quoted* in New Orleans *v.* Jané, 34 La. Ann. 667, 668].

59. Jacob L. Dict. [*quoted* in Watson *v.* Harlem, etc., Nav. Co., 52 How. Pr. (N. Y.) 348, 353; State *v.* Crowley, 41 Wis. 271, 284, 22 Am. Rep. 719].

60. Black L. Dict.

61. The term may apply to a union so formed for a temporary or limited purpose, as in the case of an offensive and defensive alliance; but it is more commonly used to denote that species of political connection between two or more independent states by which a central government is created, invested with certain powers of sovereignty, (mostly external,) and acting upon the several component states as its units, which, however, retain their sovereign powers for domestic purposes and some others. Black L. Dict.

CONFEDERATE MONEY. An obligation or promise of the Confederate states to pay a certain number of dollars, therein mentioned, to bearer in a specified time after a treaty of peace between the Confederate states and the United States. It did not purport to be of any value unless the rebellion should prove to be a success.[62]

CONFEDERATION. A league or compact for mutual support, particularly of princes, nations, or states.[63]

CONFERENCE. A meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes. Thus, a meeting between a counsel and solicitor to advise on the cause of their client. In the practice of legislative bodies, when the two houses cannot agree upon a pending measure, each appoints a committee of "conference," and the committees meet and consult together for the purpose of removing differences, harmonizing conflicting views, and arranging a compromise which will be accepted by both houses.[64]

CONFESS. To admit the truth of a charge or accusation; usually spoken of charges of tortious or criminal conduct.[65] The word is ordinarily used to characterize the admission of personal sin or wrongdoing.[66]

CONFESSING ERROR. A plea to an assignment of error, admitting the same.[67]

CONFESSIO. A CONFESSION,[68] *q. v.*

CONFESSIO FACTA IN JUDICIO OMNI PROBATIONE MAJOR EST. A maxim meaning "A confession made in court is of greater effect than any proof."[69]

CONFESSIO FACTI. Admission of a fact.[70]

CONFESSIO JURIS. Admission of law — of the effect of a thing in law.[71]

CONFESSION.[72] The acknowledgment of some fact,[73] of a fault or wrong, or of an act or obligation adverse to one's reputation or interest;[74] an admission of something done antecedently.[75] At common law an admission of a cause of action.[76] In criminal law,[77] a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it;[78] the voluntary declaration made by a person who has committed a

62. Goodman *v.* McGehee, 31 Tex. 252, 254.

63. Black L. Dict.

64. Black L. Dict.

In international law, a personal meeting between the diplomatic agents of two or more powers, for the purpose of making statements and explanations that will obviate the delay and difficulty attending the more formal conduct of negotiations. Black L. Dict.

In French law, a concordance or identity between two laws or two systems of laws. Black L. Dict.

65. Black L. Dict.

66. Gallagher *v.* Bryant, 44 N. Y. App. Div. 527, 529, 60 N. Y. Suppl. 844.

67. Black L. Dict.

68. Black L. Dict.

Confessio in judicio, a confession made in or before a court. Black L. Dict.

69. Black L. Dict.

70. Anderson L. Dict.

71. Anderson L. Dict.

72. The word, both in its derivation and uses, is a plain one. It is an every-day sort of word, and is well understood. Hunter *v.* Eddy, 11 Mont. 251, 262, 28 Pac. 296.

73. Adams *v.* Tator, 57 Hun (N. Y.) 302, 304, 10 N. Y. Suppl. 617, 32 N. Y. St. 120.

74. Century Dict. [*quoted* in Hunter *v.* Eddy, 11 Mont. 251, 262, 28 Pac. 296].

75. Uhler *v.* Browning, 28 N. J. L. 79, 82.

76. Hackett *v.* Boston, etc., R. Co., 35 N. H. 390, 397.

77. Distinguished from the term "admissions" and "declarations" see People *v.* Miller, 122 Cal. 84, 87, 54 Pac. 523 [*citing* People *v.* Strong, 30 Cal. 151]; State *v.* Novak, 109 Iowa 717, 727, 79 N. W. 465. "In our law the term admission is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term confession being generally restricted to acknowledgments of guilt." Greenleaf Ev. § 170 [*quoted* in People *v.* Velarde, 59 Cal. 457, 462].

78. Black L. Dict. [*quoted* in Spicer *v.* Com., 21 Ky. L. Rep. 528, 529, 51 S. W. 802]. See also State *v.* Heidenreich, 29 Oreg. 381, 383, 45 Pac. 755, where it is said: "If a person charged with or suspected of the commission of a crime voluntarily admits to another his agency or participation therein with a criminal intent, such admission is denominated a 'confession.'"

Express confession is made where a person charged directly confesses the crime with

crime or misdemeanor, to another, of the agency or participation he had in the same;[79] a person's declaration of his agency or participation in a crime;[80] an acknowledgment of guilt;[81] the acknowledgment of a crime or fraud.[82] (Confession: As Evidence, see CRIMINAL LAW. Of Action, see JUDGMENTS. Of Judgment, see CONFESSION OF JUDGMENT.)

CONFESSION AND AVOIDANCE. A plea in confession and avoidance is one which avows and confesses the truth of the averments of fact in the declaration, either expressly or by implication, but then proceeds to allege new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them.[83] (See, generally, PLEADING.)

CONFESSION BY CULPRIT. The acknowledgment by a criminal of the offense charged against him when called upon to plead to the indictment. The criminal may confess the offense openly in court, and submit himself to the judgment of the law, so that the confession be of his own accord, without any threats or extremity used; and sometimes he confesses the indictment to be true, and then becomes an approver or accuser of others, who are guilty of the same offense for which he is indicted or of other offenses with him. There was a third sort of a confession, formerly made by an offender in felony, not in court before the judge, but before the coroner in a church or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the land.[84] (See CONFESSION; CRIMINAL LAW.)

CONFESSION OF DEFENSE. In English practice, where defendant alleges a ground of defense arising since the commencement of the action, the plaintiff may deliver confession of such defense and sign judgment for his costs up to the time of such pleading, unless it be otherwise ordered.[85]

CONFESSION OF JUDGMENT.[86] A voluntary submission to the jurisdiction of the court, giving by consent and without the service of process, what could other-

which he is charged. State *v.* Oxendine, 19 N. C. 435, 437.

Judicial or extrajudicial.— Judicial confessions are those made in conformity to law before the committing magistrate, or in court in due course of legal proceedings. Extrajudicial confessions are those which are made by a party elsewhere than before a magistrate or in court. State *v.* Lamb, 28 Mo. 218, 230; Speer *v.* State, 4 Tex. App. 474, 479 [*citing* 1 Greenleaf Ev. (6th ed.), § 216; Roscoe Crim. Ev. 37].

79. Bouvier L. Dict. [*quoted* in People *v.* Miller, 122 Cal. 84, 87, 54 Pac. 523; People *v.* Velarde, 59 Cal. 457, 461; People *v.* Parton, 49 Cal. 632, 637; People *v.* Strong, 30 Cal. 151, 157; State *v.* Jones, 33 Iowa 9, 11; Taylor *v.* State, 37 Nebr. 788, 796, 56 N. W. 623; People *v.* Mondon, 4 N. Y. Crim. 112, 122; State *v.* Mills, 91 N. C. 581, 597].

Not the mere equivalent of the words "statements" or "declarations." People *v.* Strong, 30 Cal. 151, 157 [*quoted* in People *v.* Miller, 122 Cal. 84, 87, 54 Pac. 523; People *v.* Velarde, 59 Cal. 457, 461].

Term does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred. State *v.* Reinhart, 26 Oreg. 466, 478, 38 Pac. 822 [*citing* People *v.* Strong, 30 Cal. 151; State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683; 1 Greenleaf Ev. § 170].

80. People *v.* Le Roy, 65 Cal. 613, 614, 4 Pac. 649; Johnson *v.* People, 197 Ill. 48, 51, 64 N. E. 286; State *v.* Novak, 109 Iowa 717, 727, 79 N. W. 465 (where it is said: "Inaccurate use of such words as 'confessions,' 'admissions,' and 'declarations' has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term 'confession'"); State *v.* Carson, 36 S. C. 524, 530, 15 S. E. 588.

81. Johnson *v.* People, 197 Ill. 48, 51, 64 N. E. 286 [*citing* 1 Greenleaf Ev. § 170].

The term is restricted to acknowledgment of guilt. 1 Greenleaf Ev. § 170 [*quoted* in People *v.* Miller, 122 Cal. 84, 87, 54 Pac. 523; People *v.* Le Roy, 65 Cal. 613, 614, 4 Pac. 649; People *v.* Parton, 49 Cal. 632, 637; Lee *v.* State, 102 Ga. 221, 225, 29 S. E. 264; State *v.* Heidenreich, 29 Oreg. 381, 383, 45 Pac. 755; State *v.* Reinhart, 26 Oreg. 466, 478, 38 Pac. 822]. See also State *v.* Carson, 36 S. C. 524, 530, 15 S. E. 588.

Must be so intended, for it must be voluntary. State *v.* Novak, 109 Iowa 717, 727, 79 N. W. 465.

82. Webster Dict. [*quoted* in State *v.* Jones, 33 Iowa 9, 11].

83. Black L. Dict.

84. Wharton L. Lex.

85. Black L. Dict.

86. The word has a popular, as well as a technical, signification. Kinyon *v.* Fowler, 10 Mich. 16, 18.

wise be obtained by summons and complaint, and other formal proceedings;[87] an acknowledgment of indebtedness, upon which it is contemplated that a judgment may and will be rendered;[88] a confession in writing.[89] (See, generally, JUDGMENTS.)

CONFESSO, BILL TAKEN PRO. In equity practice, an order which the court of chancery makes when the defendant does not file an answer, that the plaintiff may take such a decree as the case made by his bill warrants.[90] (See, generally, EQUITY.)

CONFESSOR. An ecclesiastic who receives auricular confessions of sins from persons under his spiritual charge, and pronounces absolution upon them.[91]

CONFESSORIA ACTIO. In the civil law, an action for enforcing a servitude.[92] (See, generally, EASEMENTS.)

CONFESSUS. One who has confessed.[93]

CONFESSUS IN JUDICIO PRO JUDICATO HABETUR, ET QUO DAMMODO SUA SENTENTIÆ DAMNATUR. A maxim meaning "A person confessing his guilt when arraigned is deemed to have been found guilty, and is, as it were, condemned by his own sentence."[94]

CONFIDENCE. Trust; reliance; ground of trust.[95] (See, generally, CONFIDENTIAL; TRUSTS; WILLS.)

CONFIDENCE GAME. Any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler.[96] (See, generally, FALSE PERSONATION; FALSE PRETENSES; GAMING.)

CONFIDENTIAL. Having or enjoying another's confidence; having private or secret relations with another; trusted; intimate; as a confidential clerk. Given or imparted as a secret or in confidence.[97] It has two elements, that of secrecy and that of trust and confidence.[98] (Confidential: Communication, see CONFIDENTIAL COMMUNICATIONS. Relation, see CONFIDENTIAL RELATION.)

CONFIDENTIAL COMMUNICATIONS. Certain classes of communications, passing between persons who stand in a confidential or fiduciary relation to each other, (or who, on account of their relative situation, are under a special duty of secrecy and fidelity,) which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society.[99] (See, generally, DISCOVERY; LIBEL AND SLANDER; WITNESSES.)

CONFIDENTIAL RELATION.[1] In law, a relation of parties in which one is

87. Canandaigua First Nat. Bank *v.* Garlinghouse, 53 Barb. (N. Y.) 615, 619.

88. Kinyon *v.* Fowler, 10 Mich. 16, 18.

89. So defined under Mont. Code Civ. Proc. § 465. Hunter *v.* Eddy, 11 Mont. 251, 262, 28 Pac. 296, per De Witt, J., in dissenting opinion.

"Confessed judgment" refer necessarily to those statutory provisions which require the action of the defendant to be evidenced by a written document. Hunter *v.* Eddy, 11 Mont. 251, 28 Pac. 296.

90. Black L. Dict.

91. Black L. Dict.

The secrets of the confessional are not privileged communications at common law, but this has been changed by statute in some states. Black L. Dict.

92. Black L. Dict.

93. Burrill L. Dict.

94. Black L. Dict. [*citing* Powlter's Case, 11 Coke 29*a*, 30, where it is said: "For in intendment of law he cannot (against his express and voluntary confession in Court) be innocent"].

95. Black L. Dict.

In the construction of wills, this word is considered peculiarly appropriate to create a trust. "It is as applicable to the subject of a trust, as nearly a synonyme as the English language is capable of. Trust is a confidence which one man reposes in another, and confidence is a trust." Black L. Dict. [*quoting* Coates' Appeal, 2 Pa. St. 129, 133].

96. Webster Inter. Dict. [*quoted* in Maxwell *v.* People, 158 Ill. 248, 256, 41 N. E. 995].

97. Standard Dict. [*quoted* in People *v.* Gardiner, 33 N. Y. App. Div. 204, 207, 53 N. Y. Suppl. 451].

98. People *v.* Palmer, 152 N. Y. 217, 220, 46 N. E. 328 [*quoted* in People *v.* Gardiner, 33 N. Y. App. Div. 204, 207, 53 N. Y. Suppl. 451].

99. Black L. Dict.

Examples of such privileged relations are those of husband and wife and attorney and client. Black L. Dict.

1. "Strictly confidential relation" means much more than the imposition of important duties, requiring the exercise of intelligence

bound to act for the benefit of the other and can take no advantage to himself from his acts relating to the interest of the other. Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another;[2] a peculiar relation which exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners.[3] (See, generally, ABSTRACTS OF TITLE; ATTORNEY AND CLIENT; CORPORATIONS; DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; FACTORS AND BROKERS; GUARDIAN AND WARD; LANDLORD AND TENANT; PARENT AND CHILD; PARTNERSHIP; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; TRUSTS; WILLS.)

CONFINED. Restrained within limits; imprisoned; secluded; close; narrow; mean; as, a confined mind.[4]

CONFINEMENT. The state of being confined; restraint within limits; any restraint of liberty by force or other obstacle or necessity. Hence, imprisonment.[5] (See, generally, PRISONS.)

CONFIRM.[6] To make firm or certain; to give new assurance of truth or certainty; to put past doubt.[7] The word sometimes means merely "verify"; it is commonly used in that sense at the meetings of public bodies, who confirm the minutes of their last meeting, not meaning thereby that they give them force, but merely that they declare them accurate.[8] (See CONFIRMATION.)

CONFIRMARE. In old English law and conveyancing, to CONFIRM, *q. v.*; to make firm, or strong; to give additional strength or validity.[9]

CONFIRMARE EST ID FIRMUM FACERE QUOD PRIUS INFIRMUM FUIT. A maxim meaning "To confirm is to make firm that which was before infirm."[10]

CONFIRMARE NEMO POTEST PRIUSQUAM JUS EI ACCIDERIT. A maxim meaning "No person can confirm before the right shall fall to him."[11]

CONFIRMATIO. The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged.[12]

CONFIRMATIO CHARTARUM. Confirmation of charters.[13]

or trained ability or integrity. It necessarily implies personal contact between the officer and his superior; where the officer occupying the position holds toward his superior a position of confidence and trust; where the person occupying the position has the power, in consequence of the relation that exists between himself and his superior, to impose upon the superior liabilities and obligations which the superior is bound by law to discharge. People *v.* Gardiner, 33 N. Y. App. Div. 204, 207, 53 N. Y. Suppl. 451.

"Confidential relation" and "fiduciary relation" seem to be used by the courts and law writers as convertible terms. Robbins *v.* Hope, 57 Cal. 493, 497.

2. Century Dict. [*quoted* in People *v.* Palmer, 152 N. Y. 217, 220, 46 N. E. 328; People *v.* Gardiner, 33 N. Y. App. Div. 204, 207, 53 N. Y. Suppl. 451].

3. Robins *v.* Hope, 57 Cal. 493, 497.

4. Century Dict.

"The words 'confined' in one act, and 'prohibited from running at large' in the other act, mean substantially the same thing." St. Louis, etc., R. Co. *v.* Mossman, 30 Kan. 336, 341, 2 Pac. 146 [*quoted* in Osborne *v.* Kimball, 41 Kan. 187, 189, 21 Pac. 163], construing Kan. Gen. Stat. (1868), c. 105, art. 1, and Kan. Laws (1874), c. 128.

5. Century Dict.

Confinement may be by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person. Black L. Dict. [*citing* U. S. *v.* Thompson, 1 Sumn. (U. S.) 168, 171, 28 Fed. Cas. No. 16,492].

6. "Establish" and "confirm" are used to translate one and the same word in the Greek and in the Hebrew. Davenport *v.* Caldwell, 10 S. C. 317, 339 [*quoting* Numbers, c. xxx, verses 13, 14].

7. Webster Dict. [*quoted* in Boggs *v.* Merced Min. Co., 14 Cal. 279, 306].

8. Reg. *v.* York, 1 E. & B. 588, 594, 17 Jur. 667, 22 L. J. M. C. 73, 1 Wkly. Rep. 149, 72 E. C. L. 588.

9. Burrill L. Dict.

10. Black L. Dict. [*citing* Coke Litt. 295].

11. Wharton L. Lex. [*citing* Lampet's Case, 10 Coke, 46*b*, 48, where it is said: "If a man quit claims his right before the right falls to him, the quit claim is void"].

12. Black L. Dict. [*citing* 2 Bl. Comm. 325; Sheppard Touch. 325].

13. Black L. Dict.

CONFIRMATIO CRESCENS. An enlarging CONFIRMATION, *q. v.*; one which enlarges a rightful estate.[14]

CONFIRMATIO DIMINUENS. A diminishing CONFIRMATION, *q. v.*; a CONFIRMATION (*q. v.*) which tends and serves to diminish and abridge the services whereby a tenant doth hold, operating as a release of part of the services.[15]

CONFIRMATIO EST NULLA UBI DONUM PRÆCEDENS EST INVALIDUM. A maxim meaning "Confirmation is void where the preceding gift is invalid."[16]

CONFIRMATIO EST POSSESSIONIS JURE DEFECTIVE PER EOS QUORUM JUS EST RATHABITIO. A maxim meaning "The confirmation of a possession defective in law is a ratification by means of those whose right it is."[17]

CONFIRMATION. A deed or act whereby that which is voidable is made sure and valid;[18] a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.[19] In English ecclesiastical law, the ratification by the archbishop of the election of a bishop by dean and chapter under the king's letter missive prior to the investment and consecration of the bishop by the archbishop.[20] (Confirmation: Of Assessment, see MUNICIPAL CORPORATIONS; TAXATION. Of Award, see ARBITRATION AND AWARD. Of Judicial Sale, see JUDICIAL SALES. Of Referee's Report, see REFERENCES. Of Sale — By Guardian, see GUARDIAN AND WARD; By Receiver, see RECEIVERS; By Trustee, see TRUSTS; In Bankruptcy Proceedings, see BANKRUPTCY; In Insolvency Proceedings, see INSOLVENCY; In Partition Proceedings, see PARTITION; Of Attached Property, see ATTACHMENTS; Of Decedent's Land, see EXECUTORS AND ADMINISTRATORS; On Execution, see EXECUTIONS; On Foreclosure, see CHATTEL MORTGAGES; MORTGAGES. Of Tax Title, see TAXATION. Of Title to Land — Generally, see QUIETING TITLE; RECORDS; As Basis For Adverse Possession, see ADVERSE POSSESSION.)

CONFIRMATIO OMNES SUPPLET DEFECTUS, LICET ID QUOD ACTUM EST AB INITIO NON VALUIT. A maxim meaning "Confirmation supplies all defects, though that which had been done was not valid at the beginning."[21]

CONFIRMATIO PERFICIENS. A CONFIRMATION (*q. v.*) which makes valid a wrongful and defeasible title, or makes a conditional estate absolute.[22]

CONFIRMAT USUM QUI TOLLIT ABUSUM. A maxim meaning "He confirms the use [of a thing] who removes the abuse, [of it]."[23]

CONFIRMAVI. I have confirmed.[24]

CONFIRMED. A word, the natural meaning of which is more than "indorsed" or "verified." It is equivalent to "approved."[25]

A statute passed in the 25 Edw. I, whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. Black L. Dict. [*citing* 1 Bl. Comm. 128].

14. Black L. Dict. [*citing* Sheppard Touch. 311].

15. Black L. Dict. [*citing* Sheppard Touch. 311].

16. Black L. Dict. [*citing* Gibons *v.* Marltiward, F. Moore 594; Coke Litt. 295].

17. Morgan Leg. Max.

18. Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306, 328.

19. Black L. Dict.

"Conveyance" is the generic term, of which confirmation is the species. Its operative words include those of a feoffment, which is also a species of a conveyance. Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 139, 2 Pac. 322.

Of a nature nearly allied to a release.— 2 Bl. Comm. 325.

20. Black L. Dict. [*citing* 25 Hen. VIII, c. 20]. See also Reg. *v.* Canterbury, 11 Q. B. 483, 12 Jur. 862, 17 L. J. Q. B. 252, 63 E. C. L. 483.

21. Wharton L. Lex. [*citing* Coke Litt. 295*b*].

22. Black L. Dict. [*citing* Sheppard Touch. 311].

23. Black L. Dict.

24. The emphatic word in the ancient deeds of confirmation. Burrill L. Dict.

25. Reg. *v.* York, 1 E. & B. 588, 596, 17 Jur. 667, 22 L. J. M. C. 73, 1 Wkly. Rep. 149, 72 E. C. L. 588.

Ratified and confirmed.— In Viterbo *v.* Friedlander, 120 U. S. 707, 737, 7 S. Ct. 962, 30 L. ed. 776 [*citing* U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 88, 89, 8 L. ed. 604] it is said: "Although the words 'shall be ratified

CONFIRMEE. The grantee in a deed of CONFIRMATION,[26] *q. v.*

CONFIRMOR. The grantor in a deed of CONFIRMATION,[27] *q. v.*

CONFISCARE. In civil and old English law, to CONFISCATE, *q. v.*; to claim for or bring into the fisc, or treasury.[28]

CONFISCATE.[29] To transfer property from private to public use; or to forfeit property to the prince, or state;[30] either an act of penal justice for the punishment of great crimes against the state, or the exercise of a belligerent right against the property of public enemies;[31] the act of the sovereign against a rebellious subject.[32] (See CONFISCATION.)

CONFISCATION. The act of confiscating; or of condemning and adjudging to the public treasury.[33] In international law, where a state seizes property belonging to another state, or to its subjects, and appropriates it. Confiscation is the punishment for carrying contraband of war; or for attempting to carry supplies to a place besieged or blockaded. Forfeiture as a punishment for smuggling, etc., is sometimes called confiscation.[34]

CONFISK. An old form of CONFISCATE,[35] *q. v.*

CONFITENS REUS. An accused person who admits his guilt.[36]

CONFLICT OF LAWS. An opposition, conflict, or antagonism between different laws of the same state or sovereignty upon the same subject-matter; a similar inconsistency between the municipal laws of different states or countries, arising in the case of persons who have acquired rights or a *status*, or made contracts, or

and confirmed' are properly the words of contract, stipulating for some future legislative Act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by the force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

26. Black L. Dict.

27. Black L. Dict.

28. Black L. Dict.

29. **From the Latin *con* with, and *fiscus* a** basket, or hamper, in which the emperor's treasure was formerly kept. Ware *v.* Hylton, 3 Dall. (Pa.) 199, 234, 1 L. ed. 568.

Derived from the Roman law, in which it imported actual deposit in the treasury. Burrill L. Dict.

30. Ware *v.* Hylton, 3 Dall. (Pa.) 199, 234, 1 L. ed. 568.

Formerly used as synonymous with "forfeit," but at present the distinction between the two terms is well marked. Confiscation supervenes upon forfeiture. The person, by his act, forfeits his property; the state thereupon appropriates it, that is, confiscates it. Hence, to confiscate property implies that it has first been forfeited; but to forfeit property does not necessarily imply that it will be confiscated. Black L. Dict.

Bona confiscata (confiscated goods), as they are called by the civilians, because they belong to the *fiscus* or imperial treasury; or, as our lawyers interpret them, *forisfacta;* that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this: that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. 1 Bl. Comm. 299.

31. The Globe, 10 Fed. Cas. No. 5,484, 3 Am. L. J. N. S. 337, 13 Law Rep. 488, 8 West. L. J. 241 [*citing* 4 Bl. Comm. 377; 1 Kent Comm. 61–66].

32. Winchester *v.* U. S., 14 Ct. Cl. 13, 48.

"Confiscation" is also to be distinguished from "condemnation" as prize. The former is the act of the sovereign against a rebellious subject; the latter is the act of a belligerent against another belligerent. Confiscation may be effected by such means, summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership. Black L. Dict. [*quoting* Winchester *v.* U. S., 14 Ct. Cl. 13, 48].

33. Black L. Dict.

34. Sweet L. Dict. (See, generally, ADVERSE POSSESSION; CONSTITUTIONAL LAW; EMINENT DOMAIN; FORFEITURES; WAR.)

35. Black L. Dict.

36. Black L. Dict.

incurred obligations, within the territory of two or more states; that branch of jurisprudence, arising from the diversity of the laws of different nations in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of a foreign country, (the acts or rights in question having arisen under it,) either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable to the case in point. In this sense, it is more properly called "private international law."[37] (Conflict of Laws: As to Administration, see EXECUTORS AND ADMINISTRATORS. As to Agency, see PRINCIPAL AND AGENT. As to Assignment, see ASSIGNMENTS. As to Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. As to Bill of Lading, see CARRIERS; SHIPPING. As to Bill or Note, see COMMERCIAL PAPER. As to Bond, see BONDS. As to Carrier, see CARRIERS; SHIPPING. As to Champerty and Maintenance, see CHAMPERTY AND MAINTENANCE. As to Charter-Party, see SHIPPING. As to Corporation, see CORPORATIONS. As to Commercial Paper, see COMMERCIAL PAPER. As to Contract Generally, see CONTRACTS. As to Covenant, see COVENANTS. As to Curtesy, see CURTESY. As to Death, see DEATH. As to Disabilities and Privileges of Coverture, see HUSBAND AND WIFE. As to Divorce, see DIVORCE. As to Dower, see DOWER. As to Evidence, see EVIDENCE. As to Exemption, see EXEMPTIONS. As to General Average, see SHIPPING. As to Guaranty, see GUARANTY. As to Guardianship, see GUARDIAN AND WARD. As to Homestead, see HOMESTEADS. As to Inheritance, see DESCENT AND DISTRIBUTION. As to Insurance, see INSURANCE; and the insurance titles. As to Interest, see INTEREST. As to Judgment, see JUDGMENTS. As to Jurisdiction, see COURTS. As to Landlord and Tenant, see LANDLORD AND TENANT. As to Liens, see LIENS; MECHANICS' LIENS. As to Marriage, see MARRIAGE. As to Master and Servant, see MASTER AND SERVANT. As to Mortgage, see CHATTEL MORTGAGES; MORTGAGES. As to Negotiable Instrument, see COMMERCIAL PAPER. As to Partnership, see PARTNERSHIP. As to Patent, see PATENTS. As to Perpetuity, see PERPETUITIES. As to Power, see POWERS. As to Property, see PROPERTY. As to Railroad, see RAILROADS. As to Sale, see CONTRACTS; SALES; VENDOR AND PURCHASER. As to Statute of Frauds, see FRAUDS, STATUTE OF. As to Statute of Limitations, see LIMITATIONS OF ACTIONS. As to Stock and Stock-Holders, see CORPORATIONS. As to Telegraph, see TELEGRAPHS AND TELEPHONES. As to Telephone, see TELEGRAPHS AND TELEPHONES. As to Tort Generally, see TORTS. As to Trust, see TRUSTS. As to Usury, see USURY. As to Will, see WILLS. See also like special titles.)

CONFORM. To make of the same form or character; make like; adjust; with "to": as to conform anything "to" a model or standard;[38] sometimes used in the sense of comply with, adopt.[39]

CONFORMITY. Correspondence in character or manner; resemblance;[40] agreement; congruity with something else.[41] In English ecclesiastical law, adherence to the doctrines and usages of the Church of England.[42]

CONFRAIRIE. In old English law, a fraternity, brotherhood, or society.[43]

CONFRERES. Brethren in a religious house; fellows of one and the same society.[44]

37. Black L. Dict.

38. Century Dict.

39. Ft. Worth, etc., R. Co. *v.* Masterson, 95 Tex. 262, 267, 66 S. W. 833, construing Tex. Rev. Stat. (1895), art. 5043*k*.

Not the equivalent of "identical," or of "the same." De Leonis *v.* Etchepare, 120 Cal. 407, 415, 52 Pac. 718.

40. Webster Dict. [*quoted* in De Leonis *v.* Etchepare, 120 Cal. 407, 415, 52 Pac. 718, where it is said: "This word is usually followed by 'to,' or 'with,' and is frequently qualified by the word 'perfect,' without which qualification identity is not indicated"].

41. Webster Dict. [*quoted* in De Leonis *v.* Etchepare, 120 Cal. 407, 415, 52 Pac. 718]. See also Eason *v.* Miller, 15 S. C. 194, 200, where it is said: "As applied to cases of this kind, its use was intended to convey the idea that the judgment should carry out the intent of the verdict."

42. Black L. Dict.

43. Black L. Dict.

44. Black L. Dict.

CONFRONT. To bring face to face;[45] to stand facing or in front of;[46] to face;[47] to stand in direct opposition; to oppose;[48] to sit face to face for examination and discovery of the truth;[49] to sit together for comparison; to compare.[50]

CONFRONTATION. In criminal law, the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify the accused.[51]

CONFUSIO. In the civil law, the inseparable intermixture of property belonging to different owners; it is properly confined to the pouring together of fluids, but is sometimes also used of a melting together of metals or any compound formed by the irrevocable commixture of different substances.[52] (See, generally, CONFUSION OF GOODS.)

CONFUSION. In Roman and French law, a mode of extinguishing a debt, by the concurrence in the same person of two qualities which mutually destroy one another; this may occur in several ways, as where the creditor becomes the heir of the debtor, or the debtor the heir of the creditor, or either accedes to the title of the other by any other mode of transfer.[53] As used in the civil law, it is synonymous with "merger" as used in the common law; it arises where two titles to the same property unite in the same person.[54] (Confusion: Of Boundaries, see CONFUSION OF BOUNDARIES. Of Debts, see CONFUSION OF DEBTS. Of Goods, see CONFUSION OF GOODS.)

CONFUSION OF BOUNDARIES. The title of that branch of equity jurisdiction which relates to the discovery and settlement of conflicting, disputed, or uncertain boundaries.[55] (See, generally, BOUNDARIES.)

CONFUSION OF DEBTS. The concurrence of two adverse rights to the same thing in one and the same person.[56]

45. Anderson L. Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

46. Webster Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

47. Anderson L. Dict.; Webster Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

48. Webster Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

49. Webster Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

50. Webster Dict. [*quoted* in State *v.* Mannion, 19 Utah 505, 511, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638].

51. Black L. Dict.

52. Black L. Dict. See also Treat *v.* Barber, 7 Conn. 274, 280 [*quoting* Wood Inst. 158, where it is said: "Confusion, as it is termed, is a mixture of liquids, as wine and wine, or wine and honey, or melted silver and gold"].

Distinguished from conmixtion by the fact that in the latter case a separation may be made, while in a case of *confusio* there cannot be. Black L. Dict.

The Roman law distinguishes between *conmixtio*, the blending together of dry goods, and *confusio*, the mingling of liquids. Spence *v.* Union Mar. Ins. Co., L. R. 3 C. P. 427, 431, 37 L. J. C. P. 169, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 1010 [*citing* Just. Inst. by Sandars, lib. II, tit. 1, §§ 27, 28; Mackeldey Jur. Rom. §§ 251, 252].

53. Black L. Dict.

54. Palmer *v.* Burnside, 1 Woods (U. S.) 179, 182, 18 Fed. Cas. No. 10,685, where it is said: "Article 2214 of the Civil Code provides that 'when the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the two credits.' So at the common law, A. owes B. B. makes A. his heir, the debt of A. is merged."

55. Black L. Dict.

56. Story Prom. Notes, § 439 [*quoted* in Woods *v.* Ridley, 11 Humphr. (Tenn.) 194, 198 (*quoting* Pothier Oblig., by Evans notes 607, 612), where it is said: "The reason given for the doctrine is, that a person cannot at the same time be both creditor and debtor. . . . In order to induce a confusion of the debt, the characters, not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person. Hence, if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction only take place in respect of the part, for which he is heir, and the demand continues to subsist against the others, as to the parts, for which they are respectively liable to the debts of the deceased"].

CONFUSION OF GOODS

By Frank E. Jennings

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CROSS-REFERENCES

For Matters Relating to:

Addition of Different Materials, see Accession.

Attachment of Commingled Goods, see Attachment.

Commingling of Funds, see Assignments For Benefit of Creditors; Banks and Banking; Trusts.

Community Property, see Husband and Wife.

Intermixture of Goods:

By Particular Persons, see Executors and Administrators; Factors and Brokers; Guardian and Ward; Principal and Agent; and the like.

In Warehouse, see Warehousemen.

Mortgaged, see Chattel Mortgages.

Part of Which Exempt, see Exemptions.

I. DEFINITION.

The intermixture of goods owned by different persons so that the property of each can no longer be distinguished is denominated a confusion of goods.[1]

1. Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627; Brakeley *v.* Tuttle, 3 W. Va. 86; 2 Bl. Comm. 405; Black L. Dict.

As for instance, a mixture of liquids, as wine and wine, or wine and honey, or melted silver and gold. Woods Inst. 158 [*cited* in Treat *v.* Barber, 7 Conn. 274, 280].

The doctrine is derived from the civil law. — Treat *v.* Barber, 7 Conn. 274.

What is not confusion. — It is not a mingling of goods to put potatoes into one end of a trench where potatoes belonging to another person are stored, separated therefrom by a partition of hay. Scott *v.* Schofield, 101 Iowa 15, 69 N. W. 1127. Nor is a confusion shown in a suit for the infringement of a patent, the only confusion being in the bookkeeping of the concern, and not a confusion of the articles themselves. In fact in such an instance it is perhaps impossible that the goods could be intermixed, as the identity of each could always be determined upon inspection. National Carbrake Shoe Co. *v.* Terre Haute Car, etc., Co., 19 Fed. 514. So too if one upon the accession of property in good faith adds property thereto and sells the same from time to time, but keeps the proceeds of each separate and distinctly ascertainable, there is no such confusion of goods as would make him chargeable with the value

II. DETERMINATION OF RIGHTS INVOLVED.

A. In General. In determining the relative rights of the parties after such an intermixture the courts have met with no little difficulty.[2] The civil law, although it gave the whole of the property to him who had not interfered in the mixture, allowed satisfaction to the other for what he had so improvidently lost.[3] On the other hand the common law, to guard against fraud, gave the entire property to him whose dominion was invaded without his consent.[4]

B. When Forfeiture May Be Claimed — 1. Commingling Must Be Fraudulent or Negligent. To invoke a forfeiture it is necessary to show that the mixing or confusing was done either through one's own negligence[5] or with a fraudulent or improper motive.[6]

2. Goods Must Be Incapable of Identification. Forfeitures not being favored

of the property at the time he obtained it. Armstrong *v.* McAlpin, 18 Ohio St. 184. And see Leonard *v.* Belknap, 47 Vt. 602.

2. The court of Massachusetts, in the well-considered case of Ryder *v.* Hathaway, 21 Pick. (Mass.) 298, 304, say: "Few subjects in the law are less familiar, or more obscure, than that which relates to the confusion of property. If different parcels of chattels, not capable of being identified, owned by different persons, get mixed, how are they to be severed? What are the relative rights of the different owners. Take, for example, grain or liquor. Can each one of the former owners take from the common mass his proportion, or do they become tenants in common of the whole? If one takes the whole, what shall be the remedy of the other? Will trespass lie?"

3. Bryant *v.* Ware, 30 Me. 295 [*citing* Ward *v.* Ayre, Cro. Jac. 366; Browne Civ. L. 243; 2 Kent Comm. 363, 364]; 2 Inst. c. 1, § 28 [*cited* in 2 Bl. Comm. 406]. But see Ryder *v.* Hathaway, 21 Pick. (Mass.) 298, 305, where the rule is evidently misstated by Morton, J.

4. Fellowes *v.* Mitchell, 2 Vern. 515 [*citing* Bullock *v.* Dibler, Popham 38; Hungerford *v.* Haviland, 2 Bulstr. 323]; Lupton *v.* White, 15 Ves. Jr. 432, 440, 10 Rev. Rep. 94 [*citing* Panton *v.* Panton]; 2 Bl. Comm. 406; 1 Hale P. C. 513.

5. In Wells *v.* Batts, 112 N. C. 283, 291, 17 S. E. 417, 34 Am. St. Rep. 506, a woman allowed her husband before his death, and after his death an administrator, to confuse crops so that it was impossible to tell which crop was grown upon her land and which upon that of her husband. In discussing this case the court say: "It is true that this was done by her 'tacit' consent only, but it was the result at least of her neglect to see that the crops were not intermixed. She had the control of her lands and the crops thereon, and it was her duty to have kept the crops distinct from the husband's if she intended to insist upon her legal right to the same. . . . We must infer that by permitting she at least knew of the intermixing and did not object, and this would be 'neglect' within the principle of the authority cited." See also Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

6. *Arkansas.*— Hart *v.* Morton, 44 Ark. 447.

Florida.— Wright *v.* Skinner, 34 Fla. 453, 16 So. 335.

Iowa.— Thome *v.* Colton, 27 Iowa 425, the confusion having been honestly made.

Kentucky.— Weil *v.* Silverstone, 6 Bush (Ky.) 698.

Maine.— Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627; Wingate *v.* Smith, 20 Me. 287.

Massachusetts.— Ryder *v.* Hathaway, 21 Pick. (Mass.) 298, 305, where it was said: "There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbour's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust, that he should lose his own, or be obliged to take his neighbour's."

Minnesota.— Stone *v.* Quaal, 36 Minn. 46, 29 N. W. 326.

Missouri.— Davis *v.* Krum, 12 Mo. App. 279; Franklin *v.* Gumersell, 9 Mo. App. 84.

Texas.— Brown *v.* Bacon, 63 Tex. 595 [*citing* Colwill *v.* Reeves, 2 Campb. 575].

United States.— Hentz *v.* The Idaho, 93 U. S. 575, 23 L. ed. 978.

England.— Spence *v.* Union Mar. Ins. Co., L. R. 3 C. P. 427 437, 37 L. J. C. P. 169, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 1010, the court saying: "It has been long settled in our law, that, where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner: but no authority has been cited to show that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners."

See 10 Cent. Dig. tit. "Confusion of Goods," § 4.

Fraud where goods are of equal value see *infra*, note 16.

by the law, this common-law doctrine will not be carried further than the necessities of the case require.[7] Hence while the law casts upon the wrong-doer the burden of protecting his own rights it will not invoke a forfeiture if the identity of the goods is not destroyed and they can be distinguished by the owners.[8] Where, however, the party who does the commingling cannot distinguish and separate his own goods from the others,[9] as where one indiscriminately intermixes lumber sawed from another's logs with his own,[10] mixes his own grain with that of another,[11] places old iron fraudulently acquired on other heaps of old iron belonging to him,[12] purposely intermixes his own with another's bales of cotton,[13] wilfully places his brand on another's cattle, intermingling them with his own,[14] or in any other way wrongfully changes or destroys the identity of the goods[15] he will be held to forfeit his own.

3. Goods Must Be of Unequal Value. Applying the principles of the common law which are adopted and applied in this country it would seem just and equitable that a forfeiture should not be declared unless the goods are of unequal

Fraud where goods can be identified see *infra*, note 8.

7. Keweenaw Assoc. *v.* O'Neil, 120 Mich. 270, 79 N. W. 183; Denver First Nat. Bank *v.* Scott, 36 Nebr. 607, 54 N. W. 987; Brown *v.* Bacon, 63 Tex. 595; Claflin *v.* Beaver, 55 Fed. 576. And see 2 Kent Comm. 363.

8. *Alabama.*—Alley *v.* Adams, 44 Ala. 609.

Connecticut.— Capron *v.* Porter, 43 Conn. 383; Baldwin *v.* Porter, 12 Conn. 473.

Georgia.— Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721 [*citing* Colwill *v.* Reeves, 2 Camph. 575].

Iowa.— Goodenow *v.* Snyder, 3 Greene (Iowa) 599. See also Thome *v.* Colton, 27 Iowa 425.

Louisiana.— See Jurey *v.* Hord, 25 La. Ann. 465.

Massachusetts.— Smith *v.* Sanborn, 6 Gray (Mass.) 134.

New Hampshire.— Moore *v.* Bowman, 47 N. H. 494.

New Jersey.— Jewett *v.* Dringer, 30 N. J. Eq. 291.

New York.— Frost *v.* Willard, 9 Barb. (N. Y.) 440.

North Carolina.— Queen *v.* Wernwag, 97 N. C. 383, 2 S. E. 657.

Texas.— Brown *v.* Bacon, 63 Tex. 595.

Vermont.— Holbrook *v.* Hyde, 1 Vt. 286.

United States.— See Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167.

See 10 Cent. Dig. tit. "Confusion of Goods," §§ 3, 6.

Fraudulent intent.— And this limitation has been applied even though the act of mixing was done with a fraudulent intent (Claflin *v.* Beaver, 55 Fed. 576. *Compare dicta* in Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167), as with intent to hinder and delay creditors (Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906).

9. Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62. Hence where it appeared that a party caused certain logs to be marked in the same manner as those of a certain pile already cut and to be mixed with such pile, he was not entitled to a verdict for a proportional part of the whole number of logs thus piled together; but it was held that he must identify the logs that he cut to be entitled to maintain an action. Dillingham *v.* Smith, 30 Me. 370.

10. Wingate *v.* Smith, 20 Me. 287; Root *v.* Bonnema, 22 Wis. 539; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

11. Samson *v.* Rose, 65 N. Y. 411.

12. Jewett *v.* Dringer, 30 N. J. Eq. 291.

13. Hentz *v.* The Idaho, 93 U. S. 575, 23 L. ed. 978.

14. Johnson *v.* Hocker, (Tex. Civ. App. 1897) 39 S. W. 406.

15. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

Illinois.— Beach *v.* Schmultz, 20 Ill. 185.

Massachusetts.— Willard *v.* Rice, 11 Metc. (Mass.) 493, 45 Am. Dec. 226.

Michigan.— Stephenson *v.* Little, 10 Mich. 433.

New Hampshire.— Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

Texas.— And if from the evidence it would be impossible to distinguish the property of the relative owners, after confusion, the onus being on the wrong-doer to distinguish the innocent party's property, an instruction which authorizes the jury under such facts to determine "approximately" the property owned by each would be error. Johnson *v.* Hocker, (Tex. Civ. App. 1897) 39 S. W. 406.

United States.— Williams *v.* Morrison, 28 Fed. 872.

See 10 Cent. Dig. tit. "Confusion of Goods," § 7 *et seq.*

Further illustrations.— Where a mining corporation works a claim in which it has a minority interest against the will of the majority interest and mingles with the gold extracted therefrom a portion of gold from its own claim without the consent of the other party, and the quantity and value of such portion is unknown (Hawkins *v.* Spokane Hydraulic Min. Co., (Ida. 1893) 33 Pac. 40), or where the secretary of a corporation buys a set of books with his own money and enters in them the records of the company (State *v.* Goll, 32 N. J. L. 285),

value, but that justice would be done by allowing each party to take his proportion or share; and this is the view usually taken by the courts.[16] The wronged party would, however, have a right to the possession of the entire aggregate, leaving the wrong-doer to identify his own, if he can, or to demand his proportional part.[17]

4. Application to Third Parties — a. In General. The rule of forfeiture is of strict application between the parties to the transaction, and if the interest of third parties intervene will not apply if protection can be otherwise given to the innocent owner.[18] Thus where the owner of goods fraudulently intermixes them

the whole in each case will go to the innocent party.

16. *California.*— Butte Canal, etc., Co. *v.* Vaughn, 11 Cal. 143, 70 Am. Dec. 769, where the doctrine was applied to waters which were commingled in the process of irrigation.

Maine.— Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627.

Massachusetts.— Ryder *v.* Hathaway, 21 Pick. (Mass.) 298.

Michigan.—Keweenaw Assoc. *v.* O'Neil, 120 Mich. 210, 79 N. W. 183.

Minnesota.— Osborne *v.* Cargill Elevator Co., 62 Minn. 400, 64 N. W. 1135; Stone *v.* Quaal, 36 Minn. 46, 29 N. W. 326. And see Chandler *v.* De Graff, 25 Minn. 88.

New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698; Moore *v.* Bowman, 47 N. H. 494; Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233; Gilman *v.* Hill, 36 N. H. 311.

Pennsylvania.— And see Wood *v.* Fales, 1 Phila. (Pa.) 499, 11 Leg. Int. (Pa.) 102, which seems to be governed by the rule of the text.

United States.— Hentz *v.* The Idaho, 93 U. S. 575, 8 Nat. Bankr. Reg. 214, 23 L. ed. 978; Adams *v.* Meyers, 1 Sawy. (U. S.) 306, 1 Fed. Cas. No. 62.

England.— Lupton *v.* White, 15 Ves. Jr. 432, 442, 10 Rev. Rep. 94, where the court summing up the law of the old cases, say: "If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell, what was the original value of his property, he must have the whole."

See 10 Cent. Dig. tit. "Confusion of Goods," § 8.

For other cases where the doctrine of the text is noticed see Brackenridge *v.* Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Wilkinson *v.* Stewart, 85 Pa. St. 255; Story Bailm. § 40. See also Cooley Torts 53, 54, the learned author saying: "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrong-doer the whole, when to restore to the other his proportion would do him full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but also because it would compel the other party to pay not damages but a penalty."

Fraudulent or negligent confusion.— This rule applies even, it is held, although the confusing was in fact fraudulently or negligently done. Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627; Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233. And see Adams *v.* Meyers, 1 Sawy. (U. S.) 306, 1 Fed. Cas. No. 62, 8 Nat. Bankr. Reg. 214.

17. Hentz *v.* The Idaho, 93 U. S. 575, 23 L. ed. 978. And "if he has such right, it follows that he is not responsible to the party wrongfully intermingling, for any damage or loss of such property, unless wilfully done or occasioned by himself. It can scarcely be claimed that he stands in a less favorable position than that of a tenant in common towards his co-tenant, so far as this question of liability is concerned." Martin, C. J., in Stephenson *v.* Little, 10 Mich. 433, 449.

18. National Park Bank *v.* Goddard, 9 Misc. (N. Y.) 626, 30 N. Y. Suppl. 417, 62 N. Y. St. 207. See Foster *v.* Warner, 49 Mich. 641, 14 N. W. 673, where the owner of logs in contracting to sell them to a shingle manufacturer retained the title thereto until they should be fully paid for and also reserved the right to seize the shingles manufactured from them, if the manufacturer failed to perform the conditions of his contract. The manufacturer mingled these shingles with others, treated them all as his own property, and sold them to *bona fide* purchasers. It was held that a *bona fide* purchaser could recover against the owner of the logs if he seized any shingles sold to them which had not been manufactured from his own timber. But see Bryant *v.* Ware, 30 Me. 295 (where it is said that if the property could not be distinguished, the original owner had clearly a right to take possession of the whole, even if he may be held to account to the *bona fide* purchaser for a portion of it); Hesseltine *v.* Stockwell, 30 Me. 237, 50 Am. Dec. 627; Blodgett *v.* Seals, 78 Miss. 522, 29 So. 852 (where there are *dicta* to the effect that the admixture might have been of such a character that the whole lot of logs, including those in the possession of the innocent purchaser, might have become the property of the original owner).

But one having constructive notice of a bill of sale is not in law an innocent purchaser and the doctrine of confusion if applicable

with those of a debtor in such manner that they cannot be distinguished,[19] buys goods, knowing that the sale is in fraud of creditors, and mingles them with his own,[20] or after setting apart certain property for his creditor mixes other property with it,[21] the creditor will have recourse against the whole mass for the amount of his claim. A confusion alone would, however, give a mere stranger no interest in the mass.[22]

b. Mortgagees.[23] The lien of a chattel mortgage is not impaired by a commingling of the goods mortgaged with other goods without the knowledge of the mortgagee,[24] or by the sale of such commingled property to a third party with notice.[25] It is incumbent upon the wrong-doer or his assignee to separate such goods from the unencumbered.[26]

C. Where Intermixture Was Unintentional or by Consent. A forfeiture of one's property not being enforced against him unless the commingling was fraudulent,[27] where the goods are intermingled with the consent of the owners or by inevitable accident they have an interest in common in proportion to their respective shares.[28] Where the confusion occurs, either partly, or perhaps wholly,

will operate in favor of the real owner. Kreuzer *v.* Cooney, 45 Md. 582.

19. *Alabama.* — Lanier *v.* Montgomery Branch Bank, 18 Ala. 625.

Connecticut.— Treat *v.* Barber, 7 Conn. 274 [*citing* Gordon *v.* Jenney, 16 Mass. 465; Hungerford *v.* Haviland, 2 Bulstr. 323; Ward *v.* Ayre, Cro. Jac. 366; 2 Rolle Abr. 566].

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Illinois.— Reiss *v.* Hanchett, 141 Ill. 419, 31 N. E. 165.

Kentucky.— Weil *v.* Silverstone, 6 Bush (Ky.) 698. And see Carter *v.* Carpenter, 7 Bush (Ky.) 257.

See 10 Cent. Dig. tit. "Confusion of Goods," § 12.

Where a creditor commingles goods which a debtor has turned over to him, under an agreement that when a sufficient amount thereof has been sold to pay the debts due him, the balance would be returned, with his own goods so as to destroy their identity, he will be held to have elected to pay the debtor the invoice price of the goods less the amount of the debt. Williams *v.* Geiger, 12 Wash. 42, 40 Pac. 616.

20. Eldridge *v.* Fidelity, etc., Co., (Tex. Civ. App. 1901) 63 S. W. 955; Bergson *v.* Dunham, (Tex. Civ. App. 1897) 40 S. W. 17; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219. And see Blotcky *v.* Caplan, 91 Iowa 352, 59 N. W. 204.

Limitation.— It seems, however, that the mere intermingling by a purchaser, with his other goods, of those sold to him in fraud of the seller's creditors, does not entitle the creditors of the seller to take the purchaser's whole stock of goods as the seller's property, without requesting the purchaser to point out the portion of the goods held under such sale. Smith *v.* Sanborn, 6 Gray (Mass.) 134. See also Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

21. Huff *v.* Earl, 3 Ind. 306. To similar effect see Ashmead *v.* Borie, 10 Pa. St. 154.

22. Hence if a miner allowed the tailings from his mine to mingle with the tailings belonging to other miners, a mere stranger would have no right, unless abandonment could be shown, to the whole mass. Jones *v.* Jackson, 9 Cal. 237.

23. **Confusion of mortgaged goods** see, generally, CHATTEL MORTGAGES, XIII [7 Cyc. 35].

24. Edelhoff *v.* Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314.

Where two herds of cattle, upon which there are two separate mortgages, become so intermixed and branded, without the fault of either of the mortgagees that the property of each of them cannot be distinguished, the mortgagees become in effect tenants in common of the entire property and their rights may be determined under a statute providing for the partitioning of personal property. Belcher *v.* Cassidy Bros. Live Stock Commission Co., (Tex. Civ. App. 1901) 62 S. W. 924.

25. Adams *v.* Wildes, 107 Mass. 123; Willard *v.* Rice, 11 Metc. (Mass.) 493, 45 Am. Dec. 226; Horne *v.* Hanson, 68 N. H. 201, 44 Atl. 292.

26. Elgin First Nat. Bank *v.* Kilbourne, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174; Stuart *v.* Phelps, 39 Iowa 14; Horne *v.* Hanson, 68 N. H. 201, 44 Atl. 292.

In the absence of such separation the mortgagee does not become a trespasser by reason of having taken part of the unencumbered with his own (Fuller *v.* Paige, 26 Ill. 358, 79 Am. Dec. 379); nor, it has been held, would he be liable for a conversion of the unencumbered goods thus taken before a demand is made upon him for their value (Gibson *v.* McIntire, 110 Iowa 417, 81 N. W. 699).

27. See *supra*, II, B, 1. And see Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

28. *Illinois.*— Low *v.* Martin, 18 Ill. 286.

Maine.— Tufts *v.* McClintock, 28 Me. 424, 48 Am. Dec. 501.

Michigan.— Keweenaw Assoc. *v.* O'Neil, 120 Mich. 270, 79 N. W. 183.

New Jersey.— Van Liew *v.* Van Liew, 36 N. J. Eq. 637.

New York.— Moore *v.* Erie R. Co., 7 Lans.

through the mistake or inadvertence of one, but with no bad faith or fraudulent motive, the courts, while they do not declare them tenants in common, will make an equitable apportionment of the whole, and as nearly as possible allow each that amount which his goods bore to the whole mass.[29]

III. PROCEEDINGS TO RECLAIM COMMINGLED PROPERTY.

A. In General. Parties whose goods have become commingled with others may follow and reclaim their respective shares and take possession of the same

(N. Y.) 39 (holding that where wood of different owners is mingled by a freshet the owners become tenants in common); Nowlen *v.* Colt, 6 Hill (N. Y.) 461, 41 Am. Dec. 756.

Texas.— Brown *v.* Bacon, 63 Tex. 595.

United States.— Adams *v.* Meyers, 1 Sawy. (U. S.) 306, 1 Fed. Cas. No. 62, 8 Nat. Bankr. Reg. 214. And see U. S. *v.* Norris, 44 Fed. 740 [*citing* La. Rev. Civ. Code, art. 528].

England.— Spence *v.* Union Mar. Ins. Co., L. R. 3 C. P. 427, 37 L. J. C. P. 169, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 1010 [*citing* Buckley *v.* Gross, 3 B. & S. 566, 9 Jur. N. S. 986, 32 L. J. Q. B. 129, 7 L. T. Rep. N. S. 743, 11 Wkly. Rep. 465, 113 E. C. L. 566]; Jones *v.* Moore, 4 Y. & C. 351, the latter case holding that where oil which leaked out of the casks in the course of shipment was collected it would belong to the original owners as tenants in common. And see 2 Bl. Comm. 405 [*citing* Jefferson *v.* Small, 1 Vern. 217; Inst. 2, c. 1, §§ 27, 28].

See 10 Cent. Dig. tit. "Confusion of Goods," § 9 *et seq.*

This is the rule of the Roman law as stated in Mackeldey's Modern Civil Law, under the title Commixtio et Confusio. . . . In the English edition of 1845, at p. 285, the passage is as follows: — 'The mixing together of things solid or dry (*commixtio*) or of things liquid (*confusio*) which belong to different owners, has no effect upon their rights in the things, if the latter can be separated. If, on the other hand, such separation is not practicable, then the former proprietors of the things now connected will be joint owners of the whole, whenever the mixture has been made with the consent of both parties, or by accident.'" Spence *v.* Union Mar. Ins. Co., L. R. 3 C. P. 427, 438, 37 L. J. C. P. 169, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 1010.

29. *Maine.*— Martin *v.* Mason, 78 Me. 452, 7 Atl. 11.

Michigan.— Gates *v.* Rifle Boom Co., 70 Mich. 309, 38 N. W. 245.

Minnesota.— Stone *v.* Quaal, 36 Minn. 46, 29 N. W. 326.

Missouri.— Kaufmann *v.* Schilling, 58 Mo. 218.

Nebraska.— Denver First Nat. Bank *v.* Scott, 36 Nebr. 607, 54 N. W. 987.

New Hampshire.— Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

Ohio.— Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Grossman *v.* Wenham, 10 Ohio Cir. Ct. 348.

United States.— Cheesman *v.* Shreeve, 40 Fed. 787; U. S. *v.* Two Hundred & Seventy-eight Barrels Distilled Spirits, 3 Cliff. (U. S.) 261, 20 Fed. Cas. No. 16,580, 10 Int. Rev. Rec. 164, 16 Pittsb. Leg. J. 250 [*affirmed* in 11 Wall. (U. S.) 356, 20 L. ed. 167]. And see Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551.

See 10 Cent. Dig. tit. "Confusion of Goods," § 9 *et seq.*

Illustrations.— Thus where a seller delivered corn to a buyer to be paid for on delivery and it was thrown into a heap with corn belonging to the buyer but was not paid for the intermixture will not preclude the seller from being paid for the corn which he delivered. Henderson *v.* Lauck, 21 Pa. St. 359. So where plaintiff delivered more ties to defendant than his contract called for, but so intermixed the excess with those accepted that they could not be distinguished defendant is entitled to use from the mass his proportionate share. Chandler *v.* De Graff, 25 Minn. 88. And where fowls mingle with those of a neighbor, the owner has a right to his own, and the offer by the neighbor to deliver those he may select up to a certain number, but which is less than the number he claims and is, from the evidence offered by him, probably entitled to, will not satisfy that right. Leonard *v.* Belknap, 47 Vt. 602.

Every reasonable doubt will, however, be resolved in favor of the party who was in no way concerned in the intermingling. The party at whose instance the commingling was done will in no sense be given the benefit of the doubt, even though the commingling was not done in bad faith. Osborne *v.* Cargill Elevator Co., 62 Minn. 400, 64 N. W. 1135.

The rule applies to public corporations as well as private individuals. Hence where a deficit occurred during the term of office of the treasurer of a county, who was also treasurer of the township and the school district, and who had intermingled the various funds, such funds so mingled belong to the various corporations *pro rata*, and the county is liable in equity to account to the other corporations for their proportionate share, if it appropriates the whole amount remaining after the deficit. Clark County *v.* Springfield, 36 Ohio St. 643.

wherever they can find them,[30] if they can do so peaceably; or they may bring actions for the value of their proportional shares against the person in possession.[31]

B. Identification and Demand. In an action to recover the value of one's proportionate share of goods confused by another it is not necessary to identify the precise article or the exact property formerly owned;[32] but if the action is in behalf of the one at whose instance or through whose negligence the confusion occurred, or if such party objects to the amount taken or claimed by the innocent party, it is incumbent upon him to distinguish or identify his own property.[33] So too it is held that if a party in reclaiming his property in good faith actually takes more than his share the other party can maintain no action against him until after a demand for the excess has been made;[34] although it seems that if the confusion occurred without the fault of either party and one in the division of the mass take an undue amount, it is unnecessary on the part of the other to maintain an action therefor to make a special demand.[35]

30. See Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120.

Charge for storage.— If one of the owners seizes the whole mass, claiming entire ownership, and refuses to deliver any portion to the other party he will not be allowed to charge storage on such goods not owned by him, it being subsequently shown that the other claimant was in fact entitled to a portion of the mass and that the confusing was not done fraudulently. Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788.

31. U. S. *v.* Two Hundred & Seventy-eight Barrels Distilled Spirits, 3 Cliff. (U. S.) 261, 20 Fed. Cas. No. 16,580, 10 Int. Rev. Rec. 164, 16 Pittsb. Leg. J. 250 [*affirmed* in 11 Wall. (U. S.) 356, 20 L. ed. 167]. And see Pratt *v.* Bryant, 20 Vt. 333, where a party believing that there was a contract between himself and defendant for the delivery of a quantity of wood placed such wood upon the premises of defendant, where it was so intermingled with other wood belonging to the latter that it could not be distinguished. It subsequently developed that no contract in fact existed, and defendant warned plaintiff that in taking such wood away he must be careful not to take any which did not belong to him. The wood being intermingled, plaintiff was unable to select his wood from the mass, and did not take any away. It was held that defendant would be liable in trover if he used the wood by mistake or refused to allow plaintiff to take it away, or in assumpsit if he sold the p operty, but that book-account could not be sustained.

32. *Illinois.*— Elgin First Nat. Bank *v.* Kilbourne, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174.

Kentucky.— Reid *v.* King, 89 Ky. 388, 12 S. W. 772.

Mississippi.— Peterson *v.* Polk, 67 Miss. 163, 6 So. 615.

New York.— Wilson *v.* Nason, 4 Bosw. (N. Y.) 155.

Wisconsin.— Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426; Starke *v.* Paine, 85 Wis. 633, 55 N. W. 185; Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681; Eldred *v.* Oconto Co., 33 Wis. 133; Stearns *v.* Raymond, 26 Wis. 74.

See 10 Cent. Dig. tit. "Confusion of Goods," § 14.

33. *Florida.*— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Illinois.— Diversey *v.* Johnson, 93 Ill. 547.

Maine.— Dillingham *v.* Smith, 30 Me. 370; Loomis *v.* Green, 7 Me. 386.

Missouri.— Franklin *v.* Gumersell, 9 Mo. App. 84.

New Hampshire.— Seavy *v.* Dearborn, 19 N. H. 351.

New Jersey.— James *v.* Burnet, 20 N. J. L. 635.

Pennsylvania.— McDowell *v.* Rissell, 37 Pa. St. 164.

Texas.— Johnson *v.* Hocker, (Tex. Civ. App. 1897) 39 S. W. 406.

England.— Panton *v.* Panton [*cited* in Lupton *v.* White, 15 Ves. Jr. 432, 440, 10 Rev. Rep. 94].

See 10 Cent. Dig. tit. "Confusion of Goods," § 14.

Merely a rule of evidence.— The rule as to the confusion of goods is merely a rule of evidence. The burden is thrown upon the wrong-doer of pointing out his own goods, and if this cannot be done, of bearing the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator, that is to say against one who wrongfully destroys or suppresses evidence. Holloway Seed Co. *v.* Dallas City Nat. Bank, 92 Tex. 187, 47 S. W. 95, 516 [*reversing* (Tex. Civ. App. 1898) 47 S. W. 77]. Thus where a party has intermingled wheat with his own in such a way that the exact amount cannot be shown, he is bound to prove the true quantity belonging to the other party or stand the loss or the risk of mistake in the calculation of the jury, resulting from the confusion of such goods. Starr *v.* Winegar, 3 Hun (N. Y.) 491.

34. Smith *v.* Morrill, 56 Me. 566; Chandler *v.* De Graff, 25 Minn. 88; Smith *v.* Welch, 10 Wis. 91.

35. Martin *v.* Mason, 78 Me. 452, 7 Atl. 11. In this case a lot of logs owned by two

C. Measure of Damages. If the party whose goods have been confused elects to sue for damages in their stead, or if the confusion or disposition of the goods is such that their specific recovery would be impossible, the amount awarded him will be the utmost that the value of the goods will permit.[36]

D. Questions For Jury. The question as to the existence of bad faith on the part of the intermixer of goods is one of fact and should be submitted to the jury.[37]

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person.[1]

CONFUSION OF TITLES. A civil law expression, synonymous with "merger," as used in the common law, applying where two titles to the same property unite in the same person.[2]

CONGEABLE. Lawful; permissible; allowable.[3]

CONGÉ D'EMPARLER. Leave to imparl.[4]

CONGENITAL IDIOTCY. Idiotcy which arises from a malformation of the cerebral organ.[5]

CONGREGATE. The joint action or co-operation of two or more persons, and is usually applicable to the coming together of a considerable number of persons.[6]

CONGREGATION.[7] The act of congregating; the act of bringing together or assembling; aggregation.[8] In ecclesiastical affairs, an assemblage or union of persons in society for some religious purpose, to unite in the public worship of

parties, being of the same mark and quality, became intermixed before their arrival at defendant's mill without the fault of either party. It was held that each party was entitled to his logs, or in the absence of any distinguishing mark to his proportional part of the whole lumber, and if one used or converted to his own use more than his proportional part he would be liable without special demand having been made for the excess.

36. Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250; Starr *v.* Winegar, 3 Hun (N. Y.) 491; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Rokeby *v.* Elliot, L. R. 13 Ch. D. 277; Bullock *v.* Dibler, Popham 38 [*cited* in Starr *v.* Winegar, 3 Hun (N. Y.) 491]; Panton *v.* Panton [*cited* in Lupton *v.* White, 15 Ves. Jr. 432, 440, 10 Rev. Rep. 94]; Armory *v.* Delamirie, 1 Str. 505; Lupton *v.* White, 15 Ves. Jr. 432, 10 Rev. Rep. 94. And see Atty.-Gen. *v.* Fullerton, 2 Ves. & B. 263, 13 Rev. Rep. 76. And see the analogous cases of Little Pittsburg Consol. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226; Preston *v.* Leighton, 6 Md. 88; Clark *v.* Miller, 4 Wend. (N. Y.) 628; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

37. Lanier *v.* Montgomery Branch Bank, 18 Ala. 625; Johnson *v.* Ballou, 25 Mich. 460; Taylor *v.* Jones, 42 N. H. 25. Thus in an action to recover the value of goods illegally taken by creditors, with some belonging to them on a rescission of sale, and mingled with their own, the court held that the case would fall within the operation of the principle that where a person mingles his goods with those of another and is unable to distinguish them, the loss must fall upon him, and submitted to the jury the mere question of the value of the whole amount taken. It was held that the court should have submitted the question of whether the goods were mixed wilfully, fraudulently, or wrongfully, for if they were mixed innocently or by mistake the relative rights of the interested parties would be different. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

1. Black L. Dict. [*citing* Wankford *v.* Wankford, 1 Salk. 299, 306].

2. Black L. Dict. [*citing* Palmer *v.* Burnside, 1 Woods (U. S.) 179, 182, 18 Fed. Cas. No. 10,685].

3. Black L. Dict. [*quoting* Coke Litt. § 279]. And see Ricard *v.* Williams, 7 Wheat. (U. S.) 59, 107, 5 L. ed. 398.

4. Black L. Dict. [*citing* 3 Bl. Comm. 299].

5. Stinson *v.* Bowlware, 3 McCord (S. C.) 251, 252 [*quoting* 1 Paris and Fonblanque 308].

6. Powell *v.* State, 62 Ind. 531, 532.

7. **The term has perhaps no settled legal signification.** Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95.

An appellation given to the protestants in Scotland in 1559, from their union. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95.

The term is used in the penal laws of England against disturbing public worship; particularly those to protect the worship of protestant dissenters. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 96.

Usually denominated a poll parish, in some of the neighboring states. Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 301, 24 Am. Dec. 223.

8. Century Dict.

their God, in such manner as they deem most acceptable to him;[9] an assembly met, or a body of persons who usually meet in some stated place for the worship of God and religious instruction; and may or may not include a church or spiritual body;[10] a voluntary association of individuals or families, united for the purpose of having a common place to worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc.[11] The term is also used to designate certain bureaus at Rome, where ecclesiastical matters are attended to.[12] (Congregation: In General, see RELIGIOUS SOCIETIES. Disturbance of, see DISTURBANCE OF PUBLIC MEETINGS.)

CONGREGATIONAL. Of, or pertaining to, a congregation.[13]

CONGREGATIONAL CHURCH. A body of persons, members of a congregational or other religious society, established for the promotion and support of public worship, which body was set apart from the rest of the society, for peculiar religious observances, for the celebration of the Lord's supper, and for mutual edification.[14]

CONGREGATIONALISM. That mode of church government which maintains the independence of separate churches;[15] that system of church government which vests all ecclesiastical power in the assembled brotherhood of each local church as an independent body.[16]

9. Runkel *v.* Winemiller, 4 Harr. & M. (Md.) 429, 452, 1 Am. Dec. 411. And see Powell *v.* State, 62 Ind. 531, 532.

Is composed of all — non-communicants as well as communicants — who contribute steadily to the support of divine worship in the particular church (Everett *v.* First Presby. Church, 53 N. J. Eq. 500, 506, 32 Atl. 747), and consists of a minister, elders, members, (by which word communicants are understood,) and seat-holders (Leslie *v.* Birnie, 2 Russ. 114, 119, 26 Rev. Rep. 14, 3 Eng. Ch. 114, where it is said: "In one sense 'congregation' might be construed as composed of all who met together at the chapel; in a more limited sense, it might mean the members only"). But see Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 141, where it is said: "The 'congregation,' mentioned in the deed, was understood to be composed wholly of persons in full communion; and it did not then, as the term is now generally understood, include all those who attended divine service." Again in State *v.* Crowell, 9 N. J. L. 390, 423, it is said: "A congretion evidently consists of two kinds of members; one possessing the right to vote and the others not." *Compare* People *v.* Watseka Camp Meeting Assoc., 160 Ill. 576, 579, 43 N. E. 716, construing the words "owned by the congregation," as used in a statute where the court said: "It can scarcely be claimed that the people who annually assemble in these grounds for worship constitute a congregation, within the meaning of the statute."

When it terminates. — In State *v.* Jones, 53 Mo. 486, 489, it is said: "After the minister in charge dismisses his congregation, it then ceases to be a congregation met for religious worship." See also Com. *v.* Jennings, 3 Gratt. (Va.) 595, 597.

10. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95 [*affirmed* in part in 11 N. Y. 243].

11. Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 301, 24 Am. Dec. 223.

12. Black L. Dict.

13. Webster Int. Dict. And see Atty.-Gen. *v.* Dublin, 38 N. H. 459, 551, where it is said: "It is not one of the terms, like 'evangelical' or 'liberal,' which have acquired a peculiar and conventional meaning in the usage of a particular religious sect or party."

14. Weld *v.* May, 9 Cush. (Mass.) 181, 184. See also Anderson *v.* Brock, 3 Me. 243, 247 (where a congregation is defined to be "a voluntary association of Christians united for discipline and worship, connected with, and forming a part of some religious society, having a legal existence"); Hale *v.* Everett, 53 N. H. 9, 83, 16 Am. Rep. 82 [*quoting* Weld *v.* May, 9 Cush. (Mass.) 181, where the term is defined as "an aggregate body or association — not a corporation or *quasi*-corporation — formed within the religious society or parish"].

"The general meaning of the terms, Congregational minister, Congregational church, Congregational denomination, and Congregational persuasion, is not matter of fact, to be proved by the testimony of witnesses, but matter of law, to be determined by the court. They are not terms of art, used only in some particular trade or business, and understood by those only who are engaged in that trade or business, but general terms, in common use by all people, to designate a well known denomination of Christians, whenever there is occasion to speak of them." Atty.-Gen. *v.* Dublin, 38 N. H. 459, 513. See, generally, RELIGIOUS SOCIETIES.

15. Worcester Dict. [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 542].

16. Webster Dict. [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 513. See, generally, RELIGIOUS SOCIETIES.

CONGREGATIONALIST.[17] One who adheres to Congregationalism;[18] one who holds to the independence of each congregation or church of Christians, and the right of the assembled brethren to elect their own pastors and determine all ecclesiastical matters.[19]

CONGREGATIONAL PERSUASION. A term which has manifestly the same meaning as "Congregational denomination," and includes Unitarians as well as Trinitarians.[20]

CONGREGATIONAL SOCIETY. Is generally made up first of the church, and next of those who worship with the church and favor the same views, and who assist in supporting the preaching and public worship of that church.[21]

CONGRESS. See UNITED STATES.

CONJOINT USE. A use in the same machine or apparatus.[22]

CONJUDEX. In old English law, an associate judge.[23]

CONJUGAL RIGHTS. See HUSBAND AND WIFE.

CONJUNCTIM. In old English law, jointly.[24]

CONJUNCTIM ET DIVISIM. In old English law, jointly and severally.[25]

CONJUNCTIO MARITI ET FEMINÆ EST DE JURE NATURÆ. A maxim meaning "The union of husband and wife is of the law of nature."[26]

CONJUNCTIVE. A grammatical term for particles which serve for joining or connecting together. Thus, the conjunction "and" is called a "conjunctive," and "or" a "disjunctive," conjunction.[27]

CONJUNCTIVE OBLIGATION. One in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract.[28]

CONJURATION.[29] The act of using certain words or ceremonies to obtain the aid of a superior being, the act of summoning in a sacred name, the practice of arts to expel evil spirits, allay storms or perform supernatural or extraordinary acts.[30]

17. "**Congregationalists** are said 'to be a denomination of Protestants, who maintain that each particular church has authority from Christ for exercising church government, and enjoying the ordinances of worship within itself.'" Adams Dict. All Religions 60 [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 542], where it is also said: "They are divided into Calvinists of the old school, a large number of Hopkinsians, Arminians, Unitarians of different grades, etc."

Congregationalists are a class of Protestants who hold that each congregation of Christians, meeting in one place, and uniting by a solemn covenant, is a complete church, with Christ for its only head, and deriving from him the right to choose its own officers, to observe the sacrament, to have public worship, and to discipline its own members. The Bible is the only standard by which to test heresy; the churches are not bound by any one creed, but each church makes its own, and alters it at pleasure. All that synods and churches have done has been to set forth the prevailing belief of the churches at the time when they were held. Encyclopedia Religious Knowledge [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 542].

18. Worcester Dict. [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 542].

19. Webster Dict. [*quoted* in Atty.-Gen. *v.* Dublin, 38 N. H. 459, 541].

20. Atty.-Gen. *v.* Dublin, 38 N. H. 459, 514, where it is also said that the court must take the responsibility of deciding as a matter of law the general meaning of the term "minister of the Congregational persuasion," as used in a will. See, generally, RELIGIOUS SOCIETIES.

21. Hale *v.* Everett, 53 N. H. 9, 83, 16 Am. Rep. 82, where it is said: "The society, as such, often, perhaps generally, has no creed or published religious opinions distinct from the church; the church is the basis or foundation of the whole. This is true in the Congregational societies in this country generally, whether orthodox or Unitarian. See, generally, RELIGIOUS SOCIETIES.

22. Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 833, 834.

23. Black L. Dict.

24. Black L. Dict. [*citing* Inst. 2, 8, 20].

25. Black L. Dict.

26. Black L. Dict.

27. Black L. Dict.

28. La. Civ. Code (1900), art. 2063.

29. Classed by Blackstone with witchcraft, enchantment, and sorcery, but distinguished from each of these by other writers. 4 Bl. Comm. 60.

As consideration of note see COMMERCIAL PAPER.

30. Webster Dict. [*quoted* in Cooper *v.* Livingston, 19 Fla. 684, 694, where conjuration is also said to be: "A plot or compact

CONJURATOR. A COMPURGATOR,[31] *q. v.*

CONJURER. One who practices conjuration; one who pretends to the secret art of performing things supernatural or extraordinary by the aid of superior powers; an impostor who pretends by unknown means, etc.[32]

CONNECT.[33] A word which, taken literally, must mean to tie together, to be joined or united.[34]

CONNECTED.[35] Any relation, whether organic or conventional, by which one is "linked" or "united" to another.[36]

CONNECTING CARRIERS. See CARRIERS.

CONNECTIONS.[37] Relations by blood or marriage, but more commonly the relations of a person with whom one is connected by marriage.[38] The term also means the act of connecting with some means of carriage or forming a junction with such means.[39] (Connections: Between Railroads, see RAILROADS.)

CONNEXION. A word of two meanings — either a criminal connection, or an innocent connection.[40]

CONNIVANCE.[41] A figurative expression, meaning voluntary blindness to some present act or conduct, to something going on before the eyes, and is inapplicable to anything past or future;[42] an agreement or consent, directly or indirectly

made by persons combining by oath to do any public harm, was more especially used for the having personal influence with the devil or some evil spirit, to know any secret or effect any purpose"].

31. Black L. Dict.

32. Webster Dict. [*quoted* in Cooper *v.* Livingston, 19 Fla. 684, 694]. And see Tomlin L. Dict. [*quoted* in Cooper *v.* Livingston, 19 Fla. 684, 694], defining conjurors as "Those who, by force of certain magic words, endeavor to raise the devil and oblige him to execute their commands."

33. "The Latin particle *con*, when used as a prefix, signifies union or association; as concourse — a running together; and when placed before the verb *necto*, which means to tie, we have the root of our English word connect." Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20, 59.

34. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20, 59, where it is said: "Perhaps the most perfect illustration of the meaning of this word is derived from the process of knitting, where the union of parts becomes very intimate."

"Connect," etymologically considered, implies a closer union than can be made of railroad tracks of different gauges. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20, 59.

When limited to mechanical union.—Where a right was granted "to connect with the road hereby provided for," it was said: "But the word 'connect,' as here used, was not supposed to mean anything more than a mechanical union of the tracks, is apparent from" the circumstances. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291.

35. The word may have a broad signification. The connection may be slight or intimate, remote or near, and where the line shall he drawn it may be difficult sometimes to determine. Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552, 556 [*quoted* in Lapham *v.* Osborne, 20 Nev. 168, 174, 18 Pac. 881; Siebecht *v.* Siegel-Cooper Co., 38 N. Y. App. Div. 549, 551, 56 N. Y. Suppl. 425; Rothschild *v.* Whitman, 57 Hun (N. Y.) 135, 137, 10 N. Y. Suppl. 427, 32 N. Y. St. 560].

36. Allison *v.* Smith, 16 Mich. 405, 433.

"Connected with or used in the business of the employer" cannot be taken literally, but when used in connection with ways, works, and machinery must be understood to mean ways, works, and machinery connected with or used in the business of the employer by his authority, and subject to his control. Trask *v.* Old Colony R. Co., 156 Mass. 298, 31 N. E. 6.

37. Simple and clear in its meaning. Schroeder *v.* Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467, 478, 44 Am. Rep. 61.

As used in a will the term may have a larger signification than "relatives." Ennis *v.* Pentz, 3 Bradf. Surr. (N. Y.) 382, 385.

38. Black L. Dict. See also Storer *v.* Wheatley, 1 Pa. St. 506, 507.

39. Webster Dict.; Worcester Dict. [*quoted* in Schroeder *v.* Schweiser Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467, 478, 44 Am. Rep. 61].

Where it applies to surface tracks it means an actual physical connection with such tracks. Or, in other words, where there is to be a connection with surface tracks, the commission shall extend the entrance to the subway far enough to reach surface tracks. Browne *v.* Turner, 174 Mass. 150, 161, 54 N. E. 510.

40. Bramwell *v.* Bramwell, 3 Hagg. Eccl. 618, 628.

41. "Passive sufferance" and "connivance" imply knowledge, and if the acts suffered were without remonstrance, it would be assent although perhaps not choice. Sherwood *v.* Titman, 55 Pa. St. 77, 81.

42. Gipps *v.* Gipps, 11 H. L. Cas. 1, 14, 10 Jur. N. S. 641, 33 L. J. P. & M. 161, 10 L. T. Rep. N. S. 735, 4 New Rep. 303, 12 Wkly. Rep. 937.

given, that something unlawful shall be done by another;[43] consent;[44] passive consent;[45] voluntary oversight;[46] the corrupt consenting of a married party to that conduct of the other of which afterward complaint is made.[47] (See COLLUSION; CONDONATION.)

CONNOISSEMENT. In French law, an instrument similar to the English bill of lading.[48]

CONQUEROR. In old English and Scotch law, the first purchaser of an estate; he who brought it into the family owning it.[49]

CONQUEST.[50] In feudal law, acquisition by purchase; any method of acquiring the ownership of an estate other than by descent. Also an estate acquired otherwise than by inheritance.[51] In international law,[52] the acquisition of the sovereignty of a country by force of arms, exercised by an independent power

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offense has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted. Turton *v.* Turton, 3 Hagg. Eccl. 338, 350.

43. Oakland Bank *v.* Wilcox, 60 Cal. 126, 137.

Connivance excuses on the principle of *volenti non fit injuria.* To constitute it there must be corrupt intention. Ross *v.* Ross, L. R. 1 P. & D. 734, 736, 38 L. J. P. & M. 49, 20 L. T. Rep. N. S. 853; Gipps *v.* Gipps, 11 H. L. Cas. 1, 14, 10 Jur. N. S. 641, 33 L. J. P. & M. 161, 10 L. T. Rep. N. S. 735, 4 New Rep. 303, 12 Wkly. Rep. 937 [*citing* Phillips *v.* Phillips, 10 Jur. 829, 1 Rob. Eccl. 144; Glennie *v.* Glennie, 8 Jur. N. S. 1158, 32 L. J. P. & M. 17, 11 Wkly. Rep. 28].

44. Ross *v.* Ross, L. R. 1 P. & D. 734, 735, 38 L. J. P. & M. 49, 20 L. T. Rep. N. S. 853.

45. Webster Int. Dict. [*quoted* in State *v.* Gesell, 124 Mo. 531, 536, 27 S. W. 1101].

46. Webster Int. Dict. [*quoted* in State *v.* Gesell, 124 Mo. 531, 536, 27 S. W. 1101].

Is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. Gipps *v.* Gipps, 11 H. L. Cas. 1, 14, 10 Jur. N. S. 641, 33 L. J. P. & M. 161, 10 L. T. Rep. N. S. 735, 4 New Rep. 303, 12 Wkly. Rep. 937.

47. Dennis *v.* Dennis, 68 Conn. 186, 194, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

"Connivance is a thing of the intent resting in the mind. It is the consenting." Dennis *v.* Dennis, 68 Conn. 186, 194, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449 [*citing* Pierce *v.* Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; Ross *v.* Ross, L. R. 1 P. & D. 734, 38 L. J. P. & M. 49, 20 L. T. Rep. N. S. 853].

48. Black L. Dict. And see Stearine Kaarsen Fabrick Gonda Co. *v.* Heintzmann, 17 C. B. N. S. 56, 69, 112 E. C. L. 56 [*citing* Code de Commerce, tit. 7, Du Connaissement, art. 281], where it is said: "The appropriate general word to express a receipt or admission, and comprehending a mate's receipt, is 'reconnaissance;' but the word 'connaissement' has a well-known restricted and peculiar meaning. 'Reconnaissance is the genus; 'connaissement' the species. 'Connaissement,' not only in popular French, but in French law, is said to mean bill of lading."

49. Black L. Dict.

Blackstone's definition.—"What we call purchase, *perquisitio*, the feudists called *conquest, conquæstus,* or *conquisitio:* both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland: as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or conquereur. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successor's charters, and by the historians of the times, entitled *conquæstus,* and himself *conquæstor,* or *conquisitor;* signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived." 2 Bl. Comm. 242, 243. See, generally, ESTATES.

50. "Title by conquest," expresses, therefore, a fact and not a right. Until the fact of conquest occurs, the conqueror can have no rights. To affirm that a title acquired by conquest relates back to a period anterior to the conquest is almost a contradiction in terms. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

51. Black L. Dict.

52. Black L. Dict.

Conquest of England.— Summing up the result of the conquest of England by William I, Blackstone observes "that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites.

which reduces the vanquished to the submission of its empire. In Scotch law purchase.[53] (See, generally, Citizens; War.)

Conquets. See Acquets and Conquets.

Conquisitio. Acquisition,[54] *q. v.*

Conquisitor. In feudal law, a purchaser, acquirer, or conqueror.[55]

Consanguineus.[56] A person related by blood; a person descended from the same common stock.[57]

Consanguineus est quasi eodem sanguine natus. A maxim meaning "A person related by consanguinity is, as it were, sprung from the same blood."[58]

Consanguinity.[59] Blood relationship;[60] the having the blood of some common ancestor;[61] the connection or relation of persons descended from the same stock or common ancestor, *vinculum personarum ab eodem stipite descendentium;*[62] the basis of the laws which regulate the degrees between which marriage is forbidden; the rules of succession and tutorship, the recusation of judges, and the admission or rejection of persons who are offered as witnesses.[63] (Consanguinity: Affecting — Capacity to Marry, see Marriage; Credibility of Witness, see Witnesses; Right to Inherit, see Descent and Distribution. As Element of Incest, see Incest. Causing Disqualification — Of Judge, see Judges; Of Juror, see Juries; Of Justice of the Peace, see Justices of the Peace.)

Conscience.[64] Internal or self-knowledge, or judgment of right and wrong, or the faculty, power or principle within us, which decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them;[65] that moral sense, which dictates to a person right and wrong.[66] (Conscience: Freedom of, see Constitutional Law. Scruples of Juror Against Capital Punishment, see Juries.)

A supposition grounded upon a mistaken sense of the word conquest; which, in its feudal acceptation, signifies no more than acquisition; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, will be found to be most untrue." 2 Bl. Comm. 48.

Conquests in war are, by the best authorities amongst elementary writers on national law, and according to the modern practice of nations, considered only as temporary possessions, held by force, and subject to be defeated by recapture, or by the peace. U. S. *v.* The Nancy, 3 Wash. (U. S.) 281, 287, 27 Fed. Cas. No. 15,854.

53. Black L. Dict.

54. Black L. Dict. [*citing* 2 Bl. Comm. 242].

55. Black L. Dict. [*citing* 2 Bl. Comm. 242, 243].

56. Latin: *consanguineus*, related by the same blood; in Roman law *consanguinei* — brothers and sisters descended from the same father, as opposed to *uterini* — brothers and sisters descended from the same mother. Sweet L. Dict.

57. Black L. Dict.

58. Black L. Dict. [*citing* Coke Litt. 157].

59. Consanguinity may be either lineal or collateral.— Willis Coal, etc., Co. *v.* Grizzell, 198 Ill. 313, 65 N. E. 74 [*citing* Bouvier L. Dict.]; Brown *v.* Baraboo, 90 Wis. 151, 154, 62 N. W. 921, 30 L. R. A. 320. See also Collateral Consanguinity; Lineal Consanguinity.

Distinguished from "affinity."—See Higbie *v.* Leonard, 1 Den. (N. Y.) 186, 187 [*quoted* in Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549]; Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331, 333; 2 Stephen Comm. [*quoted* in Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549]. See also Affinity, 2 Cyc. 38, note 8.

How determined.— In determining the degrees of relationship by consanguinity or affinity, like in determining the descent of property, we must proceed from a single, definite *propositus*. In the descent of property the *propositus* is the ancestor or person from whom the descent is reckoned. In consanguinity it is a single, definite person; and in affinity it is a single, definite marriage. Tegarden *v.* Phillips, 14 Ind. App. 27, 42 N. E. 549.

60. Tepper *v.* Supreme Council Royal Arcanum, 59 N. J. Eq. 321, 45 Atl. 111; 1 Bl. Comm. 434.

61. Blodget *v.* Brinsmaid, 9 Vt. 25, 30.

62. Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495, 498 [*citing* Toller 87].

63. Bernard *v.* Vignaud, 10 Mart. (La.) 482, 561.

64. Distinguished from principle in People *v.* Stewart, 7 Cal. 140, 144.

65. Webster Dict. [*quoted* in People *v.* Stewart, 7 Cal. 141, 144].

66. Miller *v.* Miller, 187 Pa. St. 572, 583, 41 Atl. 277, where it is said: "True, this sense differs in degree in individual members of society; but no reasonable being, whether controlled by it or not in his conduct, is wholly destitute of it. Greatly enlightened it is in some, by reason of superior education; quickened in others, because of settled religious belief in future accountability; dulled

CONSCIENCE, COURTS OF. Courts, not of record, constituted by act of parliament in the city of London, and other towns, for the recovery of small debts; otherwise and more commonly called "Courts of Requests."[67]

CONSCIENTIA LEGALIS E LEGE FUNDATUR. A maxim meaning "Legal conscience is founded upon the law."[68]

CONSCIENTIA LEGI NUNQUAM CONTRAVENIT. A maxim meaning "Conscience never contravenes the law."[69]

CONSCIENTIA LEGIS EX LEGE PENDET. A maxim meaning "The conscience of the law depends upon the law."[70]

CONSCIENTIOUSLY.[71] In a conscientious manner; as a matter of conscience; hence faithfully; accurately; completely.[72]

CONSCRIPT. One taken by lot from the CONSCRIPTION, *q. v.*, or enrolment list,— and compelled to serve as a soldier or sailor.[73] (See, generally, ARMY AND NAVY.)

CONSCRIPTION. Drafting into the military service of the state; compulsory service falling upon all male subjects evenly, within or under certain specified ages.[74]

CONSECRATIO EST PERIODUS ELECTIONIS; ELECTIO EST PRÆAMBULA CONSECRATIONIS. A maxim meaning "Consecration is the termination of election; election is the preamble of consecration."[75]

CONSECUTIVE. Uninterrupted in course or succession; succeeding one another in a regular course; SUCCESSIVE,[76] *q. v.*

CONSENSUS EST VOLUNTAS MULTIORUM, AD QUOS RES PERTINET, SIMUL JUNCTA. A maxim meaning "Consent is the conjoint will of many persons to whom the thing belongs."[77]

CONSENSUS FACIT JUS. A maxim meaning "Consent makes law."[78] (See COMMUNIS ERROR FACIT JUS.)

CONSENSUS, NON CONCUBITUS, FACIT MATRIMONIUM. A maxim meaning "It is the consent of the parties, not their concubinage, which constitutes a valid marriage."[79] (See, generally, MARRIAGE.)

in others, by vicious habits, but never altogether absent in any."

67. Black L. Dict.

68. Morgan Leg. Max.

69. Morgan Leg. Max.

70. Morgan Leg. Max.

71. "Conscientiously" is a word of quality, rather than of quantity. Hammond *v.* State, 74 Miss. 214, 219, 21 So. 149; Burt *v.* State, 72 Miss. 408, 412, 16 So. 342, 48 Am. St. Rep. 563.

72. Webster Int. Dict.

"Conscientiously," in a charge in respect to the guilt or innocence of an accused person, "is inapt, is erroneous. One may 'conscientiously'— that is, sincerely, honestly — believe, having reference to the quality of his belief, a thing to be true, which he does not, having reference to the strength or degree of his belief, believe beyond a reasonable doubt." Burt *v.* State, 72 Miss. 408, 412, 16 So. 342, 48 Am. St. Rep. 563.

73. Webster Dict. [*quoted* in Kneedler *v.* Lane, 45 Pa. St. 238, 267].

74. Black L. Dict.

In its popular sense, the term means a finished, complete enrolment of the soldier in the public service; not simply the extension of the law so as to embrace him. Lively *v.* Robbins, 39 Ala. 461, 464. See, generally, ARMY AND NAVY.

75. Morgan Leg. Max.

76. Century Dict. And see Dever *v.* Cornwell, 10 N. D. 123, 130, 86 N. W. 227 [*citing* Webster Dict.], where it is said: "In the connection in which the words 'successive' and 'consecutive' are respectively found, these terms are synonymous in meaning. These words are quite generally used interchangeably."

"For three consecutive weeks" means during or throughout a period of twenty-one days, or a period of three full weeks of seven days each. Dever *v.* Cornwell, 10 N. D. 123, 130, 86 N. W. 227 [*citing* Finlayson *v.* Peterson, 5 N. D. 587, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532].

77. Morgan Leg. Max.

78. Morgan Leg. Max.

79. Morgan Leg. Max.

A maxim of all law — civil, canonical, and common; recognized by all courts on suitable occasion.

Arkansas.— Scroggins *v.* State, 32 Ark. 205, 212.

California.— Sharon *v.* Sharon, 75 Cal. 1, 17, 16 Pac. 345, 79 Cal. 633, 695, 22 Pac. 26, 131.

New Jersey.—Pearson *v.* Howey, 11 N. J. L. 12, 18.

New York.— Bullock *v.* Bullock, 85 Hun (N. Y.) 373, 375, 32 N. Y. Suppl. 1009, 66

CONSENSUS TOLLIT ERROREM. A maxim meaning "The acquiescence of a party who might take advantage of an error obviates its effect."[80]

CONSENT. As a noun, agreement in opinion or sentiment;[81] the unity of opinion — the accord of minds — to think alike;[82] the being in one mind;[83]

N. Y. St. 493; Bates *v.* Bates, 7 Misc. (N. Y.) 547, 550, 27 N. Y. Suppl. 872, 57 N. Y. St. 725.

England.— Reg. *v.* Millis, 10 Cl. & F. 534, 719, 8 Jur. 717, 8 Eng. Reprint 844; Gorge's Case, 6 Coke 22*a*; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54, 62; Beamish *v.* Beamish, 9 H. L. Cas. 274, 334, 8 Jur. N. S. 770, 5 L. T. Rep. N. S. 97. See also Brook *v.* Brook, 27 L. J. Ch. 401 [*affirmed* in 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461].

Canada.— Lawless *v.* Chamberlain, 18 Ont. 296, 297; Delpit *v.* Coté, 20 Quebec Super. Ct. 338, 356.

Consensus non concubitus facit nuptias is the maxim of the civil law, and it is adopted by the common lawyers who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws. 1 Bl. Comm. 433 [*quoted* in Delpit *v.* Coté, 20 Quebec Super. Ct. 338, 356].

80. Morgan Leg. Max.

Applied or explained in the following cases:

Maine.— Thompson *v.* Perkins, 57 Me. 290, 292 [*citing* Coke Litt. 126].

Massachusetts.— Young *v.* Yarmouth, 9 Gray (Mass.) 386; Morison *v.* Underwood, 5 Cush. (Mass.) 52, 55.

Missouri.— Lane *v.* Kingsberry, 11 Mo. 402. And see State *v.* Claudius, 1 Mo. App. 551, 571.

New Jersey.— Butts *v.* French, 42 N. J. L. 397, 400 [*citing* Broom Leg. Max. 100]; Stevens *v.* Enders, 13 N. J. L. 271, 283; McKinney *v.* Robinson, 2 N. J. L. 245, 246.

New York.—Chambers *v.* Clearwater, 1 Abb. Dec. (N. Y.) 341, 345, 1 Keyes (N. Y.) 310; Smith *v.* Coman, 47 N. Y. App. Div. 116, 119, 62 N. Y. Suppl. 106; Goldberger *v.* Manhattan R. Co., 3 Misc. (N. Y.) 441, 443, 23 N. Y. Suppl. 176, 52 N. Y. St. 320; Farrington *v.* Hamblin, 12 Wend. (N. Y.) 212, 213; Yates *v.* Russell, 17 Johns. (N. Y.) 461, 466; Rogers *v.* Cruger, 7 Johns. (N. Y.) 557, 611.

Ohio.— Rosebrough *v.* Ansley, 35 Ohio St. 107, 111.

Oregon.— Roy *v.* Horsley, 6 Oreg. 382, 386, 25 Am. Rep. 537.

Pennsylvania.— Wilkinson's Appeal, 65 Pa. St. 189, 190; Moore *v.* Houston, 3 Serg. & R. (Pa.) 167, 190.

United States.— Chicago, etc., R. Co. *v.* U. S., 104 U. S. 680, 26 L. ed. 891.

England.— Furnival *v.* Stringer, 1 Bing. N. Cas. 68, 5 L. J. C. P. 344, 4 Moore & S. 578, 27 E. C. L. 547; East India Co. *v.* Atkyns, Comyns 346, 1 Str. 168; Andrewes *v.* Elliott, 6 E. & B. 338, 2 Jur. N. S. 663, 25 L. J. Q. B. 336, 4 Wkly. Rep. 527, 88 E. C. L. 338. And see Laurence *v.* Wilcock, 11 A. & E. 941, 8 Dowl. P. C. 681, 8 L. J. Q. B. 284, 3 P. & D. 536, 39 E. C. L. 495; Vansittart *v.* Taylor, 4 E. & B. 910, 912, 82 E. C. L. 910.

Applies to all errors in a civil trial, except those which go to the jurisdiction of the court. Butts *v.* French, 42 N. J. L. 397; Roy *v.* Horsley, 6 Oreg. 382, 25 Am. Rep. 537.

On this maxim rests the doctrine of waiver. — Bouvier L. Dict. And see Darnley *v.* London, etc., R. Co., L. R. 2 H. L. 43, 36 L. J. Ch. 404, 16 L. T. Rep. N. S. 217, 15 Wkly. Rep. 817; Ramsden *v.* Dyson, L. R. 1 H. L. 129, 12 Jur. N. S. 506, 14 Wkly. Rep. 926.

81. Clem *v.* State, 33 Ind. 418, 431; Locke *v.* Redmond, 6 Kan. App. 76, 49 Pac. 670; Webster Dict. [*quoted* in Hawkins *v.* Carroll County, 50 Miss. 735, 759].

Distinguished from "assent."— Kornegay *v.* Styron, 105 N. C. 14, 18, 11 S. E. 153; Geddes *v.* Bowden, 19 S. C. 1, 3. But see Omer *v.* Com., 95 Ky. 353, 361, 25 S. W. 594, 15 Ky. L. Rep. 694, where it is said that "the distinction between 'consent' and 'assent' is substantially imperceptible." And see Clem *v.* State, 33 Ind. 418, 431, where it is said that "consent" as a substantive is the synonym of "assent."

Distinguished from "permit."—"Consent" implies some positive action, while the word "permit" implies mere passivity. Aull *v.* Columbia, etc., R. Co., 42 S. C. 431, 20 S. E. 302. But it is said that there is no difference in the legal meaning between the words "permission" and "consent." Miller *v.* Mead, 3 N. Y. Suppl. 784, 785.

Distinguished from "submission."— Every consent involves a submission; but a mere submission does not necessarily involve consent. State *v.* Cross, 12 Iowa 66, 70, 79 Am. Dec. 519; Reg. *v.* Day, 9 C. & P. 722, 38 E. C. L. 419.

Express consent is that directly given, either *viva voce* or in writing. Black L. Dict.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given. Black L. Dict.

82. Huntley *v.* Holt, 58 Conn. 445, 449, 20 Atl. 469, 9 L. R. A. 111, where it is said: "Consent involves the presence of two or more persons, for without at least two persons there cannot be an unity of opinion, or an accord of minds, or any thinking alike."

Implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has a right to forbid. Gray *v.* Walker, 16 S. C. 143 [*quoted* in Geddes *v.* Bowden, 19 S. C. 1, 7].

83. Huntley *v.* Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111; Webster Dict. [*quoted* in Hawkins *v.* Carroll County, 50 Miss. 735, 759].

accord;[84] acquiescence;[85] approval;[86] approbation;[87] concurrence;[88] concurrence of the will;[89] active concurrence;[90] choice;[91] an agreement to something proposed;[92] assent to some proposition submitted;[93] agreement of the mind to what is proposed or stated by another;[94] an act of reason, accompanied with deliberation; the mind weighing, as in a balance, the good and evil on both sides.[95] As a verb it implies the power to authorize and to prevent, a degree of superiority which arises from the presence of a combined mental and physical ability to act;[96] it also implies not merely that a person accedes to, but authorizes an act.[97] (Consent: As Defense, see ABDUCTION; ABORTION; ACTIONS; ADULTERY; ASSAULT AND BATTERY; CRIMINAL LAW; RAPE. Conferring Jurisdiction, see APPEAL AND ERROR; COURTS. Decree, see EQUITY. In Contracts, see CONTRACTS. Judgment, see JUDGMENTS. Of Apprentice, see APPRENTICES. To Assignment — Generally, see ASSIGNMENTS; Of Indenture of Apprenticeship, see APPRENTICES. To Decision by Appellate Court, see APPEAL AND ERROR. To Dismissal of Appeal, see APPEAL AND ERROR. To Entry and Occupation of Land, see ADVERSE POSSESSION. See also ASSENT.)

CONSENTABLE LINE. A term employed where adjoining landholders, apprised of their rights, or to compromise doubtful rights or possessions, establish a line, which will be conclusive.[98]

CONSENTIENTES ET AGENTES PARI POENA PLECTUNTUR. A maxim meaning "Those consenting and those perpetrating are embraced in the same punishment."[99]

CONSENTIRE EST FACERE. A maxim meaning "To consent to a thing is to do a thing."[1]

84. Webster Dict. [*quoted* in Hawkins *v.* Carroll County, 50 Miss. 735, 759].

85. Clem *v.* State, 33 Ind. 418, 431.

It "cannot be substituted for by a passive acquiescence."— Cocke *v.* Gooch, 5 Heisk. (Tenn.) 294, 310.

86. Locke *v.* Redmond, 6 Kan. App. 76, 49 Pac. 670.

87. Waldron *v.* Chasteney, 2 Blatchf. (U. S.) 62, 68, 28 Fed. Cas. No. 17,058.

88. Clem *v.* State, 33 Ind. 418, 431; Webster Dict. [*quoted* in Hawkins *v.* Carroll County, 50 Miss. 735, 759].

89. Howell *v.* McCrie, 36 Kan. 636, 644, 14 Pac. 257, 59 Am. Rep. 584; Locke *v.* Redmond, 6 Kan. App. 76, 49 Pac. 670 (where it is said: "Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. In the very nature of things, consent to the alienation must precede the act of conveyance"); Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 114, 21 Am. Dec. 262 [*quoting* Pothier Traite du Contrat du Vente 21, § 2, art. 3, No. 31].

90. Cocke *v.* Gooch, 5 Heisk. (Tenn.) 294, 310.

In respect to suffrage it means the active concurrence of the voters, and not a passive acquiescence. Philomath College *v.* Wyatt, 27 Oreg. 390, 452, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68; Braden *v.* Stumph, 16 Lea (Tenn.) 581, 589.

91. Geddes *v.* Bowden, 19 S. C. 1, 7, where it is said: "One can scarcely be regarded as giving his consent to that which he has no right to object to."

92. Bouvier L. Dict. [*quoted* in Geddes *v.* Bowden, 19 S. C. 1, 3].

Generally used in cases where power, rights, and claims are concerned.— We give consent when we yield that which we have a right to withhold. Webster Dict. [*quoted* in Geddes *v.* Bowden, 19 S. C. 1, 3].

93. Howell *v.* McCrie, 36 Kan. 636, 644, 14 Pac. 257, 59 Am. Rep. 584; Locke *v.* Redmond, 6 Kan. App. 76, 49 Pac. 670.

94. Plummer *v.* Com., 1 Bush (Ky.) 76, 78.

95. Locke *v.* Redmond, 6 Kan. App. 76, 49 Pac. 670; Story Eq. Jurisp. § 222 [*quoted* in Dicken *v.* Johnson, 7 Ga. 484, 492].

Given by one divested of mental faculties is equivalent to no consent at all. McCue *v.* Klein, 60 Tex. 168, 169, 48 Am. Rep. 260.

96. Ottiwell *v.* Watkins, 15 Daly (N. Y.) 308, 6 N. Y. Suppl. 518, 24 N. Y. St. 38; Webster Unabridged Dict. [*quoted* in Mosher *v.* Lewis, 10 Misc. (N. Y.) 373, 379, 31 N. Y. Suppl. 433, 64 N. Y. St. 117, where it is said by the court in delivering its opinion: "One cannot properly be said to have consented to an act which he could neither authorize nor prevent"].

97. Ottiwell *v.* Watkins, 15 Daly (N. Y.) 308, 309, 6 N. Y. Suppl. 518, 24 N. Y. St. 38 [*citing* Crabbe Synonyms]. And see Dicken *v.* Johnson, 7 Ga. 484, 492, where it is said: "To give consent there must be capacity, therefore, to know and understand fully the nature of the act done, and its effects upon the interests of the agent."

98. Brown *v.* Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660.

99. Morgan Leg. Max. [*citing* Fitzherbert's Case, 5 Coke 79*b*, 80].

1. Morgan Leg. Max.

CONSENTIRE MATRIMONIO NON POSSUNT INFRA ANNOS NUBILES. A maxim meaning "Consent to a marriage is not possible in the parties before marriageable years."[2]

CONSEQUENCE. Connection of cause and effect, or of antecedent and consequent; consecution.[3] (Consequence: Of Acts, see CRIMINAL LAW; NEGLIGENCE. Proximate and Remote, see DAMAGES; NEGLIGENCE.)

CONSEQUENTIÆ NON EST CONSEQUENTIA. A maxim meaning "The consequence of a consequence does not exist."[4]

CONSEQUENTIAL DAMAGE. See DAMAGES.

CONSERVATOR. A guardian; protector; preserver.[5] (See, generally, GUARDIAN AND WARD; INFANTS; INSANE PERSONS; SPENDTHRIFTS.)

CONSERVATORS OF THE PEACE. Common law officers, whose duties as such, were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try for them.[6] (See, generally, JUSTICES OF THE PEACE; SHERIFFS AND CONSTABLES.)

CONSIDER. To think, regard in a certain aspect, look upon, hold, or assume;[7] to fix the mind on with a view to a careful examination; to resolve; to think on with care; to think over; to ponder; to study; to meditate on.[8]

CONSIDERATION.[9] In common parlance, means deliberation, thought;[10] the price or motive of the contract.[11] (Consideration: Illegality of, see CONTRACTS; GAMING; INTOXICATING LIQUORS; USURY. Of Accord, see ACCORD AND SATISFACTION. Of Assignments — Generally, see ASSIGNMENTS; For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Bill or Note, see COMMERCIAL PAPER. Of Bond, see BONDS. Of Composition With Creditors, see COMPOSITIONS WITH CREDITORS. Of Compromise and Settlement, see COMPROMISE AND SETTLEMENT. Of Contract, see CONTRACTS. Of Deeds, see DEEDS. Of Guaranty, see GUARANTY. Of Indemnity, see INDEMNITY. Of Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Of Pledge, see PLEDGES. Of Release, see RELEASE. Of Sale, see SALES; VENDOR AND PURCHASER. Of Submission to Arbitration, see ARBITRATION AND AWARD. Of Subscription, see SUBSCRIPTIONS. Of Suretyship Agreement, see PRINCIPAL AND SURETY. Of the Court, see CONSIDERATION OF THE COURT. Of Trust, see TRUSTS. Restoration of, see CANCELLATION OF INSTRUMENTS. Statement of Under Statute of Frauds, see FRAUDS, STATUTE OF.)

CONSIDERATION OF THE COURT. In legal phraseology, means the judgment of the court.[12] (See, generally, JUDGMENTS.)

CONSIDERED. Determined by a court; adjudged.[13]

2. Morgan Leg. Max.

3. Century Dict.

As used in an insurance policy, means an immediate or proximate, not a remote consequence. Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 76, 8 S. Ct. 68, 31 L. ed. 63.

4. Morgan Leg. Max.

5. Black L. Dict.

6. Smith *v.* Abbott, 17 N. J. L. 358, 366 [*citing* 2 Burn Just. 577].

As to their origin see *In re* Barker, 56 Vt. 1, 20 [*citing* 2 Hale P. C. c. 7, note 1; 1 Lambard, c. 4].

The office was introduced into this country by our forefathers with such functions and powers as existed under the English statutes. *In re* Barker, 56 Vt. 1, 19 [*citing* Com. *v.* Foster, 1 Mass. 488, 489].

Constables, tithingmen, and the like, are conservators of the peace within their own jurisdictions. Jacob L. Dict. [*quoted* in *Ex p.* Rhodes, 2 Wheel. Crim. (N. Y.) 559, 562].

7. Century Dict. [*quoted* in State *v.* Wheeler, 97 Wis. 96, 100, 72 N. W. 225].

Is often used to express an idea which exists in the mind, with perfect distinctness, but it does not always convey to the understanding of the person to whom it is addressed, one which is very precise. Crooker *v.* Trevett, 28 Me. 271, 274.

8. Webster Dict. [*quoted* in Massachusetts Mut. L. Ins. Co. *v.* Colorado L. & T. Co., 20 Colo. 1, 6, 36 Pac. 793. McLorinan *v.* Bridgewater Tp., 49 N. J. L. 614, 616, 10 Atl. 187].

9. Has a more limited and technical meaning, distinct from motives or purposes, with regard to legal instruments. Ford *v.* Burks, 37 Ark. 91, 94.

10. Terrill *v.* Auchauer, 14 Ohio St. 80, 85.

11. 2 Bl. Comm. (Cooley ed.) 444 [*quoted* in Latham *v.* Lawrence, 11 N. J. L. 322, 325].

12. Terrill *v.* Auchauer, 14 Ohio St. 80, 85.

13. English L. Dict.

CONSIGN.[14] To commit, intrust, give in trust;[15] to deliver or transfer as a charge or trust.[16] In mercantile law, to send or transmit goods to a merchant or factor for sale;[17] to send goods to an agent, commission merchant, correspondent or factor, to be sold, stored, etc.;[18] to deposit with another to be sold, disposed of, or cared for, as merchandise or movable property.[19] In the civil law, to deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice.[20] (See, generally, CARRIERS; FACTORS AND BROKERS; SHIPPING.)

CONSIGNATION. See TENDER.

CONSIGNEE. A purchaser to whom goods have been sent;[21] the person to whom goods are consigned, shipped, or otherwise transmitted;[22] the person to whom goods are addressed;[23] a person residing at the port of delivery, to whom goods are to be delivered when they arrive there.[24] (See, generally, CARRIERS; FACTORS AND BROKERS; SHIPPING.)

CONSIGNMENT. The act or process of consigning goods; the transportation of goods consigned; an article or collection of goods sent to a factor to be sold; goods or property sent, by the aid of a common carrier, from one person in one place to another person in another place.[25] (See, generally, CARRIERS; FACTORS AND BROKERS; SHIPPING.)

CONSIGNOR. In the ordinary mercantile acceptation signifies the shipper of merchandise;[26] a vendor who ships.[27] (See, generally, CARRIERS; FACTORS AND BROKERS; SHIPPING.)

CONSILIA MULTORUM QUÆRUNTUR IN MAGNIS. A maxim meaning "The counsels of many are required in great things."[28]

CONSILII NON FRAUDULENTI NULLA OBLIGATIO EST; CÆTERUM SI DOLUS ET CALLIDITUS INTERCESSIT, DE DOLO ACTIO COMPETIT. A maxim meaning "There is no obligation not to give fraudulent counsel; but if fraud and cunning intervene, an action is competent concerning the craft."[29]

CONSIST. To be composed or made up of.[30]

CONSISTENT. Compatible, congruous, standing together or in agreement.[31] (Consistent: Defenses, see PLEADING.)

CONSISTING. Being composed or made up of.[32]

CONSISTORY. See RELIGIOUS SOCIETIES.

CONSISTORY COURTS. See RELIGIOUS SOCIETIES.

"It is considered by the court" is equivalent to "it is adjudged by the court." Terrill *v.* Auchauer, 14 Ohio St. 80, 85.

14. **A word of French origin.**— Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320 [*citing* Landar Dictionnaire de la Langue Francais].

15. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320 [*citing* Crabbe Synonyms; Richardson Dict.; Smith Synonyms Discriminated (N. Y. 1871); Soule Eng. Synonyms (Boston 1871); Webster Dict.].

16. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320 [*citing* Burrill L. Dict.; Landar Dictionnaire de la Langue Francais].

17. Powell *v.* Wallace, 44 Kan. 656, 659, 25 Pac. 42; Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320.

18. Rapalje & L. L. Dict. [*quoted* in F. F. Ide Mfg. Co. *v.* Sager Mfg. Co., 82 Ill. App. 685, 687].

19. Standard Dict. [*quoted* in F. F. Ide Mfg. Co. *v.* Sager Mfg. Co., 82 Ill. App. 685, 687].

20. Black L. Dict. [*citing* Pothier Oblig. pt. 3, c. 1, art. 8].

21. Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614, 622.

Not synonymous with "owner."— See Lyon *v.* Alvord, 18 Conn. 66, 79.

22. Powell *v.* Wallace, 44 Kan. 656, 659, 25 Pac. 42; Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320.

23. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320.

24. Wolff *v.* Horncastle, 1 B. & P. 316, 321, 4 Rev. Rep. 808.

25. Black L. Dict.

26. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 320.

27. Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614, 622.

28. Black L. Dict.

29. Morgan Leg. Max.

30. Webster Dict. [*quoted* in Farish *v.* Cook, 6 Mo. App. 328, 332].

31. Webster Dict. [*quoted* in Visscher *v.* Hudson River R. Co., 15 Barb. (N. Y.) 37, 44].

32. Black L. Dict.

Not synonymous with "including."— See Farish *v.* Cook, 6 Mo. App. 328, 331.

CONSOCIATIO. A term which signifies association.[33]

CONSOLATO DEL MARE. The name of a code of sea-laws, said to have been compiled by order of the kings of Arragon (or, according to other authorities, at Pisa or Barcelona) in the fourteenth century, which comprised the maritime ordinances of the Roman emperors, of France and Spain, and of the Italian commercial powers.[34] (See, generally, ADMIRALTY.)

CONSOLIDATE. To unite into one mass or body;[35] to join, or unite.[36]

CONSOLIDATED ORDERS. The orders regulating the practice of the English court of chancery, which were issued, in 1860, in substitution for the various orders which had previously been promulgated from time to time.[37]

CONSOLIDATION. The act of forming into a more firm or compact mass, body, or system.[38] In the civil law, the union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versa*.[39] In Scotch law, the junction of the property and superiority of an estate, where they have been disjoined.[40] (Consolidation: Of Actions, see ADMIRALTY; APPEAL AND ERROR; CONSOLIDATION AND SEVERANCE OF ACTIONS. Of Cities, Towns, and Villages, see MUNICIPAL CORPORATIONS; TOWNS. Of Corporations, see CORPORATIONS. Of Counties, see COUNTIES. Of Highway Districts, see STREETS AND HIGHWAYS. Of Indictments or Informations, see INDICTMENTS AND INFORMATIONS. Of Motions, see MOTIONS. Of School Districts, see SCHOOLS AND SCHOOL DISTRICTS.)

33. Thomas *v.* Dakin, 22 Wend. (N. Y.) 9, 104 [*quoting* Grotius].

34. Black L. Dict.

35. Webster Dict. [*quoted* in Fairview Independent Dist. *v.* Durland, 45 Iowa 53, 56].

To consolidate benefices is to combine them into one. Webster Dict. [*quoted* in Fairview Independent Dist. *v.* Durland, 45 Iowa 53, 56].

To consolidate two bills is to unite them into one. Webster Dict. [*quoted* in Fairview Independent Dist. *v.* Durland, 45 Iowa 53, 56].

36. State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 164, 38 N. W. 43, 8 Am. St. Rep. 164; East St. Louis Connecting R. Co. *v.* Jarvis, 92 Fed. 735, 742, 34 C. C. A. 639.

37. Black L. Dict.

38. East St. Louis Connecting R. Co. *v.* Jarvis, 92 Fed. 735, 742, 34 C. C. A. 639.

39. Black L. Dict.

40. Black L. Dict.

CONSOLIDATION AND SEVERANCE OF ACTIONS

By James Beck Clark

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CROSS-REFERENCES

For Matters Relating to:

Consolidation:

Of Claims Against Insolvents, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

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Severance in Defense, see PLEADING.
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Splitting Demands, see JOINDER AND SPLITTING OF ACTIONS.
Trial of Separate Causes Together, see TRIAL.

I. CONSOLIDATION.

A. Definition. Consolidation of actions may be defined generally as the union of two or more actions in one.[1]

B. Object. The object of consolidating two or more actions is to avoid a multiplicity of suits,[2] to guard against oppression or abuse,[3] to prevent delay,[4] and especially to save unnecessary cost or expense;[5] in short, the attainment of justice with the least expense and vexation to the parties litigant.[6] Consolidation, however, is improper where the conduct of the cause will be embarrassed, or complications or prejudice will result which will injuriously affect the rights of a party.[7]

C. Power to Consolidate — 1. COURTS OF GENERAL JURISDICTION. In the

1. Burrill L. Dict.

2. Horne *v.* Harness, 18 Ind. App. 214, 47 N. E. 688; Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221; P. Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Bush *v.* Abrahams, 2 N. Y. Suppl. 391, 18 N. Y. St. 919; Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932, 18 Law Rep. 672.

3. Kemp *v.* Kemp, 1 Woodw. (Pa.) 189; Cecil *v.* Brigges, 2 T. R. 639.

4. New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; The Burke, 4 Cliff. (U. S.) 582, 4 Fed. Cas. No. 2,159.

5. *Georgia.*— Hartman *v.* Columbus, 45 Ga. 96; Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507. See also Bones *v.* National Exch. Bank, 67 Ga. 339.

Indiana.— Horne *v.* Harness, 18 Ind. App. 214, 47 N. E. 688; Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221.

Mississippi.— McLendon *v.* Pass, 66 Miss. 110, 5 So. 234.

New Jersey.— Lee *v.* Kearney Tp., 42 N. J. L. 543; Den *v.* Fen, 9 N. J. L. 335.

New York.— Bush *v.* Abrahams, 2 N. Y. Suppl. 391, 18 N. Y. St. 919; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262.

Ohio.— Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

Pennsylvania.— Beltzhoover *v.* Maple, 130 Pa. St. 335, 18 Atl. 650.

United States.— New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; The Burke, 4 Cliff. (U. S.) 582, 4 Fed. Cas. No. 2,159; Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 302, 10 Fed. 454; Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932, 18 Law Rep. 672.

England.—Oldershaw *v.* Tregwell, 3 C. & P. 58, 14 E. C. L. 449.

Canada.— Niagara Grape Co. *v.* Nellis, 13 Ont. Pr. 258.

Actions not subject of consolidation.— The rule that to save costs between the same parties consolidation may be ordered does not apply to a case where the plaintiffs are different. Bones *v.* National Exch. Bank, 67 Ga. 339.

In New Hampshire instead of consolidating actions between the same parties, the court may limit the costs so as to do justice and prevent oppression. Curtis *v.* Baldwin, 42 N. H. 398.

6. Horne *v.* Harness, 18 Ind. App. 214, 47 N. E. 688; Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326; Long *v.* Yanceyville Bank, 85 N. C. 354; Person *v.* State Bank, 11 N. C. 294.

In the federal courts actions will be consolidated only where time, labor, and expense can be saved. Davis *v.* St. Louis, etc., R. Co., 25 Fed. 786.

7. *Alabama.*— Cooper *v.* Maddau, 6 Ala. 431.

Colorado.— Smith *v.* Smith, 22 Colo. 480, 46 Pac. 128, 55 Am. St. Rep. 142, 34 L. R. A. 49.

New York.— Mayor *v.* Mayor, 11 Abb. N. Cas. (N. Y.) 367, 64 How. Pr. (N. Y.) 230; Potter *v.* Pattengille, 8 Abb. Pr. N. S. (N. Y.) 189; Morris *v.* Knox, 6 Abb. Pr. (N. Y.) 328 note; Pierce *v.* Lyon, 3 Hill (N. Y.) 450; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23.

North Carolina.— Buie *v.* Kelly, 52 N. C. 266.

Texas.— Carpenter *v.* Hannig, (Tex. Civ. App. 1896) 34 S. W. 774; Texas, etc., R. Co. *v.* Cahill, (Tex. Civ. App. 1893) 23 S. W. 232.

Canada.— Evans *v.* Evans, 5 Montreal Super. Ct. 414.

Deprivation of evidence.— It is erroneous to consolidate where the effect is to deprive each defendant of the evidence of the defendants in the other suits. Smith *v.* Smith, 22 Colo. 480, 46 Pac. 128, 55 Am. St. Rep. 142, 34 L. R. A. 49.

Embarrassment by recovery.— Consolidation should not be granted where the debts on which the several actions are based have been guaranteed by different persons, so that the question of their liability would be embar-

absence of legislative enactment courts of general common-law jurisdiction have inherent power to consolidate two or more actions at the instance of the defendant or with his consent.[8]

2. Courts of Limited Jurisdiction — a. In General. Courts or tribunals of limited or special jurisdiction have no power to order consolidation, unless that power is expressly or impliedly conferred by statute.[9]

b. Ouster of Jurisdiction. Where a plaintiff brings several separate and distinct suits against a defendant, although the causes of action are similar and might properly be joined, an order of consolidation is improper if it will have the effect of ousting the jurisdiction of the court or tribunal by reason that the aggregate amount sued for exceeds the jurisdictional limit fixed by law.[10]

3. Courts of Equity. Although the power of a court of equity to order the consolidation of causes in the absence of legislative enactment has been doubted [11] or denied,[12] the great weight of authority, both in this country and in England, is to the effect that the power is inherent or implied in its general power to make reasonable rules for the transaction and regulation of its business;[13] and it may

rassed by one recovery against the defendant. Potter *v.* Pattengille, 8 Abb. Pr. N. S. (N. Y.) 189.

8. *Illinois.*— Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 114.

Indiana.— Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221.

Iowa.— Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

New York.— Clason *v.* Church, 1 Johns. Cas. (N. Y.) 29.

Pennsylvania.— Merriheu *v.* Taylor, 1 Browne (Pa.) 67 Appendix.

England.— See Hollingsworth *v.* Broderick, 4 A. & E. 646, 1 Hurl. & W. 691, 6 N. & M. 240, 31 E. C. L. 162; Lewis *v.* Barker, 4 C. B. N. S. 330, 4 Jur. N. S. 663, 27 L. J. C. P. 247, 6 Wkly. Rep. 652, 93 E. C. L. 330.

See 1 Cent. Dig. tit. "Actions," § 624.

A party may bring as many suits as he has independent causes of action, subject to the right of the court to consolidate them. Pittman *v.* Chrisman, 59 Miss. 124.

Coercion.—If the plaintiff in several actions refuse to agree to an order of consolidation the court will grant imparlances in all the actions but one until the plaintiff consents. Clason *v.* Church, 1 Johns. Cas. (N. Y.) 29.

9. Rich *v.* Kiser, 61 Ga. 370; Presstman *v.* Beach, 61 Md. 203; Matter of Wood, 34 Misc. (N. Y.) 209, 69 N. Y. Suppl. 491; Boswell *v.* Grant, 11 Ont. Pr. 376. And see Matter of Shipman, 82 Hun (N. Y.) 108, 31 N. Y. Suppl. 571, 64 N. Y. St. 161; Matter of Hodgman, 10 N. Y. Suppl. 491, 31 N. Y. St. 479.

Power of arbitrators.— Where several actions on promissory notes have been referred to arbitrators they have no power to consolidate them without the consent of the defendant. Groff *v.* Musser, 3 Serg. & R. (Pa.) 262.

The Illinois statute requiring the consolidation of all demands in actions before justices has no application to actions in courts of record. McDole *v.* McDole, 106 Ill. 452.

10. *California.*— See Cariaga *v.* Dryden, 29 Cal. 307.

Georgia.— Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. 328; Tarpley *v.* Corputt, 65 Ga. 257; Hartman *v.* Columbus, 45 Ga. 96; Manufacturers' Bank *v.* Goolsby, 35 Ga. 82.

Illinois.— Nickerson *v.* Rockwell, 90 Ill. 460; Buckner *v.* Thompson, 11 Ill. 563.

Kentucky.— Powell *v.* Weiler, 11 B. Mon. (Ky.) 186.

Mississippi.— Louisville, etc., R. Co. *v.* McCollister, 66 Miss. 106, 5 So. 695.

Missouri.— Bridle *v.* Grau, 42 Mo. 359; Sykes *v.* Planters' House, etc., Co., 7 Mo. 477; Martin *v.* Chauvin, 7 Mo. 277; Barns *v.* Holland, 3 Mo. 47.

New York.— Gillin *v.* Canary, 15 N. Y. App. Div. 594, 44 N. Y. Suppl. 313, 26 N. Y. Civ. Proc. 230.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Parrot *v.* Green, 1 McCord (S. C.) 531; Planters', etc., Bank *v.* Cowing, 2 Nott & M. (S. C.) 438; Philips *v.* Delane, 2 Brev. (S. C.) 429.

Texas.— Mohrhardt *v.* Sabine Pass., etc., R. Co., 2 Tex. App. Civ. Cas. § 322.

See 1 Cent. Dig. tit. "Actions," § 627.

11. Barger *v.* Buckland, 28 Gratt. (Va.) 850 [*distinguishing* Stevenson *v.* Taverners, 9 Gratt. (Va.) 398], in which it was intimated that the plaintiffs' consent was necessary.

12. Claiborne *v.* Gross, 7 Leigh (Va.) 331; Manchester College *v.* Isherwood, 2 Sim. 476, 2 Eng. Ch. 476; Foreman *v.* Southwood, 8 Price 572; Fonnan *v.* Blake, 7 Price 654.

13. *District of Columbia.*—Gilbert *v.* Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316; Central Nat. Bank *v.* Hume, 3 Mackey (D. C.) 360, 51 Am. Rep. 780.

Illinois.— Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37; Thielman *v.* Carr, 75 Ill. 385; India Rubber Co. *v.* C. J. Smith, etc., Co., 75 Ill. App. 222; Woodburn *v.* Woodburn, 23 Ill. App. 289.

Iowa.— Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316. See also Turner *v.* Bradley, 85 Iowa 512, 52 N. W. 364; Viele *v.*

direct a consolidation or amalgamation with or without the consent of the complainant[14] or defendant.[15]

4. Discretion. Unless by statute consolidation is a matter of right, the court is vested with a discretion to consolidate or to refuse to do so; and the exercise of that discretion will not be revised, unless in a case of palpable abuse.[16]

D. Conditions Authorizing Consolidation — 1. At Law — a. Jurisdiction

Germania, etc., Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

New Jersey.— Burnham *v.* Dalling, 16 N. J. Eq. 310; Conover *v.* Conover, 1 N. J. Eq. 403.

North Carolina.— Monroe *v.* Lewald, 107 N. C. 655, 12 S. E. 287.

Texas.— Moore *v.* Francis, 17 Tex. 28.

Virginia.— Patterson *v.* Eakie, 87 Va. 49, 12 S. E. 144; Devries *v.* Johnston, 27 Gratt. (Va.) 805; Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

West Virginia.— Wyatt *v.* Thompson, 10 W. Va. 645; Beach *v.* Woodyard, 5 W. Va. 231.

Wisconsin.—Biron *v.* Edwards, 77 Wis. 477, 46 N. W. 813.

England.— Foxwell *v.* Webster, 4 De G. J. & S. 77, 10 Jur. N. S. 137, 9 L. T. Rep. N. S. 528, 12 Wkly. Rep. 186, 69 Eng. Ch. 60; Davis *v.* Davis, 48 L. J. Ch. 40; Keighley *v.* Brown, 16 Ves. Jr. 344.

See 1 Cent. Dig. tit. "Actions," § 625.

14. Burnham *v.* Dalling, 16 N. J. Eq. 310.

15. Central Nat. Bank *v.* Hume, 3 Mackey (D. C.) 360, 51 Am. Rep. 780.

Consolidation in invitum.— Ordinarily a court of chancery will not compel consolidation *in invitum.* Ogburn *v.* Dunlap, 9 Lea (Tenn.) 162; Knight *v.* Ogden, 3 Tenn. Ch. 409.

In Kentucky, it is the duty of the court to consolidate an action by a creditor to have acts of a debtor declared preferential and to operate as an assignment for creditors, with an action by the preferred creditors against the debtor in which an attachment issued pending in the same court. Steitler *v.* Hellenbush, 23 Ky. L. Rep. 174, 61 S. W. 701.

16. *Alabama.*—Monroe *v.* Brady, 7 Ala. 59; Powell *v.* Gray, 1 Ala. 77.

Arizona.— London, etc., Bank *v.* Abrams, (Ariz. 1898) 53 Pac. 588.

Arkansas.— Lindsay *v.* Wayland, 17 Ark. 385.

District of Columbia.—Gilbert *v.* Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316.

Georgia.— Hatcher *v.* Nat. Bank, 79 Ga. 542, 547, 5 S. E. 109, 111; Bentley *v.* Gay, 67 Ga. 667; Lewis *v.* Daniel, 45 Ga. 124; Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507.

Illinois.— Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 581; Miles *v.* Danforth, 37 Ill. 156; Woodburn *v.* Woodburn, 23 Ill. App. 289.

Indiana.— Grant *v.* Davis, 5 Ind. App. 116, 31 N. E. 587.

Iowa.— Jones *v.* Witousek, 114 Iowa 14, 86 N. W. 59; Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868.

Kansas.— Wichita, etc., R. Co. *v.* Hart, 7 Kan. App. 550, 51 Pac. 933.

Maryland.— Mitchell *v.* Smith, 2 Md. 271.

Massachusetts.— Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322; Witherlee *v.* Ocean Ins. Co., 24 Pick. (Mass.) 67.

Missouri.— State *v.* Hannibal, etc., R. Co., 89 Mo. 571; Sykes *v.* Planters House, etc., Co., 7 Mo. 477; Owens *v.* Link, 48 Mo. App. 534; Williams *v.* Bugg, 10 Mo. App. 586.

New Jersey.— Den *v.* Fen, 9 N. J. L. 335; Burnham *v.* Dalling, 16 N. J. Eq. 310.

New Mexico.—Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

New York.— Bush *v.* Abrahams, 15 Daly (N. Y.) 168, 4 N. Y. Suppl. 833, 23 N. Y. St. 82; Potter *v.* Pattengille, 8 Abb. Pr. N. S. (N. Y.) 189; Morris *v.* Knox, 6 Abb. Pr. (N. Y.) 328 note; Crane *v.* Kœhler, 6 Abb. Pr. (N. Y.) 328 note; Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326; Blake *v.* Michigan Southern, etc., R. Co., 17 How. Pr. (N. Y.) 228; Dunn *v.* Mason, 7 Hill (N. Y.) 154; Wilkinson *v.* Johnson, 4 Hill (N. Y.) 46; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23; U. S. Bank *v.* Strong, 9 Wend. (N. Y.) 451; Brewster *v.* Stewart, 3 Wend. (N. Y.) 447; Jackson *v.* Stiles, 5 Cow. (N. Y.) 282; People *v.* McDonald, 1 Cow. (N. Y.) 189; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262.

North Carolina.— Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510; Person *v.* State Bank, 11 N. C. 294; Smith *v.* Powell, 1 N. C. 200.

South Carolina.—Worthy *v.* Chalk, 10 Rich. (S. C.) 141; Planters', etc., Bank *v.* Cohen, 2 Nott & M. (S. C.) 440 note; Scott *v.* Brown, 1 Nott & M. (S. C.) 417 note.

South Dakota.— Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081.

Tennessee.— Dews *v.* Eastham, 5 Yerg. (Tenn.) 297; Reid *v.* Dorson, 1 Overt. (Tenn.) 396.

Texas.— Herring *v.* Herring, (Tex. Civ. App. 1899) 51 S. W. 865; Spencer *v.* James, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242; Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222; Texas, etc., R. Co. *v.* Hays, 2 Tex. App. Civ. Cas. § 390; Morris *v.* Wood, 1 Tex. App. Civ. Cas. § 1311.

Virginia.— Patterson *v.* Eakin, 87 Va. 49, 12 S. E. 144; McRay *v.* Boast, 3 Rand. (Va.) 481.

West Virginia.— Beach *v.* Woodyard, 5 W. Va. 231.

Wisconsin.—Winninghoff *v.* Wittig, 64 Wis. 180, 24 N. W. 912; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328; Blesch *v.* Chicago, etc., R. Co., 44 Wis. 593.

United States.—Toledo, etc., R. Co. *v.* Con-

of the Separate Actions. The court to which application is made must have jurisdiction of the actions sought to be consolidated.[17]

b. Identity of Parties. To justify consolidation it is the general rule that there must be an identity of parties, that is the parties to each action must be the same, or be so interested in the controversies that all questions involved can be determined and they be concluded by the determination.[18] And the same rule is applicable to actions brought on demands claimed in different rights or capacities,

tinental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8; Andrews *v.* Spear, 2 Ban. & A. (U. S.) 602, 4 Dill. (U. S.) 470, 1 Fed. Cas. No. 379.

Canada.— Niagara Grape Co. *v.* Nellis, 13 Ont. Pr. 258.

See 1 Cent. Dig. tit. "Actions," § 631.

As to the review of discretion in consolidating causes see APPEAL AND ERROR, 3 Cyc. 334.

17. Howe *v.* Cole, (Miss. 1895) 16 So. 531.

A judge specially appointed to try a cause has no power to consolidate that cause with another. Texas-Mexican R. Co. *v.* Cahill, (Tex. Civ. App. 1893) 23 S. W. 232.

An action forbidden by statute cannot be consolidated with one of which the court has jurisdiction. Willard Mfg. Co. *v.* Tirney, 130 N. C. 611, 41 S. E. 871.

18. *Alabama.*—Birmingham Flooring Mills *v.* Wilder, 85 Ala. 593, 5 So. 307; Wilkinson *v.* Black, 80 Ala. 329; Berry *v.* Ferguson, 58 Ala. 314.

Arkansas.— Meehan *v.* Watson, 65 Ark. 216, 47 S. W. 109; Adler-Goldman Commission Co. *v.* Bloom, 62 Ark. 616, 37 S. W. 305.

Georgia.— Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109; Pupke *v.* Meador, 72 Ga. 230; Bentley *v.* Gay, 67 Ga. 667; Bones *v.* National Exch. Bank, 67 Ga. 339; Howard *v.* Chamberlin, 64 Ga. 684; Hartman *v.* Columbus, 45 Ga. 96.

Illinois.— Miles *v.* Danforth, 37 Ill. 156; Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514.

Indiana.— Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221.

Iowa.— Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868.

Kentucky.— Baughman *v.* Louisville, etc., R. Co., 94 Ky. 150, 14 Ky. L. Rep. 775, 21 S. W. 757.

Mississippi.—Spratley *v.* Kitchens, 55 Miss. 578.

Montana.— Mason *v.* Germaine, 1 Mont. 263.

New Jersey.—Lee *v.* Kearny Tp., 42 N. J. L. 543.

New York.—American Grocery Co. *v.* Flint, 5 N. Y. App. Div. 263, 39 N. Y. Suppl. 153.

North Carolina.— Hartman *v.* Spiers, 87 N. C. 28.

Ohio.— Goslin *v.* Campbell, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 369.

Pennsylvania.— Wetherill *v.* Wilson, 26 Wkly. Notes Cas. (Pa.) 231; Merriheu *v.* Taylor, 1 Browne (Pa.) 67 Appendix.

South Carolina.— Scott *v.* Cohen, 1 Nott & M. (S. C.) 413.

Texas.— Green *v.* Banks, 24 Tex. 508; Dreben *v.* Russeau, (Tex. Civ. App. 1894) 26 S. W. 867. And see Crawford *v.* French, 25 Tex. Suppl. 436.

United States.— See Central Trust Co. *v.* Virginia, etc., Steel, etc., Co., 55 Fed. 769.

England.— Oldershaw *v.* Tregwell, 3 C. & P. 58, 14 E. C. L. 449; McGregor *v.* Horsfall, 6 Dowl. P. C. 338, 2 Jur. 257, 7 L. J. Exch. 71, 3 M. & W. 320; Booth *v.* Payne, 1 Dowl. N. S. 348, 5 Jur. 1087, 11 L. J. Exch. 256; Colledge *v.* Pike, 56 L. T. Rep. N. S. 124.

Canada.— Hébert *v.* Quesnel, 10 L. C. Jur. 83; Ryan *v.* Cameron, 16 Ont. Pr. 235; Garth *v.* Banque d'Hochelega, 14 Rev. Lég. 548.

See 1 Cent. Dig. tit. "Actions," § 662 *et seq.*

Different plaintiffs.— The provisions of the Ohio code apply only where the actions are prosecuted in behalf of the same plaintiff. Burckhardt *v.* Burckhardt, 36 Ohio St. 261. Where there was but one claimant of property taken under executions issued in the suit of different parties the court denied an application to consolidate interpleaders by the sheriff in the several cases. Ubler *v.* Selfridge, 1 Wkly. Notes Cas. (Pa.) 61.

Different defendants.— An action against all the underwriters of an insurance policy cannot be joined with an action against a part of them. Isear *v.* Daynes, 1 N. Y. App. Div. 557, 37 N. Y. Suppl. 474, 73 N. Y. St. 202.

Two actions for the same libel, one against the editor and the other against the publisher, cannot be consolidated, although the declarations and pleas are the same, and substantially the same questions will arise and the same defense be interposed. Cooper *v.* Weed, 2 How. Pr. (N. Y.) 40. But see Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326; Colledge *v.* Pike, 56 L. T. Rep. N. S. 124 (actions against the proprietors of seventeen different newspapers, where the publication and attendant circumstances differed in each case and consolidation was refused).

Actions against different sureties.— Separate actions by a municipality against different sureties of its treasurer to recover sums unaccounted for are properly consolidated. Essex County *v.* Wright, 13 Ont. Pr. 474.

Actions to collect taxes.— It is proper to refuse at the instance of interveners to consolidate a number of suits by the state against "unknown owners" to collect taxes on distinct tracts of land separately assessed. Watkins *v.* State, (Tex. Civ. App. 1901) 61 S. W. 532.

with the result that such actions cannot be united.[19] Where, however, the defendants are different and but one common defendant is served, the latter may cause the actions to be consolidated in a proper case, where there is no appearance by the other defendants, and no intention to bring them into the case appears.[20] So if one defendant is common to all the actions which have been improperly united at plaintiff's instance he may dismiss as to the others, and if the actions might have been united, the consolidation may be permitted to stand.[21]

c. Identity of Subject-Matter — (i) *In General.* It is not enough, however, that the actions sought to be consolidated are between the same parties, or parties having an identity of interest, but the causes of action, subject-matter, or questions involved must be identical or substantially so, to the end that all controversies and matters of difference can be litigated and disposed of in one action.[22]

Reason for rule.— In Scott *v.* Cohen, 1 Nott & M. (S. C.) 413, the reason assigned why actions *ex contractu* against several defendants cannot be joined is that if they should have been joined and are not they may plead it in abatement.

19. Buie *v.* Kelly, 52 N. C. 266, actions on notes which originated at different times, were due at different times, two of them due to plaintiff in his own right, two as guardian of one family of children and three as the guardian of another.

An action by a surviving partner being in fact in his own right it may be consolidated with an action brought against the same defendant in the individual right of the plaintiff. McCartney *v.* Hubbell, 52 Wis. 360, 9 N. W. 61.

Same evidence.— Where two cases, involving different parties and different rights, are tried separately, although the same testimony is used in each, the court cannot order them consolidated, and that but one brief of evidence be used on a motion for new trial in both cases. Bones *v.* National Exch. Bank, 67 Ga. 339.

20. Montreal Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

21. Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868.

22. *Alabama.*—Birmingham Flooring Mills *v.* Wilder, 85 Ala. 593, 5 So. 307; Berry *v.* Ferguson, 58 Ala. 314.

Arkansas.—Meehan *v.* Watson, 65 Ark. 216, 47 S. W. 109; Adler-Goldman Commission Co. *v.* Bloom, 62 Ark. 616, 37 S. W. 305.

Georgia.— Bentley *v.* Gay, 67 Ga. 667; Bones *v.* National Exch. Bank, 67 Ga. 339; Howard *v.* Chamberlin, 64 Ga. 684; Gerding *v.* Anderson, 64 Ga. 304; Hartman *v.* Columbus, 45 Ga. 96.

Illinois.— Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514.

New Jersey.— Den *v.* Fen, 9 N. J. L. 335.

New York.— Mason *v.* Evening Star Newspaper Co., 35 Misc. (N. Y.) 77, 71 N. Y. Suppl. 203 [*affirmed* in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1140]; Gloucester Iron-Works *v.* Board of Water Com'rs, 10 N. Y. Suppl. 168, 32 N. Y. St. 352; Crane *v.* Kœhler, 6 Abb. Pr. (N. Y.) 328 note; Kipp *v.* Delamater, 58 How. Pr. (N. Y.) 183; Dunn *v.* Mason, 7 Hill (N. Y.) 154; Wilkinson *v.* Johnson, 4 Hill (N. Y.) 146; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23; Jackson *v.* Stiles, 5 Cow. (N. Y.) 282; Woodward *v.* Frost, 19 N. Y. Wkly. Dig. 125.

North Carolina.— Monroe *v.* Sewald, 107 N. C. 655, 12 S. E. 287; Hartman *v.* Spiers, 87 N. C. 28; Glenn *v.* Farmers' Bank, 70 N. C. 191; Person *v.* State Bank, 11 N. C. 294.

Ohio.— Corbin *v.* Bouve, 1 Cinc. Super. Ct. 259.

Pennsylvania.— Beltzhoover Borough *v.* Maple, 130 Pa. St. 335, 18 Atl. 660; Beshler's Estate, 129 Pa. St. 268, 18 Atl. 137; Boyle *v.* Grant, 18 Pa. St. 162; Prior *v.* Kelly, 4 Yeates (Pa.) 128; Rumsey *v.* Wynkoop, 1 Yeates (Pa.) 5; Merriheu *v.* Taylor, 1 Browne (Pa.) 67 Appendix; Wetherill *v.* Wilson, 26 Wkly. Notes Cas. (Pa.) 231.

Vermont.— Brigham *v.* Mosseaux, 20 Vt. 517.

Virginia.— See Moorman *v.* Crockett, 90 Va. 185, 17 S. E. 875.

United States.— New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706; The Burke, 4 Cliff. (U. S.) 582, 4 Fed. Cas. No. 2,159; Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 302, 10 Fed. 454.

England.— Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Hurl. & W. 691, 6 N. & M. 240, 31 E. C. L. 287; Saltash *v.* Jackman, 1 D. & L. 851, 8 Jur. 176, 13 L. J. Q. B. 105; Booth *v.* Payne, 1 Dowl. N. S. 348, 51 Jur. 1087, 11 L. J. Exch. 256; McGregor *v.* Horsfall, 6 Dowl. P. C. 329, 2 Jur. 257, 7 L. J. Exch. 71, 3 M. & W. 320; Beardsall *v.* Cheetham, E. B. & E. 243, 27 L. J. Q. B. 367, 6 Wkly. Rep. 504, 96 E. C. L. 243; Morley *v.* Midland R. Co., 3 F. & F. 961; Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16; Bramble *v.* Knox, 18 Wkly. Rep. 72.

Canada.— Hébert *v.* Quesnél, 10 L. C. Jur. 83; Chrétien *v.* Crowley, 5 Montreal Leg. N. 268, 2 Dorion (U. C.) 385; Watson *v.* Thompson, 2 Montreal Leg. N. 142; Noyes *v.* Young, 16 Ont. Pr. 254; Ryan *v.* Cameron, 16 Ont. Pr. 235; Williams *v.* Raleigh Tp., 14 Ont. Pr. 50; Niagara Grape Co. *v.* Nellis, 13 Ont. Pr. 179; Garth *v.* Banque d'Hochlega, 14 Rev. Lég. 548.

See 1 Cent. Dig. tit. "Actions," § 632 *et seq.*

Consolidation of actions ex delicto.— See *infra*, I, E, 2.

(II) *CAUSES OF ACTION WHICH MAY BE JOINED.* Another test of the propriety of consolidation is whether the causes for which the several actions were brought could have been joined in the same declaration or complaint. If there could have been a joinder, a proper case for consolidation is presented.[23] If the actions are brought on separate and distinct causes of action, which might have been joined and the plaintiff is acting strictly within his rights, the court acting within its discretion may refuse to consolidate without plaintiff's consent.[24]

d. Same Defenses or No Defense. Likewise when a consolidation is sought by the defendant in two or more actions it must appear that the defenses to them

Actions for services.— An action for a part of services rendered may be consolidated with another action for the remainder of such services for which a bill had been delivered, but which by custom was not due at the time of the institution of the first action. Beardsall *v.* Cheetham, E. B. & E. 243, 27 L. J. Q. B. 367, 6 Wkly. Rep. 504, 96 E. C. L. 243.

Actions of ejectment for separate pieces of property brought by the same plaintiff against the same defendant in the same court may be consolidated. Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

Actions to enforce municipal claims for the same work against parts of the same lot may be consolidated. Philadelphia *v.* Tyson, 9 Wkly. Notes Cas. (Pa.) 367.

Attachments for the same debt may be united. Watson *v.* Thompson, 2 Montreal Leg. N. 142.

Consolidation of judgments.— An amicable action may be maintained to revive judgments and have them consolidated. Beshler's Estate, 129 Pa. St. 268, 18 Atl. 137.

Extent of liability.— Where the causes of action and defense *prima facie* appear to be the same, an answer to an application to consolidate that the position of some of the parties may be different and raise different questions is insufficient, although the extent of the consolidation must depend on the circumstances, especially where the questions raised are only as to the amount of the respective liability. Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16.

U. S. Rev. Stat. (1878), § 921, empowers the federal courts to consolidate pending causes of a like nature, in which substantially the same cases are involved, although the defendants are different, and although they will be brought into antagonism. Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 302, 10 Fed. 454.

Several actions on a bond for the jail limits may be consolidated. Leonard *v.* Merritt, Draper (U. C.) 190.

Where the facts are disputed a motion to consolidate, that the rights of the respective parties may be adjusted so as to conform to the facts alleged in the moving affidavits, is properly denied. Gloucester Iron-Works *v.* Board of Water Com'rs, 10 N. Y. Suppl. 168, 32 N. Y. St. 352.

23. *Alabama.*—Birmingham Flooring Mills *v.* Wilder, 85 Ala. 593, 5 So. 307; Wilkinson *v.* Black, 80 Ala. 329; Berry *v.* Ferguson, 58 Ala. 314; Powell *v.* Gray, 1 Ala. 77.

California.— Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

Georgia.— Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109; Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507.

Illinois.— Miles *v.* Danforth, 37 Ill. 156.

Montana.— Mason *v.* Germaine, 1 Mont. 263.

New Jersey.—Lee *v.* Kearny Tp., 42 N. J. L. 543.

New York.— Isear *v.* Daynes, 1 N. Y. App. Div. 557, 37 N. Y. Suppl. 474, 73 N. Y. St. 202; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23; Brewster *v.* Stewart, 3 Wend. (N. Y.) 441; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262.

Ohio.— Cook *v.* Andrews, 36 Ohio St. 174.

Pennsylvania.— Merriheu *v.* Taylor, 1 Browne (Pa.) 67 Appendix.

Wisconsin.—Gross *v.* Milwaukee Mechanics' Ins. Co., 92 Wis. 656, 66 N. W. 712; Biron *v.* Edwards, 77 Wis. 477, 46 N. W. 813.

United States.— Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932, 18 Law Rep. 672.

England.—Oldershaw *v.* Tregwell, 3 C. & P. 58, 14 E. C. L. 449; Saltash *v.* Jackman, 1 D. & L. 851, 8 Jur. 176, 13 L. J. Q. B. 105; Booth *v.* Payne, 1 Dowl. N. S. 348, 5 Jur. 1087, 11 L. J. Exch. 256; Cecil *v.* Brigges, 2 T. R. 639; Chitty Pl. 221; Tidd Pr. 614.

Canada.— Commercial Bank *v.* Lovis, 3 U. C. L. J. 205.

See 1 Cent. Dig. tit. "Actions," § 632 *et seq.*

24. Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 579; Camman *v.* New York Ins. Co., 1 Cai. (N. Y.) 114; McGregor *v.* Horsfall, 6 Dowl. P. C. 338, 2 Jur. 257, 7 L. J. Exch. 71, 3 M. & W. 320. In Alexandria Bank *v.* Young, 1 Cranch C. C. (U. S.) 458, 2 Fed. Cas. No. 857, the court refused to consolidate a number of actions of debt, which might have been included in one action; because the actions were properly brought under the old practice and no general rule of court had been made on the subject.

Actions on account and note given in part payment.— An action on a book-account giving credit for an unpaid note cannot be consolidated with an action on the note. Stanley *v.* Garrigues, 1 Wkly. Notes Cas. (Pa.) 28.

are the same or substantially alike, or that there is no intention of interposing a defense.[25] So actions founded on distinct contracts originating in different transactions may be consolidated, where the questions to be tried are identical, and defendant does not deny the validity of the contracts, but sets up some matter in discharge going to the whole of the plaintiff's demand.[26]

e. Single Verdict and Judgment. There can be no actual consolidation unless one verdict and judgment can be rendered which will be conclusive of the whole subject-matter of the litigation.[27]

2. In Equity. In equity the conditions authorizing consolidation differ from those which will warrant a union of actions at law. The important inquiry is in respect to the identity or substantial identity of the subject-matter involved or

Where a party has the right to maintain separate actions, as upon notes due at different times, each sued on at maturity, he will not be compelled to consolidate. Gaulden *v.* Shehee, 24 Ga. 438.

25. *Arkansas.*— Kahn *v.* Kuhn, 44 Ark. 404; Stillwell *v.* Bertrand, 22 Ark. 375.

Georgia.— Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 So. 109; Bentley *v.* Gay, 67 Ga. 667; Tarpley *v.* Corputt, 65 Ga. 257; Howard *v.* Chamberlin, 64 Ga. 684; Wilson *v.* Riddle, 48 Ga. 609; Hartman *v.* Columbus, 45 Ga. 96; Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507.

Illinois.— Casselberry *v.* Forquer, 27 Ill. 170; Brown *v.* Kennicott, 30 Ill. App. 89.

Massachusetts.— Witherlee *v.* Ocean Ins. Co., 24 Pick. (Mass.) 67.

Mississippi.— Barnett *v.* Ring, 55 Miss. 97.

New Jersey.— Worley *v.* Glentworth, 10 N. J. L. 241; Den *v.* Fen, 9 N. J. L. 335.

New York.— Mason *v.* Evening Star Newspaper Co., 35 Misc. (N. Y.) 77, 71 N. Y. Suppl. 203 [*affirmed* in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1140]; Sire *v.* Kneuper, 3 N. Y. Suppl. 533, 19 N. Y. St. 43, 15 N. Y. Civ. Proc. 434; Morris *v.* Knox, 6 Abb. Pr. (N. Y.) 328 note; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23; Jackson *v.* Stiles, 5 Cow. (N. Y.) 282; People *v.* McDonald, 1 Cow. (N. Y.) 189; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262.

North Carolina.— Person *v.* State Bank, 11 N. C. 294.

Ohio.— See Goslin *v.* Campbell, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 369.

Pennsylvania.— Wetherill *v.* Wilson, 26 Wkly. Notes Cas. (Pa.) 231.

Tennessee.—Reid *v.* Dodson, 1 Overt. (Tenn.) 396.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 628.

England.— Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16; Colledge *v.* Pike, 56 L. T. Rep. N. S. 124.

See 1 Cent. Dig. tit. "Actions," § 665 *et seq.*

Action on promissory notes.— The court will not consolidate two actions brought against the same person by the same plaintiffs upon promissory notes drawn at different dates and payable at different times, where it does not appear that the defense is the same in each. Worley *v.* Glentworth, 10 N. J. L. 241.

Defense not intended.— Actions based on different transactions in which no defense is intended may be consolidated to avoid the expense of entering up several judgments. Wilkinson *v.* Johnson, 4 Hill (N. Y.) 46.

Ejectment.— In Martin *v.* Reynolds, 9 Dana (Ky.) 328, it was held that the effect of an agreement to consolidate actions of ejectment was that all the tenants in possession should defend together and alike.

Mandamus proceedings to enforce the payment of several judgments rendered at different times may be consolidated where there is but one and the same defense to each of the causes. Fisher *v.* Charleston, 17 W. Va. 628.

Priority of possession of land.— Where the only question involved in actions of ejectment is priority of possession, they may be consolidated. Lincoln-Lucky, etc., Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

The common-law rule of practice in Great Britain, where a special pleading is allowed, is that when the same plea may be pleaded and the same judgment given on all the counts, or when the courts are of the same nature and the same judgment may be given on all, although the pleas may be different, the several actions may be consolidated. Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507.

26. Wilkinson *v.* Johnson, 4 Hill (N. Y.) 46.

27. *Arkansas.*— Adler-Goldman Commission Co. *v.* Bloom, 62 Ark. 616, 37 S. W. 305.

Georgia.—Bentley *v.* Gay, 67 Ga. 667; Howard *v.* Chamberlin, 64 Ga. 684; Logan *v.* Mechanics' Bank, 13 Ga. 201, 58 Am. Dec. 507.

Illinois.— Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236.

Mississippi.— Spratley *v.* Kitchens, 55 Miss. 578.

New Jersey.— Conover *v.* Conover, 1 N. J. Eq. 403.

Texas.— Green *v.* Banks, 24 Tex. 508.

See 1 Cent. Dig. tit. "Actions," § 662 *et seq.*

Where the relief sought is different, consolidation of the actions should be refused. Ryan *v.* Cameron, 16 Ont. Pr. 235.

the object sought to be attained, and the aim is to bring in all the parties in interest and consolidate suits without special regard to the identity of parties. This a court of equity can do, because of its power to make appropriate orders or decrees, according to each party exact justice.[28] But as a rule consolidation will not be ordered in equity where the subject-matter is not the same although the parties are identical;[29] nor where the subject-matter as well as the parties are different,[30] the questions presented are confused,[31] or conflicting objects are sought to be accomplished.[32] Under certain circumstances, however, and when

28. *California.*— Bixby *v.* Bent, 59 Cal. 522.

District of Columbia.— Butler *v.* Strong, 3 App. Cas. (D. C.) 80; Hamilton *v.* Clarke, 3 Mackey (D. C.) 428.

Illinois.— Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236; Thielman *v.* Carr, 75 Ill. 385; Schnell *v.* Clements, 73 Ill. 613; India Rubber Co. *v.* Smith, 75 Ill. App. 222; Woodburn *v.* Woodburn, 23 Ill. App. 289.

Iowa.— P. Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

Kentucky.— Tharp *v.* Cotton, 7 B. Mon. (Ky.) 636; Biggs *v.* Kouns, 7 Dana (Ky.) 405; Johnson *v.* Beauchamp, 5 Dana (Ky.) 70; Taylor *v.* Watkins, 7 J. J. Marsh. (Ky.) 364.

New Hampshire.— Benton *v.* Barnet, 59 N. H. 249.

New Jersey.— Burnham *v.* Dalling, 16 N. J. Eq. 310.

New York.— Wing *v.* Huntington, Seld. Notes (N. Y.) 210.

Ohio.— Howlett *v.* Martin, 3 Ohio Dec. (Reprint) 113, 3 Wkly. Gaz. 266.

Texas.— Moore *v.* Francis, 17 Tex. 28.

Virginia.— Moorman *v.* Crockett, 90 Va. 185, 17 S. E. 875; Patterson *v.* Eakin, 87 Va. 49, 12 S. E. 144.

Wisconsin.— Biron *v.* Edwards, 77 Wis. 477, 46 N. W. 813.

United States.— Deering *v.* Winona Harvester Works, 24 Fed. 90.

See 1 Cent. Dig. tit. "Actions," § 637.

Illustrations.— Thus, although the parties are different, a court of equity may consolidate where the cause of action is single (Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236), joint (Taylor *v.* Watkins, 7 J. J. Marsh. (Ky.) 363), or to avoid decrees which may clash (McConnico *v.* Moseley, 4 Call (Va.) 360). This principle has been applied to an action on a note and one to foreclose a mortgage securing it (Howlett *v.* Martin, 3 Ohio Dec. (Reprint) 113, 3 Wkly. Gaz. 266); two actions to forcclose a trust deed, although a defendant in one is alone personally liable on the claim in that action (Johnston *v.* Tuling Mfg. Co., (Tex. Civ. App. 1894) 24 S. W. 996); an action to partition land and an action by one party thereto against the others to enforce a trust on the land (Bixby *v.* Bent, 59 Cal. 522); actions for infringements of different patents used in one machine (Deering *v.* Winona Harvester Works, 24 Fed. 90); a bill by an executor to have a will construed as to his authority to sell real estate, and a bill by the devisees praying for the appointment of trustees to sell the same property and distribute the proceeds (Hamilton *v.* Clarke, 3 Mackey (D. C.) 428); bills by executors of two testators who devised to the same persons, whose rights under both wills were the same (Conover *v.* Conover, 1 N. J. Eq. 403); suits between an executor and different legatees (Johnson *v.* Beauchamp, 5 Dana (Ky.) 70); and a suit by a beneficiary against a trustee and one by a legatee against the same person as executor for claims demandable out of the same fund and involving the settlement of the same transaction and the distribution of the same estate (Moorman *v.* Crockett, 90 Va. 185, 17 S. E. 875).

Intervention — Consolidation after decree. — Where during the pendency of several suits in equity to which the parties were different, strangers filed petitions to intervene, the appellate court reversed a decree in the original suits and remitted the causes to the court with directions to consolidate them. Butler *v.* Strong, 3 App. Cas. (D. C.) 80.

29. Actions to foreclose mortgages against different pieces of property cannot be consolidated, although the parties are the same. Lockwood *v.* Fox, 8 Daly (N. Y.) 127; Selkirk *v.* Wood, 9 N. Y. Civ. Proc. 141; Beeh *v.* Ruggles, 6 Abb. N. Cas. (N. Y.) 69; Kipp *v.* Delamater, 58 How. Pr. (N. Y.) 183.

30. An action of partition cannot be consolidated with a like action, the subject-matter of which is situated in another county and one or more of the parties to which are not parties to or interested in the other action. Mayor *v.* Coffin, 90 N. Y. 312, 11 Abb. N. Cas. (N. Y.) 367, 64 How. Pr. (N. Y.) 230.

Actions of partition in which the plaintiffs and defendants are not identical cannot be consolidated. Wooster *v.* Case, 12 N. Y. Suppl. 769. 34 N. Y. St. 577.

31. A court of equity will refuse to consolidate where the interests involved pertain to separate and distinct parties, and the questions are presented in such a confused and unsatisfactory condition as to require the court to separate the several matters at issue and to consider them in their respective relations to the several causes. Central Trust Co. *v.* Virginia, etc., Steel, etc., Co., 55 Fed. 769.

32. Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

feasible, the court may consolidate cases having different parties and involving different rights.[33]

3. At Law and in Equity — a. In General. Although there are exceptions to it,[34] it is the general rule that except by consent of the parties, actions at law and suits in equity cannot be consolidated.[35]

b. Transference to Equity. Under some circumstances, however, an action at law may be transferred to a court of equity and there consolidated with an equitable action pending therein.[36]

E. Conditions Dependent on Nature or Status of Actions — 1. Double Actions. Double actions for the same thing cannot be consolidated.[37]

2. Actions Ex Delicto. In the absence of express statutory authority actions

33. Thielman *v.* Carr, 75 Ill. 385; Tharp *v.* Cotton, 7 B. Mon. (Ky.) 636; Biggs *v.* Kouns, 7 Dana (Ky.) 405.

Actions to foreclose mortgages to secure notes held by different persons may be consolidated and separate judgments entered. Benton *v.* Barnet, 59 N. H. 249.

Lien suits against several lots comprising a block may be consolidated. Beltzhoover *v.* Maple, 130 Pa. St. 335, 18 Atl. 650.

Partnership accounting and proceedings to reach assets.— Where all interested persons are made parties, two suits to settle partnership accounts and to determine the rights of claimants, and proceedings to reach distinct interests in different portions of the assets may be consolidated for trial. Wing *v.* Huntington, Seld. Notes (N. Y.) 210.

Preservation of priorities.— Where several creditors' bills are pending, and the same property is sought to be subjected, or where in either of such proceedings a receiver is appointed of property which is the subject of the other proceedings, the court should in proper cases order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. Monroe *v.* Lewald, 107 N. C. 655, 12 S. E. 287.

Suits to enforce trust deeds by the same parties may be consolidated, although different premises are affected and the trustees are not the same. Brown *v.* Kennicott, 30 Ill. App. 89, further holding that the debts could not be consolidated and a sale of the whole premises directed to pay the entire amount.

The Minnesota lien law of 1889, contemplates one action in which all claims against the same property shall finally be consolidated and disposed of. Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47.

34. A replevin and an injunction against it setting up an equitable agreement as to the property may be consolidated. Corbin *v.* Bouve, 1 Cinc. Super. Ct. 259.

Attachment and bill to subject land to vendor's lien.— A bill by the assignee of a purchase-money note to subject the land for which the note was given to the assignor to a vendor's lien may be consolidated with attachment proceedings by a third person to reach the interest of the vendor and vendee in the land, and a *pro rata* disposition made of the proceeds. Thomas *v.* Wyatt, 5 B. Mon. (Ky.) 132.

35. *Arkansas.*— Robinson *v.* United Trust, (Ark. 1903) 72 S. W. 992.

Georgia.— Rosser *v.* Cheney, 64 Ga. 564.

Kentucky.— Estes *v.* McIntosh, 9 Ky. L. Rep. 980, 7 S. W. 912.

Michigan.— McGraw *v.* Dole, 63 Mich. 1, 29 N. W. 477.

Texas.— Raymond *v.* Cook, 31 Tex. 373.

See 1 Cent. Dig. tit. "Actions," § 639.

Attachment and creditor's bill.— An action in which property is attached and placed in the hands of a receiver, and a creditor's bill seeking to subject the property to the lien of a judgment cannot be consolidated. Goslin *v.* Campbell, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 369.

36. Stone *v.* Cromie, 87 Ky. 173, 10 Ky. L. Rep. 19, 7 S. W. 920.

Contra.— A suit will not be transferred to chancery that it may be consolidated with a suit there pending. Frick *v.* Moyer, 6 Ont. Pr. 245.

Action against executor and accounting by him.— An action by beneficiaries against the executor of a trustee to recover the amounts due them when consolidated with an action by the executor to settle the accounts of his testator may be transferred to equity. Drye *v.* Grundy, 18 Ky. L. Rep. 13, 35 S. W. 119.

Partnership affairs.— An action by a surviving partner to wind up a partnership, pending in one part of the chancery division, may be transferred to another part in which an action is pending to determine among other things whether certain real estate of the deceased partner had become assets of the firm. Davis *v.* Davis, 48 L. J. Ch. 40.

Same questions involved.— Where an action at law and a suit in equity involved the same questions, the court sitting in equity may consolidate them, try the consolidated case, and adjudicate the rights of all the parties. Evans *v.* McConnell, 99 Iowa 326, 63 N. W. 570, 68 N. W. 790.

37. Jamison *v.* Burlington, etc., R. Co., 78 Iowa 562, 43 N. W. 529, where there was an attempt to consolidate condemnation proceedings and an action to recover interest on the award which pending an appeal had been deposited.

ex delicto should not be consolidated;[38] and the reason for this is said to be that each of the several defendants is separately liable.[39]

3. Pending and Subsequently Accruing Actions. Some of the cases seem to hold that it is necessary that the actions should have been instituted at the same time;[40] but although the specific decisions on the subject are meager, there appears to be no good reason why a consolidation may not be ordered, although the cause on which the second action is founded had not accrued at the time the first suit was commenced.[41]

4. Actions Pending in Different Courts. By statute or the inherent power of a court of superior jurisdiction it may remove to itself an action pending in an inferior court and consolidate it with an action pending therein.[42] And a case on appeal from a justice of the peace in which there is a right to a trial *de novo* may be consolidated with an action pending in the appellate court.[43]

5. Cross-Actions. Cross-actions cannot be consolidated, one reason assigned

38. Mitchell *v.* Smith, 4 Md. 403; Scott *v.* Cohen, 1 Nott & M. (S. C.) 413.

Actions of replevin cannot be consolidated even though the parties are the same where the questions in controversy and the sureties on forthcoming bonds are different. Spratley *v.* Kitchens, 55 Miss. 578.

In New York separate actions for damages to person and property respectively growing out of the same transaction may, under section 817 of the code, be consolidated. McAndrew *v.* Lake Shore, etc., R. Co., 70 Hun (N. Y.) 46, 23 N. Y. Suppl. 1074, 53 N. Y. St. 436; Rosenberg *v.* Staten Island R. Co., 14 N. Y. Suppl. 476, 38 N. Y. St. 106. So in New Jersey generally, under rule of supreme court since 1888.

Actions for injuries to husband and wife by same act.— An action by a husband for an injury to himself may be consolidated with a separate action by him and his wife for an injury to the latter at the same time and place. Morley *v.* Midland R. Co., 3 F. & F. 961; Noyes *v.* Young, 16 Ont. Pr. 254 [*distinguishing* Westbrook *v.* Australian Royal Mail Steam Nav. Co., 14 C. B. 113, 2 C. L. R. 694, 23 L. J. C. P. N. S. 42, 78 E. C. L. 113; Williams *v.* Raleigh Tp., 14 Ont. Pr. 50]; Smurthwaite *v.* Hannay, 10 Times L. Rep. 649.

Penal actions by the same plaintiff against the same defendant for different violations of statute may be consolidated. Bramble *v.* Knox, 18 Wkly. Rep. 72.

39. Scott *v.* Cohen, 1 Nott & M. (S. C.) 413.

40. Lee *v.* Kearny Tp., 42 N. J. L. 543; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262; Cecil *v.* Brigges, 2 T. R. 639. And see Miles *v.* Danforth, 37 Ill. 156; 1 Tidd Pr. 614.

41. Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23.

Assignment pending proceedings.— Under a statute providing that no action shall abate by the transfer of any interest therein during its pendency, a proceeding to condemn real property may be consolidate with an amended petition setting up the facts filed by a purchaser from the plaintiffs in the original proceeding. Forney *v.* Ralls, 30 Iowa 559.

New action after remand on appeal.— Where on affirmance of a judgment establishing a lien of a subcontractor against the owner of a building the cause is remanded because the principal contractor was not a party and another action begun in which the contractor was made a party, the two actions may be consolidated. Price *v.* Sanford, 112 N. C. 660, 16 S. E. 850; Lookout Lumber Co. *v.* Sanford, 112 N. C. 655, 16 S. E. 849.

42. Curley *v.* F. & M. Schaefer Brewing Co., 35 Misc. (N. Y.) 131, 71 N. Y. Suppl. 318; Boyd *v.* Stewart, 24 N. Y. Suppl. 830, 30 Abb. N. Cas. (N. Y.) 127; Carter *v.* Sully, 19 N. Y. Suppl. 244, 28 Abb. N. Cas. (N. Y.) 130; Dupignac *v.* Dupignac, 12 N. Y. Civ. Proc. 351; Dupignac *v.* Van Buskirk, 18 Abb. N. Cas. (N. Y.) 204; Soloman *v.* Belden, 12 Abb. N. Cas. (N. Y.) 58; Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326. And see *supra*, I, C, 1.

In England actions may be transferred from an inferior court to a superior court and consolidated with a like action there pending. The Bjorn, 5 Aspin. 212 note, 9 P. D. 36 note; The Cosmopolitan, 5 Aspin. 212 note, 9 P. D. 35 note; The Never Despair, 5 Aspin. 211, 53 L. J. P. 30, 50 L. T. Rep. N. S. 369, 9 P. D. 34, 32 Wkly. Rep. 599.

In Canada a superior court of one district has no power to direct the transmission of the record of a cause pending therein to another district to be joined to the record of a cause there pending. Cie. du Chemin, etc. *v.* MacFarlane, 7 Montreal Super. Ct. 272.

The same conditions must exist as would authorize a consolidation were both actions pending in the superior court. Isear *v.* Daynes, 1 N. Y. App. Div. 557, 37 N. Y. Suppl. 474, 73 N. Y. St. 202.

43. Tommey *v.* Finney, 45 Ga. 155; Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276.

Under such circumstances a change of venue may be had for a trial of the consolidated cause. Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276.

therefor being that originally they could not have been joined in one action.[44]

6. Writs of Scire Facias. Writs of scire facias to revive several executions by the same parties plaintiff and defendant are not the subject of consolidation.[45]

7. Actions Removed to Federal Courts. Where an action removed from a state court to a federal court is between the same parties as those to an action already pending in the latter court it may be consolidated with the latter when the object of both actions is the same.[46]

8. Appealed Cases. Cases on appeal, error, or certiorari may be consolidated at any stage of the proceedings in the appellate court when that course appears to be the most convenient, expeditious, or inexpensive to the parties,[47] unless the actions were brought on distinct causes of action;[48] and it is not a valid objection to such consolidation that the judgments would have to be certified to different and distinct lower courts.[49]

F. Modes of Consolidation — 1. By Order. It may be stated generally that the usual mode of actual consolidation is by an order of the court made on the application of a party or by agreement.[50]

44. Woodburn *v.* Woodburn, 23 Ill. App. 289; Harris *v.* Sweetland, 48 Mich. 110, 11 N. W. 830; State *v.* Hannibal, etc., R. Co., 89 Mo. 571, 1 S. W. 123; Winninghoff *v.* Wittif, 64 Wis. 180, 24 N. W. 912.

Agreement to consolidate cross-actions.— Where plaintiff and defendant agreed that their cross-actions of assumpsit and attachment, involving different issues, should be consolidated and tried by one jury, such agreement was held unauthorized by common law or statute, and the supreme court would not review the proceeding on writ of error. Harris *v.* Sweetland, 48 Mich. 110, 11 N. W. 830.

Where cross-actions are pending in different courts and one is transferred to the court wherein the other is pending the court having control of both actions may order their consolidation. McGawley *v.* Gannon, 11 Rob. (La.) 164.

45. Mickle *v.* Brewer, 8 N. J. L. 85.

46. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513.

47. *Alabama.*— Wilkinson *v.* Black, 80 Ala. 329; Berry *v.* Ferguson, 58 Ala. 314; Cooper *v.* Maddan, 6 Ala. 431.

Arkansas.— Gregory *v.* Williams, 24 Ark. 177.

Indiana.— Turner *v.* Simpson, 12 Ind. 413; Oldfather *v.* Zent, 11 Ind. App. 430, 39 N. E. 221.

Michigan.— Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262.

Mississippi.— Ammons *v.* Whitehead, 31 Miss. 99.

New Hampshire.— Rollins *v.* Robinson, 35 N. H. 381.

Ohio.— Newberry *v.* Alexander, 44 Ohio St. 346, 7 N. E. 446; Goodwin *v.* Van Wert County Com'rs, 41 Ohio St. 399.

Tennessee.— Dews *v.* Eastham, 5 Yerg. (Tenn.) 297.

Wisconsin.— Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

England.— Hidding *v.* Denyssen, 12 App. Cas. 107, 57 L. T. Rep. N. S. 885.

See 1 Cent. Dig. tit. "Actions," § 660.

Appeals from a commissioner in insolvency severally entered by the plaintiff and principal debtor at the trial term may be consolidated and each tried upon the evidence applicable to the particular case. Rollins *v.* Robinson, 35 N. H. 381.

Consolidation of action on appeal with action pending in appellate court see *supra*, I, E, 4.

Separate judgments in a case against several parties having been appealed from at different times, a consolidation in the appellate court is proper. Newberry *v.* Alexander, 44 Ohio St. 346, 7 N. E. 446.

Under Wis. Rev. Stat. § 2792, an action on a note brought in the circuit court may be consolidated with a like action on appeal to the same court in which a trial *de novo* is to be had. Lauterbach *v.* Netzo, 111 Wis. 326, 87 N. W. 229.

Where a decree appealed from does not purport to be in both actions they cannot be heard together on appeal. Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 674, where the entry in the suit recited "that the cause came on for hearing on the bill and exhibits, answer, the record in another case against defendant and others, and upon consolidation thereof, it was ordered," etc.

Where a single demand is split and separate suits brought to give jurisdiction to a justice, they may be consolidated on appeal and dismissed. Gregory *v.* Williams, 24 Ark. 177. Where a cause of action cognizable in a superior court is split so as to give jurisdiction of several suits to a justice on appeal to that court it cannot consolidate such suits and thus acquire jurisdiction. Jarrett *v.* Self, 90 N. C. 478.

48. Wallace *v.* Eldredge, 27 Cal. 498.

49. Wipff *v.* Heder, (Tex. Civ. App. 1897) 41 S. W. 164.

50. Collier *v.* Hunter, 27 Ark. 74; Lee *v.* Kearny Tp., 42 N. J. L. 543.

An order taken to sell perishable property which was levied upon under two attach-

2. By Certiorari. A reviewing court cannot by certiorari consolidate suits so as to bring them within its appellate jurisdiction.[51]

3. By Act of Parties. However, although no order of consolidation is made there may be such action by the parties or the circumstances may be such that a virtual consolidation will be deemed to have taken place, as where one answer is made to both bills,[52] or where the parties consent[53] or agree to try two actions together without an order, in which case the court may regard them as if consolidated regularly by order.[54]

G. Partial Consolidation. There are also decisions to the effect that several pending actions on similar instruments may be consolidated so as to reduce the whole number to be tried.[55]

H. Quasi-Consolidation — 1. In General. The term "consolidation rule"[56] is, although improperly used, applicable to several methods of procedure; one to consolidate actions or demands into one where the same plaintiff has several claims against the same defendant, all complete at the same time, or at least before he has issued any writ;[57] and another is commonly employed to consolidate pending actions on the same instrument against several defendants and is in substance a direction that all the causes abide the event and final determination of the one selected as a test case, and that the judgment therein shall be entered in all the other causes.[58]

ments between the same parties will not operate as a consolidation of the cases. Epstein *v.* Levenson, 79 Ga. 718, 4 S. E. 328.

An order transferring an action at law to the chancery court to be there heard together is in effect an order of consolidation. Stone *v.* Cromie, 87 Ky. 173, 10 Ky. L. Rep. 19, 7 S. W. 920.

Nunc pro tunc.— An order of consolidation may be entered *nunc pro tunc*. Bentley *v.* Gay, 67 Ga. 667.

51. Galveston, etc., R. Co. *v.* Ware, 2 Tex. App. Civ. Cas. § 357.

Causes originating before a justice may be consolidated in the reviewing court on certiorari. Berry *v.* Ferguson, 58 Ala. 314.

52. Rodgers *v.* Dibrell, 6 Lea (Tenn.) 69.

53. Rosenthal *v.* Ives, 2 Ida. 244, 12 Pac. 904.

Actions referred by several rules to separate referees may by an agreement of the parties be consolidated in a single report signed by all the referees. Brown *v.* Scott, 1 Dall. (Pa.) 145, 1 L. ed. 74.

54. Walker *v.* Conn, 112 Ga. 314, 37 S. E. 403; Howard *v.* Gregory, 79 Ga. 617, 4 S. E. 881; Jones *v.* Witousek, 114 Iowa 14, 86 N. W. 59. See Morgan *v.* Billings, 3 Ala. 172 (wherein several defaults for non-payment of money on distinct executions were embraced in the same motion for the penalty to pay over money collected on the execution, and in which it was said that the court would consider that there had been a consolidation of actions by consent especially after a verdict without objection); Burt *v.* Wigglesworth, 117 Mass. 302 (holding that several petitions against different owners of land, taken under Mass. Stat. (1873), c. 189, § 2, for the public use, may, within the discretion of the presiding judge, be tried together, in accordance with a previous oral agreement of the parties); Eagles *v.* Hook, 22 Gratt. (Va.) 510.

And see, generally, Trial.

55. Prior *v.* Kelly, 4 Yeates (Pa.) 128 (five suits on bonds between the same parties, wherein "the court having consulted the bar, who differed in their ideas on the subject," directed four of the suits to be consolidated into two, making in the whole three suits); Rumsey *v.* Wynkoop, 1 Yeates (Pa.) 5 (where there being no opposition seven suits on protested bills drawn by the defendant to different persons were consolidated into three suits).

56. The consolidation rule is an order of court requiring the plaintiff to join in one suit several causes of action against the same defendant, which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. Bouvier L. Dict. It is said to have been introduced for the stay of proceedings in actions against several writers on the same policy of insurance. Lee *v.* Kearny Tp., 42 N. J. L. 543.

57. Lee *v.* Kearny Tp., 42 N. J. L. 543; 3 Chitty Pr. 642.

58. Lee *v.* Kearny Tp., 42 N. J. L. 543; Den *v.* Smith, 9 N. J. L. 335; Jackson *v.* Stiles, 5 Cow. (N. Y.) 282; Jackson *v.* Shauber, 4 Cow. (N. Y.) 78; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262; Camman *v.* New York Ins. Co., 1 Cai. (N. Y.) 114, Col. & Cas. (N. Y.) 187; Andrews *v.* Spear, 2 Ban. & A. (U. S.) 602, 4 Dill. (U. S.) 470, 1 Fed. Cas. No. 379. And see New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 36 L. ed. 706; Anderson *v.* Boynton, 13 Q. B. 308, 7 D. & L. 25, 14 Jur. 14, 19 L. J. Q. B. 42, 66 E. C. L. 308; Anderson *v.* Towgood, 1 Q. B. 245, 41 E. C. L. 522; Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Hurl. & W. 691, 6 N. & M. 240, 31 E. C. L. 287; Doyle *v.* Douglas, 4

2. Necessity of Consent. It seems, however, that the consent of the parties is necessary to effect a consolidation.[59]

3. Terms and Conditions. In granting the rule it is usual to stay the proceedings in all the actions but the one to be tried and to make such terms and conditions as will effectuate its object.[60]

B. & Ad. 544, 24 E. C. L. 240; Hodson *v.* Richardson, 3 Burr. 1477; Lewis *v.* Barkes, 4 C. B. N. S. 330, 4 Jur. N. S. 663, 27 L. J. C. P. 247, 6 Wkly. Rep. 652, 93 E. C. L. 330; Amos *v.* Chadwick, 9 Ch. D. 459, 47 L. J. Ch. 871, 39 L. T. Rep. N. S. 50, 26 Wkly. Rep. 840; Pullen *v.* Parry [*cited* in note to Cunnack *v.* Gundry, 1 Chit. 709, 711, 18 E. C. L. 387]; Bennett *v.* Bury, 5 C. P. D. 339, 49 L. J. C. P. 411, 42 L. T. Rep. N. S. 480; Sharp *v.* Lethbridge, 6 Jur. 399, 43 E. C. L. 29, 11 L. J. C. P. 189, 4 M. & G. 37, 4 Scott N. R. 722; Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16; Bartlett *v.* Bartlett, 11 L. J. C. P. 223, 43 E. C. L. 145, 4 M. & G. 269, 4 Scott N. R. 779; Vaughan Road Co. *v.* Fisher, 14 Ont. Pr. 340; Niagara Grape Co. *v.* Nellis, 13 Ont. Pr. 179; Taylor *v.* Bradford, 9 Ont. Pr. 350; 3 Chitty Pr. 642. See also Clason *v.* Church, 1 Johns. Cas. (N. Y.) 29, Col. Cas. (N. Y.) 68, where it is said that the consolidation rule in New York is the same as the English rule. In Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83, the supreme court by a divided opinion affirmed a decision that separate actions against different insurance companies for proportions of a loss for which they each were liable under the policy, and in which the evidence and defense was the same, might be consolidated, so that all should abide the result in one to be tried. In Cunnack *v.* Gundry, 1 Chit. 709, 18 E. C. L. 386, the declaration contained ninety-eight counts on as many promissory notes for one pound each, and the court refused to consolidate into one count but pronounced a rule for striking out all the counts but one, and giving the other notes in evidence, under that count, upon an account stated. In Westbrook *v.* Australian Royal Mail Steam Nav. Co., 14 C. B. 113, 2 C. L. R. 694, 23 L. J. C. P. 42, 78 E. C. L. 113, the court refused to stay the proceedings in seven or eight separate actions brought by different plaintiffs for personal inconveniences and injury, although the defendant offered to be bound in each by the verdict in one.

Assessment of separate damages.— Where the pleadings by plaintiff against different defendants and the main issue are identical, but if a cause of action is made out separate damages must be assessed on motion to consolidate, one of the actions may be ordered to be tried as a test case, and proceedings in the others stayed. Vaughan Road Co. *v.* Fisher, 14 Ont. Pr. 340.

For the form of a consolidation rule see Jackson *v.* Stiles, 5 Cow. (N. Y.) 282.

59. Lee *v.* Kearny Tp., 42 N. J. L. 543; Anderson *v.* Boynton, 13 Q. B. 308, 7 D. & L. 25, 14 Jur. 14, 19 L. J. Q. B. 42, 66 E. C. L. 308; Sharp *v.* Lethbridge, 6 Jur. 399, 43 E. C. L. 29, 11 L. J. C. P. 189, 4 M. & G. 37, 4 Scott N. R. 722. In Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Hurl. & N. 691, 6 N. & M. 240, 31 E. C. L. 287, a consolidation rule issued at the instance of the defendant in one action against the objection of the plaintiff.

Consent of plaintiff.— Where several actions upon the same instrument are brought against different defendants, the court without the plaintiff's consent will not make a consolidation rule upon the terms that both plaintiffs and defendants shall be bound in all the actions by the event of one. Doyle *v.* Anderson, 1 A. & E. 635, 4 N. & M. 873, 28 E. C. L. 300.

60. Vaughan Road Co. *v.* Fisher, 14 Ont. Pr. 340. In Bartlett *v.* Bartlett, 11 L. J. C. P. 223, 4 M. & G. 269, 4 Scott N. R. 779, 43 E. C. L. 145, actions by an assignee severally against the principal and his sureties, an order was made that the proceedings in all the actions should be stayed upon certain payments and that if such payments were not made the first action should be proceeded with and the defendants in the other two actions should be bound by the result of the first. In Anderson *v.* Towgood, 1 Q. B. 245, 41 E. C. L. 522, actions against two obligors of a joint and several bond, it was ordered on defendants' motion that the plaintiff proceed in whichever of the actions he should select, the proceedings in the other to be stayed until the first was tried and that the defendant should undertake to be bound by the event of the first action tried, but that plaintiff after such trial should be at liberty to proceed in the others. In Lewis *v.* Barkes, 4 C. B. N. S. 330, 4 Jur. N. S. 663, 27 L. J. C. P. 247, 6 Wkly. Rep. 652, 93 E. C. L. 330, actions against several persons on mutual insurance policies were consolidated upon terms that the defendants would admit the amount for which they would be respectively liable, if their liability should be established, and should consent if necessary to a reference to settle the amount. In Sharp *v.* Lethbridge, 6 Jur. 399, 43 E. C. L. 29, 11 L. J. C. P. 189, 4 M. & G. 37, 4 Scott N. R. 722, where the proceedings in all actions but one were stayed on defendant's consent to be bound by the verdict in one, provided that the verdict was satisfactory to the trial court; and the plaintiff was given liberty to open the order after plea, on the ground that the issue would not decide the merits in the other action.

Provision may be made for other proceeding in case the test action does not satisfactorily dispose of all the questions involved. Ben-

4. Stay of Proceedings. In this form of procedure all the actions but the one selected to be tried are stayed until the determination of that case.[61]

5. Necessity of Proper Trial and Verdict. The trial of one action as a test case contemplates a trial on the merits and the rendition of a proper verdict.[62]

I. The Application — 1. Necessity For. Generally an application is necessary to authorize the consolidation of actions at law; but in equity, although no motion is made by either party, the court may direct the consolidation of causes, when the substantial identity of the subject-matter thereof comes to its knowledge.[63]

2. Who May Apply. At common law the right to apply or move for a consolidation was limited to the defendant,[64] and the plaintiff could not secure an order without the defendant's consent;[65] but now by statute or rule the right to move has been extended in many jurisdictions to the plaintiff.[66]

3. Where Made. Where the venue of the actions is laid in different counties, the motion is properly made in the county in which all the parties reside and all the actions are triable.[67]

4. Time of Making. The decisions as to the time for moving or applying for

nett *v.* Bury, 5 C. P. D. 339, 49 L. J. C. P. 411, 42 L. T. Rep. N. S. 480.

61. Bennett *v.* Bury, 5 C. P. D. 339, 49 L. J. C. P. 411, 42 L. T. Rep. N. S. 480; Sharp *v.* Lethbridge, 6 Jur. 399, 43 E. C. L. 29, 11 L. J. C. P. 189, 4 M. & G. 37, 4 Scott N. R. 722; Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16; Taylor *v.* Bradford, 9 Ont. Pr. 350. The court will not permit the plaintiff to try the other actions, although new evidence is discovered. Pullen *v.* Parry [*cited* in note to Cunnack *v.* Gundry, 1 Chit. 709, 711, 18 E. C. L. 387]. The other causes are stayed only until the verdict in the test case, and if the defendant in the action tried has been prevented by a blunder from rendering his writ of error effectual, that rule will not preclude the defendants in the other actions from bringing error. Aylwin *v.* Favine, 2 B. & P. N. R. 430.

Where defendant had obtained a verdict in one of two actions consolidated by rule, the plaintiff will not be restrained from trying a second cause included in the rule till the costs of the first are paid. Doyle *v.* Douglas, 4 B. & Ad. 544, 24 E. C. L. 240.

62. Hodson *v.* Richardson, 3 Burr. 1477. If after consolidation one of the actions is ordered to be tried as a test action, the judgment therein is not binding on the parties in the other action unless there was a trial on the merits upon evidence. Amos *v.* Chadwick, 9 Ch. D. 459, 47 L. J. Ch. 871, 39 L. T. Rep. N. S. 50. 26 Wkly. Rep. 840, where there was no trial of the test action on the merits and it was held that the court had jurisdiction to substitute another of the actions as a test action. But see Robinson *v.* Chadwick, 7 Ch. D. 878, 47 L. J. Ch. 607, 38 L. T. Rep. N. S. 415, 26 Wkly. Rep. 556, where the plaintiff in a test action asked for a postponement for an order of discontinuance and the court declined to regard the rights of the plaintiffs in the other actions and dismissed the test action with costs.

The verdict in the test case must be satisfactory to the court. Anonymous, Lofft 147.

63. India Rubber Co. *v.* C. J. Smith, etc., Co., 75 Ill. App. 222 [*citing* Woodburn *v.* Woodburn, 23 Ill. App. 289]. In Keighley *v.* Brown, 16 Ves. Jr. 344, the court refused to consolidate several tithe cases as of course, and intimated that a special application should be made.

The court of its own motion should order consolidation of proceedings between the same parties including parts of the same account which by statute cannot be made the subjects of cross-actions. Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262.

64. *Pennsylvania.*—Groff *v.* Musser, 3 Serg. & R. (Pa.) 262; Kemp *v.* Kemp, 1 Woodw. (Pa.) 189.

Tennessee.—Reid *v.* Dodson, 1 Overt. (Tenn.) 396.

United States.—Ferrett *v.* Atwill, 1 Blatchf. (U. S.) 151, 8 Fed. Cas. No. 4,747, 4 N. Y. Leg. Obs. 215, 294.

England.—Amos *v.* Chadwick, 4 Ch. D. 869.

Canada.—Niagara Grape Co. *v.* Nellis, 13 Ont. Pr. 258.

So in England by rule under the judicature act adopted in 1875. See Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Hurl. & W. 691, 6 N. & M. 240, 31 E. C. L. 287; Amos *v.* Chadwick, 4 Ch. D. 869.

65. Groff *v.* Musser, 3 Serg. & R. (Pa.) 262; Kemp *v.* Kemp, 1 Woodw. (Pa.) 189.

66. Harsh *v.* Morgan, 1 Kan. 293; Briggs *v.* Gaunt, 4 Duer (N. Y.) 664, 2 Abb. Pr. (N. Y.) 77; Hébert *v.* Quesnel, 10 L. C. Jur. 83.

In England by the rules of 1883 an order for the consolidation of causes or matters pending in the same division between the same parties will be made upon the application of the plaintiff. Martin *v.* Martin, [1897] 1 Q. B. 429, 66 L. J. Q. B. 241, 76 L. T. Rep. N. S. 44, 45 Wkly. Rep. 260.

67. Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326, in which it was held that the motion might be made in the district which embraced the county wherein the parties resided.

an order of consolidation are by no means in accord. Thus there are authorities holding that the application may be made after the filing or delivery of the declaration and before plea.[68] Likewise it is held that an order of consolidation should not be granted until after issue has been joined in all of the cases, for the reason that until that is done the court cannot know whether the defenses are the same or substantially similar in each action.[69] So it has been required that the actions should be pending[70] and ready.[71] However, the application should be made before the actions are brought on for trial;[72] and while it has been held that several actions may be consolidated, although one of them is in judgment,[73] consolidation has been refused after judgments in the several actions have been taken for the want of a defense, for the reason that the effect would be to consolidate the judgments.[74]

5. Modes of Application — a. In General. Ordinarily an order of consolidation is sought for by a motion therefor or by obtaining and serving a rule or order to show cause why such an order should not be granted.[75] It has been held, however, that a motion to transfer causes may be treated as a motion to consolidate them.[76]

b. Notice. As a rule the adverse party should have notice of the application;[77] but a person who is not a party to either action is not entitled to notice,

68. Brewster *v.* Stewart, 3 Wend. (N. Y.) 441; Thompson *v.* Shepherd, 9 Johns. (N. Y.) 262; Worthy *v.* Chalk, 10 Rich. (S. C.) 141; Booth *v.* Payne, 1 Dowl. N. S. 348, 5 Jur. 1087, 11 L. J. Exch. 256; Keighley *v.* Brown, 16 Ves. Jr. 344. In Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Hurl. & W. 691, 6 N. & M. 240, 31 E. C. L. 287, two actions were consolidated after the declaration had been delivered in one, and an appearance had been entered in the other.

On return of writ.— If the causes of action are admitted or certainly ascertained by affidavit, the motion to consolidate may be made at the return of the writ. Worthy *v.* Chalk, 10 Rich. (S. C.) 141.

The intermission of a term between the issue of the writ on which one defendant was taken and an alias or pluries writ against the other will not prevent consolidation of the causes. Smith *v.* Woodward, 2 Cranch C. C. (U. S.) 226, 22 Fed. Cas. No. 13,129.

In England under the amendment to the law of libel act of 1888, several actions against different defendants in respect of the same or substantially the same libel may be consolidated before the defenses in the actions have been delivered. Stone *v.* Press Assoc., [1897] 2 Q. B. 159, 66 L. J. Q. B. 662, 77 L. T. Rep. N. S. 41, 45 Wkly. Rep. 641.

69. Gilbert *v.* Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316; Boyle *v.* Staten Island, etc., Land Co., 87 Hun (N. Y.) 233, 33 N. Y. Suppl. 836, 67 N. Y. St. 424; Le Roy *v.* Bedell, 1 Code Rep. N. S. (N. Y.) 201; Harris *v.* Wicks, 28 Wis. 198.

Where the plaintiff has amended his complaints after answers in both actions have been interposed, the motion to consolidate should not be made until after the time to answer the amended complaints has expired. Le Roy *v.* Bedell, 1 Code Rep. N. S. (N. Y.) 201.

70. Wilkinson *v.* Black, 80 Ala. 329; Brewster *v.* Stewart, 3 Wend. (N. Y.) 441; Cecil *v.* Brigges, 2 T. R. 639.

To authorize a consolidation rule according to the English practice the actions must be pending. See *supra*, I, H.

71. Mynot *v.* Bridge, 2 Str. 1178; Smith *v.* Crabb, 2 Str. 1149.

Where there are several bills pending to subject the same debt to the demands of several creditors, and a bill of interpleader is filed by a garnishee, if any of the causes are set down for a hearing, and others are ready, they may be consolidated; but if unprepared it is irregular and erroneous to consolidate the suits or by the order of consolidation to make the cases await the negligent preparation of one not ready. Biggs *v.* Kouns, 7 Dana (Ky.) 405.

72. Boyle *v.* Staten Island, etc., Land Co., 87 Hun (N. Y.) 233, 33 N. Y. Suppl. 836, 67 N. Y. St. 424; Eleventh Ward Sav. Bank *v.* Hay, 8 Daly (N. Y.) 328; Eckenroth *v.* Egan, 20 Misc. (N. Y.) 508, 46 N. Y. Suppl. 666; Rosenberg *v.* Staten Island R. Co., 14 N. Y. Suppl. 476, 38 N. Y. St. 106; Le Roy *v.* Bedell, 1 Code Rep. N. S. (N. Y.) 201; Daniel's Case, 10 Pa. Co. Ct. 190; Needham Piano, etc., Co. *v.* Hollingsworth, (Tex. Civ. App. 1897) 40 S. W. 750.

73. Earl *v.* Lefferts, 1 Johns. Cas. (N. Y.) 395.

74. Bank *v.* Hunsicker, 2 Wkly. Notes Cas. (Pa.) 381.

75. Scott *v.* Brown, 1 Nott & M. (S. C.) 417 note; McRae *v.* Boast, 3 Rand. (Va.) 481; Wyatt *v.* Thompson, 10 W. Va. 645.

76. Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

77. Under a statute which provides for consolidation on the plaintiff's application

and it is immaterial that the decree finally made binds him or affects his interest.[78]

c. The Motion Papers. It must appear by the motion papers that the causes of action are such as may be joined in the same declaration;[79] that the questions which will arise in each action are the same or substantially similar;[80] that the defenses are the same or of the same nature,[81] or that no defense is intended;[82] but identity of interest of the plaintiffs cannot be shown by affidavit, when the facts in that connection are put in issue by the pleas.[83]

6. Terms and Conditions — a. In General. In a proper case the court to which application is made may impose terms as a condition of granting[84] or denying the application.[85]

b. Costs. The court to which the application is addressed may impose costs as the condition of consolidating several causes.[86]

J. Effect of Consolidation — 1. At Law — a. In General. The effect of an order of consolidation made by a court of competent jurisdiction is to bind all the parties to the action until the order is vacated or reversed.[87] The effect of consolidating actions at law is to unite the causes as if the issues had been originally embraced in one action;[88] the separate actions are discontinued and the consolidated action alone left.[89] There can be no procedure in either of the actions consolidated, and the case is to be tried as if there had been an actual con-

and notice to the adverse party it is error to consolidate on such motion without such notice. Harsh *v.* Morgan, 1 Kan. 293.

78. Russell *v.* Chicago Trust, etc., Bank Co., 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Willard *v.* Calhoun, 70 Iowa 650, 28 N. W. 22.

79. Curtis *v.* Baldwin, 42 N. H. 398; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23.

80. Campbell Printing Press, etc., Co. *v.* Lyddy, 1 N. Y. Civ. Proc. 364; Crane *v.* Kœhler, 6 Abb. Pr. (N. Y.) 328 note; Dunn *v.* Mason, 7 Hill (N. Y.) 154; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23. And see Curtis *v.* Baldwin, 42 N. H. 398.

81. Campbell Printing Press, etc., Co. *v.* Lyddy, 1 N. Y. Civ. Proc. 364; Dunn *v.* Mason, 7 Hill (N. Y.) 154; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23. And see Curtis *v.* Baldwin, 42 N. H. 398.

Information and belief.— An affidavit by defendant's attorney that the defense in each suit "is substantially the same, as defendant has informed him, and as he believes," is insufficient. Crane *v.* Kœhler, 6 Abb. Pr. (N. Y.) 328 note.

82. Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23. And see Curtis *v.* Baldwin, 42 N. H. 398.

On an application by defendant for consolidation, he must show either that he has no defense or that the defense is the same to all the causes of action in the case; he must also show what that defense is that the court may see whether or not it is the same in all the cases. Gerding *v.* Anderson, 64 Ga. 304.

83. Miles *v.* Danforth, 37 Ill. 156.

84. Burnham *v.* Dalling, 16 N. J. Eq. 310; Reid *v.* Dodson, 1 Overt. (Tenn.) 396. In Booth *v.* Payne, consolidation was granted on condition that there should be no delay in going to trial. Booth *v.* Payne, 1 Dowl. N. S. 348, 5 Jur. 1087, 11 L. J. Exch. 256.

Imposition of terms on granting consolidation rule see *supra*, I, H, 3.

85. A motion to consolidate two actions against the same defendant, for breach of the same contract, claiming in one case as the assignee of a domestic corporation, and in the other as the assignee of a foreign corporation bearing the same name, will be denied where it is doubtful which corporation defendant contracted with, unless he stipulates that plaintiff may elect with which action the other should be consolidated, and that he will not object that two causes of action were improperly joined, or move that plaintiff should be called upon to elect on which cause of action he would stand. Mason *v.* Evening Star Newspaper Co., 35 Misc. (N. Y.) 77, 71 N. Y. Suppl. 203.

86. Powell *v.* Gray, 1 Ala. 77; Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109; Cecil *v.* Brigges, 2 T. R. 639; Chitty Pl. 221; Tidd Pr. 614.

Actions may be consolidated upon payment by plaintiff of the costs of a second action up to the time of the rule. Booth *v.* Paine, 1 Dowl. N. S. 348, 5 Jur. 1087, 11 L. J. Exch. 256.

As to costs on consolidation see, generally, Costs.

87. Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

88. Castro *v.* Whitlock, 15 Tex. 437.

The right to recoup damages in separate actions follow the cases on appeal and where the actions are there consolidated and a trial had *de novo* the whole amount of damages may be recouped. Hurst *v.* Everett, 91 N. C. 399.

89. Hiscox *v.* New Yorker Staats-Zeitung, 3 Misc. (N. Y.) 110, 23 N. Y. Suppl. 682, 52 N. Y. St. 212, 23 N. Y. Civ. Proc. 87, 30 Abb. N. Cas. (N. Y.) 131.

solidation in the declaration with one plea and a single issue.[90] Where the plaintiffs are different their rights remain separate and distinct, and separate and distinct proof is required.[91] When two or more suits at law are consolidated, they must be conducted in every respect as one and the same, and the rights of the parties adjudicated as if the separate suits had been originally combined in one suit.[92]

b. Dismissal of Original Cause. After consolidation of causes commenced by the same plaintiff against the same defendant, the plaintiff may dismiss his action as to some of the causes upon which he originally had commenced independent actions;[93] but a plaintiff in one action which he has caused to be consolidated with another in which he is defendant cannot by discontinuing the former affect the rights of the parties to the latter.[94]

c. Time to Plead. The time to plead in causes in different counties which have been consolidated follows the time of pleading in the county to which they are drawn by the consolidation, which may be extended.[95]

d. Effect as to Pleadings. The pleadings are to be taken and considered together and as asserting one and the same cause of action and constituting one pleading;[96] one will aid the other;[97] defects in the one will be remedied by the other and either pleading will be regarded as amendatory of the other.[98] But actions cannot be consolidated so that the petition in one will stand as an answer and counter-claim in the other;[99] nor where actions brought by different parties are consolidated without change in the pleadings will the complaint of one aid that of another of which it is no part.[1] When necessary it seems that the pleadings may be recast for the purpose of simplifying the issue.[2]

e. Effect as to Evidence. Where two or more actions are consolidated, a deposition taken in one may be introduced on the trial of the issues in the other;[3]

90. Lee *v.* Kearny Tp., 42 N. J. L. 543. See Stroh *v.* Hinchman, 37 Mich. 490, where the effect of a consolidation of actions upon promissory notes to which the defendants whose names appeared on the instrument occupied different relations to each other and to the other parties was considered but not decided.

91. Midland R. Co. *v.* Island Coal Co., 126 Ind. 384, 26 N. E. 68.

92. *Louisiana.*— Vascocu *v.* Woodward, 35 La. Ann. 555; Lockett *v.* Toby, 10 La. Ann. 713; Lafon *v.* Riviere, 6 Mart. (La.) 1.

Maryland.— Holthaus *v.* Nicholas, 41 Md. 241.

Minnesota.— Pioneer Fuel Co. *v.* St. Peter St. Imp. Co., 64 Minn. 386, 67 N. W. 217.

Tennessee.— Masson *v.* Anderson, 3 Baxt. (Tenn.) 290.

Texas.— Castro *v.* Whitlock, 15 Tex. 437.

See 1 Cent. Dig. tit. "Actions," § 690.

93. Young *v.* Canada Grand Trunk R. Co., 10 Biss. (U. S.) 550, 9 Fed. 348.

94. Williams *v.* Tripagnier, 1 Mart. N. S. (La.) 271.

The right to prosecute an action which might have been consolidated with another is not lost by the failure to cause the actions to be united. Jones *v.* Witousek, 114 Iowa 14, 86 N. W. 59.

95. Percy *v.* Seward, 6 Abb. Pr. (N. Y.) 326.

96. Pioneer Fuel Co. *v.* St. Peter St. Imp. Co., 64 Minn. 386, 67 N. W. 217; Castro *v.* Whitlock, 15 Tex. 437.

Treated as if facts embraced in several counts.— Causes consolidated are to be considered as if the facts stated in the separate petitions were embraced in one or several counts and the same as to the answers. Offut *v.* Roberts, 12 Mart. (La.) 300.

97. Pioneer Fuel Co. *v.* St. Peter St. Imp. Co., 64 Minn. 386, 67 N. W. 217, where a demurrer to one complaint was brought to a hearing after entry of the order of consolidation.

98. Castro *v.* Whitlock, 15 Tex. 437.

Defect of parties plaintiff.— Where separate suits are begun by two parties on a note in which each owns an interest, and property mortgaged to secure it is seized on separate writs of sequestration, and afterward the suits are consolidated and the pleadings amended appropriately, the defect of parties plaintiff is thereby cured, and it relates back to the filing of the suit, so as to leave such sequestration proceedings in full force and effect. Avery *v.* Popper, (Tex. Civ. App. 1898) 45 S. W. 951.

99. Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

1. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21.

2. Ralston *v.* Aultman, (Tex. Civ. App. 1894) 26 S. W. 746, where, on the consolidation of actions on a note and an account, it was required that the petition should be recast into one instrument showing clearly the amount claimed in each action.

3. Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

and evidence taken under a commission entitled in the consolidated cause may be read in the principal suit.[4]

f. Judgment. At law there should be but one verdict and one judgment;[5] and it has been held that the consolidation of several appeals between the same parties will authorize a judgment for the entire amount against sureties who are upon all the appeal-bonds.[6]

2. In Equity — a. Effect as to Pleadings. After consolidation in equity, each record is that of an independent suit. The rules of equity pleading and the rights of the parties remain unchanged. The parties in one suit do not become parties in the other, and their rights still depend or turn on the pleadings, proof, and proceedings in the respective causes. The issues remain precisely as they were, and are to be determined exactly as if the cases had been heard separately. In short the consolidation merely operates to carry on together two separate suits supposed to involve identical issues and is intended to expedite the hearing and diminish the expense.[7]

b. Effect as to Evidence. Except so far as the evidence in one is by order of the court treated as evidence in both,[8] the evidence in one case is not adopted in the other,[9] but each cause must be tried upon its separate and proper proof.[10]

c. Order of Trial. The order in which an action at law and a suit in equity shall be tried is discretionary with the trial judge, and the exercise by him of that discretion will not be revised.[11]

d. Effect on Prior Proceedings. So possible error on the part of the court with reference to the separate actions will be disregarded after consolidation, wherein the party is accorded all the rights to which he is entitled.[12]

4. Waterberry *v.* Delafield, 1 Cai. (N. Y.) 513.

5. Vascocu *v.* Woodward, 35 La. Ann. 555; Lockett *v.* Toby, 10 La. Ann. 713; Lafon *v.* Riviere, 6 Mart. (La.) 1; Young *v.* Davidson, 31 Tex. 153; Capron *v.* Adams County Sup'rs, 43 Wis. 613. See *supra*, I, D, 1, e.

Judgment nunc pro tunc.— Where separate verdicts are rendered, and one has not been carried into judgment, the court may order the entry of judgment *nunc pro tunc*. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242.

Where one cause consolidated is in judgment for plaintiff he may perfect judgment in the other cause subject to the right of the defendant to have the costs of entering judgment deducted if they pay it within the time limited exempting them from such costs. Earl *v.* Lefferts, Col. Cas. (N. Y.) 102.

6. Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657.

7. Hatcher *v.* Royster, 14 Lea (Tenn.) 222; Ogburn *v.* Dunlap, 9 Lea (Tenn.) 162; Mowry *v.* Davenport, 6 Lea (Tenn.) 80; Estill *v.* Deckerd, 4 Baxt. (Tenn.) 497; Masson *v.* Anderson, 3 Baxt. (Tenn.) 290; Lofland *v.* Coward, 12 Heisk. (Tenn.) 546; Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 674; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155. And see Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408. See also O'Bannon *v.* Roberts, 2 Dana (Ky.) 54, where the heirs and administrator of a decedent filed a bill to recover rent and subsequently the heirs filed a bill to recover the rents due after the filing of the first bill. The suits being consolidated and the first bill being dismissed the heirs were awarded a decree for the whole amount due them.

Each party has the benefit of allegations in either action.— Bowles *v.* Schoenberger, 2 B. Mon. (Ky.) 372.

In consolidation actions to reach rights in a fund, the petition that produced the fund will stand as the petition in consolidation and the other as an answer and cross petition. Brown *v.* Kuhn, 40 Ohio St. 468.

Necessity of forming issue.— Parties who have been permitted to consolidate their cause in chancery with the original cause cannot treat the defendants in that cause, some of whom are minors, as defendants to their bill and have a decree against them without making an issue with them by the pleadings or affording them an opportunity to be heard. Brevard *v.* Summar, 2 Heisk. (Tenn.) 97.

8. Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

9. Lofland *v.* Coward, 12 Heisk. (Tenn.) 546; Dews *v.* Eastham, 5 Yerg. (Tenn.) 297; Toledo, etc., R. Co. *v.* Continental Ins. Co., 95 Fed. 497, 36 C. C. A. 155.

10. Hatcher *v.* Royster, 14 Lea (Tenn.) 222.

11. Jones *v.* Jones, 94 N. C. 111.

12. **The refusal to require a plaintiff to** elect whether he would prosecute a claim case or an equitable proceeding is not erroneous, where the two causes were subsequently consolidated by the court's direction. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

Bills against insolvent corporation.— An objection that a creditor of an insolvent cor-

e. Decree — (i) *In General.* The decree should be so framed as to conserve all the rights of the parties in the causes united.[13] Ordinarily the determination should be evidenced by separate and distinct decrees.[14] A decree in one action will not be regarded as a decree in the other unless so directed;[15] and neither party can stipulate or make an agreement in regard to it which will bind the other.[16]

(ii) *Entitling.* In chancery the decree should bear the title of the consolidated cause and should recite the consolidation and hearing of the causes together. If entitled in but one case an appeal from the decree will only carry that case up.[17]

3. Control and Conduct of Cause. Where substantially the same relief is sought the conduct and control of the causes after consolidation is usually awarded to the party who commenced first.[18] Under some circumstances, however, the conduct of the proceedings may be given to the parties chiefly interested, by whom the costs are to be borne, and to whose advantage it is to keep down the expense.[19]

K. Objections. Alleged error in ordering the consolidation of actions cannot be assigned by a party at whose instance the order was made,[20] who consented to it,[21] or who failed to interpose seasonable objection or exception when opportunity offered.[22] Nor is it material that technically the consolidation of the actions

poration filed his bill for his own use only is obviated by the consolidation with another bill filed on behalf of all creditors. Swepson *v.* Exchange, etc., Bank, 9 Lea (Tenn.) 713.

13. Particular provisions.— Where an action to have a deed declared a mortgage and an action to foreclose a chattel mortgage are consolidated, the decree should limit the amount to be made by the sale of the mortgaged personalty to the sum for which the chattel mortgage was given. Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283.

A decree made in one cause prior to consolidation or the proceedings thereunder are not vacated by a decree in the other made thereafter; but all will be subject to the revision and control of the court in which they originated until finally ratified or annulled. Holthaus *v.* Nicholas, 41 Md. 241.

14. Midland R. Co. *v.* Island Coal Co., 126 Ind. 384, 26 N. E. 68.

15. Hatcher *v.* Royster, 14 Lea (Tenn.) 222; Ogburn *v.* Dunlap, 9 Lea (Tenn.) 162; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155.

16. Midland R. Co. *v.* Island Coal Co., 126 Ind. 384, 26 N. E. 68.

17. Ogburn *v.* Dunlap, 9 Lea (Tenn.) 162; Mowry *v.* Davenport, 6 Lea (Tenn.) 80.

18. Townsend *v.* Townsend, 23 Ch. D. 100, 48 L. T. Rep. N. S. 694, 31 Wkly. Rep. 735; *Re* Prime, 48 L. T. Rep. N. S. 208.

In Canada in determining who shall conduct consolidated cross-actions the main indicia to be regarded are: Which action was first begun? Upon whom does the chief burden of proof lie? Which action is the more comprehensive in its scope? Girvin *v.* Burke, 13 Ont. Pr. 216, where the first action was for the cancellation of notes made by plaintiff jointly with another, and the second was on the notes in question against both makers, substantially the same issues being raised, and plaintiff in the first action was permitted to proceed with his action, his co-maker being added as a party to it.

Where an action is transferred from an inferior court and consolidated with a cross-action begun in the higher court, the plaintiffs in the former action will be regarded as plaintiffs in the consolidated action if the action in the inferior court was begun before the cross-action. The Never Despair, 5 Aspin. 211, 53 L. J. P. 30, 50 L. T. Rep. N. S. 369, 9 P. D. 34, 32 Wkly. Rep. 599. And see The Bjorn, 5 Aspin. 212 note, 9 P. D. 36 note; The Cosmopolitan, 5 Aspin. M. C. 212 note, 9 P. D. 35 note.

19. Townsend *v.* Townsend, 23 Ch. D. 100, 48 L. T. Rep. N. S. 694, 31 Wkly. Rep. 735; *Re* Prime, 48 L. T. Rep. N. S. 208; Holden *v.* Silkstone, etc., Cole, etc., Co., 45 L. T. Rep. N. S. 531, 30 Wkly. Rep. 98.

Where the plaintiffs differed as to the conduct of the consolidated action, and an application was made by one for a change of solicitors, he was made defendant, and the other plaintiff given the control of the action, although his claim was smaller in amount than that of the other plaintiff. Holden *v.* Silkstone, etc., Coal, etc., Co., 45 L. T. Rep. N. S. 531, 30 Wkly. Rep. 98.

20. Poston *v.* Williams, 8 Tex. 281; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242. No complaint can be made of the consolidation by one who has had a motion to rescind the order disallowed. Lockhart *v.* Harrell, 6 La. Ann. 530.

Parties who have agreed to consolidate cannot object to an award under the agreement for informality. Bemus *v.* Quiggle, 7 Watts (Pa.) 362.

21. Rosenthal *v.* Ives, 2 Ida. 244, 12 Pac. 904. See Leslie *v.* Elliott, (Tex. Civ. App. 1901) 64 S. W. 1037.

22. Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143; Bangs *v.* Dunn, 66 Cal. 72, 4 Pac. 963; Russell *v.* Chicago Trust, etc., Bank, 139 Ill.

was erroneous, where no prejudice has resulted therefrom and no loss has been sustained thereby.[23]

L. Vacating and Setting Aside — 1. In General. The power to consolidate includes the power to vacate or set the consolidation aside;[24] but the party seeking to have the order of consolidation rescinded must show that it was made in disregard of his protest or present a reasonable excuse for not making seasonable objection.[25] The exercise of this power will not be revised unless prejudice has resulted.[26] So a plaintiff who has been compelled to pay accrued costs as a condition of consolidation may be permitted to withdraw from the consolidation at his election;[27] and an order erroneously consolidating an action of which the court has jurisdiction with one forbidden by statute may be disregarded and the former action proceeded with as if the order had not been made.[28]

2. Quasi-Consolidation. So where one action has been directed to be tried as a test case, the court may open the consolidation and try another similar action, and extend to the second trial all such terms as are requisite to attain the merits.[29]

M. Appeal and Error — 1. In General. The erroneous action of the court below in ordering or refusing to order the consolidation of actions by which a party has sustained prejudice may be reviewed, but will not be reversed unless substantial injury has been sustained.[30] Where, on a consolidation of causes, separate

538, 29 N. E. 37, 17 L. R. A. 345; Moore *v.* Francis, 17 Tex. 28; Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485.

Exceptions must be taken at the time the order is made.— Jones *v.* Jones, 94 N. C. 111.

Objection made for the first time on appeal see Appeal and Error, 2 Cyc. 680, note 34.

23. Rosenthal *v.* Ives, 2 Ida. 244, 12 Pac. 904; Matter of Shipman, 82 Hun (N. Y.) 108, 31 N. Y. Suppl. 571, 64 N. Y. St. 161; *In re* Hodgman, 10 N. Y. Suppl. 491, 31 N. Y. St. 479; Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991; Moore *v.* Francis, 17 Tex. 28; Young *v.* Gray, 65 Tex. 99; Leslie *v.* Elliott, (Tex. Civ. App. 1901) 64 S. W. 1037.

An exception grounded upon the increased costs incurred by a delay in ordering several actions to be consolidated will not be sustained. Morrison *v.* Baker, 81 N. C. 76. No error can be assigned on the refusal of the court to order consolidation, unless it appears that costs were thereby unnecessarily created and taxed to the defendant. Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

In case of improper consolidation, requiring a petition in one case to stand as a counter-claim in the other, informalities in the counter-claim as in seeking cancellation instead of damages are cured by trial. Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

Intervener.—A consolidation in equity cannot be objected to on appeal, by one who became a party after consolidation of the causes and whose rights were unaffected thereby. Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 7 L. R. A. 345.

24. Young *v.* Gray, 65 Tex. 99; Cohen *v.* Bulkeley, 5 Taunt. 165, 14 Rev. Rep. 731, 1 E. C. L. 92.

Effect of separate charges, verdicts, and judgments.— Where the court, on the consolidation of causes, gives a separate charge, has the jury find a separate verdict, and enters a separate judgment in each cause, overrules in one order a single motion for a new trial in favor of the cases, and approves one statement of facts for them all, the original order of consolidation will be held to be still in force. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242.

25. Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485.

26. Young *v.* Gray, 65 Tex. 99. In Central Nat. Bank *v.* Hume, 3 Mackey (D. C.) 360, 51 Am. Rep. 780, the court refused to rescind an order of consolidation made by it on an allegation by the defendant that he was injured by the order and that it was made without his consent in his absence.

27. Hatcher *v.* Independence Nat. Bank, 79 Ga. 547, 5 S. E. 111; Hatcher *v.* Chambersburg Nat. Bank, 79 Ga. 542, 5 S. E. 109.

28. Willard Mfg. Co. *v.* Tierney, 130 N. C. 611, 41 S. E. 871.

29. Cohen *v.* Bulkeley, 5 Taunt. 165, 14 Rev. Rep. 731, 1 E. C. L. 92.

But a consolidation rule will not be opened for the purpose of trying another cause where it appears that the first action was fairly tried. Foster *v.* Alvez, 3 Bing. N. Cas. 896, 5 D. P. C. 619, 3 Hodges 23, 4 Scott 535, 32 E. C. L. 410.

30. Griffith *v.* Seattle Nat. Bank Bldg. Co., 16 Wash. 329, 47 Pac. 749.

Appellate jurisdiction of aggregated claims see Appeal and Error, 2 Cyc. 566.

Bond or undertaking on appeal in actions consolidated see Appeal and Error, 2 Cyc. 827, note 89; 830, note 97; 840, note 38.

As to the necessity of incorporating the agreement for and order of consolidation in a bill of exceptions see Appeal and Error, 3 Cyc. 24, note 3.

Presumption on appeal as to regularity of the consolidation of cross-actions see Appeal and Error, 3 Cyc. 300, note 9.

An appeal from an unauthorized second

judgments are entered in each cause, one appeal may be taken from a portion of the causes which are independent of the others.[31] But no appeal will lie in any of the consolidated causes until all are finally disposed of.[32]

2. How Taken. Different defendants may sue out separate writs of error;[33] but the failure or refusal to consolidate two or more actions cannot be revised on an appeal from one of them.[34]

3. The Record. On appeal from the denial of an application to consolidate, the action of the court below will not be reviewed, where the record fails to show the nature of both actions.[35]

4. Review. An appeal in one suit will only bring up that case, leaving the other causes in the court below, and the decree as to them in full force and effect.[36]

5. Failure of One Defendant to Prosecute. If the defendant in an action ordered to be tried as a test case refuses to appeal, the court may substitute the defendant in another case for the purpose of prosecuting an appeal;[37] but if the defendant in the test case fails to prosecute an appeal taken by him and pays damages and costs to the plaintiff, the defendants in the other action will not be permitted to appeal.[38]

II. SEVERANCE.

A. As to Plaintiffs. As a general rule a demand due to several persons jointly cannot be subdivided so as to allow the individual interests to be recovered in separate actions, for the reason that the contract of the debtor is to pay the debt as an entirety to his joint creditors and is therefore indivisible.[39] However, as the debtor may by a new contract bind himself to account to the individual creditors for their respective interests in the demand, such a demand may be divided with the debtor's consent.[40]

judgment will not be dismissed, but the judgment will be annulled. Vascocu *v.* Woodward, 35 La. Ann. 555.

31. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242.

32. Mills *v.* Paul, 4 Tex. Civ. App. 503, 23 S. W. 395, 396, 30 S. W. 242; Union Pac. R. Co. *v.* Jones, 49 Fed. 343, 1 C. C. A. 282, where the defendant, a railroad company, moved that three actions pending against it by members of the same family for personal injuries received in the same accident should be consolidated and that there should be but one verdict, and there was held to be no cause of complaint on its part, although against objection on its behalf the court determined that there should be a separate verdict for each plaintiff.

33. New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

Where separate writs are sued out a joint writ is superfluous. New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

34. Monroe *v.* Brady, 7 Ala. 59.

35. It will be presumed that the refusal to consolidate was proper. Webb *v.* Trescony, 76 Cal. 621, 18 Pac. 796.

36. Hatcher *v.* Royster, 14 Lea (Tenn.) 222; Ogburn *v.* Dunlap, 9 Lea (Tenn.) 162. And see Harmon *v.* San Francisco, etc., R. Co., 86 Cal. 617, 25 Pac. 124, where two causes were consolidated below, the defendants succeeded, the plaintiffs taking several appeals, and it was held that each case must be decided on its own record without considering the evidence in the record of the other.

37. Briton Medical, etc., L. Assur. Co. *v.* Jones, 60 L. T. Rep. N. S. 637.

38. Thomas *v.* Winter, 17 L. T. Rep. N. S. 148, 16 Wkly. Rep. 82.

39. Carrington *v.* Crocker, 37 N. Y. 336, 4 Transcr. App. (N. Y.) 230, 4 Abb. Pr. N. S. (N. Y.) 335; Upjohn *v.* Ewing, 2 Ohio St. 13.

The object of the rule is to protect the debtor from a multiplicity of actions, and the consequent increased expense. Carrington *v.* Crocker, 37 N. Y. 336, 4 Transcr. App. (N. Y.) 230, 4 Abb. Pr. N. S. (N. Y.) 335.

Release by one joint creditor.— A simple receipt given by one of two joint creditors for less than one half of the debt, although intended as a discharge of the debtor as to such moiety will not preclude an action by both creditors from recovering the remainder of the debt. If in such a case the creditor who receipted subsequently give a valid release of his moiety he may be stricken out as a party and the other creditor may recover his moiety. Carrington *v.* Crocker, 37 N. Y. 336, 4 Transcr. App. (N. Y.) 230, 4 Abb. Pr. N. S. (N. Y.) 335.

40. Stewart *v.* Ashley, 34 Mich. 183; Carrington *v.* Crocker, 37 N. Y. 336, 4 Transcr. App. (N. Y.) 230, 4 Abb. Pr. N. S. (N. Y.) 335.

A debtor who procures a release from one or more of his joint creditors, between whom

B. As to Defendants. The severance of a suit as to the parties defendant, so as to make two several suits out of one joint suit, is never allowed at the common law;[41] but an action may be severed as to defendants by their consent.[42] By statute in many states, however, the plaintiffs may sever under certain circumstances,[43] as where but a part of the defendants are served,[44] where a part of the defendants default,[45] where a several judgment is proper,[46] or where one defendant dies;[47] but severance will not be granted merely to enable parties to testify.[48]

C. For Misjoinder — 1. Of Causes of Action. Misjoinder of causes of action furnishes a sufficient reason for a severance.[49]

no partnership exists, cannot conclude a co-creditor nor preclude him from a recovery in equity. Upjohn *v.* Ewing, 2 Ohio St. 13.

41. Deatherage *v.* Rohrer, 78 Ill. App. 248; Downer *v.* Dana, 22 Vt. 22; Smith *v.* Rines, 2 Sumn. (U. S.) 338, 22 Fed. Cas. No. 13,100.

In an action on a joint contract if one defendant pleads infancy, plaintiff may discontinue as to him and proceed against the other. Woodward *v.* Newhall, 1 Pick. (Mass.) 500.

Recovery against part of the defendants.— In an action *ex delicto*, the plaintiff may join several as defendants, and if he sustain his action against any he may dismiss as to the others and recover of those as to whom his complaint is upheld. Doremus *v.* Root, 94 Fed. 760 [*following* Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 17 S. Ct. 120, 41 L. ed. 485].

Removal to federal court.— A cause cannot be removed as to some defendants and left depending as to others. Smith *v.* Rines, 2 Sumn. (U. S.) 338, 22 Fed. Cas. No. 13,100.

42. Parker *v.* Stephens, (Tex. Civ. App. 1899) 48 S. W. 878, trespass to try title, where after a judgment in favor of two defendants they consented to a severance as to them, and plaintiffs filed an amended petition setting up a newly acquired title.

43. **Error not prejudicial.**— In an action wherein judgment was ordered against one maker of a note and in favor of the other, the fact that there was no discontinuance against the latter and the amendments of the pleading was held not to be prejudicial to the other defendant and that there was a sufficient severance as to the joint defendants. Reading *v.* Beardsley, 41 Mich. 123, 1 N. W. 965.

44. See, generally, Parties.

Where several defendants are sued jointly and service of process cannot be made on some of them it may be served on those accessible and the action maintained against them for the breach of the contract by all. Tappan *v.* Bruen, 5 Mass. 193. But where some are non-residents, to entitle the plaintiff to proceed against the latter, it must be shown that service was made upon all the parties within reach of process. Tappan *v.* Bruen, 5 Mass. 193.

45. See, generally, Judgments.

Where makers and indorsers are sued together and one defaults plaintiff cannot sever as to some of the rest and proceed as to the others. Paine *v.* Chase, 4 Hill (N. Y.) 563.

46. Where, in an action against two or more, a several judgment is proper, the plaintiff may be required to take judgment against one or more of the defendants and the court may direct the action to be severed and proceeded with against the other. Ferris *v.* Hard, 4 N. Y. Suppl. 9, 17 N. Y. St. 364, 15 N. Y. Civ. Proc. 171.

47. See, generally, Abatement and Revival, 1 Cyc. 47.

A statute providing where liability is several as well as joint and one party dies severance of the action may be ordered so that it may proceed against the survivor and a personal representative of the decedent does not permit the severance where the complaint is on one joint and one joint and several cause of action. Hobart *v.* Martin, 49 Hun (N. Y.) 607, 1 N. Y. Suppl. 623, 16 N. Y. St. 925, 14 N. Y. Civ. Proc. 435.

Where the statutes are confused and their application doubtful and uncertain, severance may properly be granted where the interests of the parties will not suffer. Read *v.* Simon, 19 N. Y. Suppl. 457, 46 N. Y. St. 729, 22 N. Y. Civ. Proc. 196.

48. Mathews *v.* De Laronde, 8 Mart. N. S. (La.) 505; Hill *v.* Alvord, 19 Hun (N. Y.) 77.

49. Jacobson *v.* Brooklyn El. R. Co., 22 Misc. (N. Y.) 281, 48 N. Y. Suppl. 1072; State *v.* Parker, 121 N. C. 198, 28 S. E. 297; Hodges *v.* Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917; Mitchell *v.* Mitchell, 96 N. C. 14, 1 S. E. 648; Street *v.* Tuck, 84 N. C. 605; Ballard *v.* Perry, 28 Tex. 347, where the causes of action were in the main distinct and several as to the different defendants, and in action one defendant claimed not only under a common source of title with his co-defendants but also independently under the title asserted by the defendant.

Cause of action for an injury to land, felling of trees, and conversion of them cannot be severed, since if the major cause of action fails the minor cause will fail with it. Frost *v.* Duncan, 19 Barb. (N. Y.) 560.

Severance by demand of jury trial.— If defendant demand a trial by a jury the court may sever an action at law where relief by way of injunction is asked, and send the action at law to the jury calendar. Jacobson

2. Of Parties. Where defendants have been improperly joined in an action which should have been brought against them separately a severance may be ordered.[50]

3. Of Causes and Parties. A plaintiff cannot sever either as to persons or amount and take several judgments for several sums at different stages of the proceedings,[51] and where a statute permits a severance for misjoinder of causes only, it is improper to divide an action wherein not only causes but parties are misjoined.[52]

D. Loss or Waiver of Right to Sever. The right to a severance may be lost or waived by the act of the parties.[53]

E. Discretion to Sever. Unless the conditions are such that severance is a strict matter of right, as where the right to a joint action is conferred by statute,[54] the court is vested with judicial discretion to grant or refuse an application therefor;[55] but the improper refusal of a motion for a severance is not a ground of reversal, where no injury resulted to the moving party.[56]

F. Time of Procuring. A motion for a severance may be made at any time;[57] but after verdict the court cannot sever the cause of action,[58] except by consent of the parties.[59]

G. Effect of Severance. Upon a severance all the incidents of the original action attaches to the separate actions into which it is divided.[60] If the severance was by consent, rights under a judgment in the original action are waived,[61] and where without an order the parties treat the action as severed they cannot complain of subsequent confusion in the proceedings.[62]

v. Brooklyn El. R. Co., 22 Misc. (N. Y.) 281, 48 N. Y. Suppl. 1072.

50. Seaman *v.* Slater, 18 Fed. 485.

51. Brewer *v.* Christian, 9 Ill. App. 57.

52. Morton *v.* Western Union Tel. Co., 130 N. C. 299, 41 S. E. 484; State *v.* Parker, 121 N. C. 198, 28 S. E. 297; Mitchell *v.* Mitchell, 96 N. C. 14, 1 S. E. 648.

53. Entering into joint contract.— By contracting for the carriage of baggage with two jointly, a carrier is precluded from insisting that the contract shall be severed and separate actions brought thereon. Anderson *v.* Wabash, etc., R. Co., 65 Iowa 131, 21 N. W. 485.

Joining in answer.— Defendants who waive their right to sever by joining in their answer, going to trial, or suffering a joint verdict cannot be heard to object. Mathews *v.* De Laronde, 8 Mart. N. S. (La.) 505; Sere *v.* Armitage, 9 Mart. (La.) 394, 13 Am. Dec. 311.

54. Taylor *v.* French, 11 Lea (Tenn.) 136.

55. Rice *v.* Hodge, 26 Kan. 164; Tyson *v.* Netherton, 6 Heisk. (Tenn.) 19.

In ejectment against several, each in possession of separate parcels, severance is not a matter of right, but may be granted in the discretion of the court. Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510.

56. Ballard *v.* Perry, 28 Tex. 347.

57. Ballard *v.* Perry, 28 Tex. 347, where the motion was made a few days before trial, and was not acted on until the cause was called, and there was nothing to indicate prejudice by the delay.

Cause at issue against all defendants.— A suit cannot be severed at the circuit and an inquest taken against part of the defendants, where the cause was at issue against all of the defendants and might have been noticed for trial against all of them. Livingston *v.* McIntyre, 2 How. Pr. (N. Y.) 41.

58. Griffin *v.* Head, 122 Ala. 441, 25 So. 185, 82 Am. St. Rep. 80; Fox *v.* Muller, 31 Misc. (N. Y.) 470, 64 N. Y. Suppl. 388 [*affirming* 62 N. Y. Suppl. 1129].

Under N. Y. Code Civ. Proc. § 1220, however, an application for leave to sever an action will not be denied because the motion was made after damages were assessed on one cause of action, as that section permits a severance at any stage of the action. Stokes *v.* Stokes, 31 Abb. N. Cas. (N. Y.) 464, 30 N. Y. Suppl. 153, 62 N. Y. St. 39.

Two cases which have been consolidated cannot be separated after judgment for the purpose of appeal. Chrétien *v.* Crowley, 1 Dorion (U. C.) 391.

59. Griffin *v.* Head, 122 Ala. 441, 25 So. 185, 82 Am. St. Rep. 80; Parker *v.* Stephens, (Tex. Civ. App. 1899) 48 S. W. 878.

60. In ejectment each defendant may be required to give security for costs, as provided by statute in actions for the recovery of land, and may be required, in the discretion of the court, to file a bill of particulars describing the land claimed, and disclaiming as to the balance. Bryan *v.* Moring, 99 N. C. 16, 5 S. E. 739.

61. By agreeing to a severance after judgment and going to trial on the action as severed, defendants waive their rights under the original judgment. Parker *v.* Stephens, (Tex. Civ. App. 1899) 48 S. W. 878.

62. Where in an action by joint plaintiffs and after a trial in favor of one plaintiff and against the other, all the parties treat the

H Severance by Payment, Release, or Satisfaction of Part of Joint Demand. So too where the debtor settles with one of the joint creditors, so that this one has no longer any real interest in the matter, there is a severance of the cause of action and the remaining creditors may bring separate actions for their claims.[63]

CONSOLS. An abbreviation of the expression "consolidated annuities," and used in modern times as a name of various funds united in one for the payment of the British national debt.[1]

CONSORTIO MALORUM ME QUOQUE MALUM FACIT. A maxim meaning "The company of wicked men makes me also wicked."[2]

CONSORTIUM. The person's affection, society, or aid;[3] the right to the conjugal fellowship of the wife, to her company, coöperation and aid in every conjugal relation.[4] (See, generally, DIVORCE; HUSBAND AND WIFE.)

CONSORTSHIP. A maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein.[5] (See, generally, SALVAGE.)

action as severed into two distinct suits, without an order of severance or change in the pleadings, the defendant cannot object to the anomalous character that the proceedings thereafter assume. Stewart *v.* Ashley, 34 Mich. 183.

63. *Alabama.*— Stedman *v.* Shelton, 1 Ala. 86.

Connecticut.— Beach *v.* Hotchkiss, 2 Conn. 697.

Maine.— Holland *v.* Weld, 4 Me. 255.

Massachusetts.— Boston, etc., R. Co. *v.* Portland, etc., R. Co., 119 Mass. 498, 20 Am. Rep. 338; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Austin *v.* Walsh, 2 Mass. 401.

New York.— Woodbury *v.* Deloss, 65 Barb. (N. Y.) 501.

Ohio. — Upjohn *v.* Ewing, 2 Ohio St. 13.

England. — Garret *v.* Taylor, 1 Esp. 117.

See 1 Cent. Dig. tit. "Actions," § 704. See also ACCORD AND SATISFACTION; PAYMENT; RELEASE.

1. Black L. Dict.

2. Black L. Dict.

3. Seaver *v.* Adams, 66 N. H. 142, 144, 19 Atl. 776, 49 Am. St. Rep. 597.

4. Bigaouette *v.* Paulet, 134 Mass. 123, 124, 45 Am. Rep. 307 [*quoted* in Jacobsen *v.* Siddal, 12 Oreg. 280, 288, 7 Pac. 108, 53 Am. Rep. 360].

5. Andrews *v.* Wall, 3 How. (U. S.) 568, 572, 11 L. ed. 729.

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CROSS-REFERENCES

For Matters Relating to:

Action on the Case, see CASE, ACTION ON.

Acts and Declarations of Conspirator, see CRIMINAL LAW; EVIDENCE.

For Matters Relating to (*continued*):
Combinations:
In Restraint of Trade, see CONTRACTS; MONOPOLIES.
To Create Monopoly, see MONOPOLIES.
Injunction Against Conspiracy, see INJUNCTIONS.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION AND NATURE.

A. In General. It has been said that there is perhaps no crime an exact definition of which it is more difficult to give than the offense of conspiracy.[1] The essentials of a conspiracy, whether viewed with regard to its importance in a criminal prosecution or its significance in a civil action for damages, are commonly described in this general language: It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means.[2] This definition perhaps is not perfectly accurate, but is sufficient as a general description of the offense.[3]

B. Combination — 1. NUMBER OF PERSONS NECESSARY. To constitute a conspiracy there must be a combination of two or more persons; one person cannot conspire with himself.[4]

1. State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

2. *Arkansas.*— Clinton *v.* Estes, 20 Ark. 216.

Connecticut.— State *v.* Rowley, 12 Conn. 101.

Delaware.— State *v.* Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Heaps *v.* Dunham, 95 Ill. 583; Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780; Orr *v.* People, 63 Ill. App. 305; Breitenberger *v.* Schmidt, 38 Ill. App. 168.

Maine.— State *v.* Mayberry, 48 Me. 218.

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

Michigan.— Alderman *v.* People, 4 Mich. 414, 9 Am. Dec. 321.

New Jersey.— State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

New York.— People *v.* Melvin, 2 Wheel. Crim. (N. Y.) 262; People *v.* Trequier, 1 Wheel. Crim. (N. Y.) 142.

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670, 2 Ohio N. P. 55.

Pennsylvania.— Hinchman *v.* Richie, 1 Brightly (Pa.) 143; Com. *v.* Tack, 1 Brewst. (Pa.) 511; Cote *v.* Murphy, 33 Wkly. Notes Cas. (Pa.) 421; Com. *v.* Bliss, 12 Phila. (Pa.) 580, 34 Leg. Int. (Pa.) 354.

Vermont.— Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

United States.— Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; Drake *v.* Stewart, 76 Fed. 140, 22 C. C. A. 104; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Wootten, 29 Fed. 702; U. S. *v.* Sacia, 2 Fed. 754; *In re* Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 680.

England.— Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848, 12 L. J. M. C. 135, 48 E. C. L. 49; Rex *v.* Seward, 1 A. & E. 706, 3 L. J. M. C. 103, 3 N. & M. 557, 28 E. C. L. 330; Reg. *v.* Bunn, 12 Cox C. C. 316; Reg. *v.* Vincent, 9 C. & P. 91, 38 E. C. L. 65; Rex *v.* Turner, 13 East 228.

Other definitions are: "A corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end." State *v.* Slutz, 106 La. 182, 30 So. 298; U. S. *v.* Stevens, 2 Hask. (U. S.) 164, 27 Fed. Cas. No. 16,392.

"A confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual, or of the public." State *v.* Burnham, 15 N. H. 396, 402.

The term "conspiracy" is divisible into three heads:—(1) Where the end to be attained is in itself a crime; (2) where the object is lawful, but the means to be resorted to are unlawful; (3) where the object is to do an injury to a third party or a class, although if the wrong were inflicted by a single individual it would be a wrong and not a crime. Reg. *v.* Parnell, 14 Cox C. C. 508.

By express statutory provision in Colorado the object of the conspiracy must itself be an unlawful act if committed, and the doing of a lawful act in an unlawful way is not within the provision. Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111; Miller *v.* People, 22 Colo. 530, 45 Pac. 408; Connor *v.* People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341.

3. Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

4. *Illinois.*— Evans *v.* People, 90 Ill. 384; Carl Corper Brewing, etc., Co. *v.* Minwegan, etc., Mfg. Co., 77 Ill. App. 213.

2. The Agreement — a. Necessity For Agreement — (I) *In General.* To constitute a conspiracy there must be unity of design and purpose, for the common design is of the essence of the conspiracy.[5]

(II) *Knowledge Without Participation.* The mere knowledge, acquiescence, or approval of the act, without coöperation or agreement to coöperate, is not enough to constitute one a party to a conspiracy.[6] There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.[7]

b. Character of Agreement. No formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged, although such agreement be not manifested by any formal words.[8] If two persons pursue by their acts the same

Pennsylvania.— Gaunce *v.* Backhouse, 37 Pa. St. 350; Com. *v.* Manson, 2 Ashm. (Pa.) 31; Com. *v.* Irwin, 8 Phila. (Pa.) 380.

South Carolina.— State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

Texas.— Woodworth *v.* State, 20 Tex. App. 375.

United States.— U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; U. S. *v.* Stevens, 2 Hask. (U. S.) 164, 27 Fed. Cas. No. 16,392.

England.— Reg. *v.* Thompson, 16 Q. B. 832, 5 Cox C. C. 166, Dears. C. C. 3, 17 Jur. 453, 20 L. J. M. C. 183, 7 E. C. L. 832; Reg. *v.* Boulton, 12 Cox C. C. 87; Reg. *v.* Barry, 4 F. & F. 389.

See 10 Cent. Dig. tit. "Conspiracy," § 2 *et seq.*

As husband and wife are considered one in law they cannot alone be guilty of conspiracy. People *v.* Miller, 82 Cal. 107, 22 Pac. 934; State *v.* Clark, 9 Houst. (Del.) 536, 32 Atl. 310; Com. *v.* Kirkpatrick, 15 Leg. Int. (Pa.) 268; Kirtley *v.* Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445.

Feigned purpose by one of two persons.— One person cannot be guilty of conspiring with another to commit a crime, where the latter only formed a purpose to assist in its commission with the intention of drawing the former on. In such case there is no union or concert of wills. Woodworth *v.* State, 20 Tex. App. 375.

5. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; U. S. *v.* Frisbie, 28 Fed. 808; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,289, 11 Chic. Leg. N. 336, 25 Int. Rev. Rec. 217, 8 Reporter 166.

6. *Illinois.*— Evans *v.* People, 90 Ill. 384.

Iowa.— State *v.* King, 104 Iowa 727, 74 N. W. 691.

North Carolina.— Brannock *v.* Bouldin, 26 N. C. 61.

United States.— U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902.

England.— Reg. *v.* Barry, 4 F. & F. 389.

In respect to matters with which he is not concerned or connected one is not charged with the legal duty of preventing mischief to others by communicating what he knows. Brannock *v.* Bouldin, 26 N. C. 61.

Persons acting as agents or servants.— On an indictment charging a conspiracy to defraud the United States by mailing old newspapers or fraudulently increasing the weight of mail matters, if such mailing was done by defendants' servants or agents as such, and not as parties to, or members or abettors of, the common design, they will not be deemed co-conspirators. U. S. *v.* Newton, 52 Fed. 275.

7. U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902. Thus where certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire, it was held that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterward the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood, and knew of the devices used to conceal it, was no evidence to sustain the charge of a fraudulent conspiracy between the employers and servants. Reg. *v.* Barry, 4 F. & F. 389.

8. *Alabama.*— Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— McKee *v.* State, 111 Ind. 378, 12 N. E. 510; Archer *v.* State, 106 Ind. 426, 7 N. E. 225.

Wisconsin.— Patnode *v.* Westenhover, 114 Wis. 460, 90 N. W. 467.

United States.— U. S. *v.* Sacia, 2 Fed. 754; U. S. *v.* Goldberg, 7 Biss. (U. S.) 175, 26 Fed. Cas. No. 15,253; U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223; *In re* Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 680; U. S. *v.* Allan, 24 Fed. Cas. No. 14,432, 7 Int. Rev. Rec. 163.

object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they were pursuing, this will be sufficient to constitute a conspiracy.[9] Previous acquaintance is unnecessary,[10] and it is not essential that each conspirator should know the exact part to be performed by the other conspirators in execution of the conspiracy.[11]

3. MEANS. If the object of the combination is unlawful, the means contemplated to effect such object are immaterial, either in a criminal prosecution to punish the perpetrators for entering into the combination or to recover of them the damages inflicted by carrying out the object of the conspiracy;[12] and it is not even necessary that the means should have been agreed upon.[13] Where, however, the object of the conspiracy is in itself not unlawful, the object is immaterial and the illegality of the means used or intended to be used constitutes the offense.[14] Where the object in view is lawful and no unlawful means are used there can be no prosecution for conspiracy,[15] nor any civil action.

England.— Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744.

"It is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators." U. S. *v.* Cassidy, 67 Fed. 698, 702.

9. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Spies *v.* People, 121 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *In re* Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 580; Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744.

10. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; U. S. *v.* Wrape, 28 Fed. Cas. No. 16,767, 4 Cinc. L. Bul. 433; Reg. *v.* Parnell, 14 Cox C. C. 508.

11. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223; U. S. *v.* Wrape, 28 Fed. Cas. No. 16,767, 4 Cinc. L. Bul. 433.

An excellent illustration of this principle is given in Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. It was there held that where a number of persons conspired together to destroy the police force of a city, in a certain event, as in case of a collision between them and working-men by throwing a bomb among the police, if the bomb-maker knew it was to be thrown by one of those having the common purpose, that would be sufficient to affect him with the guilt of devising, encouraging, aiding, or abetting the crime, resulting from the act; that it was altogether immaterial that the maker of the bombs did not know who was to use them.

12. *Illinois.*— Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

New York.— Adams *v.* People, 9 Hun (N. Y.) 89; Lambert *v.* People, 9 Cow. (N. Y.) 578.

Pennsylvania.— Hazen *v.* Com., 23 Pa. St. 355; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840; State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N, 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223.

See 10 Cent. Dig. tit. "Conspiracy," § 37.

As a conspiracy to seduce a female is itself unlawful, it is immaterial whether the means to be used are unlawful or not. Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780.

13. Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630.

14. *Massachusetts.*— Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Michigan.— People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.— Lambert *v.* People, 9 Cow. (N. Y.) 578.

Pennsylvania.— Com. *v.* Myers, 29 Wkly. Notes Cas. (Pa.) 497.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

15. Com. *v.* Myers, 29 Wkly. Notes Cas. (Pa.) 497.

II. CRIMINAL LIABILITY.

A. Common-Law Offense. The offense of conspiracy, as known to the common law of England, so far as it is adapted to existing conditions, is consistent with established institutions and, unaffected by legislation, is an indictable common-law offense in many of the states.[16]

B. Constituents of Offense — 1. UNLAWFUL END OR MEANS. As already shown, in order that a combination may be punishable it must be formed either to do an unlawful act or a lawful act by criminal or unlawful means.[17] It is not essential, however, to criminal liability that the acts contemplated should constitute a criminal offense, for which without the elements of conspiracy one alone could be indicted.[18] It will be enough if they are corrupt, dishonest, fraudulent,

16. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512; State *v.* Cawood, 2 Stew. (Ala.) 360.

Connecticut.— State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

Maryland.— State *v.* Buchanan 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Minnesota.— State *v.* Pulle, 12 Minn. 164.

New Hampshire.— State *v.* Burnham, 15 N. H. 396.

New Jersey.— State *v.* Norton, 23 N. J. L. 33.

Contra, Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

See 10 Cent. Dig. tit. "Conspiracy," § 30.

33 Edw. I, which purports to define conspiracy, does not abolish or limit the offense as it existed at common law. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; State *v.* Norton, 23 N. J. L. 33; 1 Hawkins P. C. 189.

N. J. Rev. Stat. p. 275, § 61, enumerating various particulars in which the crime of conspiracy consists and prescribing the punishment for the offense thus constituted, but neither in terms abolishing the common-law offense nor declaring that the cases enumerated shall alone constitute the offense, does not abrogate the existing common-law offense. State *v.* Norton, 23 N. J. L. 33.

Conspiracy to commit crime without the state.— In Alabama it is an indictable common-law misdemeanor to conspire within the state to commit a known common-law felony, *malum in se,* in a sister state. Thompson *v.* State, 106 Ala. 67, 17 So. 512. So in Texas. *Ex p.* Rogers, 10 Tex. App. 655, 38 Am. Rep. 654.

In federal courts.—Conspiracy, as known at common law, not being defined by any act of congress as an offense against the authority of the United States, is not cognizable as such in the federal courts. U. S. *v.* Martin, 4 Cliff. (U. S.) 156, 26 Fed. Cas. No. 15,728. And see U. S. *v.* McCord, 72 Fed. 159.

17. See *supra,* I, A; I, B, 3.

18. *Connecticut.*—State *v.* Gannon, (Conn. 1902) 52 Atl. 727; State *v.* Rowley, 12 Conn. 101.

Illinois.— Orr *v.* People, 63 Ill. App. 305.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Waterman, 122 Mass. 43; Adams *v.* Paige, 7 Pick. (Mass.) 542; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. *v.* Hunt, Thach. Crim. Cas. (Mass.) 609.

Michigan.— People *v.* Richards, 1 Mich. 216, 51 Am. Rep. 75. But see Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321.

New Hampshire.— State *v.* Burnham, 15 N. H. 396.

New Jersey.— State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; State *v.* Norton, 23 N. J. L. 33 [*disapproving dictum* in State *v.* Rickey, 9 N. J. L. 293].

Pennsylvania.— Wilson *v.* Com., 96 Pa. St. 56; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

England.— Reg. *v.* Warburton, L. R. 1 C. C. 274, 11 Cox C. C. 584, 40 L. J. M. C. 22, 23 L. T. Rep. N. S. 473, 19 Wkly. Rep. 165; Rex *v.* Delaval, 3 Burr. 1434, 1 W. Bl. 410, 439; Rex *v.* Roberts, 1 Campb. 399; Reg. *v.* Best, 2 Ld. Raym. 1167; Savile *v.* Roberts, 1 Ld. Raym. 374; Rex *v.* Journeymen-Taylors, 8 Mod. 10; Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415; Rex *v.* Cope, 1 Str. 144; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282. *Contra,* Rex *v.* Turner, 13 East 228, holding that an indictment will not lie for conspiring to commit a civil trespass upon property.

See 10 Cent. Dig. tit. "Conspiracy," § 35 *et seq.*

Doctrine illustrated.— It is an indictable conspiracy to induce a young female by false representations to leave the protection of the house of her parent in order to facilitate her prostitution. Rex *v.* Delaval, 3 Burr. 1434, 1 W. Bl. 410, 439. So a conspiracy to impoverish a tailor and prevent him by indirect means from carrying on his trade. Rex *v.* Eccles, 3 Dougl. 337, 26 E. C. L. 224. So a conspiracy to marry paupers, with a view to charge one parish and exonerate another (Rex *v.* Tarrant, 4 Burr. 2106), to charge a man with being the father of a bastard (Rex *v.* Kimberty, 1 Lev. 62; Timberley *v.* Childe, Sid. 68; Rex *v.* Armstrong, 1 Vent. 304), or a combination to impoverish a class of per-

or immoral, and in that sense illegal.[19] A conspiracy will be indictable if the end proposed or the means to be employed are by reason of the combination particularly dangerous to the public interest, or particularly injurious to some individual, although not criminal.[20]

2. UNLAWFUL COMBINATION. According to all the authorities the conspiring together is the essence of the charge and on proof thereof a conviction is warranted.[21]

3. OVERT ACT — a. General Rule. At common law no overt act is necessary to constitute the offense of conspiracy, and the rule is of universal application, except so far as it may be changed or limited by special statutory enactment.[22]

sons (Rex *v.* Sterling, 1 Lev. 125, Sid. 174). And see State *v.* Donaldson, 32 N. J. L. 15, 90 Am. Dec. 649.

19. State *v.* Burnham, 15 N. H. 396.

"An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression." State *v.* Burnham, 15 N. H. 396, 402.

20. Com. *v.* Waterman, 122 Mass. 43.

Many acts which if done by an individual are not indictable are punishable criminally when done in pursuance of a conspiracy between two or more persons, and it seems that an indictment may be sustained whenever there is a conspiracy for an unlawful purpose or to effect a lawful purpose by unlawful means. State *v.* Rowley, 12 Conn. 101.

21. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Connecticut.— State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; State *v.* Bradley, 48 Conn. 535; State *v.* Wilson, 30 Conn. 500.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Com. *v.* Davis, 9 Mass. 415; Com. *v.* Warren, 6 Mass. 74; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

Michigan.— People *v.* Saunders, 25 Mich. 119; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New Hampshire.— State *v.* Burnham, 15 N. H. 396.

New Jersey.— State *v.* Rickey, 9 N. J. L. 293.

New York.— People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Pennsylvania.— Com. *v.* Bartilson, 85 Pa. St. 482; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Collins *v.* Com., 3 Serg. & R. (Pa.) 220; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341.

Texas.— Bailey *v.* State, (Tex. Crim. 1900) 59 S. W. 900.

United States.— U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223.

England.— Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407; Vertue *v.* Clive, 4 Burr. 2472; Rex *v.* Rispal, 3 Burr. 1320, 1 W. Bl. 368; Rex *v.* Spragg, 2 Burr. 993; Reg. *v.* Best, 2 Ld. Raym. 1167.

See 10 Cent. Dig. tit. "Conspiracy," § 33.

"The essence of the offense charged is the unlawful combination between the defendants, and not the accomplishment of the ultimate design of their agreement." State *v.* Thompson, 69 Conn. 720, 725, 38 Atl. 868.

22. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512; State *v.* Cawood, 2 Stew. (Ala.) 360.

Connecticut.— State *v.* Wilson, 30 Conn. 500.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

Indiana.— Landringham *v.* State, 49 Ind. 186.

Maine.— State *v.* Ripley, 31 Me. 386.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 355, 9 Am. Dec. 534, where it is said: "There is nothing in the objection that to punish a conspiracy where the end is not accomplished, would be to punish a mere executed intention. It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offence, by the nature of the object intended to be effected."

Massachusetts.— Com. *v.* Warren, 6 Mass. 74; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. *v.* Hunt, Thach. Crim. Cas. (Mass.) 609.

Michigan.— Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

Minnesota.— State *v.* Pulle, 12 Minn. 164.

New Hampshire.— State *v.* Straw, 42 N. H. 393.

New Jersey.— State *v.* Rickey, 9 N. J. L. 293, rule changed by statute.

New York.— People *v.* Everest, 51 Hun (N. Y.) 19, 3 N. Y. Suppl. 612, 20 N. Y. St. 456; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *In re* Duprey, 4 City Hall Rec. (N. Y.) 121.

North Carolina.— State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571.

Pennsylvania.— Heine *v.* Com., 91 Pa. St. 145; Hazen *v.* Com., 23 Pa. St. 355; Collins

b. Statutory Changes of Rule. Nevertheless the rule has been either entirely abrogated or much limited in its application by special statutory provisions. In Arizona, California, New Jersey, New York, and Wisconsin it is essential that some act be done in execution of the design agreed upon to complete the offense, except in cases specially excepted by the statute from its operation.[23] Under the federal statutes some overt act in pursuance of the conspiracy is a necessary element of any offense against the United States;[24] but all the overt acts charged in the indictment need not be shown. It will be sufficient to show that one or more of these acts were committed in furtherance of the conspiracy.[25]

4. Accomplishment of Purpose. As is shown in the preceding section, an overt act is not an element of the offense of conspiracy and not necessary to be

v. Com., 3 Serg. & R. (Pa.) 220; Respublica *v.* Ross, 2 Yeates (Pa.) 1; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632, 35 Leg. Int. (Pa.) 420; Com. *v.* Bliss, 12 Phila. (Pa.) 580, 34 Leg. Int. (Pa.) 354; Com. *v.* Corlies, 8 Phila. (Pa.) 450.

Texas.— Johnson *v.* State, 3 Tex. App. 590.

Virginia.— Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

United States.— U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Watson, 17 Fed. 145.

England.— Heymann *v.* Reg., L. R. 8 Q. B. 102, 12 Cox C. C. 383, 28 L. T. Rep. N. S. 162, 21 Wkly. Rep. 357; Rex *v.* Rispal, 3 Burr. 1320, 1 W. Bl. 368; Rex *v.* Spragg, 2 Burr. 993; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061; Reg. *v.* Duffield, 5 Cox C. C. 404; Reg. *v.* Best, 2 Ld. Raym. 1167; Rex *v.* Edwards, 8 Mod. 320; Rex *v.* Kinnersley, 1 Str. 193.

See 10 Cent. Dig. tit. "Conspiracy," § 38.

23. *Arizona.*— Territory *v.* Turner, (Ariz. 1894) 37 Pac. 368.

California.— People *v.* Daniels, 105 Cal. 262, 38 Pac. 720.

New Jersey.— State *v.* Barr, (N. J. 1898) 40 Atl. 772; Wood *v.* State, 47 N. J. L. 180; Johnson *v.* State, 26 N. J. L. 313; State *v.* Norton, 23 N. J. L. 33.

New York.— People *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785, 54 N. Y. St. 513, 36 Am. St. Rep. 690, 23 L. R. A. 221; People *v.* Flack, 125 N. Y. 324, 26 N. E. 267, 34 N. Y. St. 722, 11 L. R. A. 807; People *v.* Willis, 34 N. Y. App. Div. 203, 54 N. Y. Suppl. 642; People *v.* Everest, 51 Hun (N. Y.) 19, 3 N. Y. Suppl. 612, 20 N. Y. St. 456; People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Brickner, 8 N. Y. Crim. 217.

Wisconsin.— Rev. Stat. § 4568.

See 10 Cent. Dig. tit. "Conspiracy," § 38.

Sufficient overt act.— People *v.* Daniels, 105 Cal. 262, 38 Pac. 720, was a trial for conspiring falsely to move and maintain an action for slander, and it was held that the commencement of such action by filing a complaint constituted a sufficient overt act. although defendant was not a party to such suit.

Insufficient proof of overt act.— U. S. *v.* Newton, 52 Fed. 275, was a case of conspiracy to defraud the United States by mailing old newspapers for the purpose of fraudulently increasing the weight of mail matter on a railway post route at a time when the government was considering the payment of additional compensation for the carriage of the mails. It was held that evidence that the newspapers, the fraudulent mailing of which within the district constituted the overt act charged, were rewrapped and remailed over the post route from a place outside of the district by an alleged co-conspirator, was not proof of such act although it might be considered as showing the nature, extent, plan, and operations of the conspiracy.

The only exceptions made by the statutes of some of these states are in the case of conspiracy to commit a felony upon the person of another or to commit arson or burglary. Ariz. Pen. Code, p. 701, par. 266; Cal. Pen. Code, § 284; N. Y. Pen. Code, § 171; Wis. Rev. Stat. § 4568.

24. Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Howell, 56 Fed. 21; U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Thompson, 29 Fed. 86; U. S. *v.* Sanche, 7 Fed. 715; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487, 3 Centr. L. J. 143, 1 Cinc. L. Bul. 52; U. S. *v.* Boyden, 1 Lowell (U. S.) 266, 24 Fed. Cas. No. 14,632; U. S. *v.* Reichert, 12 Sawy. (U. S.) 643, 62 Fed. 142; U. S. *v.* Thompson, 12 Sawy. (U. S.) 438, 31 Fed. 331; U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288, 8 Chic. Leg. N. 211, 1 Cinc. L. Bul. 27, 22 Int. Rev. Rec. 106.

Withdrawal from conspiracy.—Until one of the conspirators does some act to effect the object of the conspiracy all the parties may withdraw and thus escape the penalty prescribed by the statute. U. S. *v.* Stevens, 44 Fed. 132.

25. U. S. *v.* Cassidy, 67 Fed. 698.

Proof of several acts.— Where the charge is conspiracy to secure an under-rate in violation of interstate commerce law, proof of several overt acts does not show more than one offense the agreement being continuous. U. S. *v.* Howell, 56 Fed. 21.

proved, unless there is some special statutory requirement to that effect. It necessarily follows then that if an overt act is not a constituent of the offense it is not essential that the object of the conspiracy should have been accomplished.[26] It is also immaterial that the accomplishment of the object of the conspiracy was impossible.[27] So even where an overt act is made necessary by statute it is not essential that the object of the conspiracy be effected.[28]

5. CORRUPT MOTIVE. The formation of a common design by two or more persons is never of itself a criminal conspiracy. This may be, and often is, perfectly innocent. The confederation must be corrupt. If the motives of the confederates are not corrupt no criminality can attach to the confederation.[29] Accordingly persons who agree to do an act innocent in itself in good faith, and without the use of criminal means, are not converted into conspirators because it turns out that the contemplated act was prohibited by statute.[30]

C. What Combinations Indictable — 1. IN GENERAL. A combination, it

26. *Alabama.*— State *v.* Cawood, 2 Stew. (Ala.) 360.

Illinois.— Medley *v.* People, 49 Ill. App. 218.

Indiana.— Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Michigan.— People *v.* Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. Rep. 490, 46 L. R. A. 218; People *v.* Clark, 10 Mich. 310.

New Hampshire.— State *v.* Straw, 42 N. H. 393.

New York.— Adams *v.* People, 9 Hun (N. Y.) 89.

North Carolina.— State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

Pennsylvania.— Heine *v.* Com., 91 Pa. St. 145; Hazen *v.* Com., 23 Pa. St. 355; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Collins *v.* Com., 3 Serg. & R. (Pa.) 220.

Vermont.— State *v.* Noyes, 25 Vt. 415.

Wisconsin.— State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

England.— Reg. *v.* Hibbert, 13 Cox C. C. 82.

Canada.— Reg. *v.* Frawley, 25 Ont. 431.

See 10 Cent. Dig. tit. "Conspiracy," § 39.

Thus where persons conspire to defraud by means of false pretenses and false writings in the form of bank-notes it is not essential to a conviction that some person was actually defrauded thereby. Collins *v.* Com., 3 Serg. & R. (Pa.) 220.

27. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

28. State *v.* Norton, 23 N. J. L. 33; People *v.* Chase, 16 Barb. (N. Y.) 495; U. S. *v.* Wilson, 60 Fed. 890; U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Sacia, 2 Fed. 754; U. S. *v.* Crosby, 1 Hughes (U. S.) 448, 25 Fed Cas. No. 14,893; U. S. *v.* Wrape, 28 Fed. Cas. No. 16,767, 4 Cinc. L. Bul. 433.

Thus under an indictment charging a conspiracy to aid and abet the landing of Chinese laborers not entitled to enter the United States, it is immaterial whether Chinese laborers were in fact landed, if a criminal agreement was entered into and any of the overt acts alleged were committed. U. S. *v.* Wilson, 60 Fed. 890.

29. Wood *v.* State, 47 N. J. L. 461, 1 Atl. 509; People *v.* Flack, 125 N. Y. 324, 26 N. E. 267, 34 N. Y. St. 722, 11 L. R. A. 807; People *v.* Powell, 63 N. Y. 88; Com. *v.* Ridgway, 2 Ashm. (Pa.) 247; Com. *v.* Tack, 1 Brewst. (Pa.) 511; Com. *v.* Sheriff, 8 Phila. (Pa.) 645. See also State *v.* Flynn, 28 Iowa 26.

"The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury find that the parties were actuated by a criminal intent. In many cases this inference would be irresistible, in others the jury might find that, although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive." People *v.* Flack, 125 N. Y. 324, 333, 26 N. E. 267, 34 N. Y. St. 722, 11 L. R. A. 807.

Where motive not corrupt at inception of conspiracy.— The fact that the motive of a party joining a conspiracy was not corrupt when joining it does not render him any the less criminally liable if he afterward became aware of the illegality of the combination and still remained a member. U. S. *v.* Mitchell, 1 Hughes (U. S.) 439, 26 Fed. Cas. No. 15,790.

30. People *v.* Powell, 63 N. Y. 88.

Illustration.— The defendants were commissioners of charities of the county of Kings and were indicted for conspiring together to omit, refuse, and neglect to advertise for supplies as required by statute. Upon the trial, the judge charged that, without regard to the defendants' ignorance of the existence of the statute, the agreement to violate the act, followed by conduct in furtherance of the agreement, constituted a conspiracy. This was held error; the court remarking that it was not enough that the act which was the object of the conspiracy was prohibited. The confederates must be corrupt. The actual criminal intention belongs to the definition of conspiracy and must be shown to justify a conviction. People *v.* Powell, 63 N. Y. 88.

has been said, will be an indictable conspiracy, whenever the end proposed or the means to be employed are of a highly criminal character; where they are such as indicated great malice in the confederates; where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals.[31] Every conspiracy to injure individuals or to do acts unlawful or prejudicial to a community is indictable at common law.[32]

2. To Commit Crime in General. It is elementary law that a conspiracy to commit a crime, whether the grade be that of a felony or misdemeanor, is an indictable offense.[33] This is true whether the act agreed to be done is an offense at common law or made so by statute.[34] So a combination to procure another to violate the law in order to extort money from him through threats of prosecution is a criminal conspiracy.[35] And it has been held an indictable conspiracy to pro-

31. State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

A fair summary of indictable combinations is given in a well-considered decision by Judge Buchanan of the Maryland court of appeals: An indictment will lie at common law: (1) For a conspiracy to do an act not illegal nor punishable if done by an individual, but immoral only. (2) For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public. (3) For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual as by verbal defamation, and that whether it be to charge him with an indictable offense or not. (4) For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat if effected by an individual. (5) For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. (6) For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and although no person be thereby injured. (7) For a bare conspiracy to cheat or defraud a third person, although the means of effecting it should not be determined on at the time. (8) A conspiracy is a substantive offense, and punishable at common law, although nothing be done in execution of it. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

32. State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571.

33. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512.

California.— People *v.* Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716.

Connecticut.— State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Illinois.— Orr *v.* People, 63 Ill. App. 305.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Kingsbury, 5 Mass. 106.

Michigan.— People *v.* Butler, 111 Mich. 483, 69 N. W. 734.

New Jersey.— State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649.

New York.— People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71.

Pennsylvania.— Com. *v.* Putnam, 29 Pa. St. 296; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341.

England.— Reg. *v.* Parnell, 14 Cox C. C. 508; Reg. *v.* Banks, 12 Cox C. C. 393.

See 10 Cent. Dig. tit. "Conspiracy," § 40.

34. Orr *v.* People, 63 Ill. App. 305; People *v.* Butler, 111 Mich. 483, 69 N. W. 734; Com. *v.* Putnam, 29 Pa. St. 296; Reg. *v.* Bunn, 12 Cox C. C. 316. Thus it is an indictable offense to conspire to commit a murder (State *v.* Tom, 13 N. C. 569; Reg. *v.* Banks, 12 Cox C. C. 393), to rob (People *v.* Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716), to circulate bank-notes known to be stolen (Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341), to offer to sell forged foreign bank-notes of a denomination the circulation of which is prohibited in the state, where the conspiracy is entered into (Twitchell *v.* Com., 9 Pa. St. 211), or to obtain money or property by false pretenses (Orr *v.* People, 63 Ill. App. 305).

Conspiracy to commit felony — What is not.—The offense of unlawfully confederating together and going forth armed and disguised to do a felonious act is not committed by four people, two of them women in men's clothes, who go out together at night to steal a few chickens. If the purpose with which defendants went forth at the time referred to be judged by what they did do, or attempted to do, they certainly intended to commit, not a felonious act but a petit larceny, for which each of them might have been indicted and punished by confinement in the county jail. Carr *v.* Com., 15 Ky. L. Rep. 828, 25 S. W. 886.

Statute repealed before trial.— It has been held that there can be no conviction upon an indictment for conspiracy to violate a statute repealed before trial. Powell *v.* People, 5 Hun (N. Y.) 169. But see Reg. *v.* Thompson, 16 Q. B. 832, 5 Cox C. C. 166, Dears. C. C. 3, 17 Jur. 453, 71 E. C. L. 832, 20 L. J. M. C. 183, which seems to hold the contrary.

35. People *v.* Saunders, 25 Mich. 119.

cure a violation of the law for the purpose of procuring evidence on which to base a prosecution of the person against whom the conspiracy is directed.[36] It has been held, however, that if the owners of property, for the purpose of entrapping certain persons, coöperate with others to make arrangements with such persons to steal the property of the above owners, none of the participants can be convicted of the conspiracy to rob, since the taking with the owner's consent would not constitute a crime, and the acts leading up thereto were not in themselves unlawful;[37] but the opposite is true if neither the owners of the property nor their coöperators suggest the offense or originate the criminal intent or agreement.[38]

3. To Abduct Child. Under a statute making it an offense for any person by force or fraud to carry away any child under a designated age with intent to deprive its parents or lawful custodian of possession of it, an agreement between a father and other persons peaceably to get possession of his child is not a criminal conspiracy, where unlawful means are not agreed on or used to accomplish their purpose.[39]

4. To Change Government by Force. Any organization for the propagation of theories involving the destruction of the present social system, the common division of the property of individuals, and the capital which has been produced by labor, becomes an unlawful conspiracy (1) if it advocate the attainment of its end by violent means, or (2) if in violation of the militia laws of any state it provides for the formation and drilling of armed bodies of men for the purpose of carrying its plans into effect.[40]

5. To Commit Offense Against United States. By a federal statute[41] it is made a punishable offense for two or more persons to conspire to commit any offense against the United States. Conspiracy as used in this statute means an unlawful agreement to do some act which by some law of the United States has been made a crime,[42] and three elements are necessary to constitute it: (1) For two or more persons to conspire together; (2) to commit any offense against the United States; (3) an overt act of one or more parties to effect the object of the conspiracy.[43] The offense denounced by the statute is not confined to such acts as injure the United States, but applies as well to all conspiracies that affect private rights or interests where they are under the protection of the criminal laws of the United States, as to the rights and interests of the government itself.[44]

36. Com. *v.* Leeds, 9 Phila. (Pa.) 569, 29 Leg. Int. (Pa.) 149. But see Com. *v.* Kostenbauder, (Pa. 1886) 20 Atl. 995, holding that persons who induced a saloon-keeper to give them liquor on Sunday so that they might get the penalty allowed to informers were not guilty of a conspiracy.

37. Connor *v.* People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341.

38. Johnson *v.* State, 3 Tex. App. 590 [*distinguishing* Pigg *v.* State, 43 Tex. 108].

39. Com. *v.* Myers, 146 Pa. St. 24, 29 Wkly. Notes Cas. (Pa.) 497, 23 Atl. 164. See also Burns *v.* Com., 129 Pa. St. 138, 18 Atl. 756.

40. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

The fact that the conspirators may not have intended to resort to force, unless in their judgment they should deem it necessary to do so, will not make the conspiracy any the less unlawful. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

41. U. S. Rev. Stat. (1872), § 5440.

42. *In re* Wolf, 27 Fed. 606.

43. U. S. *v.* Cassidy, 67 Fed. 698. And see U. S. *v.* Barrett, 65 Fed. 62.

44. U. S. *v.* Sanche, 7 Fed. 715.

The following acts have been held conspiracies within the statute: A conspiracy to plunder and wreck a vessel within admiralty jurisdiction. U. S. *v.* Sanche, 7 Fed. 715. A conspiracy to obtain money by false pretenses in the District of Columbia. *In re* Wolf, 27 Fed. 606. A combination to retard and obstruct the passage of the United States mails. U. S. *v.* Debs, 63 Fed. 436; *In re* Grand Jury, 62 Fed. 834; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; U. S. *v.* Stevens, 2 Hask. (U. S.) 164, 27 Fed. Cas. No. 16,392. A combination to aid the landing of Chinese laborers not entitled to enter the United States. U. S. *v.* Wilson, 60 Fed. 890. A combination to defraud the mails by mailing a large quantity of old newspapers for the purpose of increasing its weight at a time when the weight of mail matter constituted the basis for fixing additional compensation. U. S. *v.* Newton, 52 Fed. 275. A combination which will have the

6. To Interfere With Exercise of Civil Rights. A federal statute[45] makes it a punishable offense for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen[46] in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States or because of his having so exercised the same. This statute has been held constitutional and valid.[47] To bring a case within its operation, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted by the constitution or laws of the United States.[48] It has been held a violation of this statute to prevent a citizen from voting by force or intimidation;[49] to prevent a person from exercising the right to make effectual his homestead entry;[50] to threaten or maltreat a citizen in the custody of the officers of the law;[51] to prevent a citizen from informing the United States marshal of a violation of the revenue laws;[52] to hinder, oppress, and injure an officeholder in the discharge of his functions as such;[53] or to intimidate or injure a citizen because of his having exercised his right to sue out an attachment for contempt, for violating an injunction granted him by a federal court.[54] So the killing of revenue officers while engaged in a conspiracy to injure or oppress them in the exercise of their duties is an offense within another federal statute,[55] providing for the punishment of a felony committed while acting in violation of section 5508 of the United States Revised Statutes.[56] Again, conspiring to use intimi-

effect of defeating the provisions of the interstate commerce laws. U. S. *v.* Debs, 63 Fed. 436; *In re* Grand Jury, 62 Fed. 834; Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403. See also *In re* Grand Jury, 62 Fed. 840; U. S. *v.* Howell, 56 Fed. 21. Thus a combination to induce the officers of a common carrier corporation, subject to the provisions of the interstate commerce acts, and its locomotive engineers to refuse to receive or handle interstate freight from another like common carrier in order to injure the latter is a punishable conspiracy. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387. So where two or more men wrongfully and corruptly agree among themselves, either for the purpose of creating sympathy in a strike or for any other purpose, to cause trains carrying interstate freight to be stopped, to discharge their employees, or to refuse to employ new men so as to stop such trains, they are guilty of conspiracy. U. S. *v.* Debs, 63 Fed. 436.

On the other hand the declaring of a dividend by a banking association, when there are no net profits to pay it from, is not a wilful misapplication of the money of the bank, within U. S. Rev. Stat. (1872), § 5209. A conspiracy to commit such act is not indictable as a conspiracy to commit the crime created by such section. U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. ed. 698.

45. U. S. Rev. Stat. (1872), § 5508.

46. The word "citizen" is used in its strict sense as contrasted with "alien" and is not synonymous with "resident," "inhabitant," or "person;" and a conspiracy to deprive Chinese subjects residing within a state of rights secured to them by treaty by forcibly expelling them from their homes and the towns in which they reside is not an offense within this statute. Baldwin *v.* Franks, 120 U. S. 678, 7 S. Ct. 656, 763, 30 L. ed. 766.

47. U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274.

48. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

49. *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274.

50. U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673 [*affirming* 5 McCrary (U. S.) 155, 16 Fed. 221].

51. Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429, holding that the right of a citizen while in the custody of an officer to be protected from lawless violence is a right secured to him by the constitution or laws of the United States.

52. *In re* Quarles, 158 U. S. 532, 15 S. Ct. 959, 39 L. ed. 1080. *Compare* U. S. *v.* Sanges, 48 Fed. 78, holding that the right to testify before a federal grand jury without interference from private individuals is not one conferred by the constitution of the United States.

53. U. S. *v.* Patrick, 54 Fed. 338, where it was said that such acts cannot be regarded as directed solely against an official in his representative capacity, but may be also against a citizen exercising or enjoying the right or privilege of accepting public employment and engaging in the administration of its functions.

54. U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333.

55. U. S. Rev. Stat. (1872), § 5509.

56. U. S. *v.* Patrick, 54 Fed. 338.

U. S. Rev. Stat. (1872), §§ 5508, 5509, do not contemplate two distinct offenses against the United States; the conspiracy only being of federal cognizance and made punishable,

dation, force, or other means to prevent a citizen from voting is an offense within the federal statute[57] which prohibits a conspiracy to prevent a citizen from voting.[58]

7. To Deprive of Equal Protection of Laws. A federal statute[59] making it a punishable offense for two or more persons in any state or territory to conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws has been held to be unconstitutional as applied to conspiracies within a state against a citizen,[60] and also as applied to conspiracies within a state against aliens to deprive them of treaty rights. The statute is unconstitutional altogether as applied to conspiracies within a state.[61]

8. To Use Mails For Fraudulent Purpose. Under an indictment under a statute[62] making it an offense for persons to conspire to commit any offense against the United States, and another statute[63] making it an offense to send letters through the mails for fraudulent purposes, the offense of conspiring to defraud by the use of the mails is not made out by proof that defendants severally ordered goods by mail not intending to pay for them without showing that such orders were given in pursuance of a prearranged plan.[64]

9. To Defraud — a. Individuals — (i) *At Common Law.* Although there are decisions to the effect that a conspiracy to defraud is indictable only when the object is to cheat or defraud by false tokens, or in some mode denounced by statute as criminal,[65] the weight of authority is to the effect that conspiracies to cheat or defraud individuals without the use of false tokens, and by means which are merely wrongful and not criminal, are indictable at common law.[66] It is the com-

the other crime being merely an aggravation thereof, so that if a conspiracy is not proved there can be no conviction for the felony. Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619.

57. U. S. Rev. Stat. (1872), § 5520.

58. *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; U. S. *v.* Butler, 1 Hughes (U. S.) 457, 25 Fed. Cas. No. 14,700.

An indictment based on this section for conspiring to prevent by force a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of congress need not set out the acts of advocacy and support which the conspiracy was formed to prevent. U. S. *v.* Goldman, 3 Woods (U. S.) 187, 25 Fed. Cas. No. 15,225.

59. U. S. Rev. Stat. (1872), § 5519.

60. U. S. *v.* Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L. ed. 290.

61. Baldwin *v.* Franks, 120 U. S. 678, 7 S. Ct. 656, 30 L. ed. 766. *Compare* U. S. *v.* Blackburn, 24 Fed. Cas. No. 14,603, 8 Chic. Leg. N. 26, 1 N. Y. Wkly. Dig. 276, decided before the statute was declared unconstitutional, as to conspiracies within a state.

62. U. S. Rev. Stat. (1872), § 5440.

63. U. S. Rev. Stat. (1872), § 5480.

64. U. S. *v.* Barrett, 65 Fed. 62.

65. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

In New York, in the case of Lambert *v.* People, 9 Cow. (N. Y.) 578, the majority of the court held that the offense consisted either in the combination to do a criminal act or to do an act not criminal in itself by criminal means; that in the one case the object and in the other the means determined the criminality of the combination. The minority of the court were of the opinion that the confederacy to injure another in his person, property, or character was a conspiracy at common law, although the act to be done, if done by an individual and without any combination with others, would not be indictable. Soon after the decision of this case the crime of conspiracy was defined by the statute and by that definition a conspiracy to cheat and defraud another of his property is indictable when accompanied by overt acts and when the means to be used are criminal or are such as would, if the fraud was accomplished, constitute the offense of cheating or obtaining money or property by false pretenses. People *v.* Brady, 56 N. Y. 182.

66. *Maryland.*—State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Bean *v.* Bean, 12 Mass. 20; Com. *v.* Warren, 6 Mass. 72; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. *v.* Ward, 1 Mass. 473.

Michigan.— People *v.* Clark, 10 Mich. 310.

Mississippi.— Ellzey *v.* State, 57 Miss. 827.

New Hampshire.— State *v.* Burnham, 15 N. H. 396.

New Jersey.— State *v.* Cole, 39 N. J. L. 324.

North Carolina.— State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Rhoads *v.* Com., 15 Pa. St. 272; Twitchell *v.* Com., 9 Pa. St. 211; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Com. *v.* Carlisle, Brightly (Pa.) 36; Com. *v.*

bination which constitutes the indictable offense,[67] and it is immaterial whether or not the cheat which is the object of the conspiracy, or the false and fraudulent devices by which it is executed, would be punishable as crimes if unassociated with any conspiracy.[68]

(II) *Under Statutes.* In some jurisdictions such conspiracies are indictable by statute.[69] Likewise in those jurisdictions where cheating or defrauding are

Philadelphia County Prison, 6 Phila. (Pa.) 169, 23 Leg. Int. (Pa.) 85.

South Carolina.— State *v.* Shooter, 8 Rich. (S. C.) 72.

Washington.— Bradshaw *v.* Territory, 3 Wash. Terr. 265, 14 Pac. 594.

England.— Reg. *v.* Button, 11 Q. B. 929, 3 Cox C. C. 229, 12 Jur. 1017, 18 L. J. M. C. 19, 63 E. C. L. 929; Sydserff *v.* Reg., 11 Q. B. 245, 12 Jur. 418, 63 E. C. L. 245; Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145, 11 Jur. 204, 16 L. J. Q. B. 121, 58 E. C. L. 824; Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848, 12 L. J. M. C. 135, 48 E. C. L. 49; Heymann *v.* Reg., L. R. 8 Q. B. 102, 12 Cox C. C. 383, 28 L. T. Rep. N. S. 162, 21 Wklv. Rep. 357; Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407; Reg. *v.* Hudson, Bell C. C. 263, 8 Cox C. C. 305, 6 Jur. N. S. 566, 29 L. J. M. C. 145, 2 L. T. Rep. N. S. 263, 8 Wkly. Rep. 421; Rex *v.* Tarrant, 4 Burr. 2106; Rex *v.* Roberts, 1 Campb. 399; Reg. *v.* Carlisle, 2 C. L. R. 479, 6 Cox C. C. 366, Dears. C. C. 337, 18 Jur. 386, 23 L. J. M. C. 109, 2 Wkly. Rep. 412; Reg. *v.* De Kromme, 17 Cox C. C. 492, 56 J. P. 682, 66 L. T. Rep. N. S. 301; Reg. *v.* Orman, 14 Cox C. C. 381; Reg. *v.* Lewis, 11 Cox C. C. 404; Reg. *v.* Brown, 7 Cox C. C. 442; Reg. *v.* Hewitt, 5 Cox C. C. 162; Rex *v.* Robinson, 2 East P. C. 1010, 1 Leach C. C. 44; Reg. *v.* Esdaile, 1 F. & F. 213; Reg. *v.* Hall, 1 F. & F. 33; Reg. *v.* Mackarty, 2 Ld. Raym. 1179, 2 East P. C. 823; Reg. *v.* Best, 2 Ld. Raym. 1167, 6 Mod. 185; Rex *v.* Lara, 2 Leach C. C. 739, 6 T. R. 565; Reg. *v.* Orbell, 6 Mod. 42; Breerton *v.* Townsend, Noy 103; Rex *v.* Skirret, Sid. 312; Rex *v.* Cope, 1 Str. 144; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282; Clark & Marsh. Law Crimes 314 [*citing* Rex *v.* Wheatly, 2 Burr. 1125; Reg. *v.* Mackarty, 2 Ld. Raym. 1179, 2 East P. C. 823; Rex *v.* Edwards, 8 Mod. 320]. In 1 Hawkins P. C. 190, c. 72, it is said, "There can be no doubt that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." This is literally adopted and transcribed into 1 Burn Justice 378, and 3 Wilson Works 118.

See 10 Cent. Dig. tit. "Conspiracy," § 58 *et seq.*

Conspiracy to defraud partner.— A combination between one member of a partnership and a third person to issue and put in circulation the notes of the firm, drawn by such partner for the purpose of paying his individual debts, the intention of the combination being fraudulent, is an indictable conspiracy. State *v.* Cole, 39 N. J. L. 324. And see Reg. *v.* Warburton, L. R. 1 C. C. 274, 11 Cox C. C. 584, 40 L. J. M. C. 22, 23 L. T. Rep. N. S. 473, 19 Wkly. Rep. 165.

An indictment lies for a conspiracy to cheat an individual of real estate as well as of personal property. People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75. A conspiracy to get possession of land by means of an extorted deed in favor of the lawful owner was also held criminal in State *v.* Shooter, 8 Rich. (S. C.) 72.

Proof of value.— It is not necessary to conviction under a charge of conspiracy to obtain certain real estate by fraud that it should be proved that the property had value. It is enough if it was property. State *v.* Bradley, 48 Conn. 535.

67. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571; Reg. *v.* Mackarty, 2 Ld. Raym. 1179, 2 East P. C. 823; Reg. *v.* Orbell, 6 Mod. 42; Rex *v.* Skirret, Sid. 312. And see *supra*, II, B, 2.

Necessity for concert.— On an indictment for conspiracy for the sale and transferring of a railway excursion ticket not transferable, it was held, that the prisoners must be acquitted unless there was a previous concert between them to obtain the ticket for the purpose of its being fraudulently used. Reg. *v.* Absolon, 1 F. & F. 498.

Criminality as affected by nature of pretenses or accomplishment of deceit.—If a conspiracy to defraud is complete when formed, it is immaterial that the false pretenses by which the fraud was sought to be accomplished were not calculated to deceive a person of ordinary intelligence or that the person from whom money was obtained was not deceived. People *v.* Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. Rep. 490, 46 L. R. A. 218.

68. *Connecticut.*— State *v.* Gannon, (Conn. 1902) 52 Atl. 730; State *v.* Bradley, 48 Conn. 535; State *v.* Rowley, 12 Conn. 101.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534 [*citing* Rex *v.* Wheatly, 2 Burr. 1125; Reg. *v.* Mackarty, 2 Ld. Raym. 1179, 2 East P. C. 823; Reg. *v.* Orbell, 6 Mod. 42].

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Pennsylvania.— Twitchell *v.* Com., 9 Pa. St. 211.

England.— Reg. *v.* Orman, 14 Cox C. C. 381; Breerton *v.* Townsend, Noy 103.

See 10 Cent. Dig. tit. "Conspiracy," § 58.

69. Evans *v.* People, 90 Ill. 384; Com. *v.* Walker, 108 Mass. 309.

Conspiracy to permit free travel on railroad.— It is a crime under section 394 of the

made distinct offenses by statute a conspiracy to effect such a purpose is held to be punishable.[70]

(III) *Participation by Person Defrauded.* According to some decisions a conspiracy must be directed against an innocent person.[71] On the other hand it has been held that a conspiracy to cheat is indictable although the person cheated himself intended to cheat one of the defendants.[72]

b. Creditors. A conspiracy to dispose of goods with intent to defraud creditors is an indictable offense at common law;[73] hence a combination with this purpose in view is indictable whether the particular act leading to such object is contrary to the statute or to the common law.[74] To obtain goods on credit with intent to abscond from the state,[75] or under pretense of paying cash for them on delivery, the buyer knowing that he has no funds with which to pay, and appropriating them to his own use,[76] is such a fraud as will sustain an indictment.

c. The Public — (I) *In General.* Conspiracies have been held to be indictable where their object is to defraud the public or to perpetrate what is termed a "public cheat" by means which common care and prudence are not sufficient to guard against,[77] on the ground that if executed they would affect hurtfully not

Ontario code to conspire by any fraudulent means to defraud any person, and so a conspiracy to permit persons to travel free on a railroad as alleged in these cases would be a conspiracy against the railway company. Reg. *v.* Defries, 25 Ont. 645.

70. Johnson *v.* People, 22 Ill. 314; Orr *v.* People, 63 Ill. App. 305; State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; People *v.* Watson, 75 Mich. 582, 42 N. W. 1005; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632, 35 Leg. Int. (Pa.) 420.

71. Thus it has been held that a conspiracy between certain persons to defraud another in an unlawful enterprise in which the latter is a participant is not criminal. State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719, where the defendants conspired to defraud another by falsely pretending that parcels sold by them to him contained counterfeit money, when in fact they contained sawdust.

72. Reg. *v.* Hudson, Bell C. C. 263, 8 Cox C. C. 305, 6 Jur. N. S. 566, 29 L. J. M. C. 145, 2 L. T. Rep. N. S. 263, 8 Wkly. Rep. 421.

A conspiracy to defraud an insurance company by presenting a false claim of loss by death is indictable, although the amount of the policy would have gone to the beneficiary, who was induced by deception to make the claim but who did not appear to be a party to the conspiracy. Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885.

73. Com. *v.* Gallagher, 4 Pa. L. J. Rep. 98; Reg. *v.* Hall, 1 F. & F. 33.

74. Roget's Case, 2 City Hall Rec. (N. Y.) 61.

75. Com. *v.* Ward, 1 Mass. 473.

76. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, holding, however, that the unlawfulness of the act consists in purchasing the goods of another and appropriating them to the purchaser's own use without expecting to pay for them; and that the mere obtaining of goods on credit by an insolvent person, without disclosing his insolvency, is not of itself such an unlawful act as would be indictable even though the purchaser should have known that by the fair and ordinary course of his business he could not pay for the same.

77. State *v.* Young, 37 N. J. L. 184; State *v.* Norton, 23 N. J. L. 33; People *v.* Olson, 15 N. Y. Suppl. 778, 39 N. Y. St. 295; People *v.* Stone, 9 Wend. (N. Y.) 182; Lambert *v.* People, 9 Cow. (N. Y.) 578; People *v.* Miller, 14 Johns. (N. Y.) 371; Clary *v.* Com., 4 Pa. St. 210; Com. *v.* Znern, 16 Pa. Super. Ct. 588; Com. *v.* Tack, 1 Brewst. (Pa.) 511; Com. *v.* Philadelphia County Prison, 6 Phila. (Pa.) 169, 23 Leg. Int. (Pa.) 85; Scott *v.* Brown, [1892] 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. N. S. 782, 4 Reports 42, 41 Wkly. Rep. 116; Reg. *v.* Aspinall, 1 Q. B. D. 730, 13 Cox C. C. 231, 45 L. J. M. C. 129, 35 L. T. Rep. N. S. 738, 24 Wkly. Rep. 921; Rex *v.* Pollman, 2 Campb. 229, 11 Rev. Rep. 689; Reg. *v.* Gurney, 11 Cox C. C. 414; Reg. *v.* Brown, 7 Cox C. C. 442; Rex *v.* Norris, 2 Ld. Ken. 300; Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415.

A mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offense at common law, and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud. Reg. *v.* Lewis, 11 Cox C. C. 404.

Conspiracy to impoverish farmers of excise. — In Rex *v.* Starling, Sid. 174, upon conviction of the defendants of conspiracy to impoverish the farmers of the excise it was objected that there was no offense. The court sustained the conviction because it appeared that the offense tended to prejudice the revenue of the crown.

Conspiracy to make false statement of the affairs of a bank. — On a prosecution for a conspiracy to make a false statement of the affairs of a bank, the essence of the offense is jointly concerting to make it. There should be a criminal concert between two or more. There must be an intent to defraud. Reg. *v.* Burch, 4 F. & F. 407.

only individuals but the public at large, even though they might not be indictable if affecting the rights of only one or a few individuals.[78]

(II) *Corporations Representing Public Interests.* This principle of public injury has also been applied to punish conspiracies to defraud corporations representing the civil interests of numerous persons.[79]

(III) *The United States.* The federal statute[80] making it an indictable offense to defraud the United States in any manner or for any purpose includes all acts of conspiracy to defraud the United States by depriving or divesting it of any property or money or other things by means of misrepresentation or concealment of material facts.[81] Under this statute it has been held immaterial whether the fraud contemplated has been declared a crime by statute or not.[82] It applies to conspiracy to defraud the United States of taxes on liquors;[83] to a conspiracy to destroy papers relating to dutiable merchandise for the purpose of suppressing evidence of fraud;[84] and to a conspiracy to procure by bribery the making of a false certificate by the board of examining surgeons, whereby the commissioner of pensions may be induced to allow a fraudulent increase of pension.[85] So persons may be guilty of a conspiracy to defraud the United States by obtaining title to public mineral lands by means of homestead entry, since a patent to such lands so obtained would not be void.[86]

Conspiracy to manufacture spurious goods with fraudulent intent to sell is genuine.— In Com. *v.* Judd, 2 Mass. 329, 2 Am. Dec. 54, it was held that a conspiracy to manufacture base and spurious indigo with the fraudulent intent to sell the same as good and genuine indigo is an indictable offense although no sale be made.

If persons conspire to fabricate shares in addition to the limited number of which a joint-stock company according to its rules consists, in order to sell them as good shares they may be indicted for it, notwithstanding any imperfection in the original formation of the company. Rex *v.* Mott, 2 C. & P. 521, 12 E. C. L. 710.

The destruction or erasure of the indorsement on a promissory note with intent to defraud any person is a misdemeanor, and a conspiracy to do it is an indictable conspiracy, under the statute, on the ground that the act done, although not in itself indictable, is essentially a public injury. State *v.* Norton, 23 N. J. L. 33.

78. State *v.* Young, 37 N. J. L. 184; State *v.* Norton, 23 N. J. L. 33.

79. As for instance in the case of incorporated banks, since such conspiracies would seem to properly rank with those indictable as against the public or in restraint of trade. State *v.* Young, 37 N. J. L. 184; State *v.* Norton, 23 N. J. L. 33. So a conspiracy to cheat a state (State *v.* Cardoza, 11 S. C. 195), a county (see McDonald *v.* State, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547 [*reversing* 25 Ill. App. 350]), or a city (State *v.* Young, 37 N. J. L. 184) is an indictable offense, as being a conspiracy to injure the public. See also Hazen *v.* Com., 23 Pa. St. 355, holding that a conspiracy to defeat the operation of a statute prohibiting the circulation of foreign bank-notes under the denomination of five dollars is a combination against the public welfare and an indictable offense.

80. U. S. Rev. Stat. (1872), § 5440.

To convict under U. S. Rev. Stat. (1872), § 5438, making it an offense to conspire to obtain the payment or allowance of false claims against the government, it must appear that the defendants agreed to present the claim with knowledge of its falsity and with the purpose to defraud the government. U. S. *v.* Jennison, 1 McCrary (U. S.) 226, 26 Fed. Cas. No. 15,475.

81. U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; State *v.* Thompson, 29 Fed. 86; U. S. *v.* Owen, 13 Sawy. (U. S.) 53, 32 Fed. 534.

Where, by an agreement, one person impersonates another in appearing upon an examination before the civil service commission and fills out and signs with the other's name the "declaration sheet" required in such case, they are subject to indictment under U. S. Rev. Stat. (1872), §§ 5414–5418, which make it an offense to falsely make, alter, or forge enumerated papers for the purpose of defrauding the United States. U. S. *v.* Bunting, 82 Fed. 883.

82. U. S. *v.* Whalan, 28 Fed. Cas. No. 16,669, 1 Am. L. T. Rep. (U. S. Cts.) 63, 7 Int. Rev. Rec. 161.

83. *In re* Calicott, 4 Fed. Cas. No. 2,311, 1 Am. L. T. Rep. (U. S. Cts.) 129, 8 Int. Rev. Rec. 169.

To constitute a conspiracy to remove whisky without paying the tax, it is sufficient that it appear that defendants were acting in concert to effect a removal without branding according to law. U. S. *v.* Sulzberger, 27 Fed. Cas. No. 16,415, 7 Int. Rev. Rec. 201.

84. U. S. *v.* De Grieff, 16 Blatchf. (U. S.) 20, 25 Fed. Cas. No. 14,936.

85. U. S. *v.* Van Leuven, 62 Fed. 62.

86. U. S. *v.* Peuschel, 116 Fed. 642.

Conspiracy to deprive of possession for indefinite period.— A conspiracy by two persons to enter a certain tract of land in the name of one of them, under the United States

10. To Injure Trade or Commerce. It is an indictable conspiracy at common law for persons dealing in a commodity which is one of the necessaries of life to bind themselves under a penalty not to sell such commodity at less than a designated price.[87] A combination between independent dealers to prevent competition between themselves in the sale of an article of necessity is, in the contemplation of law, an act inimical to trade or commerce without regard to what may be done in pursuance of it.[88] So it is an act injurious to trade or commerce, within a statute punishing a conspiracy to commit such an act, to conspire to depress the value of the capital stock of a corporation dealt in on the stock exchange.[89] And it has been held to be an indictable offense at common law to conspire to raise the price of public funds on a particular day by false rumors.[90]

11. To Obstruct Justice or Due Administration of Laws. Any confederacy or combination, the purpose of which is to obstruct the due course of justice or the due administration of the laws, is an indictable conspiracy.[91] Thus it is an offense to conspire to fabricate evidence;[92] to induce witnesses to suppress evidence;[93] to give false evidence;[94] not to appear at the trial;[95] to pack a jury;[96] to impede an officer of the law in the discharge and performance of his duty;[97] to liberate

Timber Culture Act, with the money of the other, for the purpose of selling and disposing of the location for the benefit of the party furnishing the money to any one who might desire to enter the same, is not a conspiracy to defraud the United States of its title to or dominion over said land, but it may be a conspiracy to defraud the United States of the possession thereof for an indefinite period. U. S. *v.* Thompson, 29 Fed. 86, 89.

87. Rex *v.* Norris, 2 Ld. Ken. 300. See also Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 80 Am. Rep. 159.

88. People *v.* Sheldon, 139 N. Y. 251, 34 N. E. 785, 54 N. Y. St. 513, 36 Am. St. Rep. 690, 23 L. R. A. 221. See also Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159. In this case it appeared that five coal corporations of Pennsylvania entered into an agreement in New York to divide two coal regions of which they had the control; to appoint a committee to take charge of their interests, which was to decide all questions and appoint a general agent at Watkins, New York; the coal mined to be delivered through him, each corporation to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct; the committee to adjust the process, rates of freight, etc., and enter into agreements with anthracite companies; the five companies might sell their coal themselves only to the extent of their proportion and at prices adjusted by the committee; the agent to suspend shipments by either beyond their proportion; frequent detailed reports to be made by companies, and settlements monthly by the committee, prices to be averaged and payments made to those in arrear by those in excess, neither to sell coal otherwise than as agreed upon, and the regulations of the committee to be carried out faithfully. A statute of New York makes it a misdemeanor for "persons to conspire to commit any act injurious to trade or commerce." It was held that their agreement was in contravention of the statute and also against public policy and therefore illegal and void.

89. People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 627, 63 N. E. 1120].

90. Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415.

91. State *v.* McKinstry, 50 Ind. 465; State *v.* Ripley, 31 Me. 386; Rex *v.* Macdaniel, 1 Leach C. C. 52.

A conspiracy to deprive Chinese subjects of their rights under the laws and treaties of the United States has been held not a violation of a statute making it an offense for two or more persons in any state or territory to conspire to overthrow or destroy the government, to levy war against it, to oppose by force a treaty thereof, or by force to prevent the execution of any law of the United States. Baldwin *v.* Franks, 120 U. S. 678, 7 S. Ct. 656, 763, 30 L. ed. 766. *Contra, In re* Grand Jury, 26 Fed. 749.

92. State *v.* De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

93. People *v.* Chase, 16 Barb. (N. Y.) 495; State *v.* De Witt, 2 Hill (S. C.) 283, 27 Am. Dec. 371.

94. People *v.* Chase, 16 Barb. (N. Y.) 495.

95. Reg. *v.* Hamp, 6 Cox C. C. 167.

96. O'Donnell *v.* People, 41 Ill. App. 23.

97. State *v.* Noyse, 25 Vt. 415; U. S. *v.* Mitchell, 2 Dall. (U. S.) 348, 26 Fed. Cas. No. 15,788, Whart. St. Tr. 176; U. S. *v.* Smith, 1 Dill. (U. S.) 212, 27 Fed. Cas. No. 16,333. As for instance to threaten or intimidate a revenue officer while searching for an illicit distillery or to prevent him from continuing the discharge of his duty with respect thereto. U. S. *v.* Johnson, 26 Fed. 682.

Bribery of officer.— In a prosecution for conspiracy to bribe a person holding an office of trust and profit under the laws of the state, the question whether or not such person was an officer *de jure* is immaterial, he having qualified and acted as such an officer and being

prisoners;[98] to make an unlawful use of legal process;[99] to obstruct the due administration of the election laws;[1] to certify falsely that a highway was in repair;[2] to defraud devisees by destruction of a will;[3] or to obtain a fraudulent divorce.[4]

12. To Obstruct Administration of Election Laws. A conspiracy to tamper with or fraudulently subvert the fair procedure in, or the just returns of, a public election is indictable at common law,[5] under statutes making it an offense to conspire to commit any act for the perversion or obstruction of justice,[6] or under a statute making it an offense to interfere in any manner with an election officer in the discharge of his duties.[7]

13. To Commit Offense Against Chastity. Although seduction and prostitution are not indictable at common law it is an indictable offense to conspire to procure a woman to lead a life of prostitution.[8] It is likewise an offense to conspire to seduce a woman[9] or to procure sexual intercourse with her through a pretended marriage.[10]

an officer *de facto*. State *v.* Ray, 153 Ind. 334, 54 N. E. 1067.

98. Kipper *v.* State, (Tex. Crim. 1901) 62 S. W. 420; Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619.

99. As for instance to use legal process for the enforcement of a pretended debt. Reg. *v.* Taylor, 15 Cox C. C. 265. So it has been held that a conspiracy to pervert legal process may be criminal, although for the purpose only of getting possession of land by means of an extorted deed in favor of the legal owner. State *v.* Shooter, 8 Rich. (S. C.) 72. And a combination to entice a citizen within the jurisdiction of another state for the purpose of procuring him to be arrested on civil process has been held to be actionable, although there be a good cause of action against him. Phelps *v.* Goddard, 1 Tyler (Vt.) 60, 4 Am. Dec. 720.

1. See *infra*, II, C, 12.

2. Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

3. State *v.* De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371.

4. Cole *v.* People, 84 Ill. 216; People *v.* Flack, 125 N. Y. 324, 26 N. E. 267, 34 N. Y. St. 722, 11 L. R. A. 807.

5. Com. *v.* McHale, 97 Pa. St. 397, 407, 39 Am. Rep. 808. See also Reg. *v.* Haslam, 1 Den. C. C. 73.

A prosecution for conspiracy to procure illegal votes is not defeated by the fact that defendants made their plan before they knew the names of any of the persons named in the indictment as the persons to be procured to vote illegally, as the conspiracy was enlarged by each new item that entered into the plan while it was still on foot. Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Irregularity insufficient to invalidate election.—The fact that the warden at a primary election was elected shortly before four o'clock at a caucus called at that hour, although Mass. Stat. (1898), c. 548, § 129, requires the election of such officer to be made at the caucus, is not a defense to a prosecution for conspiracy to procure illegal voting or aiding and abetting in such illegal voting, as the irregularity is not sufficient to invalidate the election. Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Elections in private corporations.— The common-law rule in respect to offenses against the due administration of general election laws applies to the elections in a private corporation. State *v.* Burnham, 15 N. H. 396, where certain conspirators fraudulently contrived to procure the election of certain persons as directors of an insurance company that they might thereby obtain for themselves employment in the service of the company. It was held that while the end itself was lawful, yet that inasmuch as they accomplished such end by issuing fraudulent policies to persons, thereby inducing them to vote for certain directors, the means were unlawful; although the policies might in point of law be binding on both parties.

6. Moschell *v.* State, 54 N. J. L. 390, 25 Atl. 964, 53 N. J. L. 498, 22 Atl. 50.

7. *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274.

8. Rex *v.* Delaval, 3 Burr. 1434, 1 W. Bl. 410, 439; Reg. *v.* Mears, 4 Cox C. C. 423, 2 Den. C. C. 79, 15 Jur. 66, 20 L. J. M. C. 59, T. & M. 414; Rex *v.* Gray, 1 East P. C. 460; Reg. *v.* Howell, 4 F. & F. 160. Thus it is an indictable offense for a master, attorney, and a gentleman to assign over a female apprentice by her own consent for the purpose of prostitution. Rex *v.* Delaval, 3 Burr. 1434, 1 W. Bl. 410.

The agreement of a man and a woman to commit adultery or fornication is not a conspiracy to commit a misdemeanor and is not indictable. Miles *v.* State, 58 Ala. 390; Shannon *v.* Com., 14 Pa. St. 226.

9. Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780; State *v.* Powell, 121 N. C. 635, 28 S. E. 525; Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

10. State *v.* Savoy, 48 Iowa 562; State *v.* Wilson, 121 N. C. 650, 28 S. E. 416. See also State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79. In this case, on a trial for conspiracy in persuading an unmarried woman and her parents to believe that a forged marriage license was genuine and that one of the conspirators was a justice of the peace, thus

14. To Procure or Prevent Marriage. It is an indictable offense at common law to conspire to assist a female infant to escape from her father's control with a view to marry her against his will.[11] It is also an offense to conspire to carry an infant son out of the custody and government of his father to marry him to a prostitute.[12] So a conspiracy to cause it to falsely appear that a person is married in order to prevent him from contracting marriage is an unlawful offense.[13]

15. To Procure Abortion. It is an indictable conspiracy at common law to conspire to procure abortion,[14] but like all other conspiracies does not amount to a felony but only to a misdemeanor.[15]

16. To Prevent Interment of Corpse. It is a punishable conspiracy at common law to combine to prevent the interment of a corpse.[16]

17. To Charge Person With Commission of Crime. It is an indictable offense to conspire to falsely charge a person with the commission of a crime.[17] This is so whether the purpose be to extort money,[18] to injure in reputation or character,[19] or to procure an unjust punishment.[20] It is not necessary that the party accused should have been indicted or acquitted[21] or that there should have been any intention to procure an indictment or legal process against him.[22]

18. To Injure Person's Character. As just shown[23] it is an indictable offense to charge a man with the commission of a crime for the purpose of injuring his character. It is not necessary, however, that the matters alleged against a person should constitute an indictable offense to constitute the offense of conspiracy.[24]

gaining their consent to the marriage, it was held immaterial that a license was unnecessary to the validity of the marriage.

11. Mifflin *v.* Com., 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527; King *v.* Twistleton, 1 Lev. 257, 1 Sid. 387.

12. Rex *v.* Thorp, 5 Mod. 221.

13. Com. *v.* Waterman, 122 Mass. 43.

14. See Com. *v.* Demain, Brightly (Pa.) 441.

A woman may conspire with others to produce an abortion upon herself. Solander *v.* People, 2 Colo. 48.

15. Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379.

16. 2 Wharton Crim. L. (10th ed.), § 1365.

17. *Illinois.*— Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786.

Massachusetts.— Com. *v.* Tibbetts, 2 Mass. 536.

Michigan.— People *v.* Dyer, 79 Mich. 480, 44 N. W. 937.

New Jersey.— State *v.* Hickling, 41 N. J. L. 208, 32 Am. Dec. 198; Johnson *v.* State, 26 N. J. L. 313.

New York.— Elkin *v.* People, 28 N. Y. 177.

England.— Rex *v.* Rispal, 3 Burr. 1320, 1 W. Bl. 368; Ashley's Case, 12 Coke 90; Rex *v.* Kinnersley, 1 Str. 193.

The offense is one of the best known at common law.— People *v.* Dyer, 79 Mich. 480, 44 N. W. 937.

18. Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786; Com. *v.* Nichols, 134 Mass. 531; Com. *v.* Andrews, 132 Mass. 263; Com. *v.* O'Brien, 12 Cush. (Mass.) 84; Com. *v.* Doughty, 139 Pa. St. 383, 21 Atl. 228; Rex *v.* Rispal, 3 Burr. 1420, 1 W. Bl. 368; Rex *v.* Kinnersley, 1 Str. 193.

19. State *v.* Hickling, 41 N. J. L. 208, 32 Am. Dec. 198; Rex *v.* Spragg, 2 Burr. 993.

20. Rex *v.* Spragg, 2 Burr. 993.

21. Ashley's Case, 12 Coke 90.

A conspiracy to extort money from a person who has in fact violated the criminal law, by threatening to have him prosecuted unless he pays the moneys demanded, is an indictable offense. Patterson *v.* State, 62 N. J. L. 82, 40 Atl. 773. And see Ashley's Case, 12 Coke 90, holding that when parties conspire and promise a bribe to one to induce him to accuse another of murder, and enter into articles in writing to share and divide the estate of the party accused after the attainder, they are punishable for the misdemeanor and conspiracy, whether the party accused is guilty or not guilty of murder.

Effect of conviction of person accused.— A conspiracy to procure the conviction of an innocent man is a high crime; and although legally convicted before a competent tribunal by the conspirators a legal conviction is no bar to an indictment against the conspirators, since a judgment obtained by corrupt testimony may be controverted in a proceeding against those who have been guilty of a fraudulent combination to produce it. Com. *v.* McClean, 2 Pars. Eq. Cas. (Pa.) 367.

22. Com. *v.* Tibbetts, 2 Mass. 536; Reg. *v.* Best, 2 Ld. Raym. 1167; Rex *v.* Kinnersley, 1 Str. 193.

23. See *supra*, II, C, 17.

24. If the acts alleged are such as will disgrace and degrade him the conspiracy will be indictable; and it has been so held in the case of a combination to defame by spreading false statements that the person had cheated and defrauded another (Hood *v.* Palm, 8 Pa. St. 237), when a man is charged to be the father of an illegitimate child (Rex *v.* Kimberty, 1 Lev. 62; Rex *v.* Armstrong, 1 Vent. 304. See Johnston *v.* State, 26 N. J. L. 313),

19. To Commit Assault and Battery. A conspiracy to commit an assault and battery is an indictable offense at common law[25] and sometimes is made so by statute.[26]

20. To Raise Wages. In the earlier English decisions, it was held that while persons may each singly refuse to work unless they receive an advance of wages, yet if they do so by preconcert or association they may be punished as for a conspiracy.[27] The more recent English decisions, influenced doubtless by legislation on the subject, hold that workmen have a right while perfectly free of engagement to agree among themselves not to go into any employment unless they can get a certain rate of wages.[28] The doctrine of these later English decisions is also recognized in America. Workmen may lawfully combine to obtain such wages as they may after consideration agree to insist upon receiving for their work.[29] It is said, however, that the law is only clear to the extent that the combination is lawful, while its purpose is to obtain a benefit for the parties who combine;[30] and a combination will not be lawful where the means to be employed to effect the object of the combination are interference with the rights of others, by misrepresentation, intimidation, molestation, or coercion.[31]

21. To Injure in Business or Calling — a. In General. A conspiracy to injure a person's trade or business or to defeat or diminish the revenue properly accruing from the possession of certain property may be an indictable offense.[32]

b. By Breach of Contract of Employment. It has been held to be an indictable conspiracy for servants of a company under contract of service to agree to quit and to quit their employment in breach of their contract without notice to their employers.[33]

c. By Persuading Others to Break Contract of Employment. It is an indictable conspiracy for a number of workmen to conspire together to persuade workmen under contract to break their contracts of employment and leave before the

or with the commission of fornication (Reg. *v.* Best, 2 Ld. Raym. 1167).

25. Com. *v.* Putnam, 29 Pa. St. 296.

26. State *v.* Ripley, 31 Me. 386.

27. Rex *v.* Journeymen-Taylors, 8 Mod. 10; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

28. Reg *v.* Rowlands, 5 Cox C. C. 436; Reg. *v.* Duffield, 5 Cox C. C. 404.

Each man for himself may say: "I will not go into any employ unless I can get a certain rate of wages." Reg. *v.* Duffield, 5 Cox C. C. 404.

All may say: "We will agree with one another, that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." Reg. *v.* Duffield, 5 Cox C. C. 404.

29. Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; People *v.* Melvin, 2 Wheel. Crim. (N. Y.) 262; Wabash R. Co. *v.* Hannahan, 121 Fed. 563. See also Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1.

Men are "free to work for whom they please, or not to work, if they so prefer," and it is not unlawful or "criminal for them to agree together to exercise this right in such way as may best subserve their own interest." Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

30. Reg. *v.* Rowlands, 5 Cox C. C. 436.

31. Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

Every man has a right to employ his talents, industry, and capital as he pleases, free from the dictation of others, and if two or more persons combine to coerce his choice in this regard, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investment of commerce, are all in equal sense property. State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

32. Thus a conspiracy to injure a man's trade by bribing an employee or an assistant to use adulterated or injurious material in the manufacture of his goods (Rex *v.* Cope, 1 Str. 144), to injure an actor or theatrical production by hissing him or it from the stage (Rex *v.* Leigh, 2 Camph. 372 note), to unlawfully enter upon and retain possession of another's property (Wilson *v.* Com., 96 Pa. St. 56), to induce a person to forego a legal claim, although the result of such acts does not deprive him from subsequently enforcing his rights of action (Reg. *v.* Carlisle, 2 C. L. R. 479, 6 Cox C. C. 366, Dears. C. C. 337, 18 Jur. 386, 23 L. J. M. C. 109, 2 Wkly. Rep. 412), or for one under an assumed name to marry a woman co-conspirator, thereby creating a specious title to the property of her master (Rex *v.* Robinson, 1 Leach C. C. 44, 2 East P. C. 1010).

33. Reg. *v.* Bunn, 12 Cox C. C. 316.

term has expired.[34] It is not essential to the offense that threats or intimidation be used.[35]

d. By Causing Person to Discharge Employees. It is an indictable conspiracy for a person to conspire to injure another's business by causing him, by threats and intimidation, to discharge other workmen in his employ.[36] An employer has the right to engage all persons who are willing to work for him at any prices that may be mutually agreed upon.[37] It amounts to intimidation, coercion, or threats, within the rule, for employees to combine to agree to stop work and notify their employer that they will stop work unless he discharges certain of his employees;[38] and it is also intimidation or coercion within the rule to cause the discharge of employees by a combination to agree to prevent patronage of the person, by threatening his customers with injury to their business if they continued their patronage of such person.[39] It had been held, however, that the formation of a club by journeymen, one of the regulations of which was that no person belonging to it should work for any master-workman who would employ any journeymen not members of the club, does not amount to an unlawful conspiracy; that the law will not intend without proof that it was formed for the accomplishment of any illegal purpose; that it might be used to afford each other assistance in times of poverty, sickness, and distress, or to raise their moral or social condition.[40]

34. U. S. *v.* Stevens, 2 Hask. (U. S.) 164, 23 Fed. Cas. No. 16,392; Reg. *v.* Rowlands, 17 Q. B. 671, 5 Cox C. C. 466, 2 Den. C. C. 364, 16 Jur. 268, 21 L. J. M. C. 81, 79 E. C. L. 671; Reg. *v.* Duffield, 5 Cox C. C. 404.

35. Reg. *v.* Duffield, 5 Cox C. C. 404.

36. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

A master builder had in his employ several carpenters who were members of a carpenters' union, and also J, who was not a member. The secretary of a branch lodge served the master with the following notice in the middle of the week: "I am requested by the committee of Carpenters and Joiners to give the men in your employ notice to come out on strike against J, unless he become a member of the above society. . . . This notice will be carried out after the 27th inst., unless settled in accordance with the society's laws." It was held that the secretary was rightly convicted under 6 Geo. IV, c. 129, § 3, of having by threats endeavored to force the master builder to limit the description of his workmen. Skinner *v.* Kitch, L. R. 2 Q. B. 393, 10 Cox C. C. 493, 36 L. J. M. C. 116, 16 L. T. Rep. 413, 15 Wkly. Rep. 830.

A resolution was passed by a society of bricklayers that no society bricklayer would work for B until such time as he parted with some of his apprentices. The men in B's employment were accordingly withdrawn. In reply to a letter from B, requiring to be informed why the men were taken away, the resolution was communicated to him in a letter from the secretary. The secretary and the president of the meeting at which the letter was written having been convicted under 6 Geo. IV, c. 129, § 3, of using threats to compel B to limit the number of his apprentices, it was held that in the absence of any evidence to show that the letter communicating the resolution, although apparently an explanation, was in fact meant as a threat, the conviction could not be sustained. Wood *v.* Bowron, L. R. 2 Q. B. 21, 7 B. & S. 931, 36 L. J. M. C. 5, 15 L. T. Rep. N. S. 207, 15 Wkly. Rep. 58.

37. Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340.

38. State *v.* Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Skinner *v.* Kitch, L. R. 2 Q. B. 393, 10 Cox C. C. 493, 30 L. J. M. C. 116, 16 L. T. Rep. N. S. 413, 15 Wkly. Rep. 830; Walsby *v.* Anley, 3 E. & E. 516, 7 Jur. N. S. 465, 30 L. J. M. C. 121, 3 L. T. Rep. N. S. 666, 9 Wkly. Rep. 271, 107 E. C. L. 516; Rex *v.* Bykerdike, 1 M. & Rob. 179. But *compare* Connor *v.* Kent, [1891] 2 Q. B. 545, 562, 17 Cox C. C. 354, 55 J. P. 485, 65 L. T. Rep. N. S. 573.

39. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

40. Com. *v.* Hunt, 4 Metc. (Mass.) 111, 130, 38 Am. Dec. 346. In this case it was said that the combination to induce all in the same occupation to become members is not unlawful. The court further said: "From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer, to whom they were bound by contract for a certain time, in violation of that contract; not that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with every thing stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his

e. By Causing Employees to Stop Work — (I) *By Intimidation, Molestation, or Coercion.* Neither at common law nor under statutes modifying the common-law doctrine is it lawful for workmen to combine to injure another's business by causing his employees to leave his service by intimidation, threats, molestation, or coercion. Such a combination constitutes an indictable conspiracy.[41]

(II) *By Peaceable Persuasion.* In a number of jurisdictions it is held, perhaps because of some statutory provision, that it is not unlawful for workmen to combine for the purpose of persuading other workmen by peaceable argument and persuasion to cease working for another, if they are not under contract of employment for a fixed period.[42]

f. By Preventing Persons From Entering Employment. An agreement among workmen to molest or intimidate persons willing to be hired or employed with the ntent of injuring another's business by deterring the workmen from entering into his employ is an indictable conspiracy.[43]

g. By Boycott. This term ordinarily means a confederation, generally secret, of many persons whose intent is to injure another, by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators.[44] The character of agreement included in the term defined is highly unlawful and is an indictable conspiracy.[45]

employment, if such employer, when free to act, should engage with a workman, or continue a workman in his employment, not a member of the association."

41. Com. *v.* Sheriff, 15 Phila. (Pa.) 393, 38 Leg. Int. (Pa.) 412; O'Neill *v.* Longman, 4 B. & S. 376, 9 Cox C. C. 360, 8 L. T. Rep. N. S. 657, 11 Wkly. Rep. 947, 116 E. C. L. 376; Reg. *v.* Hibbert, 13 Cox C. C. 82; Reg. *v.* Druitt, 10 Cox C. C. 592, 16 L. T. Rep. N. S. 855.

Picketing, which is the watching and speaking to workmen as they go to and from their employment to induce them to quit their employment, is not necessarily unlawful. Reg. *v.* Hibbert, 13 Cox C. C. 82.

What amounts to "hindering."— Where a committee from a trade union visits a place where members of the union are working and notifies those members that the demand of the union had been refused by their employers and that the workmen must therefore quit work such notice is not a "hindering" of the others within the meaning of a statute providing that the use of lawful and peaceful means, having for its object a lawful purpose, shall not be regarded as "in any way hindering" persons who desire to labor, and that the use of force, threat, or menace of harm to persons or property shall alone be regarded as in any way hindering persons who desire to labor for their employers from so doing or other persons from being employed as laborers. Com. *v.* Sheriff, 15 Phila. (Pa.) 393, 38 Leg. Int. (Pa.) 412.

42. Com. *v.* Sheriff, 15 Phila. (Pa.) 393, 38 Leg. Int. (Pa.) 412; Reg. *v.* Shepherd, 11 Cox C. C. 325; Reg. *v.* Druitt, 10 Cox C. C. 592, 16 L. T. Rep. N. S. 855.

In New York a combination of workmen by which they agree to use peaceable methods of persuading other workmen to leave the employ of another is only permissible where the object to be attained by the combination is an advance of wages at a certain rate. People *v.* Smith, 5 N. Y. Crim. 509.

43. Reg. *v.* Duffield, 5 Cox C. C. 401. See also Davis *v.* Zimmerman, 91 Hun (N. Y.) 489, 36 N. Y. Suppl. 303, 71 N. Y. St. 383, holding that a conspiracy to injure a person's business by preventing by means of threats or intimidations persons from entering his employment is a crime at common law and under the penal code of New York.

44. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895. And see Boycott, 5 Cyc. 995.

If two or more persons conspire by intimidation or molestation to deter or influence another in the way he should employ his industry, his talents, or his capital, they are guilty of a criminal offense. Thus it is an indictable offense for two or more persons to combine together to injure persons in their business by annoying them and making threats to their customers and patrons, with the intention of preventing them from continuing their patronage. Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

45. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; People *v.* Wilzig, 4 N. Y. Crim. 403; State *v.* Stewart, 59 Vt. 273, 9 Atl. 555, 59 Am. Rep. 710; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

The courts "have very generally condemned those combinations usually termed 'boycotts' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according

22. To Cause Loss of Employment — a. By Causing Breach of Contract by Employer. It is said to be an indictable conspiracy to combine to procure an employer to violate a contract of employment by discharging an employee.[46]

b. By Causing Discharge of Employee Not Under Contract For Time Certain. It is an indictable conspiracy for several to combine to constrain an employer to discharge a particular workman not under contract for a time certain, by threatening to prevent him from obtaining other workmen[47] or by refusing to continue work.[48]

23. To Prevent Persons From Obtaining Employment. A combination to constrain a workman to join a certain organization by threatening to prevent him from obtaining work unless he does so is an indictable conspiracy;[49] and so is a conspiracy by strikes to prevent a person from accepting employment from the person against whom the strike is operating by means of threats and intimidation.[50]

24. To Obtain Reward For Appointment to Office. An indictment will lie for a conspiracy to obtain money as a reward for an appointment to an office under government.[51]

25. To Prevent Competition at Auction. It is an indictable conspiracy for persons to agree among themselves that only one of their number shall bid on certain articles at auction, they afterward sharing the profit between the price of the articles thus obtained and their fair market value,[52] or for persons to aid or abet sham bidders in a mock auction whereby the articles are obtained at an unfair price.[53]

26. To Charge Unlawfully With Support of Pauper. While it is an indictable offense to induce paupers to voluntarily remove to another parish,[54] it is not indictable for the inhabitants of a township to make efforts to get rid of a party who is simply likely to become chargeable as a pauper.[55] Where, however, paupers are legally settled in their respective parishes, a conspiracy by the officers of one to marry a female pauper therein to a pauper settled in another parish, in order to transfer their charge to the latter, is indictable.[56] But it has been held

to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 917, 28 C. C. A. 99.

46. Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

47. *In re* Journeymen Cordwainers, Yates Sel. Cas. (N. Y.) 111; State *v.* Dyer, 67 Vt. 690, 32 Atl. 814. See also *dictum* in Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1.

48. People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; Reg. *v.* Hewitt, 5 Cox C. C. 162. See also People *v.* Smith, 10 N. Y. St. 730, where it was held that the statute making lawful an orderly and peaceable assembly or coöperation of persons employed in any calling or trade for the purpose of advancing wages or maintaining the rate of wages does not authorize a labor union to demand of an employer that he discharge an employee for failure to join the union under threat of a strike unless he discharge him. There is no question of raising or maintaining the rate of wages, and such act is one preventive of the exercise of a lawful calling.

49. State *v.* Dyer, 67 Vt. 690, 32 Atl. 814.

50. Smith *v.* Thomasson, 16 Cox C. C. 740, 54 J. P. 596, 62 L. T. Rep. N. S. 68.

51. Rex *v.* Pollman, 2 Campb. 229, 11 Rev. Rep. 689.

52. Levi *v.* Levi, 6 C. & P. 239, 25 E. C. L. 413. See also Gibbs *v.* Smith, 115 Mass. 592; Cocks *v.* Izard, 7 Wall. (U. S.) 559, 19 L. ed. 275 (holding that a tenant who by unfair practices prevented other persons from bidding, and thereby obtained his landlord's property at an unfair price, could be compelled in equity to account and reconvey to the landlord).

53. Reg. *v.* Lewis, 11 Cox C. C. 404.

54. Reg. *v.* Storwood, 9 Jur. 448, holding that the offense should be prosecuted by indictment and not by criminal information.

55. Overseer of Poor *v.* Aurand, 10 Watts (Pa.) 134.

56. Rex *v.* Watson, Wils. C. P. 41; Rex *v.* Edwards, 8 Mod. 320 (holding that the indictment must aver that the parties were legally settled in their respective parishes). See also Rex *v.* Tarrant, 4 Burr. 2106.

The offense is considered as a prostitution of the sacred rights of marriage for corrupt

necessary that defendant make use of some violence, threat, contrivance, or some sinister means to procure the marriage without the voluntary consent or inclination of the immediate parties themselves.[57]

D. Who Liable — 1. Corporations or Members of Corporations. It has been held that a corporation cannot be in contemplation of the common law one of the two or more persons whose guilty agreement constituted at common law the offense of conspiracy and that the corporate acts of a member of the corporation cannot form the basis of an indictment for conspiracy.[58] Nevertheless members of a corporation who enter into an unlawful agreement cannot escape criminal liability therefor by claiming that their wrongful acts were corporate acts.[59]

2. Person Incapable of Committing Offense Conspired to Be Committed. The fact that one of the persons conspiring is himself incapable of committing the offense which is the object of the conspiracy neither relieves him of guilt nor disables him from coöperating with another person who is able to commit it.[60]

3. Liability For Acts of Co-Conspirators. The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all.[61] Each is responsible for

and mercenary purposes, and contrary to that freedom of choice which is peculiarly required in forming a union upon which the happiness of both parties thereto so entirely depends. It is not only a great oppression upon the parties most immediately interested, but an offense and abuse of that institution by which society is best continued and legal descents preserved. Rex *v.* Fowler, 1 East P. C. 461.

57. Rex *v.* Seward, 1 A. & E. 706, 3 L. J. M. C. 103, 3 N. & M. 557, 28 E. C. L. 330; Rex *v.* Fowler, 1 East P. C. 461. And see Rex *v.* Herbert, 2 Ld. Ken. 466.

58. People *v.* Duke, 19 Misc. (N. Y.) 292, 44 N. Y. Suppl. 336.

59. People *v.* Duke, 19 Misc. (N. Y.) 292, 44 N. Y. Suppl. 336. See also Kellogg *v.* Sowerby, 32 Misc. (N. Y.) 327, 66 N. Y. Suppl. 542, where it was held that where an association is a party to an unlawful agreement to commit a criminal offense, which agreement is being carried out, a person who is and was president of the association when the contract was made, and is a member of the executive committee which manages the association's affairs, is so concerned in the association as to make him guilty of criminal conspiracy, and entitled to the benefit of the rule that no person shall be compelled to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterward be charged.

60. State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046; U. S. *v.* Stevens, 44 Fed. 132; U. S. *v.* Martin, 4 Cliff. (U. S.) 156, 26 Fed. Cas. No. 15,728; U. S. *v.* Bayer, 4 Dill. (U. S.) 407, 24 Fed. Cas. No. 14,547, 3 Centr. L. J. 11, 13 Nat. Bankr. Reg. 400; Reg. *v.* Whitchurch, 24 Q. B. D. 420. See also Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223. Thus, although the bankrupt act refers, in defining such offense, only to bankrupts, other persons may conspire with a bankrupt to commit such offense and are criminally liable for such conspiracy. U. S. *v.* Bayer, 4 Dill. (U. S.) 407, 24 Fed. Cas. No. 14,547, 3 Centr. L. J. 11, 13 Nat. Bankr. Reg. 400. In Reg. *v.* Whitchurch, 24 Q. B. D. 420, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all the parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence."

Success dependent on act of innocent person.— It cannot avail a defendant in an action for criminal conspiracy to set up in defense that the success of the crime depended in part on the action of an innocent person. Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885.

61. *Alabama.*— Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Jackson *v.* State, 54 Ala. 234.

Florida.— Hall *v.* State, 31 Fla. 176, 12 So. 449.

Georgia.— Handley *v.* State, 115 Ga. 584, 41 S. E. 992; Ferguson *v.* State, 32 Ga. 658.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Lamb *v.* People, 96 Ill. 73; Hanna *v.* People, 86 Ill. 243.

Massachusetts.— Com. *v.* O'Brien, 12 Cush. (Mass.) 84.

Mississippi.— Peden *v.* State, 61 Miss. 267.

everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan.[62] Nevertheless the act must be the ordinary and probable effect of the wrongful act, specifically agreed on so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.[63] Even if the common design is unlawful, and if one member of the party depart from the original design as agreed upon by all of the members, and did an act which was not only contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor.[64]

4. Persons Coming in After Formation of Conspiracy. While to authorize a conviction of several persons charged in one indictment with conspiracy each must be proved to have come into the conspiracy prior to the consummation of the act to be done in pursuance thereof,[65] it is not essential to a conviction of a person or persons charged with a conspiracy, that he or they should have originated the conspiracy.[66] A person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before

New York.— Ruloff *v.* People, 45 N. Y. 213.

Pennsylvania.— Collins *v.* Com., 3 Serg. & R. (Pa.) 220; Com. *v.* Spencer, 6 Pa. Super. Ct. 256; Com. *v.* Tack, 1 Brewst. (Pa.) 511; Com. *v.* Corlies, 8 Phila. (Pa.) 450.

Texas.— Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165; Smith *v.* State, 21 Tex. App. 133, 17 S. W. 558; Stevenson *v.* State, 17 Tex. App. 618; Loggins *v.* State, 8 Tex. App. 434; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Mercersmith *v.* State, 8 Tex. App. 211.

United States.— Nudd *v.* Burrows, 91 U. S. 426, 23 L. ed. 286; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Kane, 23 Fed. 748; U. S. *v.* Goldberg, 7 Biss. (U. S.) 175, 25 Fed. Cas. No. 15,223; U. S. *v.* Butler, 1 Hughes (U. S.) 457, 25 Fed. Cas. No. 14,700; U. S. *v.* Mitchell, 1 Hughes (U. S.) 439, 26 Fed. Cas. No. 15,790; U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896.

England.— Reg. *v.* Gurney, 11 Cox C. C. 414; Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Reg. *v.* Tyler, 8 C. & P. 616, 34 E. C. L. 923.

See 10 Cent. Dig. tit. "Conspiracy," § 74.

62. *Alabama.*— Turner *v.* State, 97 Ala. 57, 12 So. 54; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Arkansas.— Carr *v.* State, 43 Ark. 99.

Florida.— Myers *v.* State, (Fla. 1901) 31 So. 275.

Georgia.— Handley *v.* State, 115 Ga. 584, 41 S. E. 992.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Lamb *v.* People, 96 Ill. 73; Brennan *v.* People, 15 Ill. 511.

Mississippi.— Peden *v.* State, 61 Miss. 267.

Texas.— Blain *v.* State, 30 Tex. App. 702, 18 S. W. 862; Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416.

United States.— U. S. *v.* Sweeney, 95 Fed. 434; U. S. *v.* Kane, 23 Fed. 748.

See 10 Cent. Dig. tit. "Conspiracy," § 74.

63. *Alabama.*— Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Florida.— Myers *v.* State, (Fla. 1901) 31 So. 275.

Georgia.—Handley *v.* State, 115 Ga. 584, 41 S. E. 992; Ferguson *v.* State, 32 Ga. 658.

Illinois.— Lamb *v.* People, 96 Ill. 73.

Texas.— Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416; Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165; Mercersmith *v.* State, 8 Tex. App. 211.

See 10 Cent. Dig. tit. "Conspiracy," § 74.

Accidental results.—One conspirator cannot be held criminally liable for every accidental result arising from acts of co-conspirators while engaged in the execution of the common purpose, but only for such accidents as could reasonably have been foreseen to occur and would probably happen in the execution agreed upon. Myers *v.* State, (Fla. 1901) 31 So. 275.

64. Handley *v.* State, 115 Ga. 584, 41 S. E. 992.

65. Com. *v.* Kirkpatrick, 15 Leg. Int. (Pa.) 268.

66. All who accede to a conspiracy after its formation and while it is in execution, and all who with a knowledge of the facts concur in the plans originally formed and aid in executing them are fellow conspirators. They commit an offense when they become parties to the transaction or further the original plan.

Delaware.— State *v.* Clark, 9 Houst. (Del.) 536, 35 Atl. 310.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

or afterward, in furtherance of the common design.[67] Whenever conspirators act, by lawful intendment they renew or continue their agreement, and it is renewed or continued as to all whenever either of them acts in furtherance of the common design.[68]

5. Persons Taking Subordinate Part. A person may be liable for a conspiracy, notwithstanding that the part he takes is a subordinate one, and although it was to be executed at a remote distance from the other conspirators.[69]

6. Persons Withdrawing From Conspiracy. The fact that a person, after entering into an agreement with another to commit a crime, withdraws from the agreement does not for obvious reasons prevent his conviction for the conspiracy.[70]

7. Effect of Absence of Pecuniary Benefit. To render a person criminally liable as a conspirator it is not necessary that under the scheme he should have had any pecuniary benefit in the matter or have joined with the view of obtaining pecuniary benefit.[71]

E. Merger in Other Offenses — 1. Offenses of the Same Grade. It is well settled that where the execution of the act which is the object of the conspiracy is a misdemeanor the conspiracy itself being an offense of the same grade — a misdemeanor — is not merged in the other offense;[72] and where a statute makes it a felony to conspire to commit a felony the conspiracy does not merge in the executed felony.[73]

New York.— People *v.* Maher, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Pennsylvania.—Collins *v.* Com., 3 Serg. & R. (Pa.) 220.

Texas.— Blaine *v.* State, 33 Tex. Crim. 236, 26 S. W. 63.

United States.— U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Sacia, 2 Fed. 754; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487.

England.— Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744.

See 10 Cent. Dig. tit. "Conspiracy," § 76.

67. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Blaine *v.* State, 33 Tex. Crim. 236, 26 S. W. 63. But *compare* State *v.* Duncan, 64 Mo. 262.

68. McKee *v.* State, 111 Ind. 378, 12 N. E. 510; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Com. *v.* Bartilson, 85 Pa. St. 482; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

"In point of law, a conspiracy is considered as renewed with every act done in carrying out the plan." Raleigh *v.* Cook, 60 Tex. 438.

69. U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487.

70. Dill *v.* State, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37; Bridgewater's Case [*cited* in Mogul Steam-ship Co. *v.* McGregor, 21 Q. B. D. 544, 549].

Questions for jury.— Whether or not the act was the ordinary and probable effect of the common design of the conspiracy or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design are questions to be submitted to the jury under proper instructions. Lyons *v.* State, 30 Tex. App. 642, 18 S. W. 416; Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

71. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; U. S. *v.* Newton, 52 Fed. 275; Reg. *v.* Esdaile, 1 F. & F. 213.

To constitute a conspiracy to defraud the United States it is not necessary that there should be a pecuniary consideration between the parties. U. S. *v.* Allen, 24 Fed. Cas. No. 14,432, 7 Int. Rev. Rec. 163.

72. *Alabama.*— State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Illinois.— Orr *v.* People, 63 Ill. App. 305.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Murray, 15 Me. 100.

Massachusetts.— Com. *v.* O'Brien, 12 Cush. (Mass.) 84.

Michigan.—People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.— People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Pennsylvania.— Com. *v.* Delany, 1 Grant (Pa.) 224; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341.

Vermont.— State *v.* Noyes, 25 Vt. 415.

United States.— Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379; U. S. *v.* Gardner, 42 Fed. 829; U. S. *v.* De Grieff, 16 Blatchf. (U. S.) 20, 25 Fed Cas. No. 14,936; U. S. *v.* Martin, 4 Cliff. (U. S.) 156, 26 Fed. Cas. No. 15,728; U. S. *v.* McDonald, 3 Dill. (U. S.) 543, 26 Fed. Cas. No. 15,670.

See 10 Cent. Dig. tit. "Conspiracy," § 68 *et seq.*

Illustrations.— There can be no merger of a conspiracy in the offense of obtaining money by false pretenses (Orr *v.* People, 63 Ill. App. 305; State *v.* Mayberry, 48 Me. 218) or in the offense of impeding an officer in the discharge of his duty (State *v.* Noyes, 25 Vt. 415).

73. Davis *v.* Place, 22 Colo. 1, 43 Pac. 122.

2. WHERE OBJECT OF CONSPIRACY OF LOWER GRADE THAN CONSPIRACY. Where on a trial for conspiracy to commit larceny it appears that the theft was actually committed and that it was only petit larceny, the penalty for which is less than if it were conspiracy, there is no merger of the offense.[74]

3. WHERE OBJECT OF CONSPIRACY IS TO COMMIT A FELONY — a. At Common Law. There is considerable conflict of authority as to whether conspiracy to commit a felony is merged in the higher offense, when the object of the conspiracy is accomplished. Decisions, even in the same jurisdiction, are not always harmonious. According to a number of decisions where the felony, which is the object of the conspiracy, is committed, a conspiracy being a misdemeanor is merged in the higher offense.[75] There are, however, many decisions which reach the opposite conclusion, taking the view that a misdemeanor which is a part of a felony may be punished as a misdemeanor, although the felony has been completed.[76]

b. Under Special Statutory Provisions. Under special statutory provisions in one state,[77] the carrying of the conspiracy into effect does not merge the conspiracy in the greater offense.[78] The object of the statute is to preclude merger in such case.[79] Under the statutes of another state, providing that if two or more persons shall conspire to commit any felony and make some advance thereto, without committing the felony, they shall be deemed guilty of a misdemeanor, a conspiracy to commit a felony is not indictable after the offense has been committed. The conspiracy merges into the greater offense,[80] and an indictment

74. State *v.* Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121.

75. *Indiana.*— Wright *v.* State, 5 Ind. 527.
Kentucky.— Com. *v.* Blackburn, 1 Duv. (Ky.) 4.
Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Murray, 15 Me. 100.
Massachusetts.— Com. *v.* Kingsbury, 5 Mass. 106. But see cases cited in next note.
New York.— People *v.* McKane, 7 Misc. (N. Y.) 478, 28 N. Y. Suppl. 397, 57 N. Y. St. 723, 31 Abb. N. Cas. (N. Y.) 176; Elkin *v.* People, 24 How. Pr. (N. Y.) 272; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.
Pennsylvania.—Shannon *v.* Com., 14 Pa. St. 226; Com. *v.* Delany, 1 Grant (Pa.) 224.
Vermont.— State *v.* Noyes, 25 Vt. 415.
United States.— U. S. *v.* Gardner, 42 Fed. 829. But see cases cited in next note.
See 10 Cent. Dig. tit. "Conspiracy," § 69.
Reason for rule.— In State *v.* Setter, 57 Conn. 461, 468, 18 Atl. 782, 14 Am. St. Rep. 121, it was said: "The principles upon which the doctrine of merger seems to rest are that the offense merged is lesser than the one in which it is merged, and that the ingredients of the smaller ones are so identical with the ingredients of the larger that when both have been committed they cannot in reason and justice be separated; so that to punish an accused in such a case for both offenses would be in effect to punish the same act twice." In U. S. *v.* Gardner, 42 Fed. 829, 831, it was said: "The reason why a conviction cannot be had for the conspiracy to commit a felony, or for an attempt to commit a felony, when it appears that the felony was actually committed, is that the acquittal for the minor offense would not bar a subsequent indictment for the major, and consequently the accused might be put twice in jeopardy for acts which were all constituent parts of one offense."

76. *Connecticut.*— State *v.* Gannon, (Conn. 1902) 52 Atl. 727; State *v.* Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121; State *v.* Bradley, 48 Conn. 535.
Massachusetts.— Com. *v.* Walker, 108 Mass. 309; Com. *v.* Warren, 6 Mass. 74.
New Hampshire.— State *v.* Sias, 17 N. H. 558.
Texas.— Bailey *v.* State, (Tex. Crim. 1900) 59 S. W. 900; Whitford *v.* State, 24 Tex. App. 489, 6 S. W. 537, 5 Am. St. Rep. 890.
United States.— U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 28 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223; U. S. *v.* Goldman, 3 Woods (U. S.) 187, 25 Fed. Cas. No. 15,225.
England.— Reg. *v.* Rowlands, 17 Q. B. 671, 5 Cox C. C. 466, 2 Den. C. C. 364, 16 Jur. 268, 21 L. J. M. C. 81, 79 E. C. L. 671; Reg. *v.* Button, 11 Q. B. 929, 3 Cox C. C. 229, 12 Jur. 1017, 18 L. J. M. C. 19, 63 E. C. L. 929; Reg. *v.* Neale, 1 C. & K. 591, 1 Den. C. C. 36; Reg. *v.* Boulton, 12 Cox C. C. 87.
See also Johnson *v.* State, 29 N. J. L. 453 (one judge dissenting), holding that where an indictment charged that the defendants at one time were guilty of conspiracy and at another time were guilty of perjury and subornation of perjury, there was no merger of the offense.

77. Mich. Comp. Laws, § 7919.

78. People *v.* Summers, 115 Mich. 537, 73 N. W. 818; People *v.* Petheran, 64 Mich. 252, 31 N. W. 188; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

79. People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

80. Elsey *v.* State, 47 Ark. 572, 2 S. W. 337.

for a conspiracy to commit a felony must allege that the felony was not committed.[81]

F. Grade of Offense. At common law a conspiracy, whether it be to commit a misdemeanor or a felony, is merely a misdemeanor.[82] Where a certain kind of conspiracy is defined and made punishable by statute but not declared a felony it also is merely a misdemeanor.[83]

III. CIVIL LIABILITY.

A. Introductory Statement. It is the purpose to consider here conspiracy in its civil aspect. By the rules of the common law an action of conspiracy or to use an equivalent expression a writ of conspiracy was never allowed but in two cases;[84] one for conspiracy to procure a man to be indicted for treason; the other for a conspiracy to prosecute a man for a felony by which life was put in danger.[85] In all other cases of conspiracy the remedy was and is now by action on the case, in which it is usual to charge a conspiracy.[86]

B. Conspiracy of Itself Not a Cause of Action — 1. IN GENERAL. From the earliest period, it has been said that a conspiracy of itself furnishes no cause of action. This statement has two distinct meanings, which neither courts nor text-writers have always properly distinguished. They are: (1) That no action lies unless the conspiracy is executed to the injury of another;[87] and (2) that a conspiracy will not render unlawful an act which is lawful when committed by one.[88]

2. NECESSITY FOR DAMAGES. Unless something is actually done by one or more of the conspirators pursuant to the scheme and in furtherance of the object which results in damage no civil action lies against any one.[89] The gist of the action is

81. Elsey *v.* State, 47 Ark. 572, 2 S. W. 337.

82. Com. *v.* Demain, Brightly (Pa.) 441; Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

83. Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

84. Remedy obsolete.— Even in respect of the two cases for which a writ of conspiracy would lie such remedy has become obsolete (Parker *v.* Huntington, 68 Mass. 124; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459), and an action on the case in the nature of a conspiracy which furnishes a more adequate and liberal remedy has been adopted (Jones *v.* Baker, 7 Cow. (N. Y.) 445).

85. Parker *v.* Huntington, 2 Gray (Mass.) 124; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

86. *Illinois.*— Doremus *v.* Hennessy, 62 Ill. App. 391.

New York.—Jones *v.* Baker, 7 Cow. (N. Y.) 445.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

United States.— Smith *v.* Rines, 2 Sumn. (U. S.) 338, 22 Fed. Cas. No. 13,100.

England.— Savile *v.* Roberts, 1 Ld. Raym. 374.

87. See *infra*, III, B, 2.

88. See *infra*, III, B, 3.

89. *Iowa.*—McHenry *v.* Sneer, 56 Iowa 649, 10 N. W. 234.

Kentucky.— Hundley *v.* Louisville, etc., R. Co., 20 Ky. L. Rep. 1085, 48 S. W. 429

Maryland.— Brinkley *v.* Platt, 40 Md. 529.

Massachusetts.—Bowen *v.* Matheson, 14 Allen (Mass.) 499; Parker *v.* Huntington, 2 Gray (Mass.) 124. *Contra, dictum* in Patten *v.* Gurney, 17 Mass. 182.

Michigan.— Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

New York.— Tappan *v.* Powers, 2 Hall (N. Y.) 277; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104.

North Carolina.— Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689.

Pennsylvania.—Hinchman *v.* Richie, Brightly (Pa.) 143.

England.— Savile *v.* Roberts, 1 Ld. Raym. 374.

See 10 Cent. Dig. tit. "Conspiracy," § 5.

In the leading English case on this subject, it was said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie." Savile *v.* Roberts, 1 Ld. Raym. 374.

"A simple conspiracy, however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action; not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use." Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104.

A "conspiracy or combination is nothing so far as sustaining the action goes; the foundation of it being the actual damage done to the party." Hutchins *v.* Hutchins, 7

the damage and not the conspiracy,[90] and the damage must appear to have been the natural and proximate consequence of defendant's act.[91]

3. Necessity For Act Unlawful Independently of Conspiracy. The other branch of the rule under consideration is that where damage results from an act which if done by one alone would not afford ground of action, a like act would not be rendered actionable because done by several in pursuance of an agreement.[92]

Hill (N. Y.) 104; Laverty *v.* Vanarsdale, 65 Pa. St. 507; Savile *v.* Roberts, 1 Ld. Raym. 374.

90. *California.*— Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491; Herron *v.* Hughes, 25 Cal. 555. *Compare dictum* in Dreux *v.* Domec, 18 Cal. 83.

Connecticut.— Bulkley *v.* Storer, 2 Day (Conn.) 531.

Illinois.— Martin *v.* Leslie, 93 Ill. App. 44; Doremus *v.* Hennessy, 62 Ill. App. 391.

Iowa.— McHenry *v.* Sneer, 56 Iowa 649, 10 N. W. 234.

Kentucky.— Brewster *v.* Miller, 101 Ky. 368, 19 Ky. L. Rep. 593, 41 S. W. 301, 38 L. R. A. 505; Hundley *v.* Louisville, etc., R. Co., 20 Ky. L. Rep. 1085, 48 S. W. 429.

Maine.— Garing *v.* Fraser, 76 Me. 37; Dunlap *v.* Glidden, 31 Me. 435, 42 Am. Dec. 625.

Maryland.—Robertson *v.* Parks, 76 Md. 118, 24 Atl. 411; Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Bradley *v.* Fuller, 118 Mass. 239; Bowen *v.* Matheson, 14 Allen (Mass.) 499; Randall *v.* Hazelton, 12 Allen (Mass.) 412; Hayward *v.* Draper, 3 Allen (Mass.) 551; Parker *v.* Huntington, 2 Gray (Mass.) 124; Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Livermore *v.* Herschell, 3 Pick. (Mass.) 33; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.

Michigan.— Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222; Schwab *v.* Mabley, 47 Mich. 572, 11 N. W. 390.

Minnesota.— Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

Missouri.— Hunt *v.* Simonds, 19 Mo. 583.

Nebraska.— Commercial Union Assur. Co. *v.* Shoemaker, 63 Nebr. 173, 88 N. W. 156.

New Hampshire.— Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231; Page *v.* Parker, 40 N. H. 47.

New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376, 21 N. Y. St. 971; Verplanck *v.* Van Buren, 76 N. Y. 247; Place *v.* Minster, 65 N. Y. 89; Colyer *v.* Guilfoyle, 47 N. Y. App. Div. 302, 62 N. Y. Suppl. 21; Lee *v.* Taylor, 56 Hun (N. Y.) 610, 11 N. Y. Suppl. 131, 32 N. Y. St. 165; Buffalo Lubricating Oil Co. *v.* Everest, 30 Hun (N. Y.) 586; Tappan *v.* Powers, 2 Hall (N. Y.) 277; Kolel America Vatiferes Jerusalem *v.* Eliach, 29 Misc. (N. Y.) 499, 61 N. Y. Suppl. 935; Silverman *v.* Doran, 23 Misc. (N. Y.) 96, 51 N. Y. Suppl. 731; Bayles *v.* Vandeveer, 11 Misc. (N. Y.) 207, 32 N. Y. Suppl. 1117, 62 N. Y. St. 572; Griffing *v.* Diller, 21 N. Y. Suppl. 407, 50 N. Y. St. 435; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

North Carolina.—Eason *v.* Petwat, 18 N. C. 44.

Ohio.— Toledo Electric St. R. Co. *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 597.

Pennsylvania.— Laverty *v.* Vanarsdale, 65 Pa. St. 507; Hood *v.* Palm, 8 Pa. St. 237.

Vermont.— Sullivan *v.* Haskin, 70 Vt. 487, 41 Atl. 437; Saxe *v.* Burlington, 70 Vt. 449, 41 Atl. 438; Sheple *v.* Page, 12 Vt. 519.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840; Smith *v.* Nippert, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26.

United States.— Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696.

England.— Huttley *v.* Simmons, [1898] 1 Q. B. 181, 67 L. J. Q. B. 213; Cotterell *v.* Jones, 11 C. B. 713, 16 Jur. 88, 21 L. J. C. P. 2, 73 E. C. L. 713; Barber *v.* Lesiter, 7 C. B. N. S. 175, 6 Jur. N. S. 654, 29 L. J. C. P. 161, 97 E. C. L. 175; Poulterers' Case, 9 Coke 55*b*; Castrique *v.* Behrens, 3 E. & E. 709, 7 Jur. N. S. 1024, 30 L. J. Q. B. 163, 4 L. T. Rep. N. S. 526, 107 E. C. L. 709; Savile *v.* Roberts, 1 Ld. Raym. 374; Salaman *v.* Warner, 65 L. T. Rep. N. S. 132; Smith *v.* Cranshaw, W. Jones 93.

Canada.— East Missouri Tp. *v.* Horseman, 16 U. C. Q. B. 556.

See 10 Cent. Dig. tit. "Conspiracy," § 5.

It is not necessary to show actual specific damage; it is sufficient if defendant's acts have caused trouble, inconvenience, or expense to plaintiff. Swan *v.* Saddlemire, 8 Wend. (N. Y.) 676.

91. Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340; Bradley *v.* Fuller, 118 Mass. 239; Lamb *v.* Stone, 11 Pick. (Mass.) 527; Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696; Barber *v.* Lesiter, 7 C. B. N. S. 175, 6 Jur. N. S. 654, 29 L. J. C. P. 161, 97 E. C. L. 175.

92. *Iowa.*— De Wulf *v.* Dix, 110 Iowa 553, 81 N. W. 779; Beechley *v.* Mulville, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; Jayne *v.* Drorbaugh, 63 Iowa 711, 17 N. W. 433.

Maryland.— Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719.

What one may lawfully do singly, two or more may lawfully agree to do jointly.[93]

C. Nature of Action Not Changed by Alleging Conspiracy. An averment that the acts were done in pursuance of a conspiracy does not change the nature of the action or add anything to its legal force and effect.[94] If a plaintiff fail in the proof of a conspiracy or concerted design, he may yet recover damages against such of the defendants as are shown to be guilty of the tort without such agreement.[95] The charge of conspiracy where unsupported by evidence will be considered mere surplusage not necessary to be proved to support the action.[96]

D. For What Purpose Conspiracy Important to Action. This being so the question arises for what purpose is the allegation and proof of conspiracy important? The answer is that when the mischief contemplated is accomplished the conspiracy becomes important as it may affect the means and measure of redress.[97] It may be pleaded and proved as aggravating the wrong of which plaintiff complains and to enable him to recover against all the defendants as

Minnesota.— Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

Missouri.— Hunt *v.* Simonds, 19 Mo. 583.

Texas.— Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

United States.— Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696.

England.— Huttley *v.* Simmons, [1898] 1 Q. B. 181, 67 L. J. Q. B. 213; Kearney *v.* Lloyd, L. R. 26 Ir. 268.

See 10 Cent. Dig. tit. "Conspiracy," § 1 *et seq.*

Contra, Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; *dictum* in State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046 (to the effect that the doctrine that if an act is not actionable when done by one it is not when done by many is not the law of Wisconsin).

93. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination of conspiracy, but the damage done or threatened to plaintiff by the acts of defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337.

94. *Kentucky.*—Hundley *v.* Louisville, etc., R. Co., 105 Ky. 162, 48 S. W. 429, 20 Ky. L. Rep. 1085, 88 Am. St. Rep. 298.

Maine.— Garing *v.* Fraser, 76 Me. 37; Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625.

Maryland.— Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Bowen *v.* Matheson, 14 Allen (Mass.) 499; Randall *v.* Hazelton, 12 Allen (Mass.) 412; Parker *v.* Huntington, 2 Gray (Mass.) 124.

New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

New York.— Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

Pennsylvania.— Laverty *v.* Vanarsdale, 65 Pa. St. 507.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

England.— Barber *v.* Lesiter, 7 C. B. N. S. 175, 6 Jur. N. S. 654, 29 L. J. C. P. 161, 97 E. C. L. 175; Savile *v.* Roberts, 1 Ld. Raym. 374; Skinner *v.* Gunton, Saund. 228*d*.

Canada.— East Missouri Tp. *v.* Horseman, 16 U. C. Q. B. 556.

Allegations of conspiracy as to acts complained of in an action of tort will not support the action unless either the purpose intended or the means by which it is to be accomplished are unlawful. O'Callaghan *v.* Cronan, 121 Mass. 114.

95. *Illinois.*— Martin *v.* Leslie, 93 Ill. App. 44; Doremus *v.* Hennessy, 62 Ill. App. 391.

Maryland.— Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340.

Maine.— Garing *v.* Fraser, 76 Me. 37.

Massachusetts.— Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Parker *v.* Huntington, 2 Gray (Mass.) 124.

Michigan.— Bush *v.* Sprague, 51 Mich. 41, 16 N. W. 222.

New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

New York.— Place *v.* Minster, 65 N. Y. 89; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

Pennsylvania.— Laverty *v.* Vanarsdale, 65 Pa. St. 507.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

96. Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340; Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun (N. Y.) 153; Savile *v.* Roberts, 1 Ld. Raym. 374; East Missouri Tp. *v.* Horseman, 16 U. C. Q. B. 556.

97. Robertson *v.* Parks, 76 Md. 118, 24 Atl. 411.

joint tort-feasors.[98] The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it.[99]

E. Particular Actions on the Case in the Nature of Conspiracy — 1. Conspiracy to Defraud — a. In General. It is essential to a conspiracy to defraud that there be some designed and positively fraudulent artifice employed,[1] or that a fraudulent intent should exist[2] on the part of the party sought to be held,[3] and that such fraud or artifice should be practised on the party defrauded.[4] So too in a charge of conspiracy to obtain a favorable compromise of suits about to be commenced, the intention of the parties unfairly directed to the attainment of such end must be shown in connection with the groundlessness of the action.[5] It has, however, been held that no affirmative fraudulent representations need be shown, a concealment of the true nature of the transaction being sufficient.[6] And generally speaking all persons who enter into a compact to defraud by overvaluing property,[7] and by falsehood and device to induce a plaintiff to make a transaction without inspection or full examination of the property involved,[8] who falsely and fraudulently recommend an insolvent person as worthy of credit, by reason of which plaintiff is induced to trust him,[9] or who through his business transactions fraudulently induces such credit[10] are civilly liable in an action for conspiracy to defraud.

b. To Defraud Creditors. A civil action on the case in the nature of conspiracy to defraud creditors is no exception to the general rule that either an unlawful purpose or the employment of unlawful means must be shown;[11] and no recovery can be had where the injury complained of is remote, indefinite, and contingent.[12] Accordingly, an action will not lie for aiding and assisting a debtor to transfer or conceal his property to prevent plaintiff from attaching it, as such

98. *Maine.*— Garing *v.* Fraser, 76 Me. 37.
Maryland.— Kimball *v.* Harman, 34 Md. 407, 6 Am. Rep. 340.
Massachusetts.— Randall *v.* Hazelton, 12 Allen (Mass.) 412; Parker *v.* Huntington, 2 Gray (Mass.) 124.
Missouri.— Hunt *v.* Simonds, 19 Mo. 583.
New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.
New York.— Lee *v.* Kendall, 56 Hun (N. Y.) 610, 11 N. Y. Suppl. 131, 32 N. Y. St. 165; Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun (N. Y.) 153; Tappan *v.* Powers, 2 Hall (N. Y.) 277.

99. Robertson *v.* Parks, 76 Md. 118, 24 Atl. 411; Hunt *v.* Simonds, 19 Mo. 583.

1. Page *v.* Parker, 40 N. H. 47.
That one of the defendants is cognizant of the fraud of the others is necessarily implied in an action of this nature. Meridian First Nat. Bank *v.* Stephens, 19 Tex. Civ. App. 560, 47 S. W. 832.

2. Clark *v.* Exchange Printing Co., 148 N. Y. 721, 42 N. E. 417.

3. Fox *v.* Mackay, 123 Cal. 582, 56 Pac. 435; Bowman *v.* Lickey, 86 Mo. App. 47.
The inducement by a surety of a member of a firm to use its property to discharge the debt to which the liability of the surety attaches is not an illegal act, and the other partners cannot maintain an action in the nature of conspiracy against such partner and surety. Kirkpatrick *v.* Lex, 49 Pa. St. 122.

4. Hence the mere existence of a conspiracy between a certain party and the buyer of goods does not render such person personally liable for the price of goods sold to the buyer, by one upon whom no fraud was practised in procuring the sale. Kessler *v.* Halff, 21 Tex. Civ. App. 91, 51 S. W. 48.

5. Leavitt *v.* Gushee, 5 Cal. 152. See also Heaps *v.* Dunham, 95 Ill. 583.

6. Place *v.* Minster, 65 N. Y. 89.

7. See Watts *v.* British, etc., Mortg. Co., 60 Fed. 483, 9 C. C. A. 98.

8. Wolfe *v.* Pugh, 101 Ind. 293; Meloy *v.* Donnelly, 119 Fed. 456.

9. Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141. And see Percival *v.* Harres, 142 Pa. St. 369, 21 Atl. 876.
A personal judgment against the party inducing the credit may be rendered, although plaintiff holds the property sold, in attachment to satisfy the judgment. Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140.

10. Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140.

11. O'Callaghan *v.* Cronan, 121 Mass. 114; Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696. See also Whitman *v.* Spencer, 2 R. I. 124.
Fraudulent intent, as well as acts in execution of such intent, must be shown where the action is brought for conspiracy to cover a debtor's property by cumulative judgments and executions. Beaven *v.* Herr, 17 Leg. Int. (Pa.) 300.

12. Bradley *v.* Fuller, 118 Mass. 239; Lamb *v.* Stone, 11 Pick. (Mass.) 527.

act only prevents him from executing his intention and does not deprive him of a property right.[13]

2. CONSPIRACY TO PROSECUTE MALICIOUSLY. An action will lie to recover damages caused by an executed conspiracy in the institution of a malicious prosecution, where it appears that the prosecution was malicious and without probable cause.[14] It has been held that in order to convict of a conspiracy to prosecute maliciously all the facts necessary to support an action for malicious prosecution must be shown.[15] Want of probable cause is essential. However malicious the defendants may have been if they have probable cause for the prosecution no action can be maintained against them.[16] Nor will an action lie where a verdict and judgment has been recovered against plaintiff, so long as the judgment remains unreversed,[17] nor where a *nolle prosequi* has been entered.[18]

3. CONSPIRACY FALSELY TO IMPRISON. While it is no doubt actionable falsely to imprison one in pursuance of a conspiracy therefor, an action for confining plaintiff in a lunatic asylum cannot be sustained if defendants conscientiously believed that plaintiff was deranged and required for his recovery medical treatment under restraint.[19]

13. *Massachusetts.*— Bradley *v.* Fuller, 118 Mass. 239; Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Lamb *v.* Stone, 11 Pick. (Mass.) 527.

Rhode Island.— Klous *v.* Hennessey, 13 R. I. 332.

Vermont.— Hall *v.* Eaton, 25 Vt. 458.

Wisconsin.— Field *v.* Siegel, 99 Wis. 605, 75 N. W. 397, 47 L. R. A. 433.

United States.— Adler *v.* Fenton, 24 How. (U. S.) 407, 16 L. ed. 696.

See also Austin *v.* Barrows, 41 Conn. 287. And *compare* Mott *v.* Danforth, 6 Watts (Pa.) 304, 31 Am. Dec. 468; Penrod *v.* Morrison, 2 Penr. & W. (Pa.) 726.

See 10 Cent. Dig. tit. "Conspiracy," § 13.

Rule applied.— In one of the cases it was said: "The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention." Bradley *v.* Fuller, 118 Mass. 239, 241. The rule is otherwise, however, where the creditor actually attaches the debtor's property and his attachment is defeated by an attachment made upon a suit for a fictitious debt brought in pursuance of a conspiracy between the debtor and a third person, the property being applied to the judgment obtained in such suit. Adams *v.* Paige, 7 Pick. (Mass.) 542. So an action will lie against persons who combine together and by hostile demonstration prevent collection of a tax by a county and payment of a judgment which it owes plaintiff. Findlay *v.* McAllister, 113 U. S. 104, 5 S. Ct. 401, 28 L. ed. 930.

The mere advancement to a merchant by certain creditors of a considerable sum of money, knowing his embarrassed condition, and their allowing him to increase his indebtedness to them, is not conclusive of a conspiracy to defraud creditors generally. Weckherlin *v.* White, 4 N. Y. St. 80.

14. Page *v.* Cushing, 38 Me. 523.

Disbarment proceedings.—An action will lie for an executed malicious conspiracy to bring proceedings to disbar an attorney. McCarthy *v.* Barter, 15 Can. L. T. 198.

Inquisition of lunacy.— It has been held that a conspiracy to vex and harass a person, by having him subjected to an inquisition of lunacy without any probable cause, is actionable. Davenport *v.* Lynch, 51 N. C. 545.

What overt act sufficient.—It has been held that where defendants in pursuance of a plan to extort money from plaintiff falsely accused him before a magistrate of obtaining goods from some of them by false pretenses, under which charge he was arrested, the making of the false oath is a sufficient overt act. Raleigh *v.* Cook, 60 Tex. 438.

15. In an action on the case for conspiracy to maliciously prosecute plaintiff, proof that a magistrate, a prosecutor, and a constable each behaved improperly will not support a charge of conspiracy in instituting and conducting a malicious prosecution. This offense is specifically different from a mere malicious prosecution, much more dangerous in its character, and may justify much heavier damage. Newall *v.* Jenkins, 26 Pa. St. 159.

16. Payson *v.* Caswell, 22 Me. 212; Kirtley *v.* Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445.

Probable cause — How determined.— In an action for conspiring to procure and for procuring an application to be made maliciously and without reasonable and probable cause to disbar plaintiff, the ruling or judgment of the judge who heard the application was not conclusive as to the question of reasonable and probable cause. McCarthy *v.* Barter, 15 Can. L. T. 198.

17. Dunlap *v.* Glidden, 31 Me. 433, 52 Am. Dec. 625.

18. This is not such a termination of the action as will entitle the accused to maintain an action for malicious prosecution. Garing *v.* Fraser, 76 Me. 37.

19. Hinchman *v.* Richie, Brightly (Pa.) 143. See also Com. *v.* Sheriff, 8 Phila. (Pa.) 645.

So one who after his release from an in-

4. Conspiracy to Injure in Business, Property, or Calling — a. In General. While no civil action lies for a mere conspiracy, yet whenever in pursuance of an unlawful combination to injure another in his particular avocation or business means have been employed which tended to effectuate and to a greater or less extent did accomplish the object of the conspiracy an action on the case will lie.[20]

b. Effect of Malice. If without wrongful motive the cause of one person's interference with the property and privileges of another is to serve some legitimate right or interest of his own he may do the acts himself or cause other persons to do them that injuriously affect a third party, so long as no definite legal right of such third party is violated;[21] but where persons combine not for the purpose of protecting or advancing their own legitimate interests but for the purpose of injuring another in his trade or business, they are guilty of an unlawful conspiracy which when executed and when damages result therefrom is actionable.[22] There is a clear distinction between acts which have inducement in malice or ill-will and those which have inducement in business competition and rivalry. The latter are legal combinations and the former are not.[23] If injury results from the merely wanton or malicious acts of others without the justification of competition or the service of any interest or lawful purpose the injury is actionable.[24] Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such

sane asylum affirms the proceedings by which he was confined cannot thereafter recover damages for conspiracy to wrongfully imprison him in the asylum. Johnston *v.* Given, 14 Wkly. Notes Cas. (Pa.) 326.

20. Doremus *v.* Hennessy, 62 Ill. App. 391; Wildee *v.* McKee, 111 Pa. St. 335, 2 Atl. 108, 56 Am. Rep. 271; Hood *v.* Palm, 8 Pa. St. 237.

21. Bowen *v.* Matheson, 14 Allen (Mass.) 499; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

22. *Illinois.*— Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

Louisiana.— Graham *v.* St. Charles St. R. Co., 47 La. Ann. 214, 16 So. 806, 49 Am. St. Rep. 366, 27 L. R. A. 416.

Massachusetts.— Walker *v.* Cronin, 107 Mass. 555.

Minnesota.— Ertz *v.* Minneapolis Produce Exch., 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90.

Texas.— Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

West Virginia.— West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

United States.— Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99.

England.— Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 50 Wkly. Rep. 139.

See 10 Cent. Dig. tit. "Conspiracy," § 7 *et seq.*

Limitation of rule.— The rule does not apply where the business which is injured is itself of an illegal character. Beechley *v.* Mulville, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479.

23. Continental Ins. Co. *v.* Board of Fire Underwriters, 67 Fed. 310; Mogul Steam-ship Co. *v.* McGregor, 21 Q. B. D. 544, 23 Q. B. D. 598 [*affirmed* in [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337].

"**One may without liability induce the customers of another to withdraw their custom from him, in the race of competition,** in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another, it is actionable, if loss ensue." West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

Conspiracy to injure business as distinguished from lawful competition.— Lawful competition may injure the business of another or drive him out of business and yet not be actionable. Competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive the other set of men from business, is not actionable unless there is actual malice; and malice in this sense does not simply mean an intent to harm, but an intent to do a wrongful harm and injury. Intent to do an unlawful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competition. Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

24. Walker *v.* Cronin, 107 Mass. 555.

intentional action when done without just cause or excuse is what the law calls a malicious wrong.[25]

c. Effect of Fraud or Misrepresentation. A conspiracy to injure one in his business or trade by fraud or misrepresentation is actionable when it results in injury.[26] No man, whether trader or not, can justify damaging another in his business by fraud or misrepresentation.[27]

d. Commission of Act Declared Illegal by Statute. One who suffers injury in an act done in furtherance of a conspiracy entered into for the purpose of preventing competition in trade in commodities in common use, which combinations are declared illegal by statute, has a right of action to recover damages sustained.[28]

e. Particular Combinations to Injure — (i) *In General.* An action may be maintained for injuries resulting from a conspiracy to injure a teacher in his vocation by statements reflecting upon his mental condition;[29] from a conspiracy to injure the business and reputation of a dressmaker by falsely suing out an inquisition of lunacy;[30] or for injuries resulting from a conspiracy with the foreman of an employer to obtain the secrets of his business.[31] So it has been held that while the public who go to a theater have a right to express their free and unbiased opinions of the merits of the performers who appear upon the stage, parties have no right to go to a theater by a preconcerted plan to make such a noise that an actor, without any judgment being formed of his performance, should be driven from the stage; and that if two persons are shown to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage they are liable in an action for a conspiracy.[32]

(ii) *To Procure Patrons or Customers to Discontinue Patronage or Custom* — (a) *In General.* It is not unlawful for an associated body of traders to combine to get the whole of a limited trade in their own hands by

25. Mogul Steam-ship Co. *v.* McGregor, 23 Q. B. D. 598.

26. *Kentucky.*— Hundley *v.* Louisville, etc., R. Co., 105 Ky. 162, 20 Ky. L. Rep. 1085, 48 S. W. 429, 88 Am. St. Rep. 298.

Nebraska.— McCartney *v.* Berlin, 31 Nebr. 411, 47 N. W. 1111.

New Jersey.— Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

New York.— Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373; Ryan *v.* Burger, etc., Brewing Co., 13 N. Y. Suppl. 660, 37 N. Y. St. 287.

Ohio.— Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

Pennsylvania.— Wildee *v.* McKee, 111 Pa. St. 335, 2 Atl. 108, 56 Am. Rep. 271.

Vermont.— Saxe *v.* Burlington, 70 Vt. 449, 41 Atl. 438.

England.— Mogul Steam-ship Co. *v.* McGregor, 23 Q. B. D. 598.

False entry as to cause of discharge.— A railroad company is liable to a discharged employee for making a false entry on its records as to the cause of his discharge, where such entry has been directly or indirectly communicated to other railroad companies, and he has thereby been prevented from obtaining employment. Hundley *v.* Louisville, etc., R. Co., 105 Ky. 162, 20 Ky. L. Rep. 1085, 48 S. W. 429, 88 Am. St. Rep. 298.

Injury by defamation.— Trespass on the case for conspiracy to defame and thereby injure another in his particular avocation or business may be maintained whenever, in pursuance of such unlawful combination, means have been employed which tended to effectuate and to a greater or less extent accomplished the object of the conspirators. Wildee *v.* McKee, 111 Pa. St. 335, 2 Atl. 108, 56 Am. Rep. 271.

27. Mogul Steam-ship Co. *v.* McGregor, [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337.

28. The combination charged being prohibited and made criminal every act of defendants in furtherance of the object of the combination is unlawful, and it makes no difference whether such acts if done by an individual not in the combination might have been lawful, and that a person suffering thereby would be without remedy. Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373.

29. Wildee *v.* McKee, 111 Pa. St. 335, 2 Atl. 108, 56 Am. Rep. 271.

30. Smith *v.* Nippert, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26.

31. Jones *v.* Baker, 7 Cow. (N. Y.) 445.

32. Gregory *v.* Brunswick, 1 C. & K. 24, 1 D. & L. 518, 8 Jur. 448, 13 L. J. C. P. 34, 6 M. & G. 205, 6 Scott N. R. 809, 47 E. C. L. 24. See also Clifford *v.* Brandon, 2 Campb. 358, 11 Rev. Rep. 731.

offering exceptional terms to customers who will deal exclusively with them, the object being to prevent rival traders competing with them and so to receive the whole profits of the trade for themselves;[33] but a combination without any just cause or excuse, and without the purpose to advance or further the interest of the members thereof, but to maliciously induce third persons not to trade with a certain person is an actionable conspiracy when executed and when injury results.[34]

(B) *By Threats of Injury to Business.* Any combination, the object of which is to prevent one's patrons or customers from having business dealings with him by threats of injury or loss to the business of such patrons or customers, is an unlawful conspiracy and actionable when damage results.[35] The fact that there is no binding contract between the person injured and his usual customers makes no difference in the application of the rule. It will be presumed that the

33. Mogul Steam-ship Co. *v.* McGregor, [1892] A. C. 25, 7 Aspin. 120, 56 J. P. 101, 61 L. J. Q. B. 295, 66 L. T. Rep. N. S. 1, 40 Wkly. Rep. 337, where the facts and holding were as follows: A combination between ship-owners carrying from the same ports, with the object of keeping freights within their control, effected by allowing a rebate to shippers who ship exclusively on board their ships, by prohibiting their agents on penalty of removal from being directly or indirectly interested in ships other than theirs, and by sending to ports where other ship-owners are asking for cargo ships sufficient to lower the freights below the rate under open competition, thereby causing loss to such ship-owners, not being attended by circumstances of dishonesty, intimidation, molestation, or actual malice, is not actionable as a wrong by individuals, as a conspiracy, or as in restraint of trade.

A combination between insurance companies whereby they agree not to keep in their employ any agent also employed by other companies not members of the association, and not to reinsure, accept from, place, or cause to be placed, whether by reinsurance or otherwise, any business in any company or any agency not represented in the association, except with the consent of the executive committee thereof, is not an unlawful conspiracy. Continental Ins. Co. *v.* Board of Fire Underwriters, 67 Fed. 310. For a case somewhat similar on the facts see Tanenbaum *v.* New York F. Ins. Exch., 33 Misc. (N. Y.) 134, 68 N. Y. Suppl. 342, holding that an agreement of an association of insurance companies designed to maintain uniform rates and to select suitable agents for the transaction of local business, to whom licenses of the association should be issued, was not an unlawful combination affecting the rights of third parties merely because there was a custom to pay commissions to any broker bringing insurance, and plaintiff, who was not willing to conform his business to the rules of the exchange, was consequently affected thereby; but such agreement was merely an exercise of the right by defendants to select the persons with whom they would do business.

34. Olive *v.* Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428, where it was held an unlawful conspiracy for wholesale dealers, who have formed an association not to sell to consumers but only to retail dealers, to agree to issue, and to issue, circulars to retail dealers requesting them not to patronize a certain wholesale dealer, not a member of the association, until he agrees to sell only to retail dealers and not directly to consumers.

35. *Louisiana.*— Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791.

New York.— Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 56 N. Y. Suppl. 123. *Compare* People *v.* Radt, 71 N. Y. Suppl. 846, 15 N. Y. Crim. 174. In this case one of defendants at a meeting of a labor union said: "We must ruin the business of" complainant, and moved the appointment of a committee. The other defendant seconded the motion, and they were appointed. A circular reciting certain alleged facts by way of inducement, and ending: "Therefore we appeal to every member, to every religious and justly thinking person to only buy goods" from others, was distributed; and defendants put up posters with the words: "Scab Labor! Don't Patronize [the complaining witness]! Scab Labor! 556 Cortland avenue." It was held that such words and acts did not violate N. Y. Pen. Code, § 168, subs. 5, providing that if two or more persons conspire to prevent another from exercising a lawful calling by force, threats, or intimidation, each is guilty of a misdemeanor, since no force was used or threatened by defendants. There is no force and there is no threat or intimidation, nor do these acts tend to interfere, nor do they threaten to interfere, with the implements or property used by or in the employ of the complainant.

Ohio.— Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

United States.— Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730; Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193.

England.— Temperton *v.* Russell, [1893] 1 Q. B. 715, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports 376, 41 Wkly. Rep. 565.

See 10 Cent. Dig. tit. "Conspiracy," § 10.

Boycotting hotel.— An agreement among the merchants of a town or village not to buy any goods of drummers who stop at a certain

customers would have continued their voluntary patronage but for the wrongful acts complained of.[36] It has also been held that the mere fact that an organization has not counseled parties outside of its membership to withdraw their patronage from a party is not conclusive that no right of action against them exists. If the organization through any system of fines or coercive by-laws induces its members to withdraw their patronage from a plaintiff, a right of action exists against such organization, provided it does appear that patronage has been withdrawn which would not have been withdrawn had it not been for such fines or other coercive means provided for in the by-laws or management of the organization.[37] It is likewise an actionable conspiracy for a labor union to picket one's premises for the purpose of intercepting his customers and employees with the intention of ruining his business, and it is not necessary that any violence or threats of violence should be used.[38] It is clear that everyone has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another.[39]

(o) *By False or Fraudulent Representations.* It is an actionable conspiracy to combine for the purpose of preventing customers of a person from dealing with him by means of false and fraudulent representations.[40]

hotel, the owner of which had incurred the displeasure of members of the combination, is an unlawful conspiracy and when put into execution to the injury of the owner of the hotel he is entitled to recover damages. Webb *v.* Drake, 52 La. Ann. 220, 26 So. 791.

Boycotting newspaper.— It is an actionable conspiracy for a labor union in order to force a newspaper company to pay the price fixed by its regulations to issue circulars instructing organized labor not to buy the newspapers or to patronize any firms who advertise in them and to send threatening resolutions among the advertisers of such paper. Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 56 N. Y. Suppl. 123. For a case almost identical on the facts with the foregoing see Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193.

Boycotting owners of sleeping-cars.—A combination by employees of railway companies to injure the owner of the cars operated by the companies by compelling them to cease using his cars by threats of stopping, and actually stopping, their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable and has no effect whatever on the character or reward of the services of the employees so combining, is a boycott and an unlawful conspiracy at common law. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

Boycott of manufacturer.— The members of two labor organizations entered into a combination to compel a manufacturer of casks and barrels to discontinue the use of a valuable labor-saving device. This object was to be accomplished by notifying plaintiff's customers and other persons not to purchase machine-hooped barrels, and by inducing the members of all labor organizations throughout the country and persons who were in sympathy with them not to purchase provisions or other commodities which were packed in machine-hooped barrels. It was held that the combination in question was an unlawful conspiracy to deprive plaintiff of its right to manage its business as it thought best, such as would entitle the manufacturer to recover from the parties concerned in the conspiracy whatever damages it had sustained thereby. Hopkins *v.* Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99.

36. West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

37. Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803. The facts of this case were as follows: A granite manufacturers' association, embracing ninety-five per cent of all the granite manufacturers in the place, adopted a resolution that no trade should be conducted with any person, firm, or corporation engaged in cutting, quarrying, or polishing granite in the state who should not be members of the association. The by-laws imposed a fifty-dollar fine for the violation of the rules of the association. The result was to practically kill the polishing business of plaintiffs who were not members, which was the real object of the resolution, so as to compel plaintiffs to join the association. It was held that the members of the association were liable to plaintiffs for the actual damages caused to their business, notwithstanding that they did not try to influence persons outside of the association. It was also held that the voluntary acceptance of by-laws by members of an association providing for the imposition of coercive fines for the violation of the association's rules did not remove the fact of their coerciveness.

38. Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407. See also Tarleton *v.* McGawley, Peake N. P. 205, 3 Rev. Rep. 689.

39. Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

40. Van Horn *v.* Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184.

(III) *To Prevent Persons From Obtaining Supplies Necessary For Carrying on Business.* Persons engaged in the same line of business may combine and agree among themselves that none of them will sell to another person supplies necessary to the carrying on of his business;[41] and it has been held in numerous decisions that a combination may lawfully agree among themselves not to patronize any dealer who furnishes supplies of the description used by them to a person not a member thereof.[42] These decisions, however, presuppose as a basis for their holdings that the object of the association is to serve some legitimate interest of the members who compose it. If the purpose of the combination is to ruin or cause injury to the business of another and not to protect or advance their own legitimate interests, it is an unlawful conspiracy and an action will lie for the damages caused by putting the agreement into execution.[43] No number of men jointly having no legitimate interest to protect can lawfully injure the business of another by maliciously inducing others not to deal with him.[44]

41. Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

42. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L.R.A. 337; Buchanan *v.* Barnes, (Pa. 1894) 28 Atl. 195; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455. See also Bowen *v.* Matheson, 14 Allen (Mass.) 499, which strongly supports this view. *Compare* Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588, in which it was held that where the members of an association of retail dealers agree not to patronize any wholesale dealer who refuses to pay a fine to a member of the association for selling lumber in such member's community to one not a regular dealer, a person not a regular dealer who has underbid a member of the association on a contract, but who has been refused lumber by a wholesale dealer because it has been previously obliged to pay a fine to such member for selling lumber in his community to one not a regular dealer will be entitled to recover of such members damages resulting therefrom. This decision proceeds upon the theory that the acts complained of amounted to intimidation and coercion, and dissents from Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337. Nothing is said as to the element of protection or advancement of legitimate business interests, or as to the element of malice.

The object to be attained is lawful and there is no element of fraud, intimidation, or coercion in the means used to effect the purpose. Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455.

Applications of doctrine.— An association of master plumbers, in order to free themselves from the competition of those who were not members, sent notices to wholesale dealers in plumbers' supplies not to sell to others than members of the association under the penalty of a withdrawal of the latter's patronage. The wholesale dealers thereupon refused to sell to non-members, who were in consequence unable to purchase supplies from wholesale dealers in this state and from other wholesale dealers in the United States. It was held that the sending of the notices did not violate any legal rights of those not members. Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455. A combination of employers prevented dealers in the supplies used by such employers from selling to an employer who was not a member of their combination, and who had conceded a demand of the employees by informing such dealers that no member of the combination would buy from them if they sold to such employer. It was held that this was not unlawful coercion. Buchanan *v.* Barnes, (Pa. 1894) 28 Atl. 195; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 33 Wkly. Notes Cas. (Pa.) 421, 39 Am. St. Rep. 686, 23 L. R. A. 135.

43. Ertz *v.* Minneapolis Produce Exch., 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. To the same effect see Olive *v.* Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

By threats of causing employees to quit work.—Where a committee composed of members of several trades unions, because of plaintiff's refusal to comply with their demand not to supply material to a firm which they have boycotted, procure others not to furnish material to plaintiff by threatening injury to their business by causing their employees to leave them, they are guilty of an actionable conspiracy and liable for the damages thus caused. Temperton *v.* Russell, [1893] 1 Q. B. 715, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports 376, 41 Wkly. Rep. 565.

44. Ertz *v.* Minneapolis Produce Exch., 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90, where it was held that a complaint which alleges that plaintiff, a dealer in farm produce, had a profitable business, that defendants had conspired together to refuse to deal with him, and to induce others to do likewise, it not appearing

(IV) *To Cause Employees to Stop Work* — (A) *By Intimidation, Molestation, or Coercion.* It is unlawful for persons to conspire to injure another in his property or business, by agreeing to procure his employees to quit his employment where the methods used are those of intimidation, molestation, or coercion. This will constitute an actionable conspiracy when executed and where injury results in consequence thereof.[45] No one can lawfully interfere by force or intimidation[46] to prevent employers or persons employed or willing to be employed from the exercise of these rights.[47]

(B) *By Peaceable Persuasion* — (1) Where Employees Not Under Contract For Fixed Period. In a number of jurisdictions, usually perhaps because of some statutory provision, it is held not an unlawful conspiracy for workmen to combine to persuade others by peaceable means and without intimidation or threats not to continue in the service of another, if they are under no contract to work for a fixed period.[48]

(2) Where Employees Under Contract For Fixed Period. It is an actionable conspiracy if persons combine to induce without justification, and do induce others to break their contract of employment, when this is done for the purpose of injuring their employer and damage is thereby caused to him.[49] It is immate-

that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.

45. *Massachusetts.* — Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Pennsylvania.— Buchanan *v.* Barnes, (Pa. 1894) 28 Atl. 195; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135.

United States.— Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48.

See 10 Cent. Dig. tit. "Conspiracy," § 9.

Picketing, which is the watching and speaking to workmen as they go to and from their employment, to induce them to leave their services, is not necessarily unlawful, nor is it unlawful to use terms of persuasion toward them to accomplish that object. Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32. But as soon as threats, personal injury, or unlawful harm are made against the employees, this amounts to intimidation and is unlawful. Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722. And see Lyons *v.* Wilkins, [1896] 1 Ch. 811, 60 J. P. 325, 65 L. J. Ch. 601, 74 L. T. Rep. N. S. 358, 45 Wkly. Rep. 19, holding that picketing is illegal, excepting when it is for the limited purpose of obtaining information.

46. Intimidation as here used is not limited to threats of violence or physical injury to person or property. It has a broader significance; there may also be a moral intimidation which is illegal. A combination to do injurious acts expressly directed to another by way of intimidation or constraint, either of himself, of the persons employed, or seeking to be employed by him, is outside of the allowable competition and is unlawful. Temple Iron Co. *v.* Carmanoskie, 10 Kulp (Pa.) 37.

47. Temple Iron Co. *v.* Carmanoskie, 10 Kulp (Pa.) 37.

48. *Michigan.*— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

New Jersey.— Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Pennsylvania.— Buchanan *v.* Barnes, (Pa. 1894) 28 Atl. 195; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135.

United States.— Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264.

See 10 Cent. Dig. tit. "Conspiracy," § 9.

Under the New York statutes a body of workmen may combine for the purpose of peaceably persuading their fellow workmen to leave their employment, in order to obtain an advance in wages. It has been held that they may lawfully pay the expenses of those who leave and post in their place of assembly the name of such persons as contributed to the sum for the support of those to surrender their wages. Rogers *v.* Evarts, 17 N. Y. Suppl. 264.

49. Walker *v.* Cronin, 107 Mass. 555; Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223; Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55; Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 50 Wkly. Rep. 139

rial that the inducement by which the employees were led to break their contract was by peaceable persuasion.[50]

(v) *To Prevent Persons From Entering Employment.* A combination to injure a person's business by preventing by means of threats and intimidation other persons from entering his employment is an unlawful conspiracy and actionable when injury results.[51]

(vi) *To Stop Employment by Concerted Action.* It is lawful for employees, without any illegal purpose, to quietly and peaceably leave the service in which they are employed by concerted action at a given time, so long as they do not violate any contract;[52] but if an employer uses the benefit which his labor is or may be to another, by threatening to withhold or by agreeing to bestow it, for the purpose of inducing, procuring, or compelling another to commit an unlawful or criminal act, the withholding or bestowing of his labor for such purpose is itself unlawful.[53]

(vii) *To Cause Loss of Employment or Prevent Employment.* All combinations and associations, the purpose of which is to coerce workmen to become members thereof or to prevent them from working below certain rates by procuring their discharge from employment or by preventing them from obtaining employment are unlawful conspiracies.[54] It has therefore been held that where a non-union man is discharged by his employer in consequence of a threat by a labor organization that in case he is retained in his employer's service the organization will notify all other labor organizations of the city that the employer is a non-union man, the employee will be entitled to recover damages sustained in

[*affirming* [1899] 2 Ir. 667, and *distinguishing* Allen *v.* Flood, [1898] A. C. 1, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258]. In Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802, it appeared that plaintiff conducted a laundry business, engaging others to do the work, she receiving and delivering the same to her customers. The laundrymen's association insisted that she should increase the price for her work in accordance with a scale fixed by its association, and on her refusal to do so combined to cause the parties who had contracted to do her work to break their contracts and refuse to do the same any longer, and threatened that in case they did not do so their business also would suffer loss. These contracts were broken and plaintiff suffered injury in consequence thereof, and it was held that an action would lie for the damages sustained. In Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367, it appeared that F contracted to make and glaze bricks, etc., at agreed prices, for plaintiff exclusively, during a period of five years. It was held that the contract being for exclusive personal service, plaintiff could maintain an action against defendant for maliciously procuring F to break the contract.

50. Walker *v.* Cronin, 107 Mass. 555; Parker *v.* Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc. L. Bul. 223.

51. Davis *v.* Zimmerman, 91 Hun (N. Y.) 489, 36 N. Y. Suppl. 303, 71 N. Y. St. 385; Cote *v.* Murphy, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; Temple Iron Co. *v.* Carmanoskie, 10 Kulp (Pa.) 37; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264. And see Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

If workmen associate themselves to coerce an employer into paying money which he is not legally bound to do by threats that if he refuses they will induce his workmen to leave his services and will deter others from taking their places they are chargeable with an illegal conspiracy, and if these threats are carried into execution the employer may recover damages for the wrong done. Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

52. Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; U. S. *v.* Stevens, 2 Hask. (U. S.) 164, 27 Fed. Cas. No. 16,392.

53. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

54. Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802; Master Stevedores' Assoc. *v.* Walsh, 2 Daly (N. Y.) 1; Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48.

The right which the striking workman claims for himself, and to which he is justly entitled, viz., to work for whom he pleases and to ask for his work such wages as he shall deem proper, is also a right which he must accord to every other workman in the community; and any form of compulsion or coercion to interfere with the right is an invasion of the very right for which the striking workman is himself contending — the right of free labor. Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

consequence of such discharge.[55] So an agreement between an association of masters and an assembly of workmen that all employees of the former shall be members of the latter and that no employee shall work more than four weeks without becoming such member is against public policy and the interest of society and cannot justify an action of members of such assembly in procuring the discharge of a workman because of his failure to become a member thereof.[56] It has been held, however, that a combination of workmen to strike unless another workman is discharged is not actionable in the absence of malice, intimidation, or violence, if no contract relations are broken thereby.[57]

5. Conspiracy to Refuse to Canvass Votes. A conspiracy to refuse to canvass votes and to declare a person elected to an office cannot be made the subject of a civil action, for such refusal without conspiracy would not give the right to a civil action.[58]

6. Conspiracy to Refuse Insurance. It has been held that several insurance companies may agree to and actually refuse to insure the property of a designated person, and that no action will lie for injury caused thereby, although the motives of those forming the combination were malicious.[59]

F. Who Liable — 1. Corporations. An action may be maintained against a corporation to recover damages caused by a conspiracy.[60]

2. Liability For Acts of Co-Conspirators. Where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act.[61] Every conspirator is liable for all overt acts illegally committed in pursuance of the conspiracy and for the consequent loss

55. Lucke *v.* Clothing Cutters', etc., Assembly No. 7057 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

A statute legalizing trade unions "to promote the well-being of their every day life, and for mutual assistance in securing the most favorable conditions for the labor of their members, and as beneficial societies" does not legalize the making of war upon the non-union laboring men or any illegal interference with their rights and privileges. Lucke *v.* Clothing Cutters', etc., Assembly No. 7057 K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

56. Curran *v.* Gilen, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. Rep. 496, 37 L. R. A. 802 [*affirming* 77 Hun (N. Y.) 610, 28 N. Y. Suppl. 1134, 59 N. Y. St. 981].

57. Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367. But see cases cited *supra*, II, C, 21, e.

58. Jayne *v.* Drorbaugh, 63 Iowa 711, 17 N. W. 433.

59. Hunt *v.* Simonds, 19 Mo. 583. See also Orr *v.* Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770, holding that an agreement of three insurance companies not to insure any boat on which a certain person might be employed as master, in consequence of which he lost his employment, does not give any cause of action. The court said: "Nor could the motives of the company be questioned; whether they were malicious and with the sole design of injuring the plaintiff or not, would be entirely immaterial in a legal point of view so long as there was no contract on their part and no legal obligation to insure such boat. Courts can enforce only legal obligations and redress injuries to legal rights."

60. Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669, 12 N. E. 826; West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

61. *Illinois.*— Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

Indiana.— Hodgin *v.* Bryant, 114 Ind. 401, 15 N. E. 815; Wolfe *v.* Pugh, 101 Ind. 293; Breedlove *v.* Bundy, 96 Ind. 319; Boaz *v.* Tate, 43 Ind. 60.

Massachusetts.— Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126; Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629.

New Hampshire.— Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

New York.— Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 64 N. Y. Suppl. 123; Warshauer *v.* Webb, 9 N. Y. St. 529.

Texas.— Raleigh *v.* Cook, 60 Tex. 438.

Wisconsin.— Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

See 10 Cent. Dig. tit. "Conspiracy," § 14.

Where a man has combined and conspired with others to cheat and defraud plaintiff in the sale of certain property by fraudulent concealments and misrepresentations, and the fraud has been perpetrated accordingly by some other member or members of the conspiracy, he will be liable, although he may not individually have made any fraudulent misrepresentations or have fraudulently concealed anything in regard to the condition or

whether they were active participants or not.[62] And it is no defense that the person committing the acts was of unsound mind.[63] Nor can any conspirator set up as a defense that his participation was not necessary to the accomplishment of the ultimate purpose and that it would have been consummated if he had not become a conspirator.[64] Where, however, there is no evidence of conspiracy each party is liable for his own acts alone.[65]

3. Liability For Acts of Agent. A man cannot be associated with others in conspiracy, civil or criminal, or be held guilty of acts done in pursuance of such association merely because his agent may have knowledge of the same or be a participant therein.[66]

4. Effect of Absence of Pecuniary Benefit. A conspirator is none the less liable because he expected to derive no benefit from the wrong or in fact received no benefit therefrom.[67]

5. Persons Coming in After Formation of Conspiracy. To render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception.[68]

G. Time to Sue and Limitations. A right of action for conspiracy accrues when the combination itself is perfected or a wrong is done, and plaintiff need not wait until he has suffered the full damage intended by the conspirators;[69] and an action for the alleged conspiracy to injure plaintiffs by malicious and fraudulent statements cannot be considered an action for slander, thereby invoking limitations applicable to the latter action.[70] Plaintiff cannot, however, evade the statute of limitations by disguising his real cause of action by the form of his complaint.[71] The limitations applicable to conspiracy begin to run not

qualities of the property in question. Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

Where various labor unions have conspired in an attempt to boycott an employer by threats to withdraw support from the latter's patrons, each union is chargeable with the acts of all the other unions designed to effectuate the scheme. Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 56 N. Y. Suppl. 123.

Where one or more persons conspire with another to effect the violation of a contract, and the object of the combination is consummated to the damage of a third person, such third person has his action to recover the damage against him who breached the contract and every person who by reason of the combination is connected with the wrong. Martens *v.* Reilly, 109 Wis. 464, 84 N. W. 840.

62. Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797, 802.

63. "No man can shield himself from liability for his wrongful acts on the ground that the person who assisted in carrying out and executing his wrongful purpose, or the wrongful purpose of himself and others, was a person of unsound mind." Tucker *v.* Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129.

64. Green *v.* Cochran, 43 Iowa 544.

65. Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

66. "He cannot enter into a combination of two or more persons to accomplish by concerted action some demand or unlawful purpose, or to accomplish some purpose, not criminal or unlawful in itself, by criminal or unlawful means, simply and solely because of the mental condition or physical acts of his agent." Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

67. Felsenthal *v.* Thieben, 23 Ill. App. 569; Breedlove *v.* Bundy, 96 Ind. 319; Jernigan *v.* Wainer, 12 Tex. 189; Stockley *v.* Hornidge, 8 C. & P. 11, 34 E. C. L. 580; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634. Where two or more persons conspired to commit and did commit a fraud upon another, they are all liable for the damages sustained, without proof that they all participated in the profits of the fraud. Jernigan *v.* Wainer, 12 Tex. 189.

68. Every one who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it. Stewart *v.* Johnson, 18 N. J. L. 87; Warshauer *v.* Webb, 9 N. Y. St. 529; Hinchman *v.* Richie, Brightly (Pa.) 143; Freeman *v.* Stine, 34 Leg. Int. (Pa.) 96; Raleigh *v.* Cook, 60 Tex. 438.

69. Betz *v.* Daily, 3 N. Y. St. 309.

70. Van Horn *v.* Van Horn, 56 N. J. L. 318, 28 Atl. 669.

71. Reed *v.* Wilson, 2 Mona. (Pa.) 612, where plaintiff's cause of action being in fact a trespass committed against his person, it was held to be barred by the limitations prescribed in actions of that nature, although the form of action alleged was of a conspiracy to consummate the trespass.

from the time a defendant enters the same, but from the time of the commission of his last overt act in furtherance of the conspiracy.[72]

IV. PARTIES.

A. In Criminal Prosecutions — 1. In General. The usual and convenient course is to include all the conspirators in a joint indictment.[73] Nevertheless an indictment or information will ordinarily lie against one of the alleged parties to the conspiracy,[74] unless there be some reason peculiar to such an indictment plainly making a several proceeding improper.[75]

2. Joinder of Public Officials and Private Persons. There is no impropriety in joining in one indictment a charge of conspiracy against private individuals and against officers of the government where such indictment is based entirely upon the same statute,[76] and it makes no difference that the official might have been indicted under another statute.[77]

B. In Civil Cases — 1. Parties Plaintiff. In an action for conspiracy to injure plaintiff carried into effect by a trespass upon his place of business, the

72. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662. *Compare* Com. *v.* Bartilson, 85 Pa. St. 482, holding that the commission of each act is in itself an offense, and an indictment charging a conspiracy without the statutory period, and the commission of acts in pursuance of each conspiracy within such period, is insufficient.

73. State *v.* Slutz, 106 La. 182, 30 So. 298.

Joinder of railway officials and purchasers of tickets sold in pursuance of conspiracy.— In Reg. *v.* Quinn, 19 Cox C. C. 78, where railway officials were indicted for conspiring to defraud the railway company by stealing and selling uncanceled, but used, tickets, it was held that persons to whom they sold these tickets could be indicted together in the same count with the officials.

Participants in design.— Where the unlawful act in furtherance of a conspiracy to defraud was done in the state where the indictment is found, the conspirators who participated only in the design may be tried without joining in the indictment the perpetrators of the overt act. State *v.* Turner, 119 N. C. 841, 25 S. E. 810.

Persons not privy to acts relied on to show offense.— It is not proper to include persons who were not privy to the acts relied on to prove the conspiracy and whose offenses are wholly separate and distinct. "To include in the indictment defendants whose offence, if any, came under the latter head, was unfair and unjust, as tending to involve them in the odium of acts to which they were not parties." Reg. *v.* Boulton, 12 Cox C. C. 87.

74. *California.*—People *v.* Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716.

New York.— People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Pennsylvania.— Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Demain, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29.

United States.— U. S. *v.* Miller, 3 Hughes (U. S.) 553, 26 Fed. Cas. No. 15,774.

England.— Rex *v.* Nicols, 13 East 412, note *a*; Rex *v.* Kinnersley, 1 Str. 193.

Canada.— Reg. *v.* Frawley, 25 Ont. 431, 14 Can. L. T. 446.

See 10 Cent. Dig. tit. "Conspiracy," § 80.

Where one of three persons engaged in conspiracy dies before trial and another is acquitted the survivor may be tried and convicted. People *v.* Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

Effect of charge.— A charge that the defendant indicted conspired with others named does not charge an individual conspiracy, but that there was a common purpose. State *v.* Slutz, 106 La. 182, 30 So. 298.

75. U. S. *v.* Miller, 3 Hughes (U. S.) 553, 26 Fed. Cas. No. 15,774.

76. U. S. *v.* Van Leuven, 62 Fed. 62, 69, where the court, in distinguishing the case of U. S. *v.* McDonald, 3 Dill. (U. S.) 543, 26 Fed. Cas. No. 15,670, said: "It is further urged that the ruling of Mr. Justice Miller in U. S. *v.* McDonald, *supra*, to the effect that it is improper to join in one indictment a charge of conspiracy against officers and private citizens, is applicable to this case. In that case the indictment charged a conspiracy on part of the officers of the government under the provisions of section 3169 of the Revised Statutes, and also charged a conspiracy against the private citizens under section 5440; and it was held an improper joinder, mainly by reason of the difference in the punishments provided in the two sections. In the case now under consideration the indictment for conspiracy is based alone upon section 5440, and the ruling relied upon has no application."

Conspiracy to issue criminal process.— The officer, prosecutor, and all other persons concerned may be indicted for a conspiracy to procure criminal process for improper purposes. Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786.

77. U. S. *v.* Boyden, 1 Lowell (U. S.) 266, 24 Fed. Cas. No. 14,632.

fact that his business was carried on in partnership with another is not sufficient to require or justify the joinder of such other as plaintiff.[78]

2. Parties Defendant. In an action on the case in the nature of a conspiracy to recover damages, one only may be sued, as the damage and not the conspiracy itself is the gist of the action;[79] or plaintiff may at his option join all the alleged conspirators as defendants in one action.[80]

V. PLEADINGS.

A. In Criminal Prosecutions[81] — 1. Joinder of Counts — a. In General. Counts charging a conspiracy and also the offense committed in pursuance thereof may be joined where both offenses are similar in nature and in mode of trial and punishment.[82] Nor is an indictment objectionable, because the same transaction is detailed differently in several counts.[83]

b. Duplicity. An indictment charging a conspiracy to commit an act in itself criminal, and also the commission of such act, is not bad for duplicity where no conviction is sought on account of the overt act.[84] Nor will such indictment be rendered duplicitous by the fact that the felony which it is the purpose of the conspirators to commit is described by different names,[85] or by the fact that the

78. Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493.

79. *Georgia.*— Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750.

New York.— Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

North Carolina.— Eason *v.* Westbrook, 6 N. C. 329.

United States.— Smith *v.* Rines, 2 Sumn. (U. S.) 338, 22 Fed. Cas. No. 13,100.

England.— Mills *v.* Mills, Cro. Car. 239; Savile *v.* Roberts, 1 Ld. Raym. 374; Skinner *v.* Gunton, 1 Saund. 228*d*.

See 10 Cent. Dig. tit. "Conspiracy," § 17.

80. Cheney *v.* Powell, 88 Ga. 629, 15 S. E. 750; Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791; Kernan *v.* Humble, 51 La. Ann. 389, 25 So. 431; Walters *v.* Green, [1899] 2 Ch. 696, 63 J. P. 742, 68 L. J. Ch. 730, 81 L. T. Rep. N. S. 151, 48 Wkly. Rep. 23.

The plaintiff may look beyond the actual participants in committing the injury and join with them as defendants all who coöperated in or advised or assisted in the accomplishment in the common design. Kernan *v.* Humble, 51 La. Ann. 389, 25 So. 431.

81. See, generally, Indictments and Informations.

For forms of indictments, informations, and complaints for conspiracy see the following cases:

Alabama.— Thompson *v.* State, 106 Ala. 67, 17 So. 512; State *v.* Cawood, 2 Stew. (Ala.) 260.

Connecticut.— State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Iowa.— State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

Maryland.— State *v.* Buchanan, 5 Harr. & . (Md.) 317, 9 Am. Dec. 534.

Massachusetts.—Com. *v.* Nichols, 134 Mass. 531; Com. *v.* Waterman, 122 Mass. 43; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

Michigan.— People *v.* Dyer, 79 Mich. 480, 44 N. W. 937; People *v.* Petheram, 64 Mich. 252, 31 N. W. 188.

New Jersey.—Patterson *v.* State, 62 N. J. L. 82, 40 Atl. 773; State *v.* Barr, (N. J. 1898) 40 Atl. 772.

New York.— People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520.

North Carolina.— State *v.* Trammell, 24 N. C. 379.

Pennsylvania.— Com. *v.* Putnam, 29 Pa. St. 296.

South Carolina.— State *v.* Cardoza, 11 S. C. 195.

Vermont.— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Virginia.— Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

United States.— U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673; U. S. *v.* Cruikshank, 92 U. S. 543, 23 L. ed. 588; U. S. *v.* Lackey, 99 Fed. 952; U. S. *v.* Wilson, 60 Fed. 890; U. S. *v.* Patrick, 53 Fed. 356; U. S. *v.* Stevens, 44 Fed. 132; U. S. *v.* Gordon, 22 Fed. 250; U. S. *v.* Waddell, 5 McCrary (U. S.) 155, 16 Fed. 221.

England.— Reg. *v.* Rispal, 3 Burr. 1320, 1 W. Bl. 368; Rex *v.* Spragg, 2 Burr. 993; Reg. *v.* Banks, 12 Cox C. C. 393; Reg. *v.* Mears, 4 Cox C. C. 425, 2 Den. C. C. 79, 15 Jur. 66, 20 L. J. M. C. 59, T. & M. 414; Reg. *v.* Howell, 4 F. & F. 160.

82. Thomas *v.* People, 113 Ill. 531 (a charge in two counts of conspiring to obtain goods by false pretenses and a charge of obtaining the goods by such pretenses); Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421 (a charge of conspiracy to procure illegal voting and a charge of aiding and abetting illegal voting); U. S. *v.* Lancaster, 44 Fed. 885, 10 L. R. A. 333 (a charge in one count of conspiracy and a charge in another count of murder committed in pursuance of such conspiracy).

83. State *v.* Howard, 129 N. C. 584, 40 S. E. 71.

84. State *v.* Grant, 86 Iowa 216, 53 N. W. 120. But *compare* State *v.* Kennedy, 63 Iowa 197, 18 N. W. 885.

85. State *v.* Sterling, 34 Iowa 443.

conspiracy in its consummation would in fact have required the commission of several distinct felonies.[86] So where an agreement to do several acts constituting one offense is charged as a single conspiracy the indictment is not bad because charging the doing of the several acts at different times and with different individuals;[87] and where more than one unlawful act is sought to be accomplished by the same conspiracy, the facts relating to each unlawful act so intended may be set up in a separate count.[88]

c. **Effect of Joining Defective Counts.** Where, although some of the counts are defective, one or more properly charged all the ingredients of the offense, the indictment is not vitiated by the insertion of the defective counts.[89]

2. **CHARGING THE OFFENSE — a. In General.** In accordance with the general rule in criminal prosecutions, an indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offense in ordinary and concise language, with as much certainty as the nature of the case will admit, in such a manner as to enable a person of common understanding to know what is intended, and with such precision that defendant may plead his acquittal or conviction to a subsequent indictment based on the same facts.[90] If the offense

86. State *v.* Sterling, 34 Iowa 443.

87. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

Means agreed to be used.— An indictment charging a conspiracy to do a certain act and setting forth the means agreed to be used to accomplish that end charges "but one crime and in one form," as required by N. Y. Code Crim. Proc. § 278, although the means enumerated involve the commission of various crimes. People *v.* Everest, 51 Hun (N. Y.) 19, 3 N. Y. Suppl. 612, 20 N. Y. St. 456.

Recital of original scheme and charge of conspiracy at later date.— A conspiracy to defraud the United States is punishable under the statute, notwithstanding the fact that the scheme to defraud was originally devised and entered into at a time so remote that a prosecution for acts then done would be barred by limitation, when it was continuous in its operation, and overt acts have been committed thereunder within the period of limitation; and an indictment which after reciting the original scheme charges a conspiracy at a later date to apply it, in pursuance of which overt acts were committed, is not objectionable on the ground of duplicity. U. S. *v.* Greene, 115 Fed. 343.

88. State *v.* Kennedy, 63 Iowa 197, 18 N. W. 885.

89. *Maine.*—State *v.* Mayberry, 48 Me. 218.

New York.— People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520.

North Carolina.— State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

United States.— Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; U. S. *v.* Dustin, 2 Bond (U. S.) 332, 25 Fed. Cas. No. 15,011.

England.— Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145, 11 Jur. 204, 16 L. J. Q. B. 121, 58 E. C. L. 824; Latham *v.* Reg., 5 B. & S. 635, 9 Cox C. C. 516, 10 Jur. N. S. 1145, 33 L. J. M. C. 197, 10 L. T. Rep. 571, 12 Wkly. Rep. 908, 117 E. C. L. 635; Reg. *v.* Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

90. *Indiana.*— Landringham *v.* State, 49 Ind. 186.

Iowa.— State *v.* Potter, 28 Iowa 554.

Kentucky.— Com. *v.* Ward, 92 Ky. 158, 13 Ky. L. Rep. 422, 17 S. W. 283.

Massachusetts.— Com. *v.* Wallace, 16 Gray (Mass.) 221; Com. *v.* Harley, 7 Metc. (Mass.) 506; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Montana.— Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

New York.—People *v.* Willis, 34 N. Y. App. Div. 203, 54 N. Y. Suppl. 642 [*reversing* 24 Misc. (N. Y.) 537, 54 N. Y. Suppl. 129]; March *v.* People, 7 Barb. (N. Y.) 391.

North Carolina.— State *v.* Enloe, 20 N. C. 508.

Pennsylvania.— Com. *v.* Foering, Brightly (Pa.) 315, 4 Pa. L. J. Rep. 29; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632, 35 Leg. Int. (Pa.) 420; Com. *v.* Galbraith, 6 Phila. (Pa.) 281, 24 Leg. Int. (Pa.) 109; Com. *v.* Gallagher, 2 Pa. L. J. Rep. 297, 4 Pa. L. J. 58.

Vermont.— State *v.* Keach, 40 Vt. 113.

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538; U. S. *v.* Mills, 7 Pet. (U. S.) 138, 8 L. ed. 636; U. S. *v.* Melfi, 118 Fed. 899; U. S. *v.* Greene, 115 Fed. 343; Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; U. S. *v.* Adler, 49 Fed. 736; U. S. *v.* Newton, 48 Fed. 218; U. S. *v.* Fero, 18 Fed. 901; U. S. *v.* Watson, 17 Fed. 145; U. S. *v.* Donau, 11 Blatchf. (U. S.) 168, 25 Fed. Cas. No. 14,983, 17 Int. Rev. Rec. 181; U. S. *v.* Walsh, 5 Dill. (U. S.) 58, 28 Fed. Cas. No. 16,636. And see U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673.

England.— Rex *v.* Reg., 6 Q. B. 795, 9 Jur. 883, 14 L. J. M. C. 172, 53 E. C. L. 795; Rex *v.* Jones, 4 B. & Ad. 345, 1 N. & M. 78, 24 E. C. L. 156.

See 10 Cent. Dig. tit. "Conspiracy," § 79 *et seq.*

Abbreviation of terms employed in science

is not defined by statute it may be charged as at common law;[91] but if it has been made the subject of legislative enactment, all the material facts necessary to bring the case within the terms of the statute must be substantially set forth.[92]

b. Charging Offense in Language of Statute. Where conspiracy is made a statutory offense, when entered into for the purpose of committing certain specified offenses, if the statute sets out fully and without uncertainty or ambiguity the elements necessary to constitute the offense intended to be punished, it will be sufficient to charge the offense in the language of the statute or in words of equivalent meaning.[93] If, however, the statute employs broad and comprehensive language, descriptive of the general nature of the offense denounced, the use of such language is insufficient to charge a specific offense thereunder. There should be such a particular statement of the facts and circumstances as will inform the accused of the specific offense charged;[94] and the fact that the statute in question,

and the arts is insufficient — there should be an explanation of their meaning in ordinary language. U. S. *v.* Reichert, 12 Sawy. (U. S.) 643, 32 Fed. 142.

Charging offense in the alternative.— An information for conspiracy charging that the conspiracy was to prevent a certain person "from obtaining work or employment, or continuing in his said work and employment" with a certain corporation, "or in any other shops or works," is not bad, as charging offenses in the alternative, where the information also alleges that such person was an employee of the corporation when the conspiracy originated. State *v.* Dyer, 67 Vt. 690, 32 Atl. 814.

Definiteness.— The conspiracy need not be charged more definitely than the actual agreement of the conspirators. People *v.* Willis, 34 N. Y. App. Div. 203, 54 N. Y. Suppl. 642.

In the United States courts the sufficiency of the indictment will be determined by the provision contained in section 1025 of the Revised Statutes that an indictment shall not be deemed insufficient by reason of any defect of form which shall not tend to the prejudice of the defendant. Wright *v.* U. S., 158 U. S. 232, 15 S. Ct. 819, 39 L. ed. 963; U. S. *v.* Greene, 115 Fed. 343 (where the court permitted a statement in the first count as to the general scheme of the conspiracy, its purposes, and the intended manner of its accomplishment, and of the powers of one of the alleged conspirators as an officer of the United States, to be read into every count, whether it described a conspiracy or an overt act).

91. Bradshaw *v.* Territory, 3 Wash. Terr. 265, 14 Pac. 594.

92. State *v.* Clary, 64 Me. 369; U. S. *v.* Peuschal, 116 Fed. 642; U. S. *v.* Watson, 17 Fed. 145; U. S. *v.* Walsh, 5 Dill. (U. S.) 58, 28 Fed. Cas. No. 16,636.

93. *Illinois.*— Cole *v.* People, 84 Ill. 216; Towne *v.* People, 89 Ill. App. 258; Williams *v.* People, 67 Ill. App. 344.

Iowa.— State *v.* Soper, (Iowa 1902) 91 N. W. 774; State *v.* Grant, 86 Iowa 216, 53 N. W. 120; State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

Kentucky.— Sellers *v.* Com., 13 Bush (Ky.) 331; Com. *v.* Bryant, 11 Ky. L. Rep. 426, 12 S. W. 276.

Louisiana.— State *v.* Slutz, 106 La. 182, 30 So. 298.

Maine.— State *v.* Locklin, 81 Me. 251, 16 Atl. 895; State *v.* Ripley, 31 Me. 386.

New York.— Elkins *v.* People, 28 N. Y. 177 [*affirming* 24 How. Pr. (N. Y.) 272]; People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 627, 63 N. E. 1120].

Vermont.— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046; State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— U. S. *v.* Wilson, 60 Fed. 890.

England.— Reg. *v.* Rowlands, 17 Q. B. 671, 5 Cox C. C. 466, 2 Den. C. C. 364, 16 Jur. 268, 21 L. J. M. C. 81, 79 E. C. L. 671.

Indictment for conspiracy to procure illegal voting — Failure to show manner of disqualification.— An indictment charging conspiracy to procure illegal voting is not bad for failing to show in what manner the persons whom the defendants conspired to procure to vote were disqualified, but an allegation that they were not entitled to vote is sufficient. Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

94. Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; U. S. *v.* Taffe, 86 Fed. 113; U. S. *v.* Wilson, 60 Fed. 890; *In re* Benson, 58 Fed. 962; *In re* Greene, 52 Fed. 101; *In re* Wolf, 27 Fed. 601; U. S. *v.* Crafton, 4 Dill. (U. S.) 145, 25 Fed. Cas. No. 14,881, 17 Am. L. Reg. N. S. 127, 4 Centr. L. J. 441, 23 Int. Rev. Rec. 186.

Averment of citizenship in indictment for conspiracy to threaten or intimidate a citizen.— An indictment under U. S. Rev. Stat. (1872), §§ 5508, 5509, for conspiracy to "injure, oppress, threaten, or intimidate any citizen" in the free exercise of any right or privilege secured by the constitution or laws of the United States, must aver that the persons conspired against were citizens, and it is insufficient merely to allege that they were officers conspired against in the discharge of their official duties. U. S. *v.* Patrick, 53 Fed. 356.

read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.[95]

e. Combination or Confederacy — (i) *In General.* The agreement, combination, or common purpose must be charged in appropriate language,[96] and it must be alleged that the confederation was corrupt.[97]

(ii) *Single Defendant.* Where one defendant is separately charged it should be averred that he conspired with another or others — the usual form under such circumstances is that he conspired "with divers other persons, to the jurors unknown," [98] and it has been held that this form of indictment is good even though the names of the co-conspirators must actually have been known to the grand jury.[99]

(iii) *Aider by Other Averments.* An illegal combination imperfectly and insufficiently charged in the indictment will not be aided by other averments of the overt acts which were done in pursuance of it,[1] by matter which precedes or

Conspiracy to defraud United States by bribing examining board.— In an indictment under U. S. Rev. Stat. (1872), § 5440, for conspiracy to defraud the United States by bribing a member of a board of examining surgeons to make a false report to the commissioner of pensions, it is unnecessary to aver that the commissioner has authority to grant pensions, for such authority is given by general statute of which the court will take judicial notice. U. S. *v.* Van Leuven, 62 Fed. 62 [*distinguishing* U. S. *v.* Reichert, 12 Sawy. (U. S.) 643, 32 Fed. 142].

Conspiracy to present fraudulent claims — Averment of authority of officer to allow claims.— Where an indictment alleges as part of the conspiracy that a false, fictitious, and fraudulent claim was to be presented to the United States surveyor-general for allowance and payment, it should also allege that such officer was authorized to allow and approve the claim, and for the omission of this allegation the indictment is defective. U. S. *v.* Reichert, 12 Sawy. (U. S.) 643, 32 Fed. 142.

In an indictment under U. S. Rev. Stat. (1872), § 5440, for conspiracy to defraud, under the recognized rules of criminal pleading it is not sufficient to allege generally a conspiracy to defraud, but the nature of the fraud and to the required extent the manner in which or the means by which it was to be effected must be averred. *In re* Benson, 58 Fed. 962; U. S. *v.* Crafton, 4 Dill. (U. S.) 145, 25 Fed. Cas. No. 14,881, 17 Am. L. Reg. N. S. 127, 4 Centr. L. J. 441, 23 Int. Rev. Rec. 186 [*following* U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588].

95. Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419.

96. State *v.* Slutz, 106 La. 182, 30 So. 298; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75; State *v.* Jackson, 7 Rich. (S. C.) 283, 24 Am. Rep. 476; U. S. *v.* Adler, 49 Fed. 736.

Illustrations.— Combination or agreement is sufficiently charged by an averment that the defendants "conspired and confederated together" (State *v.* Grant, 86 Iowa 216, 53 N. W. 120), "assembled and agreed" (State *v.* Berry, 21 Mo. 504), "falsely combined" (Johnson *v.* State, 26 N. J. L. 313), "unlawfully and falsely did combine and agree together" (Com. *v.* Quay, 7 Pa. Dist. 723), "did falsely and maliciously conspire and agree" (Com. *v.* Hadley, 13 Pa. Co. Ct. 188), "conspired" (Wright *v.* U. S., 108 Fed. 805, 48 C. C. A. 37), or "unlawfully did conspire and combine together" (Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407).

97. Wood *v.* State, 47 N. J. L. 461, 1 Atl. 509. See also Johnson *v.* State, 26 N. J. L. 313.

98. State *v.* Slutz, 106 La. 182, 30 So. 298.

99. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122. But see State *v.* McDonald, 1 McCord (S. C.) 532, 10 Am. Dec. 691.

If the name of the co-conspirator is known, giving his name in the indictment does not render it bad. People *v.* Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Dec. 716.

1. *Massachusetts*— Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Michigan.— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

New York.— People *v.* Willis, 24 Misc. (N. Y.) 537, 54 N. Y. Suppl. 129.

Vermont.— State *v.* Keach, 40 Vt. 113.

United States.— U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. ed. 698; U. S. *v.* Milner, 36 Fed. 890.

England.— Reg. *v.* Rex, 7 Q. B. 782, Dav. & M. 741, 8 Jur. 662, 13 L. J. M. C. 118, 53 E. C. L. 782.

Canada.— Horseman *v.* Reg., 16 U. C. Q. B. 543.

See, however, as apparently holding that the allegation of an overt act may aid a defective charge of conspiracy when the allegation itself is unnecessary and if defective might be treated as surplusage, People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; Rex *v.* Spragg, Burr. 993.

follows the direct averments, or by qualifying epithets which are attached to the facts averred.[2]

d. Time and Place. The time and place of the conspiracy alleged should be charged[3] with such particularity as will enable defendant to plead the judgment in bar to a future prosecution.[4]

e. Person Conspired Against. Where the conspiracy is directed against a particular person, or the object of the conspiracy has been effected so that the person or persons intended can be ascertained, he or they should be designated by name or the reason why such designation is not made should be stated;[5] but where no intent as to any particular person was formed it should charge an intended wrong against some person, persons, or class of persons or the general public,[6] without designating any particular individual.[7]

f. Object or Purpose — (I) *In General.* The purpose or object of the conspiracy or unlawful combination must be appropriately averred by setting forth the particular crime or illegal act agreed on.[8]

(II) *Particularity.* In charging the intended offense, the indictment need

See 10 Cent. Dig. tit. "Conspiracy," § 79 *et seq.*

2. Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, such epithets as "unlawful, deceitful, pernicious," etc.

3. U. S. *v.* Soper, 4 Cranch C. C. (U. S.) 623, 27 Fed. Cas. No. 16,353.

In the federal courts, a general averment that the offense was committed within the district is sufficient. U. S. *v.* Smith, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322.

4. People *v.* Willis, 34 N. Y. App. Div. 203, 54 N. Y. Suppl. 642.

Inability to state date.— An averment that the conspiracy was entered into in or about a certain month of a year specified with a statement of the inability of the jurors to fix the particular date is sufficient. People *v.* Willis, 34 N. Y. App. Div. 203, 54 N. Y. Suppl. 642.

5. McKee *v.* State, 111 Ind. 378, 12 N. E. 510; Com. *v.* Andrews, 132 Mass. 263; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

Aider by caption.— The caption of an indictment for conspiracy to defraud the United States may be referred to to show that the United States mentioned in the body of the indictment are the United States of America. U. S. *v.* Boyden, 1 Lowell (U. S.) 266, 24 Fed. Cas. No. 14,632.

Sufficient designation.— In an indictment for conspiring to cheat and defraud an individual of his money, an allegation that defendants did conspire "to cheat, defraud, and from him obtain $200" is sufficiently explicit to charge them with conspiring to cheat and defraud the person whose name in the indictment is the antecedent of the word "him;" this pronoun being understood immediately after the governing verbs "to cheat" and "defraud." Scholtz's Case, 5 City Hall Rec. (N. Y.) 112.

6. *Indiana.*— McKee *v.* State, 111 Ind. 378, 12 N. E. 510.

Massachusetts.— Com. *v.* Harley, 7 Metc. (Mass.) 506; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

Michigan.— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

New York.—*In re* Malone, 2 City Hall Rec. (N. Y.) 22.

Pennsylvania.— Clary *v.* Com., 4 Pa. St. 210.

"Divers other persons, to the grand jury unknown."— Where the defendants are charged with having accomplished their purpose as to certain persons named and "divers other persons in said county" who, it was alleged in another part of the indictment, were "to the grand jury unknown," such indictment is not bad because the names of such "other persons" were not set out. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

If the intended victims had not been selected at the time of the formation of the conspiracy, it should be appropriately averred that the objects of the conspiracy were unascertained at the time it was entered into. Rex *v.* Reg., 7 Q. B. 795, 9 Jur. 883, 14 L. J. M. C. 172, 53 E. C. L. 795; Reg. *v.* Peck, 9 A. & E. 686, 8 L. J. M. C. 22, 1 P. & D. 508, 36 E. C. L. 362; Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415.

7. Reg. *v.* Rex, 7 Q. B. 782, Dav. & M. 741, 8 Jur. 662, 13 L. J. M. C. 118, 53 E. C. L. 782; Reg. *v.* Peck, 9 A. & E. 686, 8 L. J. M. C. 22, 1 P. & D. 508, 36 E. C. L. 362.

Future purchasers.— An indictment for conspiracy to raise the price of funds with intent to injure the persons who should purchase is sufficient without specifying the particular persons who purchased as the persons intended to be injured. Rex *v.* De Berenger, 3 M. & S. 67, 15 Rev. Rep. 415.

8. *Colorado.*— Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111.

Illinois.—Towne *v.* People, 89 Ill. App. 258.

Indiana.— Miller *v.* State, 79 Ind. 198; State *v.* McKinstry, 50 Ind. 465; Landringham *v.* State, 49 Ind. 186.

Iowa.— State *v.* Savoye, 48 Iowa 562.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 217, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Barnes, 132 Mass.

only be certain to a common intent. The crime intended to be accomplished by the conspiracy need not be described in the indictment with the accuracy or detail which would be essential in an indictment for the commission of the offense itself, but need only be designated as it is known to the common law or defined by statute. Allegations of acts which if committed would have constituted the crime are not required;[9] but where the intended offense has no designation at common law, or having a designation the indictment does not so refer to it but attempts to state its ingredients, they must be stated as fully as if the indictment were for the commission of the offense itself.[10] If the purpose of the conspiracy be the doing of an act which is not an offense at common law but only by statute, such purpose must be set forth in such a manner as to show that it is within the terms of the statute.[11]

(III) *Description and Ownership of Property to Be Obtained.* It is not necessary to set forth and describe particularly the rights, property, goods, or chattels of which defendant conspired to defraud complainant,[12] where

242; Com. *v.* O'Brien, 12 Cush. (Mass.) 84; Com. *v.* Kellogg, 7 Cush. (Mass.) 473; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 51 Am. Dec. 596; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Michigan.— Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321.

North Carolina.— State *v.* Trammell, 24 N. C. 379.

Wisconsin.—State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; U. S. *v.* Melfi, 118 Fed. 899; U. S. *v.* Taffe, 86 Fed. 113.

Canada.— Horseman *v.* Reg., 16 U. C. Q. B. 543.

See 10 Cent. Dig. tit. "Conspiracy," § 86.

The proviso in the Indiana Felony Act of May 31, 1861, dispensing with the necessity of charging the particular felony which it was the purpose or object of the persons combining to commit, is unconstitutional and void. Miller *v.* State, 79 Ind. 198; Scudder *v.* State, 62 Ind. 13; State *v.* McKinstry, 50 Ind. 465; Landringham *v.* State, 49 Ind. 186.

9. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Colorado.— Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111.

Iowa.— State *v.* Soper, (Iowa 1902) 91 N. W. 774; State *v.* Grant, 86 Iowa 216, 53 N. W. 120; State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370; State *v.* Savoye, 48 Iowa 562; State *v.* Potter, 28 Iowa 554.

Maine.— State *v.* Ripley, 31 Me. 386.

Massachusetts.— Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Michigan.—People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

Pennsylvania.— Hazen *v.* Com., 23 Pa. St. 355.

Texas.— Brown *v.* State, 2 Tex. App. 115.

Vermont.— State *v.* Keach, 40 Vt. 113.

Wisconsin.— State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— Ching *v.* U. S., 118 Fed. 538, 55 C. C. A. 304; U. S. *v.* Taffe, 86 Fed. 113; U. S. *v.* Wilson, 60 Fed. 890; U. S. *v.* Adler, 49 Fed. 736; U. S. *v.* Stevens, 44 Fed. 132; U. S. *v.* De Grieff, 16 Blatchf. (U. S.) 20, 25 Fed. Cas. No. 14,936.

See 10 Cent. Dig. tit. "Conspiracy," § 86.

In Indiana and Kentucky the offense which the conspiracy was formed to commit must be set forth with the same particularity required in an indictment for the offense itself. Smith *v.* State, 93 Ind. 67; Scudder *v.* State, 62 Ind. 13; State *v.* McKinstry, 50 Ind. 465; Landringham *v.* State, 49 Ind. 186; Com. *v.* Ward, 92 Ky. 158, 13 Ky. L. Rep. 422, 17 S. W. 283.

10. Lipschitz *v.* People, 25 Colo. 261, 53 Pac. 1111; Scudder *v.* State, 62 Ind. 13; Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; Hartman *v.* Com., 5 Pa. St. 60; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632, 35 Leg. Int. (Pa.) 420; Com. *v.* Galbraith, 6 Phila. (Pa.) 281, 24 Leg. Int. (Pa.) 109.

11. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; State *v.* Parker, 43 N. H. 83; Hazen *v.* Com., 23 Pa. St. 355; Hartman *v.* Com., 5 Pa. St. 60; U. S. *v.* Sanges, 48 Fed. 78; U. S. *v.* De Grieff, 16 Blatchf. (U. S.) 20, 25 Fed. Cas. No. 14,936.

12. *Maryland.*— State *v.* Dent, 3 Gill & J. (Md.) 8.

Massachusetts.— Com. *v.* Ward, 1 Mass. 473.

New Hampshire.— State *v.* Straw, 42 N. H. 393.

Pennsylvania.— Rogers *v.* Com., 5 Serg. & R. (Pa.) 463; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632, 35 Leg. Int. (Pa.) 420; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538.

England.— Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126; Rex *v.* Hamilton, 7 C. & P. 448, 32 E. C. L. 701; Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358.

An indictment charging a conspiracy to commit burglary, with intent to steal personal property belonging to a named person, is not defective because it does not state the

an indictment alleges a conspiracy to defraud. The ownership, however, should be sufficiently averred.[13]

g. Knowledge and Intent. If an act is in its nature unlawful, knowledge of its wrongful character is presumed, and it is unnecessary to allege in an indictment that defendants had knowledge of its wrongful character.[14] It is otherwise where the act becomes wrongful by the presence of accidental or fortuitous features not ordinarily attendant upon it.[15] In those cases, however, where knowledge is an essential element of the offense it must be alleged.[16] Where as is the general rule intent is an essential element of the offense it must be averred in the indictment.[17] In alleging knowledge or intent as an element of the offense either the language of the statute creating the offense may be used or language equivalent thereto.[18]

kind and value of such property. Reinhold v. State, 130 Ind. 467, 30 N. E. 306.

13. Reg. *v.* Parker, 3 Q. B. 292, 2 G. & D. 709, 6 Jur. 822, 11 L. J. M. C. 102, 43 E. C. L. 741; Reg. *v.* Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

14. Com. *v.* Goldsmith, 12 Phila. (Pa.) 635, 35 Leg. Int. (Pa.) 420; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Knowledge of falsity of document.— In an indictment for a conspiracy, in producing a false certificate in evidence, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

15. State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

16. Conspiracy to defraud by knowingly making or presenting false affidavit supporting claim for pension.— Under U. S. Rev. Stat. (1872), § 4746, providing for the punishment of persons knowingly or wilfully procuring the making or presentation of any false or fraudulent affidavit concerning any claim for pension, an indictment for conspiracy to defraud the United States by making a false and fraudulent affidavit in support of a claim for pension should allege that defendant knowingly caused to be made and presented such false affidavit. U. S. *v.* Adler, 49 Fed. 736.

Conspiracy to defraud by obtaining allowance of fraudulent claim.— An indictment under U. S. Rev. Stat. (1872), § 5438, for conspiracy to defraud the United States or any department or officer thereof, by obtaining or aiding to obtain payment or allowance of any false or fraudulent claim, will be defective for not stating that the accused knew that the claim was false, fictitious, and fraudulent. U. S. *v.* Reichert, 12 Sawy. (U. S.) 643, 32 Fed. 142.

Conspiracy to obtain mineral lands — Averment of knowledge of mineral deposits when conspiracy formed.— To constitute a criminal conspiracy to defraud the United States by obtaining title and possession through homestead entry to mineral lands not subject to entry, the fact that the land contained valuable minerals and knowledge of such fact by the conspirators at the time the conspiracy was formed are essential, and must be averred in the indictment. An indictment which, after charging such conspiracy and the subsequent making of an affidavit, and the filing of an application for entry in furtherance thereof, avers that the defendants "then and there" well knew that the land contained valuable mineral deposits, is uncertain and fatally defective, in failing to charge such knowledge at the time the conspiracy was formed. U. S. *v.* Peuschel, 116 Fed. 642.

17. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

Averment of intent in conspiracy to obstruct justice or impede administration of laws.— The acts of congress and the statutes of Indiana make it a crime for an inspector of elections or other election officer at an election for a member of congress, to whom is committed the safe-keeping and delivery to the board of canvassers of the poll-books, the tally sheets, and the certificates of the votes, to fail or omit to perform this duty of safe-keeping and delivery. An indictment in a federal court for a conspiracy to induce these officers to omit such duty that the documents mentioned might come to the hands of improper persons, who tampered with and falsified the returns, need not allege that the conspirators intended to affect the election of the member of congress who was voted for at that place, the returns of which were in the same poll-books, tally sheets, and certificates with those for state officers. *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274.

18. **An indictment which charges that defendants conspired and confederated together** for the purpose of committing the crime, and in fact committed it by so conspiring, sufficiently charges mutual intent. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

An indictment under Me. Rev. Stat. c. 126, § 17, charging, nearly in the words of the statute, that defendant did conspire, "with intent falsely, fraudulently and maliciously" to cause D to be prosecuted for an attempt to murder and kill, "of which crime the said D was innocent," is sufficient, without averring that defendant knew, or had reasonable cause to believe, that D was innocent. State *v.* Locklin, 81 Me. 251, 16 Atl. 895.

h. The Means to Be Employed — (1) *To Do Unlawful Act.* If the object of the conspiracy was to do an act in itself unlawful at common law or by statute, the means by which it was to be accomplished need not be stated;[19] but under

Conspiracy to falsely and maliciously charge one with offense.— An indictment for a conspiracy, which avers that the accused, with another person, conspired unlawfully and maliciously to procure a third person to be arrested for the offense of larceny, well knowing that he was not guilty of said offense, follows the statute substantially, and contains all the averments needful to sustain a conviction. Elkin *v.* People, 28 N. Y. 177 [*affirming* 24 How. Pr. (N. Y.) 272].

Conspiracy to injure trade by knowingly circulating false statements, etc.— Under N. Y. Pen. Code, § 435, enacting that one who, with intent to affect the market-price of stocks, bonds, etc., of a corporation, knowingly circulates any false statement, etc., shall be punished by a fine, etc., an indictment for conspiracy to injure a party and to depress the value of certain shares of stock by contriving, propagating, and spreading divers false and injurious rumors, well knowing the premises and injurious rumors which occasion a decline of the stock, sufficiently charges the intent and guilty knowledge. People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520.

Omission of statutory word "designedly." — Under a statute making fraudulent or malicious intent an element of conspiracy it is not material that the statutory word "designedly" is not found in the indictment for conspiracy which charges that the defendants conspired "for the unlawful, malicious, and felonious purpose, and with fraudulent and malicious intent and purpose, . . . to obtain," etc. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

19. *Illinois.*— Thomas *v.* People, 113 Ill. 531; Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780; Johnson *v.* People, 22 Ill. 314; Cowen *v.* People, 14 Ill. 348.

Iowa.— State *v.* Soper, (Iowa 1902) 91 N. W. 774; State *v.* Grant, 86 Iowa 216, 53 N. W. 120; State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370; State *v.* Potter, 28 Iowa 554.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Ripley, 31 Me. 386; State *v.* Bartlett, 30 Me. 132.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Com. *v.* Ward, 1 Mass. 473.

Michigan.— People *v.* Bird, 126 Mich. 631, 86 N. W. 127; People *v.* Summers, 115 Mich. 537, 73 N. W. 818; People *v.* Butler, 111 Mich. 483, 69 N. W. 734; People *v.* Dyer, 79 Mich. 480, 44 N. W. 937; People *v.* Watson, 75 Mich. 582, 42 N. W. 1005; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; People *v.* Winslow, 39 Mich. 505; People *v.* Clark, 10 Mich. 310; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

Montana.— Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

New Hampshire.—State *v.* Parker, 43 N. H. 83.

New Jersey.— State *v.* Young, 37 N. J. L. 184.

New York.— Warshauer *v.* Webb, 9 N. Y. St. 529.

North Carolina.—State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

Pennsylvania.— Hazen *v.* Com., 23 Pa. St. 355; Twitchell *v.* Com., 9 Pa. St. 211; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Com. *v.* Quay, 7 Pa. Dist. 723; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341; Com. *v.* Hadley, 13 Pa. Co. Ct. 188; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538.

South Carolina.— State *v.* De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371.

Vermont.— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State *v.* Keach, 40 Vt. 113.

Virginia.— Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

Wisconsin.—State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— U. S. *v.* Benson, 70 Fed. 591, 17 C. C. A. 293; U. S. *v.* Adler, 49 Fed. 736; U. S. *v.* Milner, 36 Fed. 890; U. S. *v.* Gordon, 22 Fed. 250; U. S. *v.* Sanche, 7 Fed. 715; U. S. *v.* Dustin, 2 Bond (U. S.) 332, 25 Fed. Cas. No. 15,011; U. S. *v.* Goldman, 3 Woods (U. S.) 187, 25 Fed. Cas. No. 15,225; U. S. *v.* Dennee, 3 Woods (U. S.) 47, 25 Fed. Cas. No. 14,948.

England.— Wright *v.* Reg., 14 Q. B. 148, 14 Jur. 305, 68 E. C. L. 148; Synderff *v.* Reg., 11 Q. B. 245, 12 Jur. 418, 63 E. C. L. 245; Reg. *v.* Rex, 7 Q. B. 782, Dav. & M. 741, 8 Jur. 662, 13 L. J. M. C. 118, 53 E. C. L. 782; Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 13 L. J. M. C. 131, 51 E. C. L. 126; Rex *v.* Seward, 1 A. & E. 706, 3 L. J. M. C. 103, 3 N. & M. 557, 28 E. C. L. 330; Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407; Rex *v.* Hollingberry, 4 B. & C. 329, 6 D. & R. 345, 3 L. J. K. B. O. S. 226, 10 E. C. L. 601; Latham *v.* Reg., 5 B. & S. 635, 9 Cox C. C. 516, 10 Jur. N. S. 1145, 33 L. J. M. C. 197, 10 L. T. Rep. N. S. 571, 12 Wkly. Rep. 908, 117 E. C. L. 635; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061; Reg. *v.* Stapylton, 8 Cox C. C. 69, 6 Wkly. Rep. 60; Reg. *v.* Best, 2 Ld. Raym. 1167.

See 10 Cent. Dig. tit. "Conspiracy," § 85.

Conspiracy to defraud United States.— U. S. Rev. Stat. (1872), § 5440, makes it a crime to conspire to defraud the United States in any manner, and a count in an indictment is not demurrable because it charges a conspiracy to defraud, without setting forth the means by which the fraud is to be consummated. U. S. *v.* Gordon, 22 Fed. 250;

such circumstances it will be deemed sufficient for the indictment to state the conspiracy and its object.[20]

(II) *To Do Lawful Act.* Where neither the conspiracy nor the object to be attained is unlawful, it is necessary to set out the means or state the character of the acts by which the design was to be accomplished as a component part of the offense, with such precision and certainty as to show that they were unlawful.[21] So if means are alleged that may create a crime, although in themselves

U. S. *v.* Dustin, 2 Bond (U. S.) 332, 25 Fed. Cas. No. 15,011; U. S. *v.* Dennee, 3 Woods (U. S.) 47, 25 Fed. Cas. No. 14,948.

A conspiracy to extort money is *per se* an offense at common law and need not be charged to be attempted by unlawful means. Rex *v.* Hollingherry, 4 B. & C. 329, 6 D. & R. 345, 3 L. J. K. B. O. S. 226, 10 E. C. L. 601.

20. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

General allegation of corrupt intent sufficient without statement of means.— In Madden *v.* State, 57 N. J. L. 324, 30 Atl. 541, it was held that after the general allegation of a corrupt intent in an indictment for conspiracy to cheat it is not essential that a statement of the means by which the conspiracy was to be executed should also show such intent. See also as holding such generality of charging sufficient Wood *v.* State, 47 N. J. L. 461, 1 Atl. 509; State *v.* Young, 37 N. J. L. 184.

21. *Illinois.*— Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780. See, however, Cole *v.* People, 84 Ill. 216.

Iowa.— State *v.* Soper, (Iowa 1902) 91 N. W. 774; State *v.* Harris, 38 Iowa 242; State *v.* Stevens, 30 Iowa 391; State *v.* Potter, 28 Iowa 554; State *v.* Jones, 13 Iowa 269.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Roberts, 34 Me. 320; State *v.* Hewett, 31 Me. 396; State *v.* Ripley, 31 Me. 386; State *v.* Bartlett, 30 Me. 132.

Massachusetts.— Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997; Com. *v.* McParland, 148 Mass. 127, 19 N. E. 25; Com. *v.* Barnes, 132 Mass. 242; Com. *v.* Waterman, 122 Mass. 43; Com. *v.* Wallace, 16 Gray (Mass.) 221; Com. *v.* Prius, 9 Gray (Mass.) 127; Com. *v.* O'Brien, 12 Cush. (Mass.) 84; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Michigan.— People *v.* Bird, 126 Mich. 631, 86 N. W. 127; People *v.* Summers, 115 Mich. 537, 73 N. W. 818; People *v.* Petheram, 64 Mich. 258, 31 N. W. 188; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; People *v.* Barkelow, 37 Mich. 455; People *v.* Clark, 10 Mich. 310; Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

Montana.— Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

New Hampshire.—State *v.* Parker, 43 N. H. 83; State *v.* Straw, 42 N. H. 393; State *v.* Burnham, 15 N. H. 396.

New York.— People *v.* Everest, 51 Hun (N. Y.) 19, 3 N. Y. Suppl. 612, 20 N. Y. St. 456; People *v.* Olson, 15 N. Y. Suppl. 778; Lambert *v.* People, 9 Cow. (N. Y.) 578 [*reversing* 7 Cow. (N. Y.) 166]; *In re* Cromwell, 3 City Hall Rec. (N. Y.) 34.

Pennsylvania.— Com. *v.* Goldsmith, 12 Phila. (Pa.) 635, 35 Leg. Int. (Pa.) 420; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538.

South Carolina.—State *v.* Cardoza, 11 S. C. 195.

Vermont.— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State *v.* Keach, 40 Vt. 113; State *v.* Noyes, 25 Vt. 415.

Wisconsin.—State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719.

United States.— Pettibone *v.* U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; U. S. *v.* Gardner, 42 Fed. 829; U. S. *v.* Dustin, 2 Bond (U. S.) 332, 25 Fed. Cas. No. 15,011; U. S. *v.* Goldman, 3 Woods (U. S.) 187, 25 Fed. Cas. No. 15,225.

England.— Rex *v.* Seward, 1 A. & E. 706, 3 L. J. M. C. 103, 3 N. & M. 557, 28 E. C. L. 330; Rex *v.* Jones, 4 B. & Ad. 345, 1 N. & M. 78, 24 E. C. L. 156; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061; Rex *v.* Fowle, 4 C. & P. 592, 19 E. C. L. 664; Rex *v.* Eccles, 3 Dougl. 337, 26 E. C. L. 224; Rex *v.* Fowler, 1 East P. C. 461; Rex *v.* Richardson, 1 M. & Rob. 402.

See 10 Cent. Dig. tit. "Conspiracy," § 85.

"Intimidation" not being *vocabulum artis* has not necessarily a meaning in a bad sense. To give it legal efficacy, it should at least appear, from the context of the indictment, what species of fear was intended and upon whom such fear was meant to operate. O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061. In Reg. *v.* Rowlands, 17 Q. B. 671, 5 Cox C. C. 466, 2 Den. C. C. 364, 16 Jur. 268, 21 L. J. M. C. 81, 79 E. C. L. 671, an indictment charging defendants with conspiring to force workmen to depart from their employment, by unlawfully molesting them, by unlawfully using threats to them, by unlawfully intimidating them, by unlawfully molesting their employer, and by unlawfully obstructing his business, and the workmen so hired, sufficiently states the means by which a conspiracy denounced by 6 Geo. IV, c. 129, § 3, was to be carried.

Procuring official appointment.—Where the general allegations of the indictment, that the parties did unlawfully, wickedly, and corruptly conspire to procure such appointment to office are followed by an allegation that the acts were done upon a corrupt and wicked agreement, and with intent that upon the appointment being made, the business of the

they fall outside of the legal definition of any, the means must be stated that the court may ascertain what crime, if any, they create.[22]

i. Overt Acts — (i) *Necessity of Alleging Offense* — (A) *When Not Element of Offense.* No overt act is essential to complete the offense of conspiracy, unless made so by special statutory requirement, and in the absence of such statute it is of course unnecessary to allege the commission of an overt act,[23] even though one has been actually committed.[24] However, such acts may be charged by way of aggravation.[25]

office should be transacted by the party appointed, as the other party should direct, etc., there is a sufficient designation of the means by which the alleged conspiracy was to be effected and carried out. People *v.* Squier, 20 Abb. N. Cas. (N. Y.) 368.

An indictment for conspiracy to cheat and defraud according to some decisions must set forth the means agreed upon by the conspirators, as such charge does not necessarily imply a criminal object.

Iowa.— State *v.* Jones, 13 Iowa 269.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Roberts, 34 Me. 320; State *v.* Hewett, 31 Me. 396.

Massachusetts.— Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997; Com. *v.* Wallace, 16 Gray (Mass.) 221; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

Michigan.— Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321.

Montana.— Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

New Hampshire.—State *v.* Parker, 43 N. H. 83.

New York.— March *v.* People, 7 Barb. (N. Y.) 391; People *v.* Eckford, 7 Cow. (N. Y.) 535.

See 10 Cent. Dig. tit. "Conspiracy," § 85.

But according to other decisions the means to be used where such words are held to import an offense need not be set forth.

New Jersey.— State *v.* Young, 37 N. J. L. 184.

New York.— People *v.* Scholtz, 2 Wheel. Crim. (N. Y.) 617.

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71; State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

Pennsylvania.— Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Com. *v.* Hadley, 13 Pa. Co. Ct. 188; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538. And see Rhoads *v.* Com., 15 Pa. St. 272.

England.— Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145, 11 Jur. 204, 16 L. J. Q. B. 121, 58 E. C. L. 824 [*following* Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407].

22. People *v.* Barkelow, 37 Mich. 455.

Superfluous statement as to overt acts.— When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage, and the two charges of conspiracy regarded as charging a conspiracy of the nature indicated by the particular allegations respecting the method adopted for effecting the criminal purpose. State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046.

23. *Iowa.*— State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

Maryland.— State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts.— Com. *v.* Fuller, 132 Mass. 563; Com. *v.* O'Brien, 12 Cush. (Mass.) 84; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Com. *v.* Warren, 6 Mass. 72; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. *v.* Ward, 1 Mass. 473.

Michigan.— People *v.* Dyer, 79 Mich. 480, 44 N. W. 937; People *v.* Petheram, 64 Mich. 252, 31 N. W. 188; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; People *v.* Clark, 10 Mich. 310; Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

Missouri.— State *v.* Nell, 79 Mo. App. 243.

Montana.— Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

New Hampshire.—State *v.* Straw, 42 N. H. 393.

New York.— People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Lambert *v.* People, 9 Cow. (N. Y.) 578.

Pennsylvania.— Com. *v.* McHale, 97 Pa. St. 397, 39 Am. Rep. 808; Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Bartilson, 85 Pa. St. 482; Clary *v.* Com., 4 Pa. St. 210; Com. *v.* McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630; Com. *v.* Hadley, 13 Pa. Co. Ct. 188; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538.

Vermont.— State *v.* Keach, 40 Vt. 113; State *v.* Noyes, 25 Vt. 415.

United States.—Bannon *v.* U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Gardner, 42 Fed. 829; U. S. *v.* Watson, 17 Fed. 145; U. S. *v.* Walsh, 5 Dill. (U. S.) 58, 28 Fed. Cas. No. 16,636.

England.— Rex *v.* Gill, 2 B. & Ald. 204, 20 Rev. Rep. 407; Reg. *v.* Dean, 4 Jur. 364.

See 10 Cent. Dig. tit. "Conspiracy," § 89.

24. State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

25. *Connecticut.*— State *v.* Bradley, 48 Conn. 535.

Iowa.— State *v.* Grant, 86 Iowa 216, 53

(B) *When Element of Offense.* If by statute an overt act is made a constituent element of the offense, it is necessary for the indictment to contain, in addition to an allegation of the conspiracy, an allegation of some overt act in furtherance and pursuance thereof.[26]

(II) *WHAT ALLEGATIONS NECESSARY* — (A) *In General.* The overt act should be charged to have been committed in furtherance and pursuance of the unlawful combination and agreement, by the employment of language sufficient to show that fact.[27] It will be enough, without stating the manner in which the act in question tended to effect the purpose contemplated[28] or

N. W. 120; State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370.

Kentucky.— Com. *v.* Ward, 92 Ky. 158, 13 Ky. L. Rep. 422, 17 S. W. 283.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Ripley, 31 Me. 386; State *v.* Murray, 15 Me. 100.

Massachusetts.— Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Com. *v.* Davis, 9 Mass. 415; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

Michigan.—People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.— People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Vermont.— State *v.* Keach, 40 Vt. 113.

See 10 Cent. Dig. tit. "Conspiracy," § 89.

26. *California.*—People *v.* Daniels, 105 Cal. 262, 28 Pac. 720.

Dakota.— U. S. *v.* Carpenter, 6 Dak. 294, 50 N. W. 123.

New Jersey.— State *v.* Barr, (N. J. 1898) 40 Atl. 772; Wood *v.* State, 47 N. J. L. 461, 1 Atl. 509; State *v.* Young, 37 N. J. L. 184; Johnson *v.* State, 26 N. J. L. 313.

New York.—Elkin *v.* People, 28 N. Y. 177; People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Squire, 20 Abb. N. Cas. (N. Y.) 368.

United States.—U. S. *v.* Donau, 11 Blatchf. (U. S.) 168, 25 Fed. Cas. No. 14,983, 17 Int. Rev. Rec. 181; U. S. *v.* Martin, 4 Cliff. (U. S.) 156, 26 Fed. Cas. No. 15,728; U. S. *v.* Walsh, 5 Dill. (U. S.) 38, 28 Fed. Cas. No. 16,636; U. S. *v.* Dennee, 3 Woods (U. S.) 47, 25 Fed. Cas. No. 14,948; U. S. *v.* Blunt, 24 Fed. Cas. No. 14,615, 7 Chic. Leg. N. 258.

See 10 Cent. Dig. tit. "Conspiracy," § 89.

27. State *v.* Norton, 23 N. J. L. 33. See also People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; U. S. *v.* Dustin, 2 Bond (U. S.) 332, 25 Fed. Cas. No. 15,011; U. S. *v.* Boyden, 1 Lowell (U. S.) 266, 24 Fed. Cas. No. 14,632.

Sufficient averment that act was in furtherance of conspiracy.— An indictment under U. S. Rev. Stat. (1872), § 5440, charged a conspiracy to defraud the United States, and certain overt acts "according to and in pursuance" thereof. It was held that this met the requirement of the statute of an act "to effect the object of the conspiracy." Dealy *v.* U. S., 152 U. S. 539, 14 S. Ct. 680, 38 L. ed. 545.

Facts showing fraudulency of claim, the presentation of which is charged as overt act. — An indictment under U. S. Rev. Stat. (1872), § 5438, for conspiracy to defraud the government of the United States by obtaining the allowance and payment of a false and fraudulent claim, which charges as the overt act the presentation of such claim, must state the particular facts showing the fraudulent character of the claim, and a general averment in the language of the statute that it was fraudulent is not sufficiently specific. U. S. *v.* Greene, 115 Fed. 343.

Description of affidavit taken by applicant for public land.— Where the words of the affidavit required to be taken by an applicant for public land are set forth in the statute under which the application is made, it is sufficient, in an indictment for conspiracy to defraud the United States, to refer to or describe it as the affidavit required of such applicant by law. U. S. *v.* Thompson, 29 Fed. 86, 89.

28. Gantt *v.* U. S., 108 Fed. 61, 47 C. C. A. 210; U. S. *v.* Benson, 70 Fed. 591, 17 C. C. A. 293; U. S. *v.* Sanche, 7 Fed. 715; U. S. *v.* Donau, 11 Blatchf. (U. S.) 168, 25 Fed. Cas. No. 14,983, 17 Int. Rev. Rec. 181; U. S. *v.* Dennee, 3 Woods (U. S.) 47, 25 Fed. Cas. No. 14,948.

Sufficient showing of overt acts.— Allegations of the indictment that the defendant, in pursuance of the conspiracy, made application for appointment to the office, and made, signed, and delivered to the codefendant a letter embodying the agreement set forth sufficiently show overt acts done in pursuance of the alleged agreement. People *v.* Squire, 20 Abb. N. Cas. (N. Y.) 368.

The averment of the commission of the larceny which was the object of the conspiracy sufficiently charges an overt act in furtherance of the conspiracy. U. S. *v.* Gardner, 42 Fed. 829.

Under U. S. Rev. Stat. (1872), § 5440, punishing conspiracy to defraud the United States where any act to "effect the object of the conspiracy" is done by any of the parties, the gist of the offense being the conspiracy, an indictment charging such a conspiracy entered into within the United States and the jurisdiction of the court is sufficient, although it does not allege the overt acts

all the means employed,[29] to charge and describe any act by one or more of the defendants.

(B) *Person Committing Act.* Although the indictment should charge the conspiracy against all the defendants, an overt act in furtherance of the conspiracy may be charged against those only who committed it.[30]

(C) *Time and Place.* The indictment should allege the time and place of the act done to effect the object of the conspiracy so as to identify it and show that it post-dated the conspiracy and was not merely a part of it.[31]

j. Accomplishment of Purpose. It is not necessary that the indictment should aver that the object of the conspiracy was accomplished.[32]

3. Surplusage. The general rule that where an averment may be wholly omitted without affecting the charge against the prisoner and without detriment to the indictment it may be treated as surplusage is applicable to indictments for conspiracy.[33] And an immaterial averment not contradicting any other averment, not descriptive of the identity of the charge or of anything essential to it, or tending to show that any offense has been committed will not vitiate the indictment, but may be treated in like manner.[34]

4. Bill of Particulars. If the charge is general, or if it does not convey sufficient information to enable defendant to prepare for trial, a bill of particulars or specification of facts may be ordered, where the court is of opinion that otherwise defendant may be prejudiced or deprived of his rights;[35] and the prosecution

charged to have been done within the United States. Dealy *v.* U. S., 152 U. S. 539, 14 S. Ct. 680, 38 L. ed. 545.

29. State *v.* Young, 37 N. J. L. 184.

30. Bannon *v.* U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494; U. S. *v.* Greene, 115 Fed. 243; U. S. *v.* Benson, 70 Fed. 591, 17 C. C. A. 293. See also Com. *v.* Tack, 1 Brewst. (Pa.) 511.

31. U. S. *v.* Milner, 36 Fed. 890.

An allegation that an overt act was "according to and in pursuance" of the conspiracy sufficiently shows that it was subsequent thereto, and, the date of the conspiracy being alleged, the time of the overt act need not be specifically stated. Dealy *v.* U. S., 152 U. S. 539, 14 S. Ct. 680, 38 L. ed. 545.

32. State *v.* Bruner, 135 Ind. 419, 35 N. E. 22; Shircliff *v.* State, 96 Ind. 369; Miller *v.* State, 79 Ind. 198; Com. *v.* Bryant, 10 Ky. L. Rep. 426, 12 S. W. 276; State *v.* Straw, 42 N. H. 395; U. S. *v.* Newton, 48 Fed. 218.

33. State *v.* Hadley, 54 N. H. 224.

34. Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885; State *v.* Mayberry, 48 Me. 218; Clary *v.* Com., 4 Pa. St. 210; Woodsworth *v.* State, 20 Tex. App. 375.

Improper insertion of unnecessary words.— Where an indictment for conspiracy can dispense altogether with certain words complained of as being inserted in the wrong place, such improper insertion does not vitiate the indictment, as such words are only harmless surplusage. Elkin *v.* People, 24 How. Pr. (N. Y.) 272.

It is not necessary to set forth the county in which an alleged conspiracy was formed, in violation of the act of March 2, 1867 (14 U. S. Stat. at L. 484), and it may be rejected as surplusage. U. S. *v.* Smith, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322.

Rejection of averment as to false pretenses.— In Reg. *v.* Yates, 6 Cox C. C. 441, a count of the indictment charged the defendants with a conspiracy by false pretenses and subtle means and devices to extort from T one sovereign of his moneys, and to cheat and defraud him thereof; but the evidence failed to prove that the defendants employed any false pretenses in an attempt to obtain the money. It was held that so much of the count might be rejected as surplusage and the defendants convicted of the conspiracy to extort and defraud. See also Rex *v.* Hollingberry, 4 B. & C. 329, 6 D. & R. 345, 3 L. J. K. B. O. S. 226, 10 E. C. L. 601.

Where a common-law indictment concludes "contrary to the form of the statute," etc., such words may be rejected as surplusage and a demurrer for that cause will be overruled. State *v.* Straw, 42 N. H. 393.

35. McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; State *v.* Howard, 129 N. C. 584, 40 S. E. 71; State *v.* Brady, 107 N. C. 822, 12 S. E. 325; Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538; Reg. *v.* Rycroft, 6 Cox C. C. 76. See also Rex *v.* Hamilton, 7 C. & P. 448, 32 E. C. L. 701, in which it was held that the judge will not, however, compel the prosecutor to state in his bill of particulars the specific acts with which the defendants are charged, and the times and places at which those acts are alleged to have occurred.

To whom application made.— An application for a bill of particulars should first be made to the officer prosecuting for the state. If refused, the defendant or his counsel should then, before the cause is called for trial, apply to the court. State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

Discretion.— The matter of granting or re-

under such circumstances will be confined to the specification of facts therein contained.[36]

5. Variance — a. In General. As in other criminal prosecutions, on trial of an indictment for conspiracy, the proof must correspond with and support its material averments.[37] If the offense intended is stated with unnecessary particularity it should be proved as laid.[38]

fusing a bill of particulars lies within the sound discretion of the trial judge, and where the exercise of such discretion has not been abused it will not be reviewed by the appellate court. State *v.* Brady, 107 N. C. 822, 12 S. E. 325; Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

Particulars of overt acts.— In a general count for conspiracy the defendant is entitled to particulars of the acts relied upon in support of the charge; but on a special count reciting overt acts the court will not order particulars to be furnished in the absence of an affidavit on the part of the defendant that he has no knowledge of the overt acts charged and does not possess sufficient information to enable him to meet them. Reg. *v.* Stapylton, 8 Cox C. C. 69, 6 Wkly. Rep. 60.

Effect of nol. pros. of particular counts.— In State *v.* Howard, 129 N. C. 584, 40 S. E. 71, it was held that where, on a prosecution for conspiracy to defraud, particulars were fully furnished by certain counts of the indictment which were nolle prossed at the instance of defendants and after the close of the evidence, they were in full possession of all information which a bill of particulars could have furnished them.

36. McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547 [*reversing* 25 Ill. App. 350, and *distinguishing* Ochs *v.* People, 124 Ill. 399, 16 N. E. 662]; Regent *v.* People, 96 Ill. App. 189; Reg. *v.* Esdaile, 1 F. & F. 213.

Order not complied with.— Where particulars ordered pending the trial were not delivered, the court declined to limit the evidence of the prosecution as to the facts of which disclosure was sought. Reg. *v.* Esdaile, 1 F. & F. 213.

37. *Illinois.*— Towne *v.* People, 89 Ill. App. 258.

Massachusetts.— Com. *v.* Kellogg, 7 Cush. (Mass.) 473; Com. *v.* Harley, 7 Metc. (Mass.) 506; Com. *v.* Manley, 12 Pick. (Mass.) 173.

New Hampshire.— State *v.* Hadley, 54 N. H. 224.

North Carolina.— State *v.* Trammell, 24 N. C. 379.

United States.— U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333.

England.— Rex *v.* Pollman, 2 Campb. 229, 11 Rev. Rep. 689; Reg. *v.* Dean, 4 Jur. 364.

See 10 Cent. Dig. tit. "Conspiracy," § 90.

Allegations as to possession and title.— On the trial for conspiracy to commit robbery, if the indictment alleges the possession of the property intended to have been stolen in one person and the title in another, the state must prove both allegations. Ward *v.* State, (Tex. Crim. 1893) 21 S. W. 250.

Means employed.— In Reg. *v.* Yates, 6 Cox C. C. 441, it was held that the charge of a conspiracy by false pretenses to extort money was supported by evidence of a conspiracy to extort money without reference to false pretenses.

Motive or intent.— Proof of one of several intentions charged is sufficient (Rex *v.* Evans, 3 Stark. 35, 23 Rev. Rep. 754, 3 E. C. L. 583); as is proof of particular motive although the evidence discloses others in addition (U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333).

Object or purpose.— A charge of conspiring to prevent particular workmen from continuing their employment is supported by proof of a conspiracy to so prevent any (Rex *v.* Byckerdike, 1 M. & Rob. 179); of preventing the employment of any apprentices, by proof of a conspiracy to prevent the hiring of more (Rex *v.* Ferguson, 2 Stark. 489, 3 E. C. L. 500); of obtaining goods, by proof of a conspiracy to obtain goods and labor (Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997), to obtain property, by proof of a design to obtain a draft or check (Regent *v.* People, 96 Ill. App. 189), and a charge of conspiring to inflict a great bodily injury by proof of a conspiracy to tar and feather (State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370).

Overt act.— An indictment charging a conspiracy to injure and hinder a collector of internal revenue in the discharge of his duties by firing at him is established by proof that the posse which he commanded was fired at. U. S. *v.* Johnson, 26 Fed. 682.

Participation in combination.— To allege against a number of persons generally that they have conspired to cheat and defraud does not enable the prosecution to prove several conspiracies, each affecting different contracts and different persons or groups of persons interested in the contracts, unless all the contracts and the wrong purposes in respect to them form parts of the combination in which the parties have joined. In order that any of the defendants may be convicted of conspiracy he must be shown to have participated in the alleged general combination or concerted with all or some of the other defendants. Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

38. Ward *v.* State, (Tex. Crim. 1893) 21 S. W. 250.

A count charging conspiracy to obtain goods by different indictable false pretenses is supported by evidence of a conspiracy to cheat by some one of those pretenses. Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

b. As to Time and Place. The time of the alleged conspiracy,[39] of the commission of an overt act,[40] or an unnecessary averment as to the place where the conspiracy was entered into,[41] need not be proved precisely as laid in the indictment.

B. In Civil Cases — 1. Allegations of Declaration or Complaint[42] — a. Grounds of Action. In an action on the case in the nature of a conspiracy, the grounds or gravamen of the action, whether single or several, must be set out with the same certainty as in an action against a single defendant for the same character of action, whether it be libel, slander, assault and battery, malicious prosecution, or false imprisonment; for the judgment may be against a single defendant without proof of the conspiracy;[43] although it cannot be entered against joint defendants without such proof.[44]

39. U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371. And see U. S. *v.* Goldberg, 7 Biss. (U. S.) 175, 25 Fed. Cas. No. 15,223; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111, 27 Fed. Cas. No. 15,902.

An indictment alleging a conspiracy to murder a living infant is not supported by evidence of a conspiracy existing previously to the birth of such infant, unless the agreement and intention continue subsequently to the birth. Reg. *v.* Banks, 12 Cox C. C. 393.

40. U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371.

41. U. S. *v.* Smith, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322.

42. See, generally, Pleading.

For forms of declaration held to be good on demurrer see the following cases:

To injure business see Kellogg *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 35, 70 N. Y. Suppl. 237; Dueber Watchcase Mfg. Co. *v.* E. Howard Watch, etc., Co., 3 Misc. (N. Y.) 582, 24 N. Y. Suppl. 647; Griffith *v.* McKelvey, 30 Pittsb. Leg. J. N. S. 292; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111, 20 Am. St. Rep. 755; Olive *v.* Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; Fisher *v.* Schuri, 73 Wis. 370, 41 N. W. 527; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

To defraud see O'Connor *v.* Jefferson, 45 Minn. 162, 47 N. W. 538; Colyer *v.* Guilfoyle, 47 N. Y. App. Div. 302, 62 N. Y. Suppl. 21.

Malicious prosecution see Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690.

To injure and oppress see Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493.

For forms of complaint held insufficient on demurrer see McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 58 N. E. 463; Schulten *v.* Bavarian Brewing Co., 96 Ky. 224, 16 Ky. L. Rep. 442, 28 S. W. 504.

43. Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943; Severinghaus *v.* Beckman, 9 Ind. App. 388, 36 N. E. 930; Boston *v.* Simmons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; Booker *v.* Puyear, 27 Nebr. 346, 43 N. W. 133; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Conspiracy to defraud. — In an action in the nature of conspiracy to defraud, the specific acts constituting the fraud must be alleged. A general charge of fraud will be insufficient as being a conclusion of law. Harshman *v.* Paxson, 16 Ind. 512; Davis *v.* Minor, 2 U. C. Q. B. 464 (where the court said that merely calling a transaction fraudulent in the declaration will not make it a fraud, if the act as described is not in its nature fraudulent); Wright *v.* Bourdon, 50 Vt. 494. See also Ide *v.* Gray, 11 Vt. 615. Where the complaint alleged that the defendants did in concert, by connivance, conspiracy, and combination, cheat and defraud plaintiffs, it was held that this was not a sufficient allegation of fraud and conspiracy, the averment of facts being too meager. Cohn *v.* Goldman, 76 N. Y. 284 [*reversing* 43 N. Y. Super. Ct. 436, and *disapproving* Ynguanzo *v.* Salomon, 3 Daly (N. Y.) 153].

Malicious prosecution. — In an action on a case in the nature of conspiracy for malicious prosecution, it is not sufficient to allege that the prosecution was false and malicious, an allegation that the action was without probable cause being essential. Kirtley *v.* Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459. See also Ellis *v.* Thilman, 3 Call (Va.) 3; Sutton *v.* Johnstone, 1 Bro. C. C. 76, 1 T. R. 493, 1 Eng. Reprint 427; Morgan *v.* Hughes, 2 T. R. 225. But *compare* Griffith *v.* Ogle, 1 Binn. (Pa.) 172. However, in an action in the nature of a conspiracy for malicious prosecution, malice and absence of reasonable and probable cause may properly be alleged as facts, without setting out the facts and circumstances from which they may be inferred. McCarthy *v.* Barter, 15 Can. L. T. 198. Where the petition, in an action for conspiracy, charges that the defendant maliciously, and without probable cause, instigated others to institute suits in the courts against the plaintiff, such petition is demurrable unless it alleges the termination of such suits. Toledo Electric St. R. Co. *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 597.

44. Jenner *v.* Carson, 111 Ind. 522, 13 N. E. 44; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943; Severinghaus *v.* Beckman, 9 Ind. App. 388, 36 N. E. 930; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376, 21 N. Y. St. 791; Forsyth *v.* Edminston, 11 How. Pr. (N. Y.) 408; Hutchins *v.* Hutchins, 7 Hill

b. **Combination** — (i) *Necessity For Alleging.* The rule is well established that in civil actions the conspiracy is not the gravamen of the charge, but may be pleaded and proved in aggravation of the wrong of which plaintiff complains, and for the purpose of enabling him to recover against all the conspirators as joint tort-feasors. The allegation of conspiracy does not change the nature of the action from one purely on the case, subject to all the settled rules of such action.[45] And when it becomes necessary to prove a conspiracy in order to connect defendant with the wrong complained of, no averment of the conspiracy need be made in the pleadings to entitle it to be proved.[46]

(ii) *Setting Forth Acts From Which Conspiracy Inferred.* In an action of the nature under consideration the rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred; even so far as to allow the individual acts of the conspirators to be averred.[47] The act complained of, however, must be definitely and issuably stated, so that if the facts themselves should be admitted the court can draw legal conclusions. An averment that a party has acted unlawfully, without showing what he did, is not an averment of issuable facts.[48]

(N. Y.) 104; Laverty *v.* Vanarsdale, 65 Pa. St. 507; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

45. See *supra;* III, B, C, and D.

Allegation of conspiracy matter of inducement.— Since less certainty is required in setting out matters of inducement than in setting out the gist of the action, it has been held that a plaintiff will not be compelled to set forth the names of individuals, copartnerships, and corporations organized as a trust under a certain name and alleged to constitute a conspiracy for the purpose of "freezing" such plaintiff out of a certain line of business. Barron *v.* Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528.

46. Parker *v.* Huntington, 2 Gray (Mass.) 124; Livermore *v.* Herschell, 3 Pick. (Mass.) 33; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376, 21 N. Y. St. 791; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Jones *v.* Baker, 7 Cow. (N. Y.) 445.

Where two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is never necessary to aver this previous combination in the complaint, and if averred it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done. Herron *v.* Hughes, 25 Cal. 555.

47. Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373; Mussina *v.* Clark, 17 Abb. Pr. (N. Y.) 188; Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493.

This rule was distinctly stated by Oakley, J., in Tappan *v.* Powers, 2 Hall (N. Y.) 277, 298, as follows: "It cannot be doubted that if the declaration had averred that all the defendants used the fraudulent means of obtaining plaintiff's property, which were charged against Lawrence, that such an averment should be supported by proof that they were used by him in pursuance of a plan considered among them all; and it seems to me equally clear . . . the act of each defendant may be stated to be done individually and that such act, in judgment of law, is the act of all."

Allegation of claim by defendant as to his right to do injurious act.— In John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 514, 52 N. Y. Suppl. 475, it was held that in an action based upon the allegation of a conspiracy to boycott the plaintiff's business it is not necessarily improper pleading to allege the claim made by a defendant as to his right to do a certain act which plaintiff insists is injurious, and his reason for doing it. In the course of this opinion the court said: "At the basis of this cause of action lies the allegation of a conspiracy to boycott the plaintiff's business, and as a conspiracy may consist either of a combination to do an illegal act or to accomplish a legal act by unlawful means (Buffalo Lubricating Oil Co. *v.* Everest, 30 Hun (N. Y.) 586) some of the acts which are done by the conspirators, while legal when standing alone, may, if they are joined with unlawful acts and have in view an unlawful purpose to the injury of the plaintiff, become improper because they are part of an illegal scheme. For that reason we cannot say that, in all cases, it is improper to set up a claim which was made by a party as to his right to do a certain act which the plaintiff insists is injurious, and his reason for doing it."

Allegations struck out as scandalous matter.— So far as the allegations of acts of individual conspirators are scandalous they should be stricken out if they do not relate to the foundation of the action. Mussina *v.* Clark, 17 Abb. Pr. (N. Y.) 188.

48. McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 58 N. E. 463 [*affirming* 83 Ill. App. 463]; Schwab *v.* Mabley, 47 Mich. 572, 573, 11 N. W. 390 (where the court said: "The allegation of a mere conspiracy need not, perhaps, in all cases, show the specific means which conspirators intend to use, because they may reserve some latitude as to choice of expedients. But the illegal purpose which they

c. Damages—(I) *Necessity For Alleging Damages.* The declaration or complaint must allege in a competent form that the conspiracy or the acts done in furtherance thereof resulted in damage to plaintiff or it will be demurrable;[49] and it has been held that the absence of such allegation cannot be supplied by amendment.[50] The declaration or complaint must also show that the damage alleged was the natural proximate consequence of the act complained of.[51]

(II) *Method of Alleging Damages.* In alleging damage it is not sufficient simply to state that damage did in fact result, but the facts should be alleged from which the court can see, if the facts be true, that damage would naturally or possibly result from the act stated.[52] The allegation of facts as they actually existed, however, does not require or permit a statement in the complaint of the evidence relied on to prove such facts, unless the evidence consists of the facts themselves.[53]

mean to accomplish must be described accurately, because unless the object is illegal, or means agreed upon are illegal, there is no wrong chargeable"); Setzar *v.* Wilson, 26 N. C. 501; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Sufficiency of allegation as to tort intended. — A complaint charging defendants with conspiracy in that one of them used a false letter of credit, thereby inducing plaintiff to sell him goods, and that the other subscribed his name as a witness to a false signature to said letter of credit, sufficiently pleads the tort that the conspiracy was formed to accomplish. Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

49. Douglass *v.* Winslow, 52 N. Y. Super. Ct. 439; Silverman *v.* Doran, 23 Misc. (N. Y.) 96, 51 N. Y. Suppl. 731 (where a complaint for conspiracy alleged *inter alia* that defendants obtained a patent from the Dominion of Canada by perjury and subornation of perjury in a trial before arbitrators appointed by the Canadian court to decide whether plaintiffs or defendants were entitled to the invention, and averred that defendants had manufactured such invention, to the great loss of plaintiffs and asked damages therefor, but failed to set out in substance the patent laws of Canada. Such complaint was held demurrable on the ground that it failed to show that the patent would have been issued to plaintiffs but for the perjury and conspiracy of defendants, and hence the complaint failed to show damages, which was the gist of the action); Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Catterell *v.* Jones, 11 C. B. 713, 16 Jur. 88, 21 L. J. C. P. 2, 73 E. C. L. 713; East Missouri Tp. *v.* Horseman, 16 U. C. Q. B. 556. But *compare* Griffith *v.* Ogle, 1 Binn. (Pa.) 172, holding that the law will imply damage for a conspiracy, to accuse a person of an offense for which he is liable for indictment and removal from office. It is to be noted, however, that this case holds contrary to the overwhelming weights of authority that the gist of the action is the conspiracy and not a damage and is therefore of no particular value as authority on this proposition.

50. Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231.

51. Barber *v.* Lesiter, 7 C. B. N. S. 175, 6 Jur. N. S. 654, 29 L. J. C. P. 161, 97 E. C. L. 175.

52. Commercial Union Assur. Co. *v.* Shoemaker, 63 Nebr. 173, 88 N. W. 156; Toledo Electric St. R. Co. *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 597.

Averment of conclusion insufficient.— To entitle one to recover damages for the wrongful act of another, whereby he has been prevented from obtaining employment, he must allege that he has sought, and by reason of such wrongful act, been refused, employment; the averment that it is impossible for him by reason of such act to obtain employment being a mere conclusion and therefore not sufficient. Hundley *v.* Louisville, etc., R. Co., 105 Ky. 162, 20 Ky. L. Rep. 1085, 48 S. W. 429, 88 Am. St. Rep. 298.

Itemizing damages.— It was held in Barron *v.* Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, that the averment of a conspiracy makes it possible to unite in one action, and as a single cause of action, claims for damages which would otherwise have to be sought in independent actions. Thus threats, slander of business, unlawful solicitation of customers, etc., may be parts or elements of a charge of conspiracy, or the attempted destruction of plaintiff's business. Therefore a motion requiring plaintiff to itemize his damages should be overruled.

Sufficient allegation of damages illustrated. — An allegation that by reason of a conspiracy shippers had been prevented from shipping a certain amount of grain through plaintiff's elevator is sufficient allegation of damages. Kellogg *v.* Lehigh Valley R. Co., 61 N. Y. App. Div. 35, 70 N. Y. Suppl. 237.

53. John D. Park, etc., Co. *v.* Hubbard, 30 N. Y. App. Div. 517, 52 N. Y. Suppl. 481 (where it was held that in an action at law to recover damages for injuries inflicted by means of a boycott less latitude is allowed in the allegations of the complaint than in an equitable action to restrain the boycott); John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Ynguanzo *v.* Salomon, 3 Daly (N. Y.) 153; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

2. JOINDER OF COUNTS OR CAUSES OF ACTION. Where a complaint in an action for conspiracy states facts which constitute several causes of action, on either of which plaintiff can recover, although he might fail as to the others, the court will order the complaint amended so as to state the causes of action separately.[54] Specific acts done to effectuate the conspiracy may be set forth and are not to be considered as constituting several causes of action, although they be different in their particular character, were done at different times, and defendants do not all claim to be interested in, or benefited by, each of them, or in the same degree as to any of them.[55]

3. BILL OF PARTICULARS. According to the weight of authority it is within the sound discretion of the court, in a civil action in the nature of an action on the case for a conspiracy, to require plaintiff to file a bill of particulars, which has sometimes been defined to be an amplification of the declaration, where the averments of the acts constituting such alleged conspiracy are general in their character.[56]

4. VARIANCE. Where the declaration or complaint alleges a conspiracy between specified persons to effectuate a purpose in a particular way, and the proof establishes such conspiracy between the persons named, but shows a variation as to the details of the conspiracy and the mode in which it is carried out, there is a variance in some particulars only, and not in the entire scope of the declaration or complaint, and it is not fatal.[57]

VI. EVIDENCE.

A. Presumptions and Burden of Proof. As in other criminal cases,[58] the prosecution has the burden of overcoming the presumption of innocence which attends a defendant charged with conspiracy.[59] The prosecution must prove the existence of the conspiracy and defendant's connection with it at some time within the period of limitation,[60] and also that the offense charged was committed within the county in which the venue is laid.[61] Where under a statute it is necessary to

54. Forsyth *v.* Edminston, 11 How. Pr. (N. Y.) 408.

Improper joinder of actions.— An action to recover damages against a number of defendants for a fraudulent conspiracy cannot be joined with an action to obtain a cancellation of a certificate of deposit owned and held by one of such defendants alone, even though the certificate was obtained as one of the fruits of the conspiracy. Therefore, where facts sufficient to constitute both said causes of action are blended in the same petition, a demurrer for improper joinder should be sustained. Haskell County Bank *v.* Santa Fé Bank, 51 Kan. 39, 32 Pac. 624.

55. Jones *v.* Morrison, 31 Minn. 140, 16 N. W. 854; Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Suppl. 373; Martens *v.* O'Connor, 101 Wis. 18, 76 N. W. 774; Murray *v.* McGarigle, 69 Wis. 483, 34 N. W. 522.

56. Leigh *v.* Atwater, 2 Abb. N. Cas. (N. Y.) 419 (where, in an action for damages for conspiring to withhold evidence in a previous action, it was held that defendant might have an order for a bill of particulars setting forth specifically the evidence alleged to have been withheld or concealed, if oral, the names and residences of the witnesses who would or should have testified; if documentary, the writing suppressed); New York *v.* Marrener, 49 How. Pr. (N. Y.) 36 (where a bill of particulars was granted in an action against defendants for fraudulent combination and conspiracy by such defendants to procure from plaintiffs a large amount of money on the alleged false pretense that defendants had furnished to plaintiffs, or for their use, certain goods upon the false bills or vouchers procured by defendants).

57. Livermore *v.* Herschell, 3 Pick. (Mass.) 33 (where, in an action for conspiracy against three for obtaining goods upon credit by false and fraudulent representations, it was held that evidence that such representations were made by one alone in pursuance of a previous agreement and confederacy to that effect with the other two, but in their absence, would sustain a declaration charging them all with having made such representations, and that the variance was immaterial); Hardy *v.* Trick, 121 Mich. 251, 80 N. W. 33; Place *v.* Minster, 65 N. Y. 89.

58. See, generally, CRIMINAL LAW.

59. Com. *v.* Peck, 1 Brewst. (Pa.) 511; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333.

60. Thompson *v.* State, 106 Ala. 67, 17 So. 512; Ochs *v.* People, 25 Ill. App. 379 [*affirmed* in 124 Ill. 399, 16 N. E. 662].

61. Thompson *v.* State, 106 Ala. 67, 17 So. 512.

allege and establish a particular intent, the prosecution has the burden of making out the intent as a part of its case, but the burden shifts when the prosecution has established facts from which, no explanation being offered, the existence of the conspiracy may be reasonably inferred. It is then for defendants to explain their acts.[62]

B. Admissibility — 1. In General. General evidence of the conspiracy and the nature thereof may in the first instance be received as a preliminary step to the more particular evidence showing the participation of a defendant. "This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants."[63] It is hardly necessary to add that a defendant is not affected by such general proof unless supplemented by proof bringing the matter home to him or to an agent employed by him.[64]

2. Character of Evidence Admissible. The conspiracy may of course be shown by direct evidence,[65] and it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy[66] from the very nature of

62. Reg. *v.* Deasy, 15 Cox C. C. 334, a prosecution under 11 & 12 Vict. c. 12, § 3 (the Treason-Felony Act).

"Red Men's" Act.— Under W. Va. Code (1891), c. 148, § 10, if a band of persons was found using violence toward an individual it was presumed that such action was the result of a conspiracy. The presumption of fact which would naturally arise in such a case was made, by the statute, a presumption of law, and the burden was thereby thrown on the defense to show that such conspiracy did not exist. State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883.

63. Opinion of Judges, 2 B. & B. 284, 22 Rev. Rep. 662, 6 E. C. L. 147, per Abbott, C. J. In Rex *v.* Hammond, 2 Esp. 719, an indictment for a conspiracy to raise wages, the prosecution having stated that a plan for a combination of shoemakers had been formed and printed some years before for the regulation of their meetings, subscriptions for their mutual support, and other matters for their mutual government in forwarding their designs, the court allowed a member of the society to testify to such regulations and rules and that others acted under them in execution of the conspiracy charged against defendant as introductory to the proof that defendants were members of the society and equally implicated. Lord Kenyon said: "If a general conspiracy exists, you may go into general evidence of its nature, and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it, years after those terms have been established, and who may reside at a great distance from the place where the general plan is carried on; such as was done in the cases of the State Trials in the year 1745; where, from the nature of the charge, it was necessary to go into evidence of what was going on at Manchester, in France, Scotland, and Ireland, at the same time."

64. Opinion of Judges, 2 B. & B. 284, 22 Rev. Rep. 662, 6 E. C. L. 147.

65. See State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

Generally speaking the conspiracy must be proven by the acts of the party himself and of any other with whom it is attempted to connect him concurring together at the same time and to the same purpose or particular object. The evidence of the conspiracy is more or less strong according to the publicity or privacy of the object of such concurrence and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater the coincidence in the other the stronger is the evidence of conspiracy. 1 East P. C. 97 [*quoted* in Gardner *v.* Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91].

66. *Alabama.*— Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

Arkansas.— Doghead Glory *v.* State, 13 Ark. 236.

Colorado.— Solander *v.* People, 2 Colo. 48.

Connecticut.— State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; State *v.* Spalding, 19 Conn. 233, 48 Am. Dec. 158; Gardner *v.* Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91.

Delaware.— State *v.* Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

Georgia.— Dixon *v.* State, (Ga. 1902) 42 S. E. 357.

Indiana.— Tucker *v.* Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129; Archer *v.* State, 106 Ind. 426, 7 N. E. 225.

Iowa.— State *v.* Sterling, 34 Iowa 443.

Massachusetts.—Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

Michigan.— Grimes *v.* Bowerman, 92 Mich. 458, 52 N. W. 751.

Minnesota.— Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; People *v.* McKane, 143 N. Y. 455, 38 N. E. 950, 62 N. Y. St. 829; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Jones *v.* Baker, 7 Cow. (N. Y.) 445;

the case and the rule which admits this class of evidence applies equally in civil and criminal cases.[67]

3. LATITUDE ALLOWED IN ADMISSION OF EVIDENCE. In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to come to a satisfactory conclusion.[68] And it is no objection that the evidence covers a great many transactions and extends over a long period of time,[69] provided, however, that the facts shown have some bearing upon, and tendency to prove, the ultimate fact at issue.[70] But

In re Taylor, 1 City Hall Rec. (N. Y.) 192; *In re* Storm, 1 City Hall Rec. (N. Y.) 169.

Texas.— Hudson *v.* State, (Tex. Crim. 1902) 66 S. W. 668.

Wisconsin.— Patnode *v.* Westenhaver, 114 Wis. 460, 90 N. W. 467; Horton *v.* Lee, 106 Wis. 439, 82 N. W. 360.

United States.— U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Smith, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487, 3 Centr. L. J. 143, 1 Cinc. L. Bul. 52; The Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 680; U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288, 1 Cinc. L. Bul. 27, 8 Chic. Leg. N. 311, 22 Int. Rev. Rec. 106.

England.— Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126; Reg. *v.* Brittain, 3 Cox C. C. 76; Rex *v.* Parsons, 1 W. Bl. 392.

See 10 Cent. Dig. tit. "Conspiracy," §§ 26, 106; and *infra*, VI, C, 1.

"Such corrupt agreement of the parties, entered into in secret, can only in exceptional cases be established in any other manner." State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

67. Coleridge, J., in Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744.

68. *Indiana.*— Reinhold *v.* State, 130 Ind. 467, 30 N. E. 306.

Iowa.— Chew *v.* O'Hara, 110 Iowa 81, 81 N. W. 157; State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349; Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140.

Louisiana.— Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791.

Massachusetts.— Emmons *v.* Alvord, 177 Mass. 466, 50 N. E. 126; Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189; Com. *v.* Waterman, 122 Mass. 43.

Pennsylvania.— Com. *v.* Spink, 137 Pa. St. 255, 27 Wkly. Notes Cas. (Pa.) 37, 20 Atl. 680; Com. *v.* Tack, 1 Brewst. (Pa.) 511.

Vermont.— Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

United States.— Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619; U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Cole, 5 McLean (U. S.) 573, 25 Fed. Cas. No. 14,832.

England.— Rex *v.* Hunt, 3 B. & Ald. 566, 22 Rev. Rep. 485, 5 E. C. L. 327.

See 10 Cent. Dig. tit. "Conspiracy," § 106.

Assumption of an alias.— On trial for conspiracy to obtain goods under false pretenses it may be shown that Kennedy, a defendant, had assumed the name of Brown in the transaction shortly before the conspiracy, that he went under the name of St. Clair, and that his wife while living with him took the name of St. Clair, as having some tendency to show that the assumption of the name of Brown was a mere pretense and that the agreement that he should assume that name for the purpose of obtaining goods on credit was a conspiracy to cheat as charged. Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

Complaints showing public alarm.— On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble for the purpose of exciting terror in the minds of her majesty's subjects, evidence was given of several meetings at which defendants were present. It was held that the superintendent of police might testify that persons complained to him of being alarmed by these meetings, and that it was not necessary to call the persons who made the complaints. Reg. *v.* Vincent, 9 C. & P. 275, 38 E. C. L. 169.

Correspondence after flight.— A letter received by one indicted for a conspiracy from his housekeeper, who was intimately acquainted with his affairs, advising him to disguise himself for the purpose of the trial, is admissible as showing his relation to the case and his means of information. Com. *v.* Waterman, 122 Mass. 43.

Printing of circulars used by conspirators. —A conspirator not on trial having refused to testify on the ground that he might incriminate himself, it is competent, for the purpose of showing that he printed circulars used during the existence of the conspiracy and in furtherance of it, to prove the testimony given by him in regard to that matter in the trial of another case, not as the declaration of a co-conspirator but merely to show printing. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Good character is a fact, like all the other facts proven in the cause, to be weighed and estimated by the jury, and is especially proper to be shown in a case depending on circumstantial evidence. In a doubtful case it may turn the scale in favor of the accused. U. S. *v.* Lancaster, 44 Fed. 885, 10 L. R. A. 333; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487, 3 Centr. L. J. 143, 1 Cinc. L. Bul. 52. It must not be allowed, however, to obscure the other testimony in the case, and cannot justify an acquittal where the evidence of guilt is clear and convincing. U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896.

69. U. S. *v.* Wilson, 60 Fed. 890.

70. See State *v.* Shooter, 8 Rich. (S. C.) 72; Smith *v.* Nippert, 79 Wis. 135, 48 N. W.

much discretion is left to the trial court, in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact.[71]

4. Acts and Declarations of Co-Conspirators[72]— a. Admissibility — (i) *Statement of Rule.* If it be shown that several have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan, and with reference to the common object is, in the contemplation of the law, the act of all, and therefore proof of such act will be evidence against any of the others who were engaged in the conspiracy, and any declaration made by one of the parties in the absence of the others during the pendency of the illegal enterprise is not only evidence against himself, but against all the other conspirators who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate, as if made and committed by themselves.[73]

253. Thus on a charge of conspiracy to prosecute G, who was not guilty of the crime, the state may not prove that defendants prosecuted other parties who were guilty, and with whom G had no connection. Such proof could only create prejudice. The prosecution of guilty persons is not proof of a conspiracy to prosecute the innocent. State *v.* Walker, 52 Me. 195. And evidence that K wrote letters while in prison to one Flora Brown who was not called as a witness and whose relationship to him was not shown has no tendency to show that K's true name is Brown and is inadmissible for that purpose. Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

71. State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189; State *v.* Brady, 107 N. C. 822, 12 S. E. 325; Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269.

Acquittal of one charged as co-conspirator. — When one of several charged with conspiracy is acquitted the record of such acquittal is admissible in favor of another conspirator subsequently tried. Paul *v.* State, 12 Tex. App. 346.

"Anything done at any time, even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy, is admitted in evidence against such person." Kelly, C. B., in Reg. *v.* Stenson, 12 Cox C. C. 111, 117, 25 L. T. Rep. N. S. 666, where it was shown that at the date of the fraud charged one defendant had declared that he had called himself by the name of H and represented himself as one of the firm of H & Co., which was the name under which the frauds were committed.

Seeking interview.— On trial of an indictment charging a conspiracy to commit burglary, evidence that defendant was seeking an interview with his co-conspirator for the purpose of arranging to commit burglaries is admissible, as tending to show his willingness to conspire as charged in the indictment. Reinhold *v.* State, 130 Ind. 467, 30 N. E. 306.

72. As to admissibility of acts or declarations of co-conspirators generally see Criminal Law; Evidence.

73. *Arkansas.*— Clinton *v.* Estes, 20 Ark. 216.

Colorado.— Solander *v.* People, 2 Colo. 48.

Connecticut.— State *v.* Gannon, (Conn. 1902) 52 Atl. 727; Gardner *v.* Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91.

Delaware.— State *v.* Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

Indiana.— McKee *v.* State, 111 Ind. 378, 12 N. E. 510.

Iowa.— State *v.* Myers, 19 Iowa 517; State *v.* Shelledy, 8 Iowa 477; State *v.* Nash, 7 Iowa 347.

Massachusetts.— Com. *v.* Waterman, 122 Mass. 43; Com. *v.* O'Brien, 12 Cush. (Mass.) 84.

Mississippi.— Browning *v.* State, 30 Miss. 656.

Missouri.— State *v.* Gathin, 170 Mo. 354, 70 S. W. 885.

Nebraska.—Brown *v.* Winterstein, 21 Nebr. 113, 31 N. W. 246.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503; Dewey *v.* Moyer, 72 N. Y. 70; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Cuyler *v.* McCartney, 40 N. Y. 221; People *v.* Sharp, 45 Hun (N. Y.) 460; Matthews *v.* Shankland, 25 Misc. (N. Y.) 604, 56 N. Y. Suppl. 123; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People *v.* Bassford, 3 N. Y. Crim. 219.

North Carolina.— State *v.* Anderson, 92 N. C. 732.

Pennsylvania.— Hinckman *v.* Richie, Brightly (Pa.) 143; Weil *v.* Cohn, 4 Pa. Super. Ct. 443.

Texas.— Atkinson *v.* State, 34 Tex. Crim. 424, 30 S. W. 1064; McKenzie *v.* State, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795; McFadden *v.* State, 28 Tex. App. 241, 14 S. W. 128; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655; Kennedy *v.* State, 19 Tex. App. 618; Pierson *v.* State, 18 Tex. App. 524; Post *v.* State, 10 Tex. App. 598; Avery

(II) *Reason For Rule.* Such evidence is admissible as being part of the *res gestæ*.[74] This rule of evidence is founded upon principles which apply to agencies and partnerships. And it is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or the commission of a crime, that the association should be bound by the acts of one of its members in carrying out the design.[75]

(III) *Extent and Limits of Rule* — (A) *Acts or Declarations of Person Not a Defendant.* The rule applies as well to the acts and declarations of a co-conspirator who is not himself a defendant in the case.[76]

(B) *Acts and Declarations Not in Aid of or During Existence of Conspiracy.* Acts and declarations of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy.[77] So the acts and declarations must occur during the

v. State, 10 Tex. App. 199; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Utah.— People *v.* Hampton, 4 Utah 258, 9 Pac. 508.

Wisconsin.— Tucker *v.* Finch, 66 Wis. 17, 27 N. W. 817.

United States.— U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Lancaster, 44 Fed. 885, 896, 10 L. R. A. 333; U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

England.— Mulcahy *v.* Reg., L. R. 3 H. L. 306; Rex *v.* Stone, 1 East P. C. 79, 99, 6 T. R. 527; Rex *v.* Salter, 5 Esp. 125.

Canada.— Reg. *v.* Connolly, 25 Ont. 151.

See 10 Cent. Dig. tit. "Conspiracy," § 102.

Letters of directors to officers of bank.— Where directors of a bank are charged with conspiracy to defraud, letters or statements by each or any of them to officers of the bank are admissible against them all. Reg. *v.* Brown, 7 Cox C. C. 442.

Statements by agents.— Where conspirators, in pursuance of their design, organize an association, evidence of an agent employed thereafter, such agency having been shown, is admissible against his associates as showing what he did and said in their absence in furtherance of such design. McKee *v.* State, 111 Ind. 378, 12 N. E. 510. To the same effect see Brackett *v.* Griswold, 14 N. Y. St. 449.

74. *Alabama.*— See Smith *v.* State, 52 Ala. 407.

Colorado.— Solander *v.* People, 2 Colo. 48.

Connecticut.— State *v.* Gannon, (Conn. 1902) 52 Atl. 727.

Iowa.— Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Kentucky.— Metcalfe *v.* Connor, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340.

Maine.— State *v.* Soper, 16 Me. 292, 33 Am. Dec. 665.

Michigan.— Beebe *v.* Knapp, 28 Mich. 53.

Mississippi.— Browning *v.* State, 30 Miss. 656.

Nebraska.— Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342.

Ohio.— Clawson *v.* State, 14 Ohio St. 234; Fouts *v.* State, 7 Ohio St. 471.

Vermont.— Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

United States.— American Fur Co. *v.* U. S., 2 Pet. (U. S.) 358, 7 L. ed. 450; U. S. *v.* McKee, 3 Dill. (U. S.) 546, 26 Fed. Cas. No. 15,685, 3 Centr. L. J. 95, 23 Pittsb. Leg. J. (Pa.) 107.

England.— Reg. *v.* Shellard, 9 C. & P. 277, 38 E. C. L. 170.

See 10 Cent. Dig. tit. "Conspiracy," §§ 25, 102.

Defense.— So also as being part of the *res gestæ* letters written by one defendant to another during the time when the conspiracy was alleged to exist are admissible to disprove the allegation of fraudulent conspiracy (Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786), and to show that the writer was not a participator in the fraud but was himself deceived (Rex *v.* Whitehead, 1 C. & P. 67, 12 E. C. L. 49).

75. U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

76. People *v.* Geiger, 49 Cal. 643; State *v.* Jacobs, 10 Ohio S. & C. Pl. Dec. 252; Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803; Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269; U. S. *v.* Cassidy, 67 Fed. 698. See also People *v.* Hall, 51 N. Y. App. Div. 57, 64 N. Y. Suppl. 433, holding that on conspiracy to extort money, where the actual extortion of a specific sum is alleged and proved and a continuing design to blackmail is shown, a letter from one proven confederate not on trial, written after the date of the specific extortion, but during the further carrying out of the conspiracy, is admissible against each of his confederates.

Acts of one acquitted.— Evidence of the acts and declarations of one of the alleged conspirators who has been acquitted is inadmissible against other defendants because if the first **defendant** was not a co-conspirator his acts and declarations could not be binding upon them. Paul *v.* State, 12 Tex. App. 346.

77. *Iowa.*— Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34.

Ohio.— Fouts *v.* State, 7 Ohio St. 471.

life of the combination, that is after the formation of the corrupt agreement,[78] and before the consummation or abandonment of the object of the conspiracy.[79]

South Carolina.—State *v.* Simons, 4 Strobh. (S. C.) 266.

Texas.— Blum *v.* Jones, 86 Tex. 492, 25 S. W. 694; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

England.— Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126; Reg. *v.* Duffield, 5 Cox C. C. 404.

See 10 Cent. Dig. tit. "Conspiracy," §§ 25, 102.

Time of joining conspiracy.— It is not necessary that the person whose declarations are offered should have been a party to the original concoction of the fraud if he, after full knowledge that it was committed, attempts to reap the benefits of the fraudulent transaction. Peterson *v.* Speer, 29 Pa. St. 478. Each co-conspirator is bound by declarations of each of his co-conspirators done and said during the continuance of the conspiracy touching the object and conduct of the conspiracy. It is immaterial at what time he became connected with it, whether at its inception, at the very instant before the full accomplishment of the purpose of the conspiracy, just before its final abandonment, or at any intermediate time. Blain *v.* State, 33 Tex. Crim. 236, 26 S. W. 63; U. S. *v.* Logan, 45 Fed. 872; Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744. So at the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, evidence that fraudulent voters were spoken to by one of the conspirators before all of them had come into the scheme is admissible, in connection with proof that the others did come in and by implication adopted the acts. Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

78. *Alabama.*— Scott *v.* State, 30 Ala. 503.

California.— People *v.* Irvine, 77 Cal. 494, 20 Pac. 56.

Iowa.— State *v.* Grant, 86 Iowa 216, 53 N. W. 120; Taylor County *v.* Standley, 79 Iowa 666, 44 N. W. 911.

Michigan.—People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

Missouri.— State *v.* May, 142 Mo. 135, 43 S. W. 637.

Nevada.— State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

Oregon.— State *v.* Brown, 7 Oreg. 186.

See 10 Cent. Dig. tit. "Conspiracy," §§ 25, 102.

Applications of doctrine.— When the evidence tended to show a conspiracy between the woman on trial and her codefendant to kill the former's husband, statements made by her prior to the time when the codefendant began work for her husband which was the earliest time as to which the evidence tended to establish any intimacy between the accused, were inadmissible to inculpate him. People *v.* Kief, 126 N. Y. 661, 27 N. E. 556, 37 N. Y. St. 377. So where K and T were sued civilly for having entered into a conspiracy, by which the latter was to sustain the credit of the former so as to enable K to make purchases of goods and pay a debt owing by him to T, evidence of representations made by K to a commercial agency as to his financial standing, some time before the conspiracy was alleged to have been entered into, was not admissible. Train *v.* Taylor, 51 Hun (N. Y.) 215, 4 N. Y. Suppl. 492, 21 N. Y. St. 47.

79. *Arkansas.*— Clinton *v.* Estes, 20 Ark. 216.

California.— People *v.* Irvine, 77 Cal. 494, 20 Pac. 56.

Iowa.— Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; State *v.* Weaver, 57 Iowa 730, 11 N. W. 675; State *v.* Westfall, 49 Iowa 328.

Louisiana.— State *v.* Jackson, 29 La. Ann. 354.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Mississippi.— Browning *v.* State, 30 Miss. 656.

Missouri.— State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666, where it was said, however, that such evidence was admissible against the actor.

New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503; Stone *v.* People, 13 Hun (N. Y.) 263.

North Carolina.— State *v.* Brady, 107 N. C. 822, 12 S. E. 325; State *v.* Dean, 35 N. C. 63.

Pennsylvania.— Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Zuern, 16 Pa. Super. Ct. 588; Weil *v.* Cohn, 4 Pa. Super. Ct. 443.

Texas.— Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Bookser *v.* State, 26 Tex. App. 593, 10 S. W. 219; Martin *v.* State, 25 Tex. App. 557, 8 S. W. 682; Willey *v.* State, 22 Tex. App. 408, 3 S. W. 570.

Vermont.— State *v.* Thibeau, 30 Vt. 100.

Virginia.— Oliver *v.* Com., 77 Va. 590.

England.— Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126.

See 10 Cent. Dig. tit. "Conspiracy," §§ 25, 102.

Applications of doctrine.—Where the charge was a conspiracy to make a false arrest, arrests made subsequently to that complained of cannot be shown. State *v.* Davies, 80 Mo. App. 239. So on an information against T and B for a conspiracy to cause and procure goods to be imported without payment of part of the customs dues, by entering the goods as less in quantity and quality than they really were, it was held that evidence of a memorandum made by T on the counterfoil of a check drawn by him that part of the money arising from the fraud was received by B was inadmissible, it being a declaration of T after the principal transac-

Declarations made by one to another not in furtherance of the design but after the former had abandoned the conspiracy are mere confessions and not admissible against the other conspirators.[80]

b. Necessity of Proving Conspiracy as Basis of Admission. On account of the difficulty in proving the conspiracy and bringing the guilty to justice there is no class of cases in which it is more important that the trial judge should have a large discretion as to the order in which evidence should be received, and this discretion cannot be reviewed on error except in clear cases of abuse.[81] It is frequently said that the acts and declarations of one conspirator cannot be admitted in evidence against his fellow conspirator until proof has been made of the existence of the conspiracy.[82] There is, however, no unvarying rule to this effect.[83] According to the great weight of authority the order in which the testimony shall be received is largely in the discretion of the trial court. If the circumstances of the case are so peculiar and urgent as to require it, the acts and declarations of a conspirator may be introduced in the first instance before proof of the agreement.[84] This is often done under a promise of the prosecution to establish the combination at a later stage of the case.[85] Such evidence, however, is in the nature of a confession and can operate only against the person whose acts and declarations are shown until the conspiracy is made out *prima facie*,[86]

tion was complete. Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126.

Conspiracy terminated by arrest.—The acts and declarations of a defendant are not admissible as against his codefendant where they were made subsequently to the arrest of the latter and therefore after he had ceased to act in carrying out the common purpose. State *v.* Grant, 86 Iowa 216, 53 N. W. 120. See also People *v.* Bleeker, 2 Wheel. Crim. (N. Y.) 256; State *v.* Dyer, 67 Vt. 690, 32 Atl. 814.

Death of party making admissions.— The admissions of one defendant as to his own illegal and improper conduct cannot be received in evidence after his death in an action for conspiracy against his surviving codefendants. Gaunce *v.* Backhouse, 37 Pa. St. 350.

80. State *v.* Simons, 4 Strobh. (S. C.) 266; Willey *v.* State, 22 Tex. App. 408, 23 S. W. 570; Smith *v.* State, 21 Tex. App. 107, 17 S. W. 552; Ricks *v.* State, 19 Tex. App. 308; Holden *v.* State, 18 Tex. App. 91; Jones *v.* Com., 31 Gratt. (Va.) 836; Hunter *v.* Com., 7 Gratt. (Va.) 641, 56 Am. Dec. 121.

81. People *v.* Saunders, 25 Mich. 119, per Cooley, J.

82. Territory *v.* Turner, (Ariz. 1894) 37 Pac. 368; Browning *v.* State, 30 Miss. 656; Page *v.* Parker, 40 N. H. 47; Reg. *v.* Blake, 6 Q. B. 126.

83. Reg. *v.* Connolly, 12 Can. L. T. 171.

84. *Connecticut.*— State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

Kansas.— State *v.* Miller, 35 Kan. 328, 10 Pac. 865.

North Carolina.—State *v.* Jackson, 82 N. C. 565.

Texas.— Luttrell *v.* State, 31 Tex. Crim. 493, 21 S. W. 248; Harris *v.* State, 31 Tex. Crim. 411, 20 S. W. 916; Loggins *v.* State, 12 Tex. App. 65.

United States.— Drake *v.* Stewart, 76 Fed. 140, 22 C. C. A. 104.

England.— Reg. *v.* Brittain, 3 Cox C. C. 76.

In Mississippi, however, it seems that this practice is not allowable, the court declaring that it is impossible to reconcile it with the admitted principles of evidence or the great object of the law, to secure a fair and impartial trial. Browning *v.* State, 30 Miss. 656.

85. *Iowa.*— Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140; State *v.* Grant, 86 Iowa 216, 53 N. W. 120 [*citing* 1 Greenleaf Ev. 111; 2 Wharton Crim. L. 1401].

Nevada.— State *v.* Ward, 19 Nev. 297, 7 Pac. 133.

New York.— Place *v.* Minster, 65 N. Y. 89.

North Carolina.— State *v.* Anderson, 92 N. C. 732.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

86. *California.*— People *v.* Brotherton, 47 Cal. 388.

Colorado.— Rollins *v.* Pueblo County, 15 Colo. 103, 25 Pac. 319.

Connecticut.— State *v.* Thompson, 69 Conn. 720, 38 Pac. 868.

Iowa.— State *v.* Nash, 7 Iowa 347.

Kansas.— State *v.* Winner, 17 Kan. 298.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

New York.— New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503; Train *v.* Taylor, 51 Hun (N. Y.) 215, 4 N. Y. Suppl. 492, 21 N. Y. St. 47.

North Carolina.— State *v.* Brady, 107 N. C. 822, 12 S. E. 325.

South Carolina.—State *v.* Cardoza, 11 S. C. 195.

Texas.— Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

United States.— U. S. *v.* Wilson, 60 Fed. 890; U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

the jury being cautioned not to let such confessions or admissions prejudice other defendants on trial.[87]

c. Requirements as to Preliminary Proof. The preliminary evidence of the combination which will justify the jury in taking into consideration, as affecting a codefendant, the acts and declarations of a conspirator, need not be conclusive on the question of the conspiracy. All that can be required is that in the opinion of the court it shall show *prima facie* that the conspiracy existed.[88] It is sufficient, according to some cases, if the whole of the evidence introduced on the trial taken together shows that such conspiracy actually existed,[89] while other authorities distinctly hold that there must be sufficient proof *aliunde* to establish *prima facie* the fact of a conspiracy.[90] And it is undoubtedly true, as was said

England.— Reg. *v.* Brittain, 3 Cox C. C. 76.

87. *California.*— People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

Indiana.— Moore *v.* Shields, 121 Ind. 267, 23 N. E. 89.

Iowa.— State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349.

Kansas.— State *v.* Miller, 35 Kan. 328, 10 Pac. 865.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Michigan.— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

New York.— Miller *v.* Barber, 66 N. Y. 558.

Virginia.— Jones *v.* Com., 31 Gratt. (Va.) 836.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

Motion to strike out.—The opening of the case by the prosecution and any further explanations that may be called for will generally enable the judge to exercise his discretion in such manner as, while not shutting out proper evidence, shall at the same time protect the accused from being prejudiced by testimony which in the end shall prove irrelevant, or not legally competent to charge the party on trial, and wherever facts are proved which depend upon other facts to give them a bearing upon the guilt of the accused, if such other facts are not put in he has his remedy by motion to strike out the evidence. People *v.* Saunders, 25 Mich. 119, per Cooley, J.

88. *Colorado.*— Solander *v.* People, 2 Colo. 48.

Massachusetts.— Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832; Com. *v.* Waterman, 122 Mass. 43; Com. *v.* Crowninshield, 10 Pick. (Mass.) 497.

Nebraska.— Brown *v.* Winterstein, 21 Nebr. 113, 31 N. W. 246.

New Hampshire.— Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

North Carolina.— State *v.* Anderson, 92 N. C. 732.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Fouts *v.* State, 7 Ohio St. 471.

Pennsylvania.— Com. *v.* O'Brien, 140 Pa. St. 555, 21 Atl. 385; Com. *v.* Zuern, 16 Pa. Super. Ct. 588; Donnelly *v.* Com., 6 Wkly. Notes Cas. (Pa.) 104.

Vermont.— State *v.* Thibeau, 30 Vt. 100; Windover *v.* Robbins, 2 Tyler (Vt.) 1.

A division of the proceeds of the fraud has been held sufficient in a civil case. Kimmell *v.* Geeting, 2 Grant (Pa.) 125.

89. *California.*— People *v.* Daniels, 105 Cal. 262, 38 Pac. 720.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, where it was held that the conspiracy between the defendants may be proved by their individual acts.

Kansas.— State *v.* Winner, 17 Kan. 298, per Valentine, J.

United States.— U. S. *v.* Wilson, 60 Fed. 890, 898, where it was said that "any joint action upon a material point or a collection of independent but co-operating acts, by persons closely associated with each other, is sufficient to enable the jury to infer the concurrence of sentiment."

Canada.— Reg. *v.* Connolly, 25 Ont. 151.

90. Com. *v.* Waterman, 122 Mass. 43; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406; Hamilton *v.* Smith, 39 Mich. 222; People *v.* Saunders, 25 Mich. 119; Cuyler *v.* Cartney, 40 N. Y. 221.

Acts occurring after conspiracy formed.— In no case can acts occurring after the conspiracy is formed be referred to to prove the existence of the conspiracy. People *v.* Brickner, 15 N. Y. Suppl. 528 [*citing* People *v.* Squire, 6 N. Y. Crim. 475; People *v.* Kerr, 6 N. Y. Crim. 406]. So where several were on trial for conspiring to defraud the government out of internal revenue taxes and one defendant testified that he gave money gained from the conspiracy to another at the end of every week for delivery to the defendant, the subsequent declarations of the one to whom the money was given before the one from whom he received it as to his disposition of such money, are admissible as a part of the *res gestæ* but not for the purpose of showing the fact of the conspiracy or connecting defendant therewith, and should be disregarded by the jury unless defendant's connection with the combination is shown by independent evidence. U. S. *v.* McKee, 3 Dill. (U. S.) 546, 28 Fed. Cas. No. 15,685, 3 Centr. L. J. 100, 22 Pittsb. Leg. J. (Pa.) 107.

Proposal of the same crime to another.— Where it was charged that the defendant in order to commit the fraud impersonated a confederate by wearing his clothes, it was

in a recent case, that "if an act or declaration is of such a character as to tend to establish the existence of the conspiracy, then it should not be excluded merely because it is also of such a character as to bind all the conspirators by its consequences in the event of the establishment of the conspiracy."[91] But such acts and declarations cannot be used to show the conspiracy without other independent evidence.[92]

5. TESTIMONY OF CO-CONSPIRATORS.[93] A co-conspirator is an accomplice and although uncorroborated[94] is always a competent witness.[95] The fact that he is an accomplice operates, not against the admissibility of his testimony, but only against its credibility.[96]

6. OVERT ACTS. Although in the absence of statutory changes it is not necessary for the purpose of rendering a person criminally liable to prove that any overt acts were done in pursuance of the conspiracy, the common-law offense being complete when the combination was formed and the agreement entered into,[97] such acts may nevertheless be shown since from them an inference may be drawn as to the object of the conspiracy.[98] It sometimes occurs that a conspiracy can be proved in no other way.[99] If, however, overt acts are specified in the indictment, the proof must be confined to the acts so specified.[1]

7. COLLATERAL FACTS WITH WHICH PARTY CONNECTED. Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same

held proper to show that the defendant proposed the scheme to a person not named in the information. People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

91. Irvine, C., in Farley *v.* Peebles, 50 Nebr. 723, 7 N. W. 231. See also to the same effect Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126, per Williams, J.; Ford *v.* Elliott, 4 Exch. 78, 18 L. J. Exch. 447; Reg. *v.* Connolly, 25 Ont. 151, per Ferguson, J.

92. People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

93. As to testimony of co-conspirators generally see CRIMINAL LAW.

94. U. S. *v.* McKee, 3 Dill. (U. S.) 546, 28 Fed. Cas. No. 15,685, 3 Centr. L. J. 100, 22 Pittsb. Leg. J. (Pa.) 107.

95. *Massachusetts.*— Bean *v.* Bean, 12 Mass. 20.

New York.— Moore *v.* Tracy, 7 Wend. (N. Y.) 229.

Texas.— Cohea *v.* State, 11 Tex. App. 153.

United States.— U. S. *v.* Sacia, 2 Fed. 754.

Canada.— Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

A plea of guilty by a co-conspirator on trial is not equivalent to a conviction as rendering him incompetent to testify. U. S. *v.* Wilson, 60 Fed. 890.

96. See *infra*, VI, C, 2.

97. Thompson *v.* State, 106 Ala. 67, 17 So. 512; State *v.* Ripley, 31 Me. 386.

98. *Illinois.*— Ochs *v.* People, 25 Ill. App. 379 [*affirmed* in 124 Ill. 399, 16 N. E. 662].

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Murray, 15 Me. 100 (where it was said that in conspiracy as in treason the overt acts are laid merely as evidence of the principal charge).

Massachusetts.— Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997. See also Com. *v.* Tibbetts, 2 Mass. 536.

New York.— People *v.* Buckner, 15 N. Y. Suppl. 528, 8 N. Y. Crim. 217.

Texas.— Bailey *v.* State, (Tex. Crim. 1900) 59 S. W. 900.

United States.— U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

England.— Reg. *v.* Whitehouse, 6 Cox C. C. 38; Reg. *v.* Esdaile, 1 F. & F. 213. See also Rex *v.* Roberts, 1 Campb. 399, 2 Leach C. C. 987 note.

See 10 Cent. Dig. tit. "Conspiracy," § 104; and *supra*, VI, B, 4.

Acts beyond jurisdiction.— The circumstances by which the conspiracy can be established vary according to the objects to be accomplished, and the field of operations of the conspirators may extend over several states as the necessities of the conspirators require. Therefore the fact that the act was performed outside of the state in the course of the conspiracy does not affect the proof of it. Bloomer *v.* State, 48 Md. 521. See also State *v.* Soper, (Iowa 1902) 91 N. W. 774 (acts done in another county); Rex *v.* Bowen [*cited* in Rex *v.* Brisac, 4 East 164, 7 Rev. Rep. 551]; Reg. *v.* Connolly, 25 Ont. 151.

99. Bailey *v.* State, (Tex. Crim. 1900) 59 S. W. 900.

1. Reg. *v.* Steel, C. & M. 337, 2 Moody C. C. 246, 41 E. C. L. 187; Rex *v.* Hamilton, 7 C. & P. 448, 32 E. C. L. 701.

motive, and it is immaterial that they show the commission of other crimes.[2] The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances.[3]

C. Weight and Sufficiency — 1. In General. Although the fraudulent and corrupt combination, the common design, is the essential element, it is not necessary to prove that defendants came together and actually agreed in terms to have this common design and to pursue it by common means and so carry it into execution. Such proof can seldom be made and therefore is not required. It is sufficient to justify the jury in finding a conspiracy if it is shown that the persons charged with conspiring pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing.[4]

2. *Connecticut.*— State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Luckey *v.* Roberts, 25 Conn. 486.

Indiana.— Card *v.* State, 109 Ind. 415, 9 N. E. 591.

Iowa.— State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349; State *v.* Lewis, 96 Iowa 286, 65 N. W. 295.

Massachusetts.— Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Michigan.— People *v.* Saunders, 25 Mich. 119.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883.

Ohio.— State *v.* Jacobs, 10 Ohio S. & C. Pl. Dec. 252, 7 Ohio N. P. 261.

Pennsylvania.— Respublica *v.* Hevice, 2 Yeates (Pa.) 114; Com. *v.* Spencer, 6 Pa. Super. Ct. 256.

United States.— Bottomley *v.* U. S., 1 Story (U. S.) 135, 3 Fed. Cas. No. 1,688.

England.— Reg. *v.* Stenson, 12 Cox C. C. 111, 25 L. T. Rep. N. S. 666; Rex *v.* Levy, 2 Stark, 458, 3 E. C. L. 488.

See 10 Cent. Dig. tit. "Conspiracy," § 101.

Evidence limited by bill of particulars.— A bill of particulars in a criminal case limits and makes specific the charge to be proved and narrows the evidence to the specifications. So where the charge is a conspiracy to defraud a county by rendering false bills in connection with a certain public building and the bill of particulars limits the acts to such improvement it is not permissible to show bills rendered and acts done in connection with other improvements, especially where such evidence was not necessary to show conspiracy as to the building named. McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547 [*distinguishing* Ochs *v.* People, 124 Ill. 399, 16 N. E. 662]. To the same effect see Reg. *v.* Esdaile, 1 F. & F. 213.

To prove a conspiracy to commit a particular fraud, it may be shown that the same conspirators perpetrated similar frauds on third persons about the same time or in execution of the same plan.

Connecticut.— Luckey *v.* Roberts, 25 Conn. 486; Gardner *v.* Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91.

Indiana.— Card *v.* State, 109 Ind. 415, 9 N. E. 591.

Iowa.— State *v.* Soper, (Iowa 1902) 91 N. W. 774; State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349.

Massachusetts.— Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; Brackett *v.* Griswold, 14 N. Y. St. 449; People *v.* Bleeker, 2 Wheel. Crim. (N. Y.) 256; *In re* Hitchcock, 6 City Hall Rec. (N. Y.) 43.

Pennsylvania.— Com. *v.* Spencer, 6 Pa. Super. Ct. 256.

England.— Rex *v.* Roberts, 1 Campb. 399, 2 Leach C. C. 987 note.

See 10 Cent. Dig. tit. "Conspiracy," § 101.

3. Roscoe Crim. Ev. 88 [*approved* in People *v.* Saunders, 25 Mich. 119].

4. Coleridge, J., in Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744. This language has been quoted with approval by text-book writers and judges. See 3 Greenleaf Ev. § 93; 2 Wharton Crim. L. § 1398; and the following cases:

California.— People *v.* Bentley, 75 Cal. 407, 17 Pac. 436.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; O'Donnell *v.* People, 41 Ill. App. 23.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1.

Nebraska.— Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231.

Pennsylvania.— Com. *v.* Ridgway, 2 Ashm. (Pa.) 247.

Texas.— Mason *v.* State, 31 Tex. Crim. 306, 20 S. W. 564; Smith *v.* State, 21 Tex. App. 107, 17 S. W. 552.

United States.— Reilley *v.* U. S., 106 Fed. 896, 46 C. C. A. 25; U. S. *v.* Sacia, 2 Fed. 754; *In re* Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 680; U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371.

England.— Mulcahy *v.* Reg., L. R. 3 H. L. 306; Reg. *v.* Brown, 7 Cox C. C. 442.

2. Testimony of Co-Conspirators. Although the testimony of a co-conspirator is always admissible, it must be scrutinized with care. Although this is not a positive rule of law, yet juries are generally cautioned that there ought not to be a conviction on such testimony without corroboration;[5] and the corroboration must come from other evidence in the case aside from the testimony of other co-conspirators.[6] The weight to be attached to such evidence is for the jury alone who must consider it in view of the other evidence and reach their conclusion upon a view of the whole case.[7]

3. Reasonable Doubt — a. In Criminal Cases. Where a conviction of the crime of conspiracy is sought as in other criminal cases the jury must acquit if upon any reasonable hypothesis they can reconcile the evidence with defendant's innocence. And as in prosecutions for other crimes it is sufficient to sustain a conviction, if upon consideration of all the evidence the jury are satisfied beyond a reasonable doubt of defendant's guilt.[8]

Canada.— Reg. *v.* Connolly, 25 Ont. 151; Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

See 10 Cent. Dig. tit. "Conspiracy," § 105.

Evidence held sufficient.— The evidence was held sufficient to justify a finding of conspiracy in the following cases:

Connecticut.— State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; O'Donnell *v.* People, 41 Ill. App. 23.

Iowa.— Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140; State *v.* Sterling, 34 Iowa 443.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189; Com. *v.* Warren, 6 Mass. 74.

Michigan.— People *v.* Petheram, 64 Mich. 252, 31 N. W. 188.

New York.— People *v.* Goslin, 171 N. Y. 627, 63 N. E. 1120 [*affirming* 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520]; People *v.* Hall, 51 N. Y. App. Div. 57, 64 N. Y. Suppl. 433, 15 N. Y. Crim. 29; People *v.* Mosher, 1 Wheel. Crim. (N. Y.) 246; *In re* Heath, 2 City Hall Rec. (N. Y.) 54; *In re* Malone, 2 City Hall Rec. (N. Y.) 22.

North Carolina.— State *v.* Powell, 121 N. C. 635, 28 S. E. 525.

Pennsylvania.— Com. *v.* Spink, 137 Pa. St. 255, 20 Atl. 680; Weil *v.* Cohn, 4 Pa. Super. Ct. 443.

Wisconsin.— Patnode *v.* Westenhaver, 114 Wis. 460, 90 N. W. 467.

England.— Reg. *v.* Whitehouse, 6 Cox C. C. 38; Reg. *v.* Timothy, 1 F. & F. 39.

Evidence held insufficient.— The evidence was held insufficient to sustain a finding of conspiracy in the following cases:

Arizona.—Territory *v.* Turner, (Ariz. 1894) 37 Pac. 368.

Illinois.— People *v.* Jacobs, 72 Ill. App. 286.

Kansas.— State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.

Minnesota.— Benton *v.* Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

Missouri.— State *v.* May, 142 Mo. 135, 43 S. W. 637.

New York.— People *v.* Chandler, 54 N. Y. App. Div. 111, 66 N. Y. Suppl. 391, 15 N. Y. Crim. 165; Brackett *v.* Griswold, 59 Hun (N. Y.) 617, 13 N. Y. Suppl. 192, 35 N. Y. St. 875; People *v.* Keys, 1 Wheel. Crim. (N. Y.) 275.

South Carolina.—State *v.* Simons, 4 Strobh. (S. C.) 266.

Texas.— Loggins *v.* State, 8 Tex. App. 434; Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731.

Wisconsin.— Horton *v.* Lee, 106 Wis. 439, 82 N. W. 360.

United States.— Drake *v.* Stewart, 76 Fed. 140, 22 C. C. A. 104; U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

England.— Reg. *v.* Boulton, 12 Cox C. C. 87; Reg. *v.* Read, 6 Cox C. C. 134; Reg. *v.* Whitehouse, 6 Cox C. C. 38; Reg. *v.* Barry, 4 F. & F. 389.

5. People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Suppl. 674; Cohea *v.* State, 11 Tex. App. 153; U. S. *v.* Logan, 45 Fed. 872.

6. U. S. *v.* Logan, 45 Fed. 872.

7. Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; U. S. *v.* Lancaster, 44 Fed. 885, 896, 10 L. R. A. 333; Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

In U. S. v. Sacia, 2 Fed. 754, 758, the jury were charged upon this point as follows: "You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. Where it is supported in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it, unless, after the exercise of extreme caution, it produces in your minds the most positive conviction of its truth."

8. Thompson *v.* State, 106 Ala. 67, 17 So. 512; People *v.* Goslin, 171 N. Y. 627, 63 N. E. 1120 [*affirming* 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520]; State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883; Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619; Reilley *v.* U. S., 106 Fed. 896, 46 C. C. A. 25; U. S. *v.* Newton, 52 Fed. 275; U. S. *v.* Lancaster, 44 Fed. 885, 896, 10 L. R. A. 333; U. S. *v.* Babcock, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487,

b. In Civil Cases. The doctrine of reasonable doubt has no place, however, in a civil suit for damages, where it is sufficient if the evidence is full, clear, and satisfactory,[9] and the conspiracy established by a preponderance of the evidence.[10]

VII. TRIAL.

A. In Criminal Prosecutions — 1. Venue and Jurisdiction. The venue in an indictment for conspiracy may be laid in the county in which the agreement was entered into, or in any county in which any overt act was done by any of the conspirators in futherance of the common design.[11] If the conspiracy is entered into within the jurisdiction of the court, the parties thereto are triable in that jurisdiction, notwithstanding the offense was to be committed without the jurisdiction;[12] and if a conspiracy is formed without the jurisdiction, an overt act committed by one of the conspirators within the jurisdiction is evidence of the crime within the jurisdiction where the overt act is committed.[13]

2. Severance as to Joint Defendants. While there is one decision that defendants jointly indicted for a conspiracy cannot be awarded separate trials,[14] the weight of authority is to the effect that prosecutions for conspiracy are proper cases for severance as to the parties defendant.[15] Unless it is so provided by statute,[16] separate trials are not a matter of right, but the court is vested with

3 Centr. L. J. 143, 1 Cinc. L. Bul. 52; U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832; *In re* Mussel Slough Case, 6 Sawy. (U. S.) 612, 5 Fed. 680; U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896; U. S. *v.* Hutchins, 26 Fed. Cas. No. 15,430, 1 Cinc. L. Bul. 371.

As to reasonable doubt generally see Criminal Law.

9. Biever *v.* Herr, 1 Pearson (Pa.) 510.

10. Martin *v.* Leslie, 93 Ill. App. 44.

11. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Hazen *v.* Com., 23 Pa. St. 355; Com. *v.* Tack, 1 Brewst. (Pa.) 511; Rex *v.* Bowen [*cited* in Reg. *v.* Brisac, 4 East 164, 171, 7 Rev. Rep. 551]; Reg. *v.* Connolly, 25 Ont. 151. *Compare* Reg. *v.* Best, 1 Salk. 174.

In a prosecution in the federal courts for a conspiracy the defendants may be tried in any district where the overt acts were committed. U. S. *v.* Rindskopf, 6 Biss. (U. S.) 259, 27 Fed. Cas. No. 16,165, 8 Chic. Leg. N. 9, 21 Int. Rev. Rec. 326, 1 N. Y. Wkly. Dig. 223.

If a conspiracy be formed at sea, the venue may be laid in any county in which an overt act was committed by one of the conspirators on land. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Rex *v.* Brisac, 4 East 164, 7 Rev. Rep. 551.

12. Com. *v.* Corlies, 8 Phila. (Pa.) 450.

If the conspiracy was entered into in one state and one or more overt acts perpetrated there, the courts of that state have jurisdiction, although the act which was the subject of the conspiracy was performed in another state. *Ex p.* Rogers, 10 Tex. App. 655, 88 Am. Rep. 654. And see Thompson *v.* State, 106 Ala. 67, 17 So. 512.

13. Reg. *v.* Kohn, 4 F. & F. 68.

14. Com. *v.* Manson, 2 Ashm. (Pa.) 31.

Severance as to joint defendants see, generally, Trial.

15. *California.*— People *v.* Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716.

Tennessee.— Watson *v.* State, 16 Lea (Tenn.) 604.

Texas.— Willey *v.* State, 22 Tex. App. 408, 3 S. W. 370.

Wisconsin.— Casper *v.* State, 47 Wis. 535, 2 N. W. 1117.

England.— Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848, 12 L. J. M. C. 135, 48 E. C. L. 49; Rex *v.* Cooke, 5 B. & C. 538, 7 D. & R. 673, 11 E. C. L. 574; Rex *v.* Scott, 3 Burr. 1262, 1 W. Bl. 350; Reg. *v.* Ahearne, 6 Cox C. C. 6; Rex *v.* Niccolls, 13 East 412, 2 Str. 1227; Rex *v.* Thode, 3 Keb. 111, 117, 1 Vent. 234; Rex *v.* Kinnersley, 1 Str. 193.

Death of one before trial.— In People *v.* Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168 note, it was held that where three persons were engaged in a conspiracy and one of them died before trial and another was acquitted, the survivor might be tried and convicted. According to Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848, 12 L. J. M. C. 135, 48 E. C. L. 49, where one defendant in conspiracy dies between the indictment and trial, it is no ground of a *venire de novo* for a mistrial, if the trial proceeds against both, no suggestion of the death being entered on the record.

Where several are indicted for a conspiracy and one only appears, if he moves to be tried separately he may be tried alone. State *v.* Buchanan, 5 Harr. & J. (Md.) 500 note.

16. Davis *v.* People, 22 Colo. I, 43 Pac. 122; Willey *v.* State, 22 Tex. App. 408, 3 S. W. 570.

Change of venue as to part of defendants. — Under Wis. Rev. Stat., §§ 4680, 4685, where

judicial discretion, and its exercise thereof is not the subject of revision except for abuse.[17]

3. Instructions — a. In General. The general rules requiring the trial court to instruct the jury as to the effect of the evidence and the principles of law applicable to the facts thereby disclosed govern the trial of an indictment or information for conspiracy.[18]

b. As to Intent. An instruction that the jury must find that defendants sought to accomplish their purpose by "false and fraudulent pretenses and representations," sufficiently charges the necessity of the jury finding an intent to defraud.[19]

c. As to Refusal to Testify. It is error for the court to decline to instruct that the refusal of the alleged conspirators to testify when placed on the witness stand should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume therefrom that the testimony if given would be against defendants.[20]

d. As to Reasonable Doubt. The jury should be instructed as to the doctrine of reasonable doubt, upon the question of guilt on the whole case, some element of the crime, or some entire matter of defense,[21] and not with respect to belief as to particular facts.[22]

4. Questions For Jury. In trials for conspiracy in accordance with the usual rule that all questions of fact are to be left to the jury, the question of knowl edge or intent when essential to the offense is for the jury.[23] So also whether

the venue is changed for some of the defendants only, separate trials must be had. Casper *v.* State, 47 Wis. 535, 2 N. W. 1117.

17. Johnson *v.* People, 22 Ill. 314; State *v.* Davis, 13 Mont. 384, 34 Pac. 182; Jones *v.* Com., 31 Gratt. (Va.) 836.

Prejudicial refusal.—When a defendant has been denied the benefit of testimony by reason of the refusal to grant a severance, if it can be seen that probable injustice has been done him, a new trial will be granted. Watson *v.* State, 16 Lea (Tenn.) 604.

Where a severance is not sought to obtain the evidence of a codefendant, the court may direct the applicant to be tried first. Bailey *v.* State, (Tex. Crim. 1900) 59 S. W. 900.

18. State *v.* Ormiston, 66 Iowa 143, 23 N. W. 370; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895. See also Lusk *v.* State, 64 Miss. 845, 2 So. 256.

Discrimination as to defendants.— Where the charge in reference to statements of one of the conspirators is fair and correct in principle, but by an oversight is in some parts applied by the judge to one of the defendants only, and no notice of the omission to expressly apply the same instruction to another defendant is taken at the time, the latter will not be heard to complain. People *v.* Saunders, 25 Mich. 119.

Remarks of judge on weight of evidence.— In Com. *v.* Zuern, 16 Pa. Super. Ct. 588, the fact that the judge had given the jury certain instructions as to the weight of the evidence was held not reversible error, in view of the fact that the defendant had offered no evidence, and especially as the jury were told that they must decide as to the credibility of the witnesses.

19. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

20. People *v.* Irwin, 77 Cal. 494, 20 Pac. 56, where it was held that the court also erred in refusing to instruct the jury that the refusal of the alleged conspirators, who had been placed on the witness-stand and declined to testify, should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume from such refusal to testify that the testimony if given would be against the defendant.

21. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

Sufficiency.— In State *v.* Grant, 86 Iowa 216, 53 N. W. 120, an instruction that if from the evidence the jury were "satisfied beyond a reasonable doubt, and believed as reasonable men" that the defendants were working together with a common object, they should find that the conspiracy was established was held not to be prejudicial to the defendants.

22. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662, where it was held that a request to charge the jury as to reasonable doubt on a conflict of testimony as to the time when the offense was committed was properly refused.

23. People *v.* Dyer, 79 Mich. 480, 44 N. W. 937; People *v.* Petheram, 64 Mich. 252, 31 N. W. 188; People *v.* Flack, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807, 34 N. Y. St. 722 [*reversing* 57 Hun (N. Y.) 83, 10 N. Y. Suppl. 475, 32 N. Y. St. 215]; U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896.

Defendant's knowledge of the falsity of a claim by which it is intended to defraud the

alleged pretenses by which an attempt was made to defraud certain citizens and "the public generally," in pursuance of a conspiracy, were of such a character as to impose upon citizens of the community is a question of fact for the jury.[24] In deciding whether the facts are sufficient to sustain a finding of conspiracy, the jury may consider the credibility of the witness.[25]

5. VERDICT — a. In General. In a trial for conspiracy the verdict must answer to the substance of the charge and not leave the truth or falsity of the accusation uncertain.[26] Where by statute,[27] providing that a conviction for a statutory offense need only state the offense in the words of the statute, a conviction containing such a statement is sufficient without setting out the particular acts constituting the offense.[28]

b. On Indictment in Several Counts. A good verdict and judgment on one count of the indictment is not affected by a defective verdict or judgment on another.[29]

c. Acquittal or Nolle Prosequi as to One or More Defendants. It is not necessary that all the defendants charged with conspiracy be shown to be guilty. It will be sufficient if the guilt of at least two is shown;[30] and on an indictment of two persons and others unknown for a conspiracy, the acquittal of one does not affect the plea of guilty of the other.[31] So where one of three persons charged with conspiracy dies before the trial and one is guilty, the third may, notwithstanding this fact, be tried and convicted.[32] It has also been held that the fact that one of the conspirators has not been indicted in order that he may be a witness for the prosecution and that the prosecuting officer as he is authorized to do procures a dismissal on his own motion of the indictment as to two others does not bar a conviction of the remaining conspirator;[33] but inasmuch as two persons are necessary to a conspiracy, if two are tried and one is acquitted,[34] the other

United States is for the jury. U. S. *v.* Noblom, 27 Fed. Cas. No. 15,896.

24. McKee *v.* State, 111 Ind. 378, 12 N. E. 510; Miller *v.* State, 79 Ind. 198.

25. Com. *v.* Zuern, 16 Pa. Super. Ct. 588; Com. *v.* Tack, 1 Brewst. (Pa.) 511. Where one is indicted for conspiring with G and other persons to the jurors unknown, and is tried separately, it is not necessary for the jury to be satisfied that defendant and G conspired, or that there should be sufficient testimony to convict any other person of that crime, if on trial. The jury may convict defendant if they believe that he conspired with any person, whether named in the indictment or not, although there may not be sufficient evidence before them to convict such person. Duprey's Case, 4 City Hall Rec. (N. Y.) 121.

26. The jury should either find a special verdict stating the facts at large and leave the law to the court, or by a general verdict affirm or negative the charge. People *v.* Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168, where it was held that a verdict in a prosecution for conspiracy to defraud that there was an agreement between a co-conspirator and the defendant to obtain money from a third person, but with intent to return it again, is insufficient to support a conviction.

27. 2 & 3 Vict. c. 71, § 48.

28. *In re* Perham, 5 H. & N. 30, 5 Jur. N. S. 1221, 29 L. J. M. C. 33, 1 L. T. Rep. N. S. 106, an indictment under 6 Geo. IV, § 129, for unlawfully endeavoring to cause any workman to depart from his hiring by "threats or intimidation," etc., wherein the conviction did not state the nature of the threats, the threats charged, or that they were made to any particular person.

29. Latham *v.* Reg., 5 B. & S. 635, 9 Cox C. C. 516, 10 Jur. N. S. 1145, 33 L. J. M. C. 197, 10 L. T. Rep. N. S. 571, 12 Wkly. Rep. 908, 117 E. C. L. 635. And see Com. *v.* Doughty, 139 Pa. St. 383, 21 Atl. 228, holding that on the trial of an indictment containing several counts it is not reversible error to omit "to instruct the jury to find on each count of the indictment separately, or generally," when there is nothing in the record to show that the court was asked for such instruction.

30. State *v.* Adams, Houst. Crim. Cas. (Del.) 361.

31. Com. *v.* Edwards, 135 Pa. St. 474, 26 Wkly. Notes Cas. (Pa.) 242, 19 Atl. 1061; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288, 8 Chic. Leg. N. 211, 1 Cinc. L. Bul. 27, 22 Int. Rev. Rec. 106.

32. People *v.* Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

33. Bradshaw *v.* Territory, 3 Wash. Terr. 265, 14 Pac. 594.

34. State *v.* Tom, 13 N. C. 569; U. S. *v.* Morris, 26 Fed. Cas. No. 15,812, 1 Balt. L. Trans. 117; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288, 11 Chic. Leg. N. 211, 8 Cinc. L. Bul. 27, 22 Int. Rev. Rec. 106; Reg. *v.* Cooke, 5 B. & C. 538, 7 D. & R. 673, 11 E. C. L. 574; Reg. *v.* Burch, 4 F. & F. 407; Rex *v.*

must also be acquitted; and the same is the case where a *nolle prosequi* is entered as to one.[35]

6. Judgment — a. On Indictment in Several Counts. In prosecutions for conspiracy, on a general verdict of guilty upon an indictment containing several counts for the same offense, judgment may be entered on any sufficient count.[36]

b. On Separate Trial. In England there are cases to the effect that where one tried separately for conspiracy is convicted, judgment may be passed on him, although the others who have appeared and pleaded have not been tried.[37] In this country, however, it has been held that, although this practice may be proper where one alone is indicted for a conspiracy with others unknown, or when he is indicted with others who cannot be taken or brought to trial, yet where several are prosecuted together, taken, and may be brought to trial for conspiracy, and upon severance one only has been tried and found guilty, there is impropriety in proceeding to judgment against him before the trial of his codefendants, and the judgment should be suspended until the number necessary to the crime are convicted; those found guilty being meanwhile held in custody or under recognizance.[38]

7. New Trial and Arrest of Judgment — a. In General. Where all of several defendants in an indictment for conspiracy are found guilty, if one of them show himself entitled to a new trial on grounds not affecting the others, a new trial will nevertheless be granted to all.[39] It has been held, however, that where two persons are indicted jointly for a conspiracy, both defendants having been found guilty, if one of them applies for a new trial, which is overruled and he obtains a writ of error, and the other does not apply for a new trial and there is a judgment against him, the judgment may be reversed as to the one who appeals without reversing the judgment against the other who did not apply for a new trial.[40]

b. Presence of All Defendants on Motion. The presence in court of all the defendants convicted on an indictment for conspiracy is necessary in order to move for a new trial in behalf of any of them.[41] But it seems that a motion in arrest of judgment will be entertained at the instance of one of several found guilty, although the others are not in court and may have actually escaped from custody.[42]

8. Sentence and Punishment — a. Where Punishment Is Not Prescribed. If no

Thode, 3 Keb. 111, 117, 1 Vent. 234; Reg. *v.* Manning, 51 L. T. Rep. N. S. 121.

So if more than three are tried and all but one acquitted the other is also entitled to acquittal. State *v.* Buchanan, 5 Harr. & J. (Md.) 500 note; Reg. *v.* Thompson, 16 Q. B. 832, 5 Cox C. C. 166, Dears. C. C. 3, 17 Jur. 453, 20 L. J. M. C. 183, 71 E. C. L. 802; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061.

35. State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

36. Com. *v.* Nichols, 134 Mass. 531.

37. Rex *v.* Cooke, 5 B. & C. 538, 7 D. & R. 673, 11 E. C. L. 574; Reg. *v.* Ahearne, 6 Cox C. C. 6; Rex *v.* Kinnersley, 1 Str. 193.

38. Casper *v.* State, 47 Wis. 535, 2 N. W. 1117.

39. Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341; Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145, 11 Jur. 204, 16 L. J. Q. B. 121, 58 E. C. L. 824; Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

No evidence against one.— Where defendants have been jointly indicted and convicted of conspiracy and an appeal is taken, if there be no evidence against one the judgment must be reversed as to all. Isaacs *v.* State, 48 Miss. 234.

40. Jones *v.* Com., 31 Gratt. (Va.) 836.

This difficulty does not arise, however, where some of the accused have been convicted and some acquitted. In such case a new trial may be granted in favor of those convicted without disturbing the verdict as to those acquitted. Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145, 11 Jur. 204, 16 L. J. Q. B. 121, 58 E. C. L. 824; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

41. Rex *v.* Teal, 11 East 307; Rex *v.* Cochrane, 3 M. & S. 10 note, 15 Rev. Rep. 380 note; Rex *v.* Askew, 3 M. & S. 9, 15 Rev. Rep. 380.

42. State *v.* Covington, 4 Ala. 603. And see Rex *v.* De Berenger, 3 M. & S. 67.

specific punishment is provided for the offense it may be punished as a misdemeanor by fine and imprisonment.[43]

b. Where Punishment Is Measured by Object of Conspiracy. Conspiracy to commit a crime is sometimes punishable by the infliction of the same punishment as that prescribed for the commission of such crime;[44] and it has been held that conspiracy to commit an offense should never be punished more severely than the perpetration of it.[45]

c. Offense Committed by Official. If the punishment of an officer of the government for conspiring against an officer is more severe than when the offense is committed by a private person, an official indicted in his individual capacity cannot be subjected to the greater punishment.[46]

d. Place of Imprisonment. Where an act expressly authorizing a sentence of fine and imprisonment on conviction for a conspiracy is silent as to the place of imprisonment, the persons convicted may be sentenced only to confinement in an institution provided for the incarceration of persons convicted of a misdemeanor.[47]

B. In Civil Actions — 1. Instructions — a. In General. The jury should be instructed as to the principles of law applicable to conspiracy, and the facts disclosed by the evidence.[48]

b. As to Fact of Conspiracy. The jury must be instructed as to the persons who must be found to have united in the confederacy.[49]

c. As to Evidence of Accomplice. Where the acts and declarations of one of the alleged conspirators have been received in evidence the court should point out the distinction between evidence admitted to establish the confederacy and that to be considered after the conspiracy is found to exist, and should also instruct as to the weight and value of the uncorroborated evidence of the alleged accomplice and the caution to be exercised in considering it.[50]

d. As to Fraud and Resulting Damage. Instructions which authorize the jury to render a verdict for plaintiff without finding that he was deceived and defrauded by defendants because of their actions or conduct in pursuance of the conspiracy are erroneous.[51]

2. Questions of Law and Fact. Where there is no evidence tending to establish guilty complicity on the part of one of the defendants the jury should be instructed that they are bound to render a verdict of not guilty as to him.[52] But the existence of the alleged conspiracy,[53] whether or not defendant was a party to the conspiracy,[54] whether deceitful and fraudulent means were used as alleged, or

43. State *v.* Cawood, 2 Stew. (Ala.) 360; State *v.* Pulle, 12 Minn. 164; State *v.* Jackson, 82 N. C. 565. And see Brooks *v.* People, 14 Colo. 413, 24 Pac. 553.

44. Clary *v.* Com., 4 Pa. St. 210. See also Williams *v.* Com., 34 Pa. St. 178; Hartman *v.* Com., 5 Pa. St. 60.

45. Williams *v.* Com., 34 Pa. St. 178; Hartman *v.* Com., 5 Pa. St. 60.

46. U. S. *v.* Boyden, 1 Lowell (U. S.) 266, 24 Fed. Cas. No. 14,632.

47. Brooks *v.* People, 14 Colo. 413, 24 Pac. 553.

48. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

49. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Wiggins *v.* Leonard, 9 Iowa 194.

But the question as to whether or not the defendants conspired is fairly presented by distinct reference to the facts which tend to show it, although the technical word "conspiracy" is not used. Morley *v.* Elsbree, (Pa. 1889) 17 Atl. 212.

50. Wiggins *v.* Leonard, 9 Iowa 194; Ynguanzo *v.* Salomon, 3 Daly (N. Y.) 153. And see Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906, where it was held proper to instruct that no evidence of anything said, done, or written by the alleged co-conspirators should be considered against the party charged unless it was found that he entered into the conspiracy and that what was said or done was in furtherance of the common design.

51. Sheple *v.* Page, 12 Vt. 519.

52. Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.

53. *Michigan.*— Hardy *v.* Trick, 121 Mich. 251, 80 N. W. 33.

New York.— Warshauer *v.* Webb, 9 N. Y. St. 529.

Pennsylvania.— Weil *v.* Cohn, 4 Pa. Super. Ct. 443.

Texas.— Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

Wisconsin.— Patnode *v.* Westenhaver, 114 Wis. 460, 90 N. W. 467.

54. Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731.

plaintiff was deceived by them to his injury,[55] or whether a particular witness shall be believed[56] are questions for the jury to determine.

3. VERDICT — a. Right to Recover as Against One Defendant Alone. At the common law on the writ of conspiracy which has since become obsolete it was necessary that at least two should be joined and found guilty. One could not be found guilty and the other acquitted.[57] However, in an action on the case in the nature of conspiracy, which has superseded the ancient writ of conspiracy, although several are sued, judgment may go against one, although the others are acquitted, as the foundation of the action is the damage and not the conspiracy.[58]

b. When Joint Wrong Necessary. Nevertheless, where an action is brought against several as concerned in a wrong done, it is necessary in order to recover against all to show a joint wrong.[59]

4. MEASURE OF DAMAGE — a. Compensation. Where as the result of the conspiracy, property had been lost, and its value can be established or the precise quantum of damage sustained can be compensated, the injured party is limited to compensation only.[60]

55. Sheple *v.* Page, 12 Vt. 519.

56. Ynguanzo *v.* Salomon, 3 Daly (N. Y.) 153.

57. Jones *v.* Baker, 7 Cow. (N. Y.) 445.

58. *Maine.*— Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625; Payson *v.* Caswell, 22 Me. 212.

Massachusetts.— Parker *v.* Huntington, 2 Gray (Mass.) 124.

Missouri.— Hunt *v.* Simonds, 19 Mo. 583.

Nebraska.— Booker *v.* Puyear, 27 Nebr. 346, 43 N. W. 133.

New Jersey.— Van Horn *v.* Van Horn, 56 N. J. L. 318, 28 Atl. 669.

New York.— Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun (N. Y.) 153; Dallas City Nat. Bank *v.* National Park Bank, 32 Hun (N. Y.) 105; Betz *v.* Daily, 3 N. Y. St. 309; Forsyth *v.* Edminston, 11 How. Pr. (N. Y.) 408; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Gaffney *v.* Colvill, 6 Hill (N. Y.) 567; Jones *v.* Baker, 7 Cow. (N. Y.) 445. And see Keit *v.* Wyman, 67 Hun (N. Y.) 337, 22 N. Y. Suppl. 133, 51 N. Y. St. 441; Griffing *v.* Diller, 66 Hun (N. Y.) 633, 21 N. Y. Suppl. 407, 50 N. Y. St. 435.

North Carolina.— Eason *v.* Westbrook, 4 N. C. 690.

Pennsylvania.— Laverty *v.* Vanarsdale, 65 Pa. St. 507.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

England.— Skinner *v.* Gunton, 1 Saund. 228*d*; Pollard *v.* Evans, 2 Show. 51.

Contra, dictum in Hablichtel *v.* Yambert, 75 Iowa 539, 39 N. W. 877.

See 10 Cent. Dig. tit. "Conspiracy," § 24.

Limitation of rule.— In an action against two or more in case in the nature of a conspiracy, if the tort be actionable where committed by one or more, recovery may be had against but one. If, however, the tort be actionable, only when committed under an unlawful conspiracy of two or more, recovery may not be had, unless the unlawful conspiracy is established. Such is the case where the acts charged in the declaration are of such a nature that they could not be committed by one defendant alone. Rundell *v.* Kalbfus, 125 Pa. St. 123, 17 Atl. 238; Collins *v.* Cronin, 117 Pa. St. 35, 11 Atl. 869.

59. *Maryland.*— Brankley *v.* Platt, 40 Md. 529.

New Jersey.— Van Horn *v.* Van Horn, 56 N. J. L. 318, 28 Atl. 669.

New York.— Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104.

Pennsylvania.— Laverty *v.* Vanarsdale, 65 Pa. St. 507.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

And see *dictum* in Herron *v.* Hughes, 25 Cal. 555.

60. See Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791.

A person who is driven out of business by a conspiracy may recover for the loss sustained in his business because of its diminished value and loss of profits, but not for a loss as for a total destruction of property, nor for the loss sustained by being forced to sell his tools and implements of trade at less than their value. Bratt *v.* Swift, 99 Wis. 579, 75 N. W. 411.

Appropriation of property by agents and others.— The measure of damages recoverable of a broker and others who in furtherance of a conspiracy and in fraud of the principal procured the conveyance to them of certain lots, the grantor supposing the conveyance to be for the principal's benefit and as part of the purchase-price of land of the latter, is the value of the lots of which the principal was deprived. Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

In an action for defeating the collection of the plaintiff's debt, by placing the debtor's property out of plaintiff's reach, the measure is the value of the property and not the amount of the debt (Mott *v.* Danforth, 6 Watts (Pa.) 304, 31 Am. Dec. 468; Penrod *v.* Mitchell, 8 Serg & R. (Pa.) 522); unless the value of the goods exceed the amount of the debt, in which case the measure is the

b. Loss Conjectural. Where the loss sustained is conjectural and uncertain and cannot be accurately determined, the jury may award such damages as by competent evidence plaintiff appears to have sustained.[61]

c. Injury From Direct Acts. Plaintiff can only recover the damage directly resulting from the conspiracy,[62] and only such as accrued from acts done prior to the commencement of the action.[63]

d. Damages as Affected by Apportionment Among Conspirators. Conspirators are liable to the party injured irrespective of how the fruits of the wrong-doing may have been divided.[64]

e. Exemplary Damages. Where from the nature of the injury there is no measure of damage, the jury may look beyond mere compensation and assess damages by way of punishment.[65] Such damages may also be awarded where the gist of the action is the injury resulting from malicious acts, and the amount is within wide limits discretionary with the jury.[66]

CONSPIRATIONE. An ancient writ that lay against conspirators.[1]

CONSPIRATORS. Persons guilty of a conspiracy.[2] (See, generally, CONSPIRACY.)

CONSTABLE. See SHERIFFS AND CONSTABLES.

CONSTABLEWICK. In English law, the territorial jurisdiction of a constable; as bailiwick is of a bailiff or sheriff.[3]

CONSTANTLY WORKED. The term means that the process of making a commodity in some of its stages is constantly going on at all reasonable and lawful times.[4]

CONSTAT. It is clear or evident; it appears; it is certain; there is no doubt.[5] (See NON CONSTAT.)

amount of the debt (Penrod *v.* Mitchell, 8 Serg. & R. (Pa.) 522). One who purchases at a low price property which he has with others procured to be transferred by a debtor to secure himself and other creditors is liable to the unsecured creditors for the difference between the value of the property and the amount paid therefor by him. Kosminsky *v.* Hamburger, 21 Tex. Civ. App. 341, 51 S. W. 53.

For a conspiracy by one partner and third persons to negotiate firm notes, a copartner who has been compelled to pay them may recover the amount of the note and interest. Betz *v.* Daily, 3 N. Y. St. 309.

Fraudulent procurement of contract.— Where a person occupying a fiduciary relation to a corporation procured it to make a building contract for a price greatly in excess of the actual cost the measure of damages was held to be such excess. St. Paul Distilling Co. *v.* Pratt, 45 Minn. 215, 47 N. W. 789.

61. Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791.

62. In Biever *v.* Herr, 1 Pearson (Pa.) 510, the alleged fraudulent act was the giving of a judgment bond on which judgment was entered, execution issued, and all the property of defendant debtor sold. It appeared that the greater part of the debt due plaintiff was contracted after judgment was entered on the bond, and it was not alleged that this credit was given on the faith of the property fraudulently encumbered. It was held that the measure of damages was the amount due plaintiff before judgment was entered.

63. Haskell County Bank *v.* Santa Fé Bank, 51 Kan. 39, 32 Pac. 624, where it was sought to recover attorney's fees, expenses, and damages incurred in an action brought against the plaintiff subsequently to the institution of the action for damages.

64. Zinc Carbonate Co. *v.* Shullsburg First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

Where money or property procured by the conspiracy is apportioned among the wrongdoers, the liability of one is coextensive with the whole loss sustained (People *v.* Tweed, 5 Hun (N. Y.) 353), especially where he was the moving spirit and the entire amount was obtained through his direction, approval, and connivance (People *v.* Tweed, 5 Hun (N. Y.) 382).

65. Webb *v.* Drake, 52 La. Ann. 290, 26 So. 791.

66. Doremus *v.* Hennessy, 62 Ill. App. 391.

1. Black L. Dict.

2. Black L. Dict.

Those who bind themselves by oath, covenant, or other alliance that each of them shall aid the other falsely and maliciously to indict persons; or falsely to move and maintain pleas, etc. 33 Edw. I, Stat. 2. Besides these, there are conspirators in treasonable purposes; as for plotting against the government. Wharton L. Lex.

3. Black L. Dict.

4. Prieger *v.* Exchange Mut. Ins. Co., 6 Wis. 89, 104.

5. Black L. Dict.

Distinguished from "exemplification," in

CONSTATE. To establish, constitute, or ordain.[6]

CONSTITUENT. A word used as a correlative to "attorney," to denote one who constitutes another his agent or invests the other with authority to act for him.[7] It is also used in the language of politics, as a correlative to "representative," the constituents of a legislator being those whom he represents and whose interests he is to care for in public affairs; usually the electors of his district.[8]

CONSTITUENT ELEMENT. As a necessary ingredient of an offense, the term is applied only to crimes consisting of two or more degrees, or where by the necessary proof of one offense, another charge is established.[9] (See, generally, CRIMINAL LAW.)

CONSTITUTION. The act of constituting; formation.[10] In ecclesiastical law, a regulation or canon respecting the doctrine or discipline of the church;[11] particular law, ordinance, or regulation made by the authority of any superior, civil or ecclesiastical; as, the constitutions of the churches; the novel constitutions of Justinian and his successors.[12] (See, generally, CONSTITUTIONAL LAW.)

Page's Case, 5 Coke 52*a*, 53*a*, where it is said that the term is so called from the fact that in letters patent the king's style begins with this word *constat*.

6. Black L. Dict.

"Constating instruments" of a corporation are its charter, organic law, or the grant of powers to it. Black L. Dict. [*citing* Ackerman *v.* Halsey, 37 N. J. Eq. 356, 361].

7. Black L. Dict.

8. Black L. Dict.

9. State *v.* Magone, 33 Oreg. 570, 576, 56 Pac. 648.

10. *Re* Wetherell, 4 Ont. 713, 715.

"It is, I think, synonymous with the word 'establishment,' which is used in sec. 101 of the British North America Act." *Re* Wetherell, 4 Ont. 713, 715.

11. Worcester Dict. [*quoted* in McRea *v.* McLeod, 26 Grant Ch. (U. C.) 255, 259].

12. Imperial Dict. [*quoted* in McRea *v.* McLeod, 26 Grant Ch. (U. C.) 255, 259].

CONSTITUTIONAL LAW

By George F. Tucker*

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Distribution of Powers Between States and United States, see STATES; UNITED STATES.

I. DEFINITION.

A constitution may be defined as that fundamental law of a state[1] which contains the principles upon which government is founded, regulates the division of

1. "A constitution is but a law; it emanates from the people, the depository, and the only one, of all political power; it is therefore, the supreme law. It organizes and defines the different parts of the government, confers on each department the powers and duties allotted to each, and limits the powers of every department. It has this further quality: having distributed the different powers to the different departments, it leaves those powers to be exercised by those departments, and leaves to the sovereign people themselves no other power than that of choosing their own officers or representatives. The people can do no act, except make a new constitution or make a revolution." Com. v. Collins, 8 Watts (Pa.) 331, 349.
Story defines a constitution to be "a fun-

sovereign powers, and directs to what persons each of these powers is to be intrusted and the manner of its exercise.[2]

II. DIFFERENT KINDS OF CONSTITUTIONS.

A. Unwritten. A constitution is said to be unwritten when its source is in precedents and customs. Such is often said to be the constitution of England.[3]

damental law or basis of government." 1 Story Const. §§ 338, 339 [*quoted* in McKoan *v.* Devries, 3 Barb. (N. Y.) 196, 198, 1 Code Rep. (N. Y.) 6, 6 N. Y. Leg. Obs. 203].

2. Bouvier L. Dict. See CONSTITUTION.

Other definitions are: "The form of government, delineated by the mighty hand of the people, . . . [It] is the supreme law of the land." Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 308, 28 Fed. Cas. No. 16,857, 1 L. ed. 391 [*quoted* in Rison *v.* Farr, 24 Ark. 160, 166, 87 Am. Dec. 52; Cohen *v.* Hoff, 3 Brev. (S. C.) 500, 501].

"An instrument of government, made and adopted by the people for practical purposes, connected with the common business and wants of human life." People *v.* New York Cent. R. Co., 24 N. Y. 485, 486.

"That by which the powers of government are limited." Kamper *v.* Hawkins, 1 Va. Cas. 20, 24.

"The organization of the government, distributing its powers among bodies of magistracy, and declaring their rights, and the liberties reserved and retained by the people." French *v.* State, 52 Miss. 759, 762.

"The body of fundamental laws as contained in written documents, or established by prescriptive usage, which constitute the form of government for a nation, state, community, association, or society." Worcester Dict. [*quoted* in McRae *v.* McLeod, 26 Grant Ch. (U. C.) 255, 259].

"The established form of government in a state, kingdom, or country; a system of fundamental rules, principles, and ordinances for the government of a state or nation, either contained in written documents, or established by prescriptive usage." Imperial Dict. [*quoted* in McRae *v.* McLeod, 26 Grant Ch. (U. C.) 255, 259].

"The work or will of the People themselves, in their original, sovereign, and unlimited capacity." Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 308, 28 Fed. Cas. No. 16,857, 1 L. ed. 391 [*quoted* in Rison *v.* Farr, 24 Ark. 161, 167, 87 Am. Dec. 52].

"To some extent a declaration of rights. It neither enforces itself nor the privileges which it guarantees." Sayres *v.* Com., 88 Pa. St. 291, 308.

"The form of government instituted by the people in their sovereign capacity, in which first principles and fundamental law are established." Phoebe (a woman of color) *v.* Jay, 1 Ill. 268, 271.

"It is to . . . the departments of government, what a law is to individuals — nay, it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which the powers, (or portions of the right to govern,) which may have been committed to them, are prescribed — It is their commission — nay, it is their creator." Kamper *v.* Hawkins, 1 Va. Cas. 20, 24.

"A constitution is not the beginning of a community nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience." Cooley Const. Lim. 37 [*quoted* in State *v.* Ah Chuey, 14 Nev. 79, 101, 33 Am. Rep. 530].

3. "There are four principal sources of English Constitutional Law: (1) Treaties, or quasi-treaties, (2) Precedents and customs generally known as Common Law, (3) Compacts, and (4) Statutes. The first, and the two last of these divisions are the written part of the Constitution, the second is the unwritten part." The treaties are: The Act of Union with Scotland (1707), the Act of Union with Ireland (1800). The precedents and customs are to be found in documents, such as judgments, authoritative reports and lawyers' opinions. The relations of the crown, cabinet, the house of lords and house of commons lie outside the domain of written law. The Compacts are the Great Charter (Magna Charta 1215), the Bill of Rights (1689), the Act of Settlement (1700). Petition of Rights (1627) and the Habeas Corpus Act (1697) are also important. The statutes are acts of parliament sanctioned by the crown. Boutmy Const. L. 8, 17, 18, 46. "The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the courts can test the validity of its declared will." Cooley Const. Lim. (5th ed.) 209. "The British parliament has supreme and uncontrolled power, and may change the Constitution of England, and repeal even Magna Charta, which is itself only an act of parliament. But in this Commonwealth the legislative, as well as the executive authority and the courts of justice, is controlled and limited by the written constitution." *In re* Whitcomb, 120 Mass. 118, 122, 21 Am. Rep.

B. Written — 1. In General. A written constitution may be defined as a stipulation agreed upon by the people of a state or nation as a rule of action binding upon all its officials and departments, and susceptible of interpretation only by a tribunal established by its provisions, and of modification or repeal only by the authority creating it.[4]

2. United States — a. Federal Constitution. The constitution of the United States is the most famous of all written constitutions.[5]

502; Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 238, 74 Am. Dec. 676. And see Opinion of Justices, 126 Mass. 557, 565. The provisions of Magna Charta were not original concessions. Nearly all of them may be traced to the usages and institutions of the Anglo-Saxons. See Bowen "Documents of the Constitution of England and America"; Stubb "Select Charters"; Thomson "Historical Essay on Magna Charta"; and Preston "Documents of American History."

A translation of Magna Charta may be found in Ky. Stat. (1899), p. 1.

4. Cooley says: "In our American Constitutional law, the word 'constitution' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the States, as the absolute rule of action and decision for all departments and officers of the Government, in respect to all points covered by it, which must control until it shall be changed by the authority which established it." Cooley Const. Lim. 3 [*quoted* in State *v.* McCann, 4 Lea (Tenn.) 1, 9; Cline *v.* State, 36 Tex. Crim. 320, 350, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; Rasmussen *v.* Baker, 7 Wyo. 117, 134, 50 Pac. 819, 38 L. R. A. 773].

Miller defines a constitution as "a written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among several departments, for their safe and useful exercise for the benefit of the body politic." Miller Const. 71 [*quoted* in Rasmussen *v.* Baker, 7 Wyo. 117, 135, 50 Pac. 819, 38 L. R. A. 773].

Other definitions are: "An agreement of the people, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves." State *v.* Parkhurst, 9 N. J. L. 427, 443 [*quoted* in Rasmussen *v.* Baker, 7 Wyo. 117, 135, 50 Pac. 819, 38 L. R. A. 773].

"The supreme original written will of the people, acting in their highest sovereign capacity, creating and organizing the form of government, designating the different departments, assigning to them their respective powers and duties, and restraining each and all of them within their proper and peculiar spheres." State *v.* Cox, 8 Ark. 436, 443 [*citing* State *v.* Ashley, 1 Ark. 513].

"A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." State *v.* Ah Chuey, 14 Nev. 79, 101, 33 Am. Rep. 530.

5. Its history is briefly as follows: Congress appointed at the same time a committee to prepare a declaration of independence and a committee to prepare a plan of confederation for the colonies. Dr. Franklin, as early as Aug. 21, 1775, submitted to that body a sketch entitled "Articles of Confederation and Perpetual Union of the Colonies," which became a basis for the articles reported on July 12, 1776. These articles of confederation were amended from time to time until Nov. 17, 1777, when congress determined to propose them to the states. The last state to ratify them was Maryland on March 1, 1781. "The exclusive cognizance of our foreign relations, the rights of war and peace, and the right to make unlimited requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the states. But, in imitation of all the former confederacies of independent states, either in ancient Greece or modern Europe, the articles of confederation carried the decrees of the federal council to the states in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow; and it has proved pernicious or destructive to all other federal governments which adopted the principle. Disobedience to the laws of the Union must either be submitted to by the government, to its own disgrace, or those laws must be enforced by arms. The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its strength and swayed by its passions. The history of the federal government of Greece, Germany, Switzerland, and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members." 1 Kent Comm. 213. The weakness of the confederation and the need of the substitution of a more stable system was pointed out by Hamilton in a letter to James Duane, Sept. 3, 1780. See 1 Hamilton Works (Lodge ed.) 203. In May, 1785, congress failed to act on the report of a committee recommending an alteration of the first paragraph of the ninth of the articles of confederation so as to enlarge the powers of congress, especially as to trade; and the legislature of Virginia on Jan. 21, 1786, appointed commissioners to meet such commissioners as might be appointed by other states

b. State Constitutions. A state constitution consists of a number of fundamental laws passed by, and alterable and repealable alone by, the people; it is superior to the will of the legislature, the validity of whose acts is determined by its provisions.[6]

"to examine the relative situation and trade of said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as when unanimously ratified by them will enable the United States in congress effectually to provide for the same." Va. Code (1887), p. 11. The commissioners of only four states besides Virginia, viz., Delaware, Pennsylvania, New Jersey, and New York, met in Annapolis on the first Monday in September. A report drawn by Mr. Hamilton was agreed upon recommending that commissioners from all the states meet on the second Monday in the May following. See Hamilton Works (Lodge ed.) 319. A convention of delegates from all the original thirteen states (except Rhode Island) met at Philadelphia May 14, 1787. On September 17 a form of constitution was unanimously agreed upon, and on September 28 submitted to the congress of the confederation. Conformably to recommendations as to its adoption, it was sent by the congress to the state legislatures, in order to be rejected or ratified by conventions of delegates chosen in each state by the people. The several state conventions ratified the constitution as follows: Delaware, Dec. 7, 1787; Pennsylvania, Dec. 12, 1787; New Jersey, Dec. 18, 1787; Georgia, Jan. 2, 1788; Connecticut, Jan. 9, 1788; Massacusetts, Feb. 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, Nov. 21, 1789; Rhode Island, May 29, 1790. Art. 7 of the constitution provides that "the Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The ratification by the ninth state was read to congress on July 2, 1788, and on September 13 congress passed the following: "Resolved, That the first Wednesday in January next, be the day for appointing electors in the several states, which before the said day shall have ratified the said Constitution; that the first Wednesday in February next, be the day for the electors to assemble in their respective states, and vote for a president; and the first Wednesday in March next, be the time, and the present seat of Congress (New York) the place for commencing proceedings under the said Constitution." 13 Jour. Cong. 141. Proceedings having taken place conformably to this resolution, Washington took the oath of office on April 30, and congress met on March 4. Owing to the want of a quorum the house did not organize until April 1, nor the senate until April 6. It has been held in Owings *v.* Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124 (action of ejectment to recover a lot of land) that the operation of the constitution "did not commence before the first Wednesday in March, 1789."

Amendments.— The first ten of the amendments were proposed at the first session of congress, Sept. 25, 1789, and were finally ratified by the constitutional number of states on Dec. 15, 1791. The eleventh was proposed in congress on March 5, 1794, and was declared by the president in a message dated Jan. 8, 1798, to have been adopted by the constitutional number of states. The twelfth was proposed in congress on Dec. 12, 1803, and was adopted by the constitutional number of states in 1804. The thirteenth was proposed in congress on Feb. 7, 1865, and was ratified by three fourths of the states. The fourteenth amendment was proposed by congress to the legislatures of the several states on June 16, 1866, but it was not until July 28, 1868, that the secretary of state certified that it had been adopted. The history of this amendment is given in Mass. Rev. Laws (1902), p. 13. The fifteenth amendment was proposed to the legislatures by congress on Feb. 27, 1869, and it was declared on March 30, 1870, to have been ratified by the constitutional number of states.

6. See Taylor *v.* Governor, 1 Ark. 21, 27; Lynn *v.* Polk, 8 Lea (Tenn.) 121, 165; Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77, 84, where it is said: "When the people associate, and enter into compact for the purpose of establishing government, that compact, whatever may be its provisions, or in whatever language it may be written, is the constitution of the State, revocable only by the people, or in the manner they prescribe."

While these state constitutions differ widely in their provisions, their important features may be thus summarized: (1) "The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their several local governments were established, subject to the authority of the English Crown and ultimately of the British Parliament. But, like most of the institutions under which English speaking peoples now live, they have a pedigree which goes back to a time anterior to the discovery of America itself. It begins with the English Trade Guild of the middle ages, itself the child of still more ancient corporations, dating back to the day of Imperial Rome, and formed under her imperishable law. Charters were granted to merchant

3. DOMINION OF CANADA. The British North America Act[7] is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined.[8]

III. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

A. Adoption. A state constitution adopted in convention but never recognized by the general government or ordained or established by the people is invalid.[9]

guilds in England as far back as the days of King Henry I. Edward IV gave an elaborate one to the Merchant Adventurers trading with Flanders in 1463. In it we may already discern the arrangements which are more fully set forth in two later charters of greater historical interest, the charter of Queen Elizabeth to the East India Company in 1599, and the charter of Charles I to the 'Governor and Company of the Massachusetts Bay in Newe-England' in 1628. . . . So long as the colony remained under the British Crown, the superior authority, which could amend or remake the frame of government, was the British Crown or Parliament. When the connection with Britain was severed, that authority passed over, not to the State legislature, which remained limited, as it always had been, but to the people of the now independent commonwealth, whose will speaks through what is now the State Constitution, just as the will of the Crown or of Parliament had spoken through the charters of 1628 and 1691." 1 Bryce Am. Commonw. (3d ed.) 427–429. See also Fiske Beginnings New Eng. (2) On the separation from Great Britain in 1776, in most cases the charters of the thirteen colonies then or later remodeled became the state constitutions. In Massachusetts the first constitution was rejected by the people in 1778, the new one being established in 1780. In Connecticut there was no change until 1828, and in Rhode Island until 1842.

Since the alliance of the original thirteen states thirty-two have been admitted into the Union by acts of congress either directing the people to meet and enact a constitution or accepting a constitution already made by the people. An illustration of the former method of procedure is offered in 25 U. S. Stat. at L. p. 676, c. 180, providing for the admission of North Dakota, South Dakota, Montana, and Washington into the Union, and of the latter in 26 U. S. Stat. at L. p. 215, c. 656; p. 222, c. 664, providing for the admission of Idaho and Wyoming. "Of these instruments (state constitutions), therefore, no less than of the constitutions of the thirteen original states, we may say that although subsequent in date to the federal constitution, they are, so far as each state is concerned, *de jure* prior to it. Their authority over their own citizens is nowise derived from it." 1 Bryce Am. Commonw. (3d ed.) 431.

Great modifications have been made in nearly all the state constitutions, an excellent analysis of which may be found in 1 Bryce Am. Commonw. (3d ed.) 433 *et seq.*

7. See British North America Act, 1867, set out in full in 1 Cas. B. N. A. Act 1.

8. Gwynne, J., in Mercer *v.* Atty.-Gen., 5 Can. Supreme Ct. 538, 675. In Lefroy's "The Law of Legislative Power in Canada" this act is treated at great length, and a comparison is drawn with the system of the United States.

An act of a provincial legislature may be held not within the legislative capacity of that legislature. Severn *v.* Reg., 2 Can. Supreme Ct. 70; Leprohon *v.* Ottawa, 2 Ont. App. 522.

9. *Alabama.*— Revenue Com'rs *v.* State, 45 Ala. 399; Scruggs *v.* Huntsville, 45 Ala. 220.

Idaho.—Amendments may be proposed by joint resolution. Hays *v.* Hays, (Ida. 1897) 47 Pac. 732.

Kentucky.— White *v.* Com., 20 Ky. L. Rep. 1942, 50 S. W. 678.

Louisiana.— Jefferson Parish *v.* Burthe, 21 La. Ann. 325. And see State *v.* Favre, 51 La. Ann. 434, 25 So. 93.

Minnesota.—An act enacted before a constitutional amendment took effect is valid. Duluth *v.* Duluth St. R. Co., 60 Minn. 178, 62 N. W. 267. See also Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74.

Mississippi.— The ratification of the constitution by popular vote on Dec. 1, 1869, was the act of adoption. State *v.* Williams, 49 Miss. 640.

Nebraska.— The method of submission and adoption of a proposition to amend the state constitution is given in Tecumseh Nat. Bank *v.* Saunders, 51 Nebr. 801, 71 N. W. 779. The history of the formation and adoption of the constitution of the state is given in Brittle *v.* People, 2 Nebr. 198.

New Jersey.— Bott *v.* State Secretary, 62 N. J. L. 107, 40 Atl. 740, giving the method of adopting and rejecting constitutional amendments.

North Dakota.—The secretary of state must certify to the county auditors a joint resolution of the legislature that the question whether a constitutional convention should be held should be submitted to the people. State *v.* Wineman, 6 N. D. 81. An article which received a majority of all the votes cast upon the question of adoption, but did not receive a majority of the votes cast for governor, was held to be legally adopted. State *v.* Barnes, 3 N. D. 319, 55 N. W. 883.

B. Amendment and Revision — 1. In General. A constitution can be amended or changed only in the mode therein prescribed.[10] Where a provision in a constitution requires that a "majority of the votes of electors voting at a general election" (or similar language) is necessary to the adoption of an amend-

South Carolina.— Neither the legislature nor courts can change the terms of a joint resolution so as to express the evident intent of the law-maker; but where one portion of a proposed amendment to the constitution, voted on and ratified, is in operation because the terms in the joint resolution make it apply to the wrong section the other portions of such amendment are not invalidated. If one section of a constitution is so amended as to make it repugnant to another original section, such original section is thereby repealed; and an act of the legislature as to certain limitations in the words of the constitution does not so operate after such limitations in the constitution are removed by amendment. Bray *v.* Florence, 62 S. C. 57, 39 S. E. 810. Notwithstanding the objections to the convention which framed the constitution of 1865, such as that it was not called in conformity with former statutes nor by competent authority, it must be treated as the fundamental law. State *v.* Starling, 15 Rich. (S. C.) 120.

South Dakota.— State *v.* Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582, method of submission to people.

Texas.— Ellis *v.* Cleburne, (Tex. Civ. App. 1896) 35 S. W. 495, validity of contract depending on time when amendment became effective.

West Virginia.— A constitutional convention lawfully convened derives its powers, not from the legislature, but from the people, and the legislature can neither limit nor restrict the exercise of such powers. Loomis *v.* Jackson, 6 W. Va. 613.

See 10 Cent. Dig. tit. "Constitutional Law," § 1.

10. *Alabama.*— Collier *v.* Frierson, 24 Ala. 100.

Arkansas.—The people of a state may alter or reform the government in the manner provided by the organic law, so long as they do not thereby ignore or deny allegiance to the federal government or antagonize the federal constitution. Penn *v.* Tollison, 26 Ark. 545.

California.— People *v.* Curry, 130 Cal. 82, 62 Pac. 516; Martin *v.* Board of Election Com'rs, 126 Cal. 404, 58 Pac. 932. For an amendment to the constitution that was properly adopted see People *v.* Strother, 67 Cal. 624, 8 Pac. 383.

Colorado.— Neshit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— If an amendment provides that the section "is hereby amended so as to read as follows," what follows becomes the entire law and the old section ceases to have any force after the adoption of the amendment. Opinion of Justices, 15 Fla. 735.

Idaho.— Hays *v.* Hays, (Ida. 1897) 47 Pac. 732 (proposal of, title, and date of going into effect); Green *v.* State Bd. Canvassers, (Ida. 1896) 47 Pac. 259 (ratification by a majority of electors).

Illinois.— Garrison *v.* Little, 75 Ill. App. 402.

Indiana.— The fact that an amendment was submitted to the people by an act not in conformity with a law passed by a previous legislature, providing the manner in which amendments should be submitted, did not render the election thereunder a special one. *In re* Denny, 156 Ind. 104, 59 N. E. 359, 52 L. R. A. 722.

Iowa.— State *v.* Brookhart, 113 Iowa 250, 84 N. W. 1064.

Maryland.— If by its terms a new constitution continues in force or operation any provisions of the old, in construing the new constitution such provisions are *pro hac vice* parts of the new. Smith *v.* Thursby, 28 Md. 244.

Massachusetts.— Opinion of Justices, 6 Cush. (Mass.) 573.

Minnesota.— Whatever irregularities existed in the submission of an amendment to the people and in their adoption of it were held to be cured by the subsequent admission of Minnesota as a state into the Union and its subsequent action in ratifying the amendment, by acting under its provisions. Secombe *v.* Kittleson, 29 Minn. 555, 12 N. W. 519.

Mississippi.— State *v.* Powell, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652. As to an amendment regarded as a part of the constitution see Green *v.* Weller, 32 Miss. 650.

Missouri.— The time when an amendment took effect is stated in State *v.* Kyle, 166 Mo. 287, 65 S. W. 763. The method of publication and the meaning of the explanatory words on the hallot are given in Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849. Methods of procedure are fully given in Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815.

Montana.—Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

Nebraska.— A proposition to amend the constitution can only be submitted at a general election at which there are elected senators and representatives. Tecumseh Nat. Bank *v.* Saunders, 51 Nebr. 801, 71 N. W. 779.

New York.— People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 47 Am. St. Rep. 702, 16 L. R. A. 836 [*reversing* 19 N. Y. Suppl. 978, 47 N. Y. St. 685], holding that while a certain amendment in some way was not submitted and it remained unchanged in view of the amendment of another section it was amended by implication. See also Green *v.* Shumway, 39 N. Y. 418, holding that that portion of

ment to the constitution, to the acceptance of certain provisions of law, or to the authorization of a county, town, municipality, etc., to do certain things such as to issue bonds, etc., there is a difference of opinion as to whether a majority of all the votes of the electors voting at the election, or only a majority of the votes of those voting upon the proposition are required, the United States courts favoring the latter contention, and the decisions of the different states not being always consistent.[11]

an act to provide for a convention to amend the constitution which required a certain test oath at the election of delegates was void.

North Carolina.— Provisions of the former state constitution authorizing the call of a convention for amending the constitution were held not to exclude the power of the United States to call a convention of the people of North Carolina for the purpose of forming a constitution, at a time when the state government organized under the former one had been held practically superseded by acts of rebellion against the national government. *In re* Hughes, 61 N. C. 57.

North Dakota.— State *v.* Dahl, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97, submission to the people by joint resolution.

Pennsylvania.— Com. *v.* Griest, 196 Pa. St. 396, 46 Atl. 505, 50 L. R. A. 568, as to the publication of an amendment.

Rhode Island.— *In re* Constitutional Convention, 14 R. I. 649.

South Dakota.— State *v.* Herried, 10 S. D. 109, 72 N. W. 93, stating the law as to entering a proposed amendment upon the journals of the two houses, the printing of, and voting upon, it. See also Lovett *v.* Ferguson, 10 S. D. 44, 71 N. W. 765.

Wisconsin.— State *v.* Timme, 54 Wis. 318, 11 N. W. 785.

United States.— Spooner *v.* McConnell, 1 McLean (U. S.) 337, 23 Fed. Cas. No. 13,245.

See 10 Cent. Dig. tit. "Constitutional Law," § 2.

11. *California.*— Howland *v.* San Joaquin County, 109 Cal. 152, 41 Pac. 864 (holding that although the proposition was submitted at a general election, the language of the constitution only required the assent of two thirds of the electors voting on the proposition); People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838 (holding that a majority of all the electors voting at the election was necessary to carry the proposition to reorganize the town).

Florida.— A majority of registered votes "as used in the act must be construed to mean a majority of those qualified electors who vote at the election, and not a majority of all who had the right to vote." State *v.* Sumpter County Com'rs, 19 Fla. 518, 539.

Georgia.— Decatur *v.* Wilson, 96 Ga. 251, 23 S. E. 240; Madison *v.* Wade, 88 Ga. 699, 16 S. E. 21; Gavin *v.* Atlanta, 86 Ga. 132, 12 S. E. 262, all cases as to the mode of ascertaining whether two thirds of the votes were cast.

Idaho.— Green *v.* State Bd. Canvassers, (Ida. 1896) 47 Pac. 259, majority of electors voting on amendment as to female suffrage only necessary.

Illinois.— Chestnutwood *v.* Hood, 68 Ill. 132, holding that a majority of those voting was necessary on the question of county aid to a railroad. See People *v.* Wiant, 48 Ill. 263, on the question of the removal of a county-seat. See also People *v.* Garner, 47 Ill. 246, requiring a majority of all the citizens to adopt township organization. In People *v.* Harp, 67 Ill. 62, it was held on the question of subscription to a railroad that only a majority of the voters voting was necessary. So in Dunnovan *v.* Green, 57 Ill. 63.

Indiana.— *In re* Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722, it appeared that the amendment having been submitted at a general election, the governor's proclamation announced that two hundred and forty thousand and thirty-one votes had been cast for, and one hundred and forty-four thousand and seventy-two against, the amendment; that six hundred and sixty-four thousand and ninety-four votes were cast for presidential electors and six hundred and fifty-five thousand nine hundred and sixty-five for governor, and it was held that the proposed amendment was rejected for want of a constitutional majority. It was held that a majority of all the votes cast was intended in South Bend *v.* Lewis, 138 Ind. 512, 37 N. E. 986 (proceedings for the annexation of a town to a city); State *v.* Swift, 69 Ind. 505. But see Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; State *v.* Dillon, 125 Ind. 65, 25 N. E. 136; Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315.

Iowa.— "The voters of the city or town, contemplated in the statute, are those who, after the required notice, come to the polls and deposit their ballots." Taylor *v.* McFadden, 84 Iowa 262, 270, 50 N. W. 1070.

Kansas.— State *v.* Echols, 41 Kan. 1, 20 Pac. 523, holding that a majority of the votes cast on the proposition of establishing a county high school are sufficient. See Marion County *v.* Winkley, 29 Kan. 36; *In re* Linn County, 15 Kan. 500.

Kentucky.—Montgomery County Fiscal Ct. *v.* Trimble, 104 Ky. 629, 20 Ky. L. Rep. 827, 47 S. W. 773, 42 L. R. A. 738 [*overruling* Belknap *v.* Louisville, 99 Ky. 474, 18 Ky. L. Rep. 313, 36 S. W. 1118, 59 Am. St. Rep. 478, 34 L. R. A. 256], assent of two thirds of the voters sufficient upon the question of authorizing county indebtedness. See Jones *v.* Com., 104 Ky. 468, 20 Ky. L. Rep. 651, 47

2. LEGISLATIVE POWERS AND PROCEEDINGS. Constitutional provisions may empower legislatures to make amendments to constitutions; but ordinarily a legislature has power only to propose amendments, which proposed amendments are

S. W. 328; Rush *v.* Com., 20 Ky. L. Rep. 673, 47 S. W. 585, both cases of voting on the sale of liquor.

Louisiana.— "We hold that on reason and authority that a majority of the property taxpayers in number and value means a majority of those voting at an election." De Soto Parish *v.* Williams, 49 La. Ann. 422, 441, 21 So. 647, 37 L. R. A. 761. See also Duperier *v.* Viator, 35 La. Ann. 957.

Maryland.— When an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who being present abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting; even though in point of fact but a minority of those entitled to vote really do vote. Walker *v.* Oswald, 68 Md. 146, 11 Atl. 711.

Massachusetts.—The constitution distinctly says that amendments shall be adopted if "approved and ratified by a majority of the qualified voters, voting thereon." Mass. Rev. Laws 42.

Michigan.— A majority of all the votes cast and not merely a majority of those cast on the question of bonding a city was held necessary in Stebbins *v.* Judge Superior Ct., 108 Mich. 693, 66 N. W. 594.

Minnesota.— In Smith *v.* Renville County, 64 Minn. 16, 35 N. W. 956, it was held that at an election under the county-seat removal act all the ballots cast, unintelligible as well as intelligible, must be considered. In Slingerland *v.* Norton, 59 Minn. 351, 357, 61 N. W. 322, "majority" was held to mean not a mere majority, but the majority required by the first clause of the act, to wit, sixty per cent. In Everett *v.* Smith, 22 Minn. 53; Bayard *v.* Klinge, 16 Minn. 249; Taylor *v.* Taylor, 10 Minn. 107, a "majority" in the constitutional provisions as to the removal of county-seats was held to mean a majority of those voting at the election.

Mississippi.—On an amendment to the constitution a majority of the votes cast is required. State *v.* Powell, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652. See United States cases *infra*, this note.

Missouri.— A majority of those voting on township organization is not sufficient; there must be a majority of all the votes cast. State *v.* McGowan, 138 Mo. 187, 39 S. W. 771. See State *v.* Binder, 38 Mo. 450; State *v.* Renick, 37 Mo. 270; State *v.* Winkelmeier, 35 Mo. 103.

Nebraska.— "To secure the adoption of an amendment to our constitution it is necessary that the favorable votes be in excess of one-half of the highest aggregate number of votes cast at said election, whether such highest number be for the election of an officer or upon the adoption of a proposition." Tecumseh Nat. Bank *v.* Saunders, 51 Nebr. 801, 805, 71 N. W. 779; Bryan *v.* Lincoln, 50 Nebr. 620, 70 N. W. 252, 35 L. R. A. 752; State *v.* Babcock, 17 Nebr. 188, 22 N. W. 372 (holding that a majority of voters of the city are necessary to authorize the issue of bonds). So in State *v.* Anderson, 26 Nebr. 517, 42 N. W. 421 (sale of county grounds); State *v.* Bechel, 22 Nebr. 158, 34 N. W. 342 (consent to operate a street railway).

New Jersey.— Under the words "voting thereon" in the constitution "evidently only those voting for or against an amendment are to be deemed those voting thereon." Bott *v.* State Secretary, 63 N. J. L. 289, 300, 43 Atl. 744, 45 L. R. A. 251, 62 N. J. L. 107, 40 Atl. 740.

New York.— Smith *v.* Proctor, 130 N. Y. 319, 29 N. E. 312, 41 N. Y. St. 632, 14 L. R. A. 403, only majority of those voting required on the question of issuing bonds for school purposes. But see People *v.* Ft. Edward, 70 N. Y. 28; May *v.* Bermel, 20 N. Y. App. Div. 53, 46 N. Y. Suppl. 622, only majority required of those voting on question of town borrowing money.

North Carolina.—A majority of the qualified voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit or contract a debt. Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Southerland *v.* Goldsboro, 96 N. C. 94, 1 S. E. 760. But see Reiger *v.* Beaufort, 70 N. C. 319.

North Dakota.— "Two thirds of the votes polled" means two thirds of the votes polled on the particular question. State *v.* Lenglie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; State *v.* Barnes, 3 N. D. 319, 55 N. W. 883.

Ohio.— Enyart *v.* Hanover Tp., 25 Ohio St. 618, a majority of all the votes cast on the question of a special tax.

Pennsylvania.— A majority of the whole number of persons voting was held sufficient to adopt a new church constitution. Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161.

Tennessee.— Two thirds of the actual voters are required to vote on the removal of county-seat. Braden *v.* Stumph, 16 Lea (Tenn.) 581. See also Cocke *v.* Gooch, 5 Heisk. (Tenn.) 294; Louisville, etc., R. Co. *v.* County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Texas.— Only a majority of all the votes cast is required for removal of county-seat. Alley *v.* Denson, 8 Tex. 297.

Washington.— Three-fifths majority of those actually voting is required as to issuing bonds, etc. Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014; Metcalfe *v.* Seattle, 1 Wash. 297, 25 Pac. 1010.

West Virginia.— Three fifths of all the

usually required to be entered upon its journals and afterward submitted to the people for approval in the manner prescribed in the constitution itself.[12]

votes cast upon the question of relocation of a county-seat is sufficient. Davis *v.* Brown, 46 W. Va. 716, 34 S. E. 839.

Wisconsin.— A majority only of the voters voting is required on the question of school tax. Sanford *v.* Prentice, 28 Wis. 358. See also Gillespie *v.* Palmer, 20 Wis. 544.

United States.— A provision in the constitution of Mississippi that the legislature shall not authorize a county to lend aid to a corporation unless two thirds of the qualified voters shall assent thereto at an election to be held therein does not require an assenting vote of two thirds of the whole number enrolled as qualified to vote, but only two thirds of those actually voting at the election held for the purpose. Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517. And so generally in the United States supreme court. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93 [*disregarding* Hawkins *v.* Carroll County, 50 Miss. 735], was the case of the issue of county bonds in Missouri in aid of a railroad, the statute providing that "two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." It was held that a majority of those voting was sufficient. See also Douglas *v.* Pike County, 101 U. S. 677, 25 L. ed. 968; Cass County *v.* Johnston, 95 U. S. 360, 24 L. ed. 416; St. Joseph Tp. *v.* Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328; Madison County *v.* Priestly, 42 Fed. 817; Mobile Sav. Bank *v.* Oktibbeha County, 24 Fed. 110, 22 Fed. 580, all of which were cases of bonds issued in aid of railroads.

See 10 Cent. Dig. tit. "Constitutional Law," § 2.

12. *Alabama.*— An amendment omitted from the ratifying resolutions was not constitutionally ratified. Collier *v.* Frierson, 24 Ala. 100.

Arkansas.— The power of the general assembly to amend the constitution does not authorize them to repeal any provision of the Bill of Rights. Eason *v.* State, 11 Ark. 481; State *v.* Cox, 8 Ark. 436.

California.— The legislature cannot propose an amendment that will not upon its adoption by the people become an effective part of the constitution. Livermore *v.* Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312. The method of proposing an amendment and submitting it to the people is set forth in Hatch *v.* Stoneman, 66 Cal. 632, 6 Pac. 734.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221, amendments valid, although not accurately entered in full on the journals of the two houses.

Iowa.— McMillen *v.* Blattner, 67 Iowa 287, 25 N. W. 245; Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609, treat of the journal of each house as the best evidence.

Louisiana.— State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776, holding that the secretary of the senate and the clerk of the house may spread a proposed amendment on the journal after it has been voted for by two thirds of the members, without express authority from the senate or the house, and that in this case there was a ratification of the secretary's act, if any was needed.

Mississippi.— "Two thirds of each house" means two thirds of a majority or a quorum. Green *v.* Weller, 32 Miss. 650.

Missouri.— Under Const. art. 15, § 2, a resolution proposing a constitutional amendment need not be read on three different days in each house, as an ordinary bill. Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815. See State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636.

Nebraska.— A proposition to amend the constitution having been passed by the senate by the necessary three-fifths majority and entered on the journal, it was amended by the house and passed by the requisite majority and entered on the journal. Afterward the house amendments were concurred in by the senate and entered on its journal. It was held that there was a sufficient compliance with Const. art. 15, § 1. *In re* Senate File No. 31, 25 Nebr. 864, 41 N. W. 981, discussing the provisions of this article and section and the methods of procedure; also the necessity of a title stating the object of a bill to amend the constitution.

Nevada.— A proposed amendment to the constitution not having been made on the journal of either house as required by the constitution, the omission was held fatal in State *v.* Tufly, 10 Nev. 391, 12 Pac. 835, 3 Am. St. Rep. 895.

North Carolina.— State University *v.* Melver, 72 N. C. 76, stating the rule regarding constitutions as laying down general propositions, leaving the details to be worked out by the legislature as applied to Const. art. 13, § 9.

South Carolina.— See Bray *v.* Florence, 62 S. C. 57, 39 S. E. 810.

See 10 Cent. Dig. tit. "Constitutional Law," § 3.

The journals kept by legislative bodies are public records, and the courts may take judicial notice of the proceedings entered therein. Cooley Const. Lim. 135. But see Koehler *v.* Hill, 60 Iowa 543, 550, 14 N. W. 738, 15 N. W. 609.

How entered.— "When a proposed amendment is entered in the journal of either house by identifying reference it is within the meaning and intent of the constitution entered in the journal of that house." Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615. A reference to the proposed amendment by title and number is sufficient. Oakland Paving Co. *v.* Tompkins, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17. Prohibitory-Amendment Cases, 24 Kan. 700; Worman *v.* Hagan,

3. Approval by President or Governor. There seems to be a difference of view as to the necessity of the approval of the executive officer.[13]

4. Certifying and Publishing Proposed Amendments. Constitutions generally provide for the publication of all proposed amendments.[14]

5. Convention to Revise. Another method of proposing amendments is by constitutional conventions. The constitutional convention puts in form the questions of amendment upon which the people are to vote, but the changes are enacted by the people themselves.[15]

6. Submission to Popular Vote. As a general rule under the provisions of the constitutions ratification by vote of the people is essential to the validity of the amendment.[16]

78 Md. 152, 27 Atl. 616, 21 L. R. A. 716. *Contra*, McMillen *v.* Blattner, 67 Iowa 287, 25 N. W. 245; Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609. See also Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3.

Submission to people see *infra*, III, B, 6.

13. State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776, holding that the governor's veto had no effect and that the proposition need not be submitted to the governor for his approval. The governor's approval of the action of the legislature in submitting the amendment was held to add nothing to its validity in *In re* Senate File No. 31, 25 Nebr. 864, 41 N. W. 981; Com. *v.* Griest, 196 Pa. St. 396, 46 Atl. 505, 50 L. R. A. 568 [*reversing* 8 Pa. Dist. 468, 22 Pa. Co. Ct. 482], holding that an amendment need not be submitted to the governor for approval or veto. The provision of U. S. Const. art. 1, § 7, was held to apply only to ordinary legislation in Hollingsworth *v.* Virginia, 3 Dall. (U. S.) 378, 1 L. ed. 644. The law as to joint resolutions is stated in Lovett *v.* Ferguson, 10 S. D. 44, 71 N. W. 765.

14. State *v.* Tooker, 15 Mont. 8, 37 Pac. 840, 25 L. R. A. 560 (holding that publication was essential); State *v.* Grey, 21 Nev. 378, 32 Pac. 190, 19 L. R. A. 134 (holding that the provision was complied with by printing the proposed amendment in the statutes); State *v.* Davis, 20 Nev. 220, 19 Pac. 894 (holding that the requirement was a reasonable one); State *v.* Thornson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582 (holding that it was the duty of the secretary to certify a question directed by the legislature as to whether a provision should be repealed, although an affirmative answer by the people would not affect the constitution).

15. Cooley Const. Lim. (6th ed.) 44 [*citing* Jameson Const. Conv. (4th ed.)]. And see the following cases:

Arkansas.— The provisions of the constitution of 1861, which were not hostile to the federal government, and the acts of the state government thereunder, not in aid of the Confederacy, could not be invalidated by the action of a subsequent constitutional convention. Berry *v.* Bellows, 30 Ark. 198.

Illinois.— A constitutional convention which fixes and defines a right may exercise legislative power in providing means for its enforcement. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124.

Massachusetts.— Delegates cannot act upon and propose amendments in parts of the constitution not specified. Opinion of Justices, 6 Cush. (Mass.) 573.

Pennsylvania.— The convention must act within the scope of its powers, and having so acted errors of procedure cannot afterward be inquired into by the courts. Wells *v.* Bain, 75 Pa. St. 39, 15 Am. Rep. 563. The sovereign right to ratify or reject the constitution belongs to the people. Woods' Appeal, 75 Pa. St. 59.

West Virginia.— The convention derives its powers from the people, and the legislature can neither limit nor restrict their exercise. Loomis *v.* Jackson, 6 W. Va. 613.

See 10 Cent. Dig. tit. "Constitutional Law," § 6.

16. *Alabama.*— May, etc., Hardware Co. *v.* Birmingham, 123 Ala. 306, 26 So. 537, holding that the method of submission to the people was valid.

Indiana.— While a majority of electors are required, the whole number of votes cast may be taken as the number of electors of the state. State *v.* Swift, 69 Ind. 505, also holding that the vote being ineffectual for want of a majority the legislature may resubmit the amendment.

Kansas.— *In re* Prohibitory Amendment Cases, 24 Kan. 700.

Louisiana.— State *v.* Favre, 51 La. Ann. 434, 25 So. 93; State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776; State *v.* New Orleans, 29 La. Ann. 863. *Compare* Brennan *v.* Sewerage, etc., Board, 108 La. 569, 32 So. 563.

Michigan.— Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641, explaining the meaning of "general election" as used in the constitution.

Minnesota.— Dayton *v.* St. Paul, 22 Minn. 400.

Missouri.— It is no ground for restraining the submission of an amendment to a vote of the people that it contains certain conditions and delegates certain powers to officials. Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815.

Nebraska.— *In re* Senate File 31, 25 Nebr. 864, 41 N. W. 981 (holding that propositions were to be separately submitted, and that

C. Ordinances and Schedules Appended to Constitution. Ordinances and schedules appended to constitutions are generally a part of the fundamental law and binding upon all the departments of the state.[17]

IV. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

A. Terminology. "Construction," as applied to a written constitution, means to determine from its known elements its true meaning, or the intent of its framers and the people who have adopted it, in the application of its provisions to cases or emergencies arising and not specifically provided for in the text of the instrument, by drawing conclusions beyond the direct expressions used in the text.[18] "Interpretation," as applied to a written constitution, means to deter-

votes cast in favor of both nullify each other); State *v.* Babcock, 17 Nebr. 188, 22 N. W. 372.

Nevada.— State *v.* State Bd. Examiners, 21 Nev. 67, 24 Pac. 614, 9 L. R. A. 385, construing the words "voting thereon."

New Jersey.— Bott *v.* State Secretary, 62 N. J. L. 107, 40 Atl. 740, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251, giving the method of adopting and rejecting constitutional amendments.

North Dakota.— State *v.* Dahl, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97, submission through joint resolution.

Ohio.— State *v.* Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L. R. A. 422.

Rhode Island.— The warrant for an election being in the language of the statute was held sufficient without setting out the proposed amendment. *In re* Constitutional Amendment, (R. I. 1898) 41 Atl. 566.

South Dakota.— State *v.* Herried, 10 S. D. 109, 72 N. W. 93; Lovett *v.* Ferguson, 10 S. D. 44, 71 N. W. 765, stating fully the various questions as to submission to the people.

Texas.— Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

Wisconsin.— The legislature may submit several distinct propositions as one amendment, if they relate to the same subject and are all designed to accomplish one object. State *v.* Timme, 54 Wis. 318, 11 N. W. 785.

See cases cited *supra*, note 10. See 10 Cent. Dig. tit. "Constitutional Law," § 7. But see Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472, holding ratification to be unnecessary to the validity of a new constitution.

17. *Alabama.*— The ordinance appended to the constitution is the declaration of the people that the general powers of the state shall not be exercised in particular cases, and is revocable either entirely or *pro tanto* by an agreement between the state and the United States. Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472.

Arkansas.—An ordinance providing for the issue of treasury warrants was held void in Bragg *v.* Tuffts, 49 Ark. 554, 6 S. W. 158. A schedule requiring all officers to qualify within a certain time was held to be mandatory, and to have all the force of a constitutional provision in State *v.* Johnson, 26 Ark. 281.

Georgia.— The ordinance 1865, suspending the statute of limitations, was of force, *proprio vigore*, irrespective of any confirmation of it by the convention of 1868. Goodroe *v.* Neal, 45 Ga. 109.

Maryland.— Magruder *v.* Swann, 25 Md. 173, holding that a schedule was intended to preserve the machinery of government in the passage from the old to the new constitution, and was not intended to suspend the authority of the new constitution.

Missouri.— State *v.* Daniels, 66 Mo. 192 (holding that a schedule operated to continue in existence a certain court); *In re* Answers to Questions, 37 Mo. 129 (holding that an ordinance did not suspend the power of the legislature to provide for the sale of railroads until there was a refusal or neglect to pay the tax required to be imposed by the ordinance).

Ohio.— State *v.* Taylor, 15 Ohio St. 137, holding that a certain section of a schedule was not intended as a permanent provision of the constitution, but was limited in its application.

Texas.— An ordinance was held to be invalid because never submitted for ratification. Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738. An ordinance adopted in 1845 was held to have no effect on titles originating under a later act. Caudle *v.* Welden, 32 Tex. 355. The validity and retrospective operation of an ordinance were recognized in Maloney *v.* Roberts, 32 Tex. 136. The ordinance appended to the constitution is a part of the fundamental law of the land and of equal authority upon the executive, legislative, and judicial departments of the state as if it formed a component part of the constitution. Stewart *v.* Crosby, 15 Tex. 546. As to how rights and titles were affected under section 1 of the schedule to the constitution of the republic of Texas see McMullen *v.* Hodge, 5 Tex. 34.

See 10 Cent. Dig. tit. "Constitutional Law," § 8.

18. Such conclusions are said to be in the spirit, though not in the letter of the text. Lieber Leg. & Pol. Hermeneutics, c. 3, § 2; Bouvier L. Dict.

mine the true sense of the words used in the text.[19] In practice construction includes interpretation, and in American constitutional law both terms are frequently used synonymously.[20]

B. Who Are to Construe[21] — 1. In General — a. Federal Constitution. It was no uncommon occurrence in early days for the individual states to claim the right to interpret the federal constitution for themselves individually, and in their aggregate capacity, independent of federal authority. Such claims were made in some cases through the state courts,[22] but most frequently through their legislative departments;[23] and an instance where the legislature of the same state has in turn claimed the right to interpret the federal constitution for itself, conceded the right to the supreme court of the United States, and reclaimed it for itself, is not wanting.[24] But it is now an established principle that in all cases

19. In other words it means to ascertain and convey, from the language used, the same meaning that the author intended to convey. Lieber Leg. & Pol. Hermeneutics, c. 1, § 4; Bouvier L. Dict.

The terms employed in Magna Charta have a meaning quite as extensive as those used in the American constitutions, and the judicial exposition of the one should be taken as a guide to the proper understanding of the other. Matter of Dorsey, 7 Port. (Ala.) 293. The words "law of the land," as originally used in Magna Charta, and incorporated into the American constitutions, mean according to due course of law, including trial by jury, and prosecution by indictment for the higher crimes and offenses; or, in the language of Mr. Webster in the Dartmouth College case, they mean "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. 2 Coke Inst. 50; 2 Kent Comm. (6th ed.) 13. And see Saco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786; Jones *v.* Robbins, 8 Gray (Mass.) 329; Taylor *v.* Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; 5 Webster Works 487, and *infra*, XIII, A.

20. Bouvier L. Dict.; Cooley Const. Lim. (6th ed.) 52.

21. What persons or departments, under the American system, are vested with authority to construe constitutional provisions of doubtful meaning, whether occurring in the federal or the state constitutions, are questions that have given rise to much difficulty and confusion, as well as conflict of authority, not only as between the federal and state authorities, but in the internal affairs of the states. In but few of the state constitutions are provisions to be found authorizing the executive or legislative departments to call upon the judiciary for its opinions as to the meaning of doubtful constitutional provisions or statutes, or upon other questions requiring a construction of the fundamental laws of the states; and upon the same subjects the federal constitution is silent. See *infra*, IV, B, 1, a, b.

22. Respublica *v.* Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683. But see Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

23. Resolutions passed by the legislatures of Kentucky and Virginia, as drawn by Jefferson and Madison respectively, declared in substance that the several states were sovereign and independent, that the federal constitution was a compact between them, to which they were the parties, that there was no common arbitrator to construe the federal constitution, and that each state had the right to construe it for itself, to judge of infractions, and the right to prescribe the mode of redress. 4 Elliot Debates 315, 322; North Am. Rev. (Oct. 1830), pp. 488–528. For answers of the legislatures of Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire, and Vermont, to these resolutions and denying their principles see Cooper Am. Politics, bk. 2, p. 6. Similar views to those expressed in the Virginia and Kentucky resolutions, although less radical in tenor, were adopted by the "Hartford Convention" of 1814. Dwight Hist. Hartf. Conv. p. 361; 7 Nile Reg. p. 308.

24. In 1810 the legislature of Pennsylvania, being of the opinion that there was no common arbitrator of the federal constitution, passed a resolution proposing an amendment to it, providing for the "appointment of an impartial tribunal to decide disputes between the state and federal judiciary," to which the legislature of Virginia, of Jan. 26, 1810, answered that it was "of opinion that a tribunal is already provided by the Constitution of the United States, to wit: The Supreme Court, more eminently qualified from their habits and duties, from their mode of selection, and from the tenure of their offices, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be created." Va. Sen. Jour. (1810); Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. But in 1829 the legislature of Virginia again resolved "that there was no common arbitrator to construe the Constitution of the United States;" that, "being a federative compact between sovereign states, each state has a right to construe the compact for itself." 3 Am. Ann. Reg. 131.

In the document known as the "Virginia

involving a construction of the federal constitution the courts of the United States have exclusive jurisdiction; and their decisions are binding upon the state courts, "anything in the constitution or laws of any state to the contrary notwithstanding."[25] And that the courts of the several states are as much bound to uphold the supremacy of the federal constitution as are the federal courts, or as much as they are bound to sustain the constitutions and laws of the other states, is now an acknowledged principle of jurisprudence.[26]

b. State Constitutions. The several states have the right to construe their own constitutions and laws as they see fit, so long as they do not infringe upon the federal constitution or laws of the United States or upon the rights of citizens of other states; and who are to be the arbitrators of a state constitution is an internal question that every state is of course at liberty to determine for itself.[27]

2. Practical Construction — a. In General. From force of circumstances and conditions necessarily arising in the administration of the affairs of the government, both state and national, it is evident that those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the constitutions and laws in numerous instances.[28] Every department of the government, invested with certain constitutional powers, must, in the first instance, but not exclusively, be the judge of its powers or it could not act;[29] and this practical

Report," of 1800, pp. 6–9, also drawn by Mr. Madison, the doctrine of the Virginia resolutions of 1798 is again set forth; but the distinguished author appears to have changed his views on this subject very materially some years later, when, in a letter to Edward Everett, in speaking of the same constitution, he said: "It cannot be altered or annulled at the will of the states individually, as the constitution of a state may be at its individual will." North Am. Rev. (Oct. 1830), p. 537 *et seq.*

25. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; Barron *v.* Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672 (holding the constitution and laws of the United States to be supreme over those of the states, and that the federal courts are the arbitrators of the federal constitution); McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

26. *In re* Spangler, 11 Mich. 298; Romine *v.* State, 7 Wash. 215, 34 Pac. 924; Ableman *v.* Booth, 11 Wis. 498.

27. Cooley Const. Lim. 39 *et seq.*

Where no federal question is involved, the courts of the United States will adopt and follow the decisions of the state courts in construing their own constitutions and laws. Fairfield *v.* Gallatin County, 100 U. S. 47, 25 L. ed. 544; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Henry County *v.* Nicolay, 95 U. S. 619, 24 L. ed. 394; *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Luthur *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581; North Bennington First Nat. Bank *v.* Bennington, 16 Blatchf. (U. S.) 53, 9 Fed. Cas. No. 4,807, 2 Browne Nat. Bank Cas. 437.

Where the rights of their own citizens are not infringed upon state courts will follow the decisions of other states in construing the constitutions and laws of the latter. Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Patterson *v.* Lynde, 112 Ill. 196.

It would no doubt be beyond the jurisdiction of a state court for any reason to declare a provision in the constitution of another state invalid; but with reference to statutes the rule is otherwise. If a statute of a state is in violation of its own constitution, and the rights of citizens of other states are affected thereby, the courts of the states whose citizens are so affected will declare such statute unconstitutional and void (Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051; Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Simonds *v.* Simonds, 103 Mass. 572, 4 Am. Rep. 576; Stoddart *v.* Smith, 5 Binn. (Pa.) 355, holding statutes of other states void, as contravening their own constitutions. See also New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233), even though such a declaration has not been made by the courts of the state in which the statute was enacted (Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051, where the court, Holmes, C. J., in declaring a statute of Vermont to be in violation of its constitution, expressed regret that the declaration did not come from the supreme court of that state).

28. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

29. Per Parsons, C. J., in Kendall *v.* Kingston, 5 Mass. 524, 533.

Practical construction.— Mr. Jefferson claimed the right to construe the federal constitution for himself, independent of the judiciary and in defiance of it. 4 Jefferson Corresp. 316, 317. President Jackson denied the power of congress, under the constitution,

construction by persons or departments outside of the judiciary may or may not be final according to the circumstances and nature of each particular case.

b. Discretionary Powers. Whenever a constitutional provision or statute gives a discretionary power, to be exercised when and under such circumstances as those who are charged with exercising such power may deem expedient, the construction given to all such provisions or statutes by those charged with such duties is conclusive and not subject to review by the judicial power, even though erroneous.[30]

3. Political Construction. Where the questions involved are of a political character, and action depends upon the construction to be given a constitutional provision, or statute, courts will not only give great consideration to constructions of such provisions or statutes by the political departments of the government[31] in doubtful cases, but they are bound by such constructions where the power is of a discretionary character, and making those who are called upon to exercise such powers, in the first instance, judges of questions of fact and existing conditions.[32]

to recharter the United States bank, after the original act of incorporation had been held constitutional by the supreme court of the United States. Veto Message (1832). And President Lincoln denied the constitutionality of the fugitive slave law, notwithstanding the decision of the same court in the "Dred Scott Case." Inaugural Address (1861).

Where governors have defied judiciary.— Two attempts by state executives to construe constitutional provisions to the exclusion of the judiciary are shown in American constitutional law. See Justices' Answer, 70 Me. 582, 608; Atty.-Gen. *v.* Barstow, 4 Wis. 567. Both of these cases were attempts by executives to perpetuate political power, against the expressed will of the people, by manipulation of election returns. In both cases the executives were vested with power, under constitutional provisions or statute, to canvass the returns and issue certificates of election; and in both cases it was held that the courts could look behind the certificates issued and pass judgment upon the result of the election contrary to the canvass made by the executive. In the Wisconsin case it was held that the court had constitutional power to oust the executive from office in proceedings by quo warranto. And in the Maine case the court, in impeaching the statement submitted by the legislative department in support of the contention of the executive, said: "To put such questions, in the absence of facts requiring their solution, would be an abuse of the power of the executive to call for the opinion of the court upon questions of law, on solemn occasions. . . . We are bound to take judicial notice of the doings of the executive and legislative departments of the government, and, when called upon by proper authorities, to pass upon their validity." Justices' Answer, 70 Me. 600, 609. And see Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325.

30. "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." Per Story, J., in Martin *v.* Mott, 12 Wheat. (U. S.) 19, 31, 6 L. ed. 537. See also People *v.* Parker, 3 Nebr. 409, 19 Am. Rep. 634.

31. Calhoun *v.* Kellogg, 41 Ga. 231; People *v.* La Salle County, 100 Ill. 495.

32. Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Griffin's Case, Chase (U. S.) 364, 17 Fed. Cas. No. 5,815, 2 Am. L. T. Rep. (U. S. Cts.) 93, 8 Am. L. Reg. (N. S.) 358, 3 Am. L. Rev. 784, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623; U. S. *v.* Lytle, 5 McLean (U. S.) 9, 26 Fed. Cas. No. 15,652, holding recognition by the president of the existence of certain state governments conclusive upon judiciary. See also Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60, holding that the president was responsible to people only in a political capacity for acts of a discretionary character. See also Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411. In Luther *v.* Borden, 7 How. (U. S.) 1, 47, 12 L. ed. 581, it is said: "According to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

Illustrations.— All constitutions contain numerous provisions granting discretionary powers, which are most frequently addressed to the executive and legislative departments. The power to call out the militia, to convene the legislature in extraordinary session, to recommend particular legislation, and the veto power are all familiar examples of the exercise of discretionary powers by the executive department. People *v.* Parker, 3 Nebr. 409, 19 Am. Rep. 634 (holding that the governor might revoke a proclamation convening the legislature in extraordinary session, is-

4. Judicial Construction — a. In General. Since the construction of the constitutional provisions and statutes, by persons charged with duties in the exercise of discretionary power is final,[33] it follows that all constitutional questions cannot receive judicial interpretation. It is therefore only in cases where some right, public or private, is involved, which results in litigation, and is not included in that class of cases which are addressed to the discretion of the other departments, that questions requiring construction of constitutional provisions can be brought to the attention of the judiciary, and judicial construction of such provisions or statutes obtained in the course of judicial administration;[34] and when this is done the law, as declared in the judgment rendered, must be taken as the authoritative rule within the jurisdiction in which it is announced, until reversed,[35] overruled, or changed by constitutional amendment or legislation.

b. Duty of Courts to Take Jurisdiction. The right and duty of the judiciary to take jurisdiction and decide cases when constitutional questions are presented are both imperative and inseparable.[36]

sued in his absence, by a person acting in his place); Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537 (holding the president to be the exclusive and final judge as to when to call out the militia). The power to reject recommendations from the executive, to pass laws over a veto by a two-thirds vote, and to enact special legislation when, in the judgment of the legislature, a general law is inapplicable, are also familiar examples of the exercise of discretionary powers by the legislative department.

Arkansas.— Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184.

Colorado.— Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

Illinois.— Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1.

Indiana.— Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; State *v.* Tucker, 46 Ind. 355; Marks *v.* Purdue University, 37 Ind. 155.

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

Kansas.— State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503.

Missouri.— St. Louis *v.* Shields, 62 Mo. 247; Hall *v.* Bray, 51 Mo. 288; State *v.* New Madrid County Ct., 51 Mo. 82; State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415, the last case holding that the legislature is the exclusive judge as to whether general law is applicable to particular case.

United States.— Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33, 42 Conn. 583.

33. See *supra*, IV, B, 2, 3.

34. *Georgia.*— Calhoun *v.* McLendon, 42 Ga. 405.

Maine.— Durham *v.* Lewiston, 4 Me. 140; Lewis *v.* Webb, 3 Me. 326.

Massachusetts.— King *v.* Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112; Holden *v.* James, 11 Mass. 396, 6 Am. Dec. 174.

Michigan.— Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641.

Pennsylvania.— Haley *v.* Philadelphia, 68 Pa. St. 45, 8 Am. Rep. 153; Reiser *v.* William Tell Sav. Fund Assoc., 39 Pa. St. 137; Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567.

Tennessee.— Governor *v.* Porter, 5 Humphr. (Tenn.) 165.

Texas.— Powell *v.* State, 17 Tex. App. 345.

United States.— Ogden *v.* Blackledge, 2 Cranch (U. S.) 272, 2 L. ed. 276; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

See 10 Cent. Dig. tit. "Constitutional Law," § 42.

35. For a judgment rendered by a court of last resort is to be taken as authority for similar cases within the jurisdiction of the court rendering it.

Illinois.— Frink *v.* Darst, 14 Ill. 304, 58 Am. Dec. 575.

Maryland.— Dugan *v.* Hollins, 13 Md. 149.

Massachusetts.— Law *v.* O'Regan, 179 Mass. 107, 60 N. E. 397.

Michigan.— Emerson *v.* Atwater, 7 Mich. 12.

Mississippi.— Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159.

New York.— Palmer *v.* Lawrence, 5 N. Y. 389; Bates *v.* Relyea, 23 Wend. (N. Y.) 336; Goodell *v.* Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351; Anderson *v.* Jackson, 16 Johns. (N. Y.) 382, 8 Am. Dec. 330.

Tennessee.—Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

Virginia.— Lewis *v.* Thornton, 6 Munf. (Va.) 87.

Wisconsin.— Kneeland *v.* Milwaukee, 15 Wis. 454.

It is also res adjudicata as between the parties and their privies and conclusive upon sureties in the absence of fraud or collusion. Law *v.* O'Regan, 179 Mass. 107, 60 N. E. 397; Cutter *v.* Evans, 115 Mass. 27; Way *v.* Lewis, 115 Mass. 26; Tracy *v.* Maloney, 105 Mass. 90, holding *bona fide* judgments to be conclusive upon sureties. And see cases cited *supra*, note 35.

36. *Maine.*— Justices' Answers, 70 Me. 570, 599; *Ex p.* Davis, 41 Me. 38.

C. General Rules For Construction — 1. As Paramount Laws. A written constitution is to be interpreted and effect given to it as a paramount law, to which all other laws must yield, and it is equally obligatory upon all departments of the government and individual citizens alike.[37] It is not always necessary, in order to render a statute invalid, that it should contravene some express provision of the constitution; if the act is inhibited by the general scope and purpose of the instrument it is as much invalid as though prohibited by the express letter of some of its provisions.[38] Therefore the implied powers and restraints to be found in a constitution are a very important part of it.[39]

2. Rules For Construction of Statutes Apply. The established rules of construction applicable to statutes also apply to the construction of constitutions.[40]

Missouri.— Baily *v.* Gentry, 1 Mo. 164, 13 Am. Dec. 484.

Pennsylvania.— De Chastellux *v.* Fairchild, 15 Pa. St. 18, 53 Am. Dec. 570.

Vermont.— Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77.

United States.— Cohen *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

See 10 Cent. Dig. tit. "Constitutional Law," § 42; and *infra*, IV, G.

37. "We must not forget that a Constitution is the measure of the rights delegated by the people to their governmental agents and not of the rights of the people. . . . The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as is the written words, and such restraints may be found either in the language employed, or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law." Rathbone *v.* Wirth, 150 N. Y. 459, 470, 483, 45 N. E. 15, 34 L. R. A. 408.

"A written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms." People *v.* Albertson, 55 N. Y. 50, 55.

Compared with statute.— A constitution is legislation direct from the people, acting in their sovereign capacity, while a statute is legislation from their representatives, subject to limitations prescribed by the superior authority. People *v.* May, 3 Mich. 598. A constitution is a law which is different from a statute only in its paramount force in cases of conflict. Both emanate from the same source, the only difference being in the mode of enactment. Varney *v.* Justice, 86 Ky. 596, 9 Ky. L. Rep. 743, 6 S. W. 457; Daily *v.* Swope, 47 Miss. 367; Newell *v.* People, 7 N. Y. 9; Devries *v.* McKoun, 6 N. Y. Leg. Obs. 203. See also *supra*, I; II, B.

38. Marshall *v.* Silliman, 61 Ill. 218; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278, holding statutes void for imposing taxation, although not violating the letter of the constitution. And see People *v.* Albertson, 55 N. Y. 50, 55.

39. Field *v.* People, 3 Ill. 79; State *v.* Hallock, 14 Nev. 202, 33 Am. Rep. 559; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; U. S. *v.* Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304, leading cases on implied powers. And see People *v.* Albertson, 55 N. Y. 50, 55.

Questions of this character have frequently arisen in connection with legislation calculated to control municipal affairs by the establishment of local boards, authorized to control certain municipal affairs, or in statutes prescribing conditions and qualifications for the selection of local officers; and in many cases such legislation has been declared unconstitutional, as being repugnant to the principle of local self-government, although not contravening any express constitutional provision. State *v.* Denny, 118 Ind. 382, 21 N. E. 274, 4 L. R. A. 65; Varney *v.* Justices, 86 Ky. 596, 9 Ky. L. Rep. 743, 6 S. W. 457; Lexington *v.* Thompson, 24 Ky. L. Rep. 384, 68 S. W. 477; State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624; Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People *v.* Albertson, 55 N. Y. 50, holding statutes unconstitutional as repugnant to the principles of local self-government, although not violating any express provision.

Validity of statutes infringing upon the right of local self-government see *infra*, IV, E, 2, b, (VI).

40. Nicholson *v.* Thompson, 5 Rob. (La.) 367; People *v.* May, 3 Mich. 598; People *v.* Potter, 47 N. Y. 375. See, generally, Statutes.

"Among the well settled rules of construction of statutes, are these: 1st, the natural import of the words of any legislative act, according to the common use of them when applied to the subject matter of the act, is to be taken as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound acknowledged principles of public policy; and 2d, if the subject of the statute relates to courts or legal proofs, the words of the legislature are to be construed technically, unless from the statute it appears that the terms were used in a more popular sense. These rules are equally appli-

3. Intent of Framers — a. Must Be Given Effect. The purpose of construction, as applied to a written constitution, is to give effect to the intent of the framers and of the people who have adopted it; and it is a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted;[41] and to accomplish this result the extremes of both a liberal and a strict construction are to be avoided[42] and technical rules are to be excluded.[43]

b. To Be Ascertained From Whole Instrument. The whole instrument is to be examined with a view to ascertaining the meaning of each and every part.[44] The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose, and therefore the instrument must be construed as a whole in order that its intent and general purposes may be ascertained; and as a necessary result of this rule it follows that wherever it is possible to do so each provision must be construed so that it shall harmonize with all others, without distorting the meaning of any of such provisions, to the end that the intent of the framers may be ascertained and carried out and effect given to the instrument as a whole.[45]

cable in the construction of a constitution — as a constitution is law, the people having been the legislators — as much as a statute is law, the senators and representatives being the legislators." People *v.* May, 3 Mich. 598, 605.

But the discretion of the courts is more restricted in the application of the rules of construction to a plan of government, embodied in a written constitution, than it is in the construction of statutes, which in many cases are hastily and unskilfully drawn and require construction in order to determine their meaning. But not so with constitutions, the most solemn and deliberate of human writings, always carefully drawn, and calculated for permanent endurance. Wolcott *v.* Wigton, 7 Ind. 44; Greencastle *v.* Black, 5 Ind. 557; Newell *v.* People, 7 N. Y. 9.

Liberal and strict construction.— It has been held that a liberal construction of statutes and a strict construction of constitutional provisions are regarded as sound judicial policy. Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185; Wolcott *v.* Wigton, 7 Ind. 44. But strict construction, as here used, is not to be taken in the sense of being narrow so much so as to check in any way the exercise of the powers granted. On the contrary, a constitution should receive a fair and liberal construction, so that the true objects of the grant may be promoted, and the government left in the full and free exercise and enjoyment of all its rights, privileges, and immunities which are not excepted out of its ordinary and general powers, and are declared by the sovereign will to be inviolable and supreme in the people. State *v.* Ashley, 1 Ark. 513; North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23. See also *infra*, IV, E, 1, c, (I). And the rule that statutes in derogation of the common law are to be strictly construed should be applied to constitutional provisions with caution, for the reason that constitutions may contemplate some radical change in existing conditions; and if they were always to be strictly construed, the intent of the framers and of the people in framing and adopting them as a paramount law might be defeated. Cooley Const. Lim. (6th ed.) 75.

41. *Alabama.*— Dorman *v.* State, 34 Ala. 216.

Arkansas.— State *v.* Ashley, 1 Ark. 513.

Georgia.— Campbell *v.* State, 11 Ga. 353.

Kentucky.— Phillips *v.* Covington, etc., Bridge Co., 2 Metc. (Ky.) 219.

Nevada.—State *v.* Glenn, 18 Nev. 34, 1 Pac. 186.

New York.— People *v.* Potten, 47 N. Y. 375; Newell *v.* People, 7 N. Y. 9.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819.

United States.—Juilliard *v.* Greenman, 110 U. S. 421, 4 S. Ct. 122, 38 L. R. A. 773, 28 L. ed. 204; Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61, 3 L. ed. 38.

See 10 Cent. Dig. tit. "Constitutional Law," § 9.

42. State *v.* Ashley, 1 Ark. 513; North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713.

43. "A constitution is not to receive a technical construction, like a common-law instrument, or statute. It is to be interpreted so as to carry out the great principles of government, not to defeat them." Dorman *v.* State, 34 Ala. 216, 238; Hunt *v.* State, 7 Tex. App. 212, 231. "Constitution, which is always to be understood in its plain, untechnical sense." Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

44. Coke Litt. 381*a*.

45. *Arkansas.*— Hawkins *v.* Filkins, 24 Ark. 286.

California.— Maryc *v.* Hart, 76 Cal. 291, 18 Pac. 325; People *v.* Leonard, 73 Cal. 230, 14 Pac. 853; Bourland *v.* Hildreth, 26 Cal.

c. **To Prevail Over Literal Meaning.** The intent of the framers of a constitution, when ascertained, will prevail over any part of the law. But the intent is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument, and the remedy sought to be applied; and when the intent of the whole is ascertained no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion.[46]

4. Construction to Be Prospective. As a constitution always operates prospectively, unless from the language used or the objects to be accomplished it is clearly shown that some provision was intended to operate retrospectively,[47] construction therefore must be in favor of prospective operation, unless an intent to the contrary is clearly established.[48]

161; French *v.* Teschemaker, 24 Cal. 518; Cohen *v.* Wright, 22 Cal. 293.

Colorado.— People *v.* Wright, 6 Colo. 92.

Florida.— State *v.* Barnes, 24 Fla. 29, 3 So. 433, where it is said that the place occupied by a provision in a constitution is of no material importance.

Idaho.— Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

Illinois.— Tuttle *v.* National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; Wilcox *v.* People, 90 Ill. 186; Hills *v.* Chicago, 60 Ill. 86; People *v.* Garner, 47 Ill. 246.

Louisiana.— Decklar *v.* Frankenberger, 30 La. Ann. 410.

Maryland.— Dyer *v.* Bayne, 54 Md. 87.

Michigan.— Coffin *v.* Board of Election Com'rs, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662.

Nebraska.— State *v.* McConnel, 8 Nebr. 28.

New York.—People *v.* Potter, 47 N. Y. 375; Newell *v.* People, 7 N. Y. 9.

Texas.— Cordova *v.* State, 6 Tex. App. 207; Lastro *v.* State, 3 Tex. App. 363.

Utah.— Richardson *v.* Treasure Hill Min. Co., 23 Utah 366, 65 Pac. 74.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

See 10 Cent. Dig. tit. "Constitutional Law," § 9 *et seq.*

"**Constitutions are not to be interpreted according to the words used in particular clauses.** The whole must be considered with a view to ascertain the sense in which the words were employed, and its terms must be taken in their ordinary and common acceptation, because they are presumed to have been so understood by the framers, and by the people who adopted it." Wilcox *v.* People, 90 Ill. 186, 196; Manly *v.* State, 7 Md. 135; Lastro *v.* State, 3 Tex. App. 363.

"**For the purpose of harmonizing apparently conflicting clauses** [in a constitution], each must be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy. And, to that end, sections, paragraphs, and sentences may be transposed; elegance of composition may be sacrificed; and the meaning of the words and phrases may be restricted or enlarged." French *v.* Teschemaker, 24 Cal. 518, 539.

Omissions by phraseology committee.— Where an article in a constitution, having passed the third reading in a constitutional convention with a provision that officers of cities should be elected "by the electors thereof," and these words having been subsequently omitted by the committee on phraseology, the convention will be held to have deemed a preceding article in the same constitution, defining the qualifications of electors "in all elections," applicable to the electors of cities. Coffin *v.* Board of Election Com'rs, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662.

Irreconcilable and ineffective provisions see *infra*, IV, C, 9.

46. *Arkansas.*— Hawkins *v.* Filkins, 24 Ark. 286.

Idaho.— Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

Indiana.— Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278.

Iowa.— McGregor *v.* Baylies, 19 Iowa 43.

New York.— People *v.* Potter, 47 N. Y. 375; Newell *v.* People, 7 N. Y. 9; People *v.* Purdy, 2 Hill (N. Y.) 31.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 28 L. R. A. 773.

See 10 Cent. Dig. tit. "Constitutional Law," § 9.

47. See *infra*, IV, D, 2.

48. *Colorado.*— Strickler *v.* Colorado Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245.

Kentucky.— Long *v.* Louisville, 97 Ky. 364, 17 Ky. L. Rep. 253, 30 S. W. 987; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

Louisiana.—Lloyd *v.* Hamilton, 52 La. Ann. 861, 27 So. 275.

Maryland.— New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Missouri.— State *v.* Holladay, 66 Mo. 385.

South Carolina.— Bouknight *v.* Epting, 11 S. C. 71.

Texas.— Orr *v.* Rhine, 45 Tex. 345.

See 10 Cent. Dig. tit. "Constitutional Law," §§ 9 *et seq.* 20.

5. Construction to Be Uniform. The construction given must be uniform, so that the operation of the instrument will be inflexible, operating at all times alike, and in the same manner with reference to the same subjects.[49]

6. Construction Confined to Language of Instrument — a. Where Meaning Is Clear — (I) *Rule Stated.* To ascertain the meaning of a constitution, the first resort in all cases is to the natural signification of the words used, in the order and grammatical arrangement in which the framers have placed them; and if thus regarded the words used convey a definite meaning which involves no absurdity and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed.[50] And this meaning, when so ascertained, must be taken as the authoritative rule.[51] There is no occasion for construction in such cases, and it is not allowable.[52]

49. No change in public opinion or questions of policy can ever be given any weight in construing the provisions of a constitution where the meaning is clear; for the adoption of a construction that might be deemed wise at one time and unwise at another would abrogate the judicial character of the court and make it the reflex of the popular opinion or passion of the day. Per Taney, C. J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691 [*citing* Crandall *v.* State, 10 Conn. 339, 340], holding that a slave gaining a residence in a free state was not entitled to liberty under the federal constitution, slaves not having been formerly recognized as citizens in free states under that instrument.

The remedy for unwise or unjust constitutional provisions is to be found in amendments and not in construction. Gage *v.* Currier, 4 Pick. (Mass.) 399; People *v.* Blodgett, 13 Mich. 127; Hyatt *v.* Taylor, 42 N. Y. 258; People *v.* Morrell, 21 Wend. (N. Y.) 563; Slack *v.* Jacobs, 8 W. Va. 612. In Hyatt *v.* Taylor, 42 N. Y. 258, 260, the court said: "Statutes which are plain and explicit are not to be qualified by construction on the mere ground that the court deem the legislation unwise or indiscreet, nor because, if effect be given thereto, according to their plain expression, one class affected thereby may be subjected to inconvenience to secure protection and immunity to another. Still less can the court create a distinct exception which the language of the statute forbids, and which no necessity demands. . . . Such considerations, though they very properly aid in the interpretation of a statute expressed in terms of possible double meaning, or of ambiguous import, or uncertain in the designation of the subjects to which they apply, have no influence in determining the legal effect of a statute free from any such obscurity." In Gage *v.* Currier, 4 Pick. (Mass.) 399, 402, the court said: "The language of the statute is clear and unambiguous, and when such is the language of a statute, we are bound to read it according to its obvious and usual signification, whatever may be our opinion of the expediency of the law. If we should give it a strained construction, even from motives of public policy, and for the advancement of apparent justice in a particular case, we should be justly chargeable with usurpation of power, and a violation of the constitution we are sworn to support."

50. *Illinois.*— Law *v.* People, 87 Ill. 385; Beardstown *v.* Virginia, 76 Ill. 34; Hills *v.* Chicago, 60 Ill. 86.

Indiana.— Greencastle Tp. *v.* Black, 5 Ind. 557.

Maryland.— Smith *v.* Thursby, 28 Md. 244.

Minnesota.— Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13.

Mississippi.— Hawkins *v.* Carroll County, 50 Miss. 735.

New York.— Newell *v.* People, 7 N. Y. 9.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 28 L. R. A. 773.

See 10 Cent. Dig. tit. "Constitutional Law," § 9 *et seq.*

51. Newell *v.* People, 7 N. Y. 9.

52. *Alabama.*— *Ex p.* Florence, 78 Ala. 419.

California.— Pattison *v.* Yuba County, 13 Cal. 175.

Georgia.— Ezekiel *v.* Dixon, 3 Ga. 146.

Illinois.— Chance *v.* Marion County, 64 Ill. 66.

Indiana.— Greencastle Tp. *v.* Black, 5 Ind. 557; Spencer *v.* State, 5 Ind. 41; Case *v.* Wildridge, 4 Ind. 51.

Iowa.— Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

Kentucky.— Bosley *v.* Mattingly, 14 B. Mon. (Ky.) 89.

Louisiana.— Louisiana State Lottery Co. *v.* Richoux, 23 La. Ann. 743, 8 Am. Rep. 602.

Maine.— Ingalls *v.* Cole, 47 Me. 530.

Maryland.— Hawbecker *v.* Hawbecker, 43 Md. 516; Smith *v.* Thursley, 28 Md. 244; Cantwell *v.* Owens, 14 Md. 215; Alexander *v.* Worthington, 5 Md. 471.

Michigan.—Atty.-Gen. *v.* Detroit, etc., Plank Road Co., 2 Mich. 138; Bidwell *v.* Whitaker, 1 Mich. 469.

Nevada.— State *v.* Doran, 5 Nev. 399; State *v.* Blasdel, 4 Nev. 241.

New Jersey.— *In re* Murphy, 23 N. J. L. 180.

New York.— Johnson *v.* Hudson River R. Co., 49 N. Y. 455; Hyatt *v.* People, 42 N. Y.

(II) *Policy and Expediency.* In all cases where the meaning upon the face of the instrument is clear and unambiguous, the question is not what was the intention of its framers, but what is the meaning of the language they have used. The duty of the court is to declare what the constitution has said, and argument *ab inconvenienti* cannot be considered.[53] Where therefore a constitutional provision is plain and unambiguous, the fact that its enforcement may work great inconvenience or hardship to particular persons or a particular class furnishes no ground for courts, by construction, to prevent its evident purpose;[54] but a construction which must necessarily work great public and private mischief must never be preferred to a construction which will work neither, or neither in so great a degree, unless the terms absolutely require such a preference; and of two constructions of a constitutional amendment involving questions of public policy, either of which is warranted by its terms, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the instrument amended.[55] In all such cases of construction it should be borne in mind

258; People *v.* New York Cent. R. Co., 24 N. Y. 485; McCluskey *v.* Cromwell, 11 N. Y. 593; People *v.* Purdy, 2 Hill (N. Y.) 31.

United States.— Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; The Paulina *v.* U. S., 7 Cranch (U. S.) 52, 3 L. ed. 266; U. S. *v.* Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304; U. S. *v.* Ragsdale, Hempst. (U. S.) 497, 2 Fed. Cas. No. 16,113; Ogden *v.* Strong, 2 Paine (U. S.) 584, 18 Fed. Cas. No. 10,460.

See 10 Cent. Dig. tit. "Constitutional Law," § 9 *et seq.*

Construction not allowed where meaning is clear.— "It is not allowed to interpret what has no need of interpretation. When an instrument is worded in clear and precise terms — when its meaning is evident, and leads to no absurd conclusion — there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures in order to restrict or extend it is but to elude it. If this dangerous method be once admitted, there will be no instrument which it will not render useless." Newell *v.* People, 7 N. Y. 9, 33; Vattel, bk. 2, c. 17, § 263. "We are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language." People *v.* Purdy, 2 Hill (N. Y.) 31, 36. And see Hyatt *v.* Taylor, 42 N. Y. 258; Newell *v.* People, 7 N. Y. 9; Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773. "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 188, 6 L. ed. 23. To the same effect is the language of the court in Henshaw *v.* Foster, 9 Pick. (Mass.) 312, 316. See also People *v.* Cowles, 13 N. Y. 350; Temple *v.* Mead, 4 Vt. 535; and Woodson *v.* Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716.

The history of a constitutional provision, the causes which led to its adoption, and the mischief it was intended to remedy, will not be considered in determining the construction of it, if the language is plain and unambiguous. State *v.* McGough, 118 Ala. 159, 24 So. 395.

53. Beardstown *v.* Virginia, 76 Ill. 34; Greencastle *v.* Black, 5 Ind. 557; Smith *v.* Thursby, 28 Md. 244; Henshaw *v.* Foster, 9 Pick. (Mass.) 312, 316; Gage *v.* Currier, 4 Pick. (Mass.) 399.

54. Chance *v.* Marion County, 64 Ill. 66.

If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them, in the form of amendments or abolition. Construction can furnish no remedy under our system of government. Scott *v.* Sanford, 19 How. (U. S.) 393, 15 L. ed. 691; Cooley Const. Lim. (6th ed.) 87.

Judge-made law.— The power of construction is so great that if it were not restrained by settled rules, the effect of a plainly worded statute would be practically uncertain. It was Chief Justice Pemberton, in the time of Charles II, who boasted that he had entirely outdone parliament in making law. See Spencer *v.* State, 5 Ind. 41.

55. On proceedings by habeas corpus to secure his release, by a prisoner who had been tried, convicted, and sentenced for commission of crime, by a judge who was disqualified for the office under the provisions of the fourteenth amendment to the federal constitution, for having been engaged in insurrection, it was held, where like proceedings by other convicts were pending or contemplated, that the trial court held the office *de facto* if not *de jure*, and that habeas corpus did not lie. Griffin's Case, Chase (U. S.) 364, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623, 11 Fed. Cas. No. 5,815.

that broad questions of expediency and sound public policy are not to be overlooked.[56]

b. Natural and Technical Meaning of Words. The words and terms of a constitution like those of a statute are to be interpreted and understood in their most natural and obvious meaning,[57] unless the subject indicates or the text suggests that they have been used in a technical sense.[58] The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them;[59] and where the same words are used in different parts of a constitution or statute they are presumed to have a uniform meaning throughout the instrument, but this does not necessarily follow.[60]

c. Punctuation. As a general rule punctuation is not considered a part of an enactment[61] and may be disregarded.[62] Punctuation will be resorted to, however,

Private loss.— Where strict construction of constitutional provision adopted would be to deprive county officers of a portion of their remuneration, a liberal construction will be adhered to. Chance *v.* Marion County, 64 Ill. 66.

56. Where the constitution conflicted with the bill of rights broad questions of expediency and public policy were considered. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

57. *Arkansas.*— State *v.* Ashley, 1 Ark. 513.

California.— Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67.

Colorado.—Alexander *v.* People, 7 Colo. 155, 2 Pac. 894.

Idaho.— Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

Illinois.— Law *v.* People, 87 Ill. 385; Beardstown *v.* Virginia, 76 Ill. 34.

Indiana.— Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278; Greencastle Tp. *v.* Black, 5 Ind. 557.

Kentucky.— Com. *v.* Bailey, 81 Ky. 395.

Louisiana.— State *v.* American Sugar-Refining Co., 51 La. Ann. 562, 25 So. 447; Shreveport Gas, etc., Co. *v.* Caddo Parish, 47 La. Ann. 65, 16 So. 650.

Maryland.— Jackson *v.* State, 87 Md. 191, 39 Atl. 504; Smith *v.* Thursby, 28 Md. 244; Picking *v.* State, 26 Md. 499; Bandel *v.* Isaac, 13 Md. 202; Manly *v.* State, 7 Md. 135.

Minnesota.— Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13.

Nevada.— State *v.* Doron, 5 Nev. 399.

New York.— People *v.* Fancher, 50 N. Y. 288; Clark *v.* Utica, 18 Barb. (N. Y.) 451.

Pennsylvania.— Cronise *v.* Cronise, 54 Pa. St. 255; Monongahela Nav. Co. *v.* Coons, 6 Watts & S. (Pa.) 101.

South Carolina.— Charleston *v.* Oliver, 16 S. C. 47.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

See 10 Cent. Dig. tit. "Constitutional Law," § 11.

"The natural import of words is that which their utterance properly and uniformly suggests to the mind — that which common use has affixed to them; the technical, is that which is suggested by their use in reference to a science or profession — that which particular use has affixed to them; and when natural and technical import unite upon a word, both these rules combine to control its construction." If the subject relates to courts or to legal proofs the words are to be construed technically, unless it appears from the enactment itself that they were used in a popular sense. People *v.* May, 3 Mich. 598, 605.

"A word having a meaning established by judicial construction, being used in a new Constitution, must be taken to be used in that established sense." Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456.

58. Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67; People *v.* May, 3 Mich. 598; Charleston *v.* Oliver, 16 S. C. 47; Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456.

59. *California.*— Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67; Bourland *v.* Hildreth, 26 Cal. 161.

Illinois.— Hills *v.* Chicago, 60 Ill. 86.

Maryland.— Manly *v.* State, 7 Md. 135.

Mississippi.— Green *v.* Weller, 32 Miss. 650.

United States.— McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

60. The rule in such cases is that the same meaning will be given to the same words occurring in different parts of the same instrument, unless it clearly appears from the whole that a different meaning was intended in some part alleged to be an exception. Green *v.* Weller, 32 Miss. 650; Brien *v.* Williamson, 7 How. (Miss.) 14; Rhodes *v.* Weldy, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584; Story Const. § 454.

Exemptions from taxation in constitutional provisions are strictly construed; and an article, to be exempt, must be specifically mentioned or it will be excluded. State *v.* American Sugar-Refining Co., 51 La. Ann. 562, 25 So. 447.

61. Cushing *v.* Worrick, 9 Gray (Mass.) 382; Richardson *v.* Treasurer Hill Min. Co., 23 Utah 366, 65 Pac. 74.

62. Cushing *v.* Worrick, 9 Gray (Mass.) 382.

as an aid in the construction of the enactment when it tends to throw light on the meaning.[63]

7. Construction Aided by Matters Extrinsic of Instrument — a. In General. In the United States,[64] where the validity of a statute is drawn in question, the general rule is that evidence outside of the act itself is not admissible to impeach it.[65] It is only where the meaning of some provision of a constitution is doubtful and not to be explained by comparison with other parts of the instrument that courts are at liberty to look beyond the instrument itself for aid in determining its meaning;[66] and when in such cases it becomes necessary to resort to extrinsic sources to aid in construction, courts will resort to the history of the times and the condition of affairs which led to the enactment of the provision in question, with a view to ascertaining its objects and purposes,[67] and then such provision should be construed in a way, so far as is reasonably possible, to further the

63. Com. *v.* Kelley, 177 Mass. 221, 58 N. E. 691; Prouty *v.* Union Hardware Co., 176 Mass. 155, 57 N. E. 352; Maney *v.* Providence, etc., Co., 161 Mass. 283, 37 N. E. 164.

Substitution of semicolon in place of comma in a statute was held not to confine the exception therein to the last antecedent. Com. *v.* Kelley, 177 Mass. 221, 58 N. E. 691.

64. In England it has been held that acts of parliament were not admissible in the courts as evidence of facts. Titus *v.* Otis, 10 How. St. Tr. 1079, 1167. And see Elandorf *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

65. *Arkansas.*— State *v.* Dorsey County, 28 Ark. 378.

California.— Rankin *v.* Colgan, 92 Cal. 605, 28 Pac. 673.

Florida.— State *v.* Barnes, 24 Fla. 29, 3 So. 433.

Illinois.— Hills *v.* Chicago, 60 Ill. 86.

Louisiana.— Louisiana State Lottery Co. *v.* Richoux, 23 La. Ann. 743, 8 Am. Rep. 602.

Mississippi.— Green *v.* Weller, 32 Miss. 650.

New York.— Rumsey *v.* People, 19 N. Y. 41; De Camp *v.* Eveland, 19 Barb. (N. Y.) 81.

Pennsylvania.— Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

Tennessee.—*Contra,* Ford *v.* Farmer, 9 Humphr. (Tenn.) 152; Bradley *v.* Commissioners, 2 Humphr. (Tenn.) 428, 37 Am. Dec. 563.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408; Lusher *v.* Scites, 4 W. Va. 11.

See 10 Cent. Dig. tit. "Constitutional Law," § 12.

In other words, the courts will not review or reverse findings of fact by the legislative department necessarily implied in the enactments questioned, and a plea that a statute is invalid, on the ground that the legislature has not complied with constitutional provisions prescribed as conditions precedent to its validity, is demurrable where the conditions specified depend upon questions of fact. Questions of this character have most frequently arisen in connection with legislation organizing new counties or municipal districts without sufficient area, or the necessary population for such purposes, prescribed in constitutional provisions. Such questions necessarily require findings of fact by the legislative department in passing the acts of organization and will not be reviewed by the courts even if erroneous. State *v.* Dorsey County, 28 Ark. 378; Rumsey *v.* People, 19 N. Y. 41.

But if questions of law are subsequently raised a judgment rendered on facts so found by the legislature will be reversed. State *v.* Dorsey County, 28 Ark. 378; Lanning *v.* Carpenter, 20 N. Y. 447.

A constitutional provision prescribing the manner for the doing of an act is held to be a prohibition against legislation prescribing a different manner for the doing of the same act. State *v.* Barnes, 24 Fla. 29, 3 So. 433.

Inference.— The existence of all facts necessary to the enactment of a statute is inferred. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

Parol evidence to show that the legislature has not complied with the constitutional requirements in enacting a statute was excluded. Louisiana State Lottery Co. *v.* Richoux, 23 La. Ann. 743, 8 Am. Rep. 602.

In Tennessee evidence has been admitted to show that a county organized under an act of incorporation passed by the legislature did not contain the number of square miles prescribed by the constitution as the area for a county, and the act was held unconstitutional and void. Ford *v.* Farmer, 9 Humphr. (Tenn.) 152; Bradley *v.* Commissioners, 2 Humphr. (Tenn.) 428, 37 Am. Dec. 563.

66. Cooley Const. Lim. (6th ed.) 79.

Where meaning of constitution is doubtful, extrinsic evidence to explain is admitted. Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

Although a title to an act of the legislature proposing an amendment to the constitution is not necessary to the validity of the act, nevertheless the same may be looked to when construing and interpreting the section of the constitution to which it relates. State *v.* O'Connor, 81 Minn. 79, 83 N. W. 498.

67. *Illinois.*— Ball *v.* Chadwick, 46 Ill. 28.

known purposes and objects for which it was adopted.[68] In such cases the relation of a doubtful provision to known political truths[69] and to political institutions[70] will be considered; and previous legislation[71] and the usages of the government[72] will also be given weight.

b. Contemporaneous and Practical Construction — (1) *In General.* Contemporaneous and practical construction of constitutional provisions by the executive and legislative departments of the government will be considered by the courts in passing upon constitutional questions; and while they are not bound by such constructions, except as to questions of a discretionary character,[73] they often yield to them as matters of policy;[74] and in doubtful cases will follow such construction as of course,[75] unless they are clearly erroneous.[76] It is evident that to reverse a construction put upon a constitutional provision by a department charged with its execution, after it has received such practical construction for

Iowa.— Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

Maryland.— Alexander *v.* Worthington, 5 Md. 471.

New York.— People *v.* Potter, 47 N. Y. 375; Smith *v.* People, 47 N. Y. 330.

United States.— Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597.

See 10 Cent. Dig. tit. "Constitutional Law," § 12.

History and circumstances of adoption of doubtful constitutional provision, resort to, will be had in determining its meaning. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529; People *v.* Gies, 25 Mich. 83; People *v.* State Treasurer, 23 Mich. 499; Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13; Lemmon *v.* People, 20 N. Y. 562.

Prior to emancipation slavery existed only by force of positive law (Negro Case, 11 Harg. St. Tr. 340; Somerset *v.* Stewart, Lofft 1) and the provision in the federal constitution respecting fugitives was an exception, and within the rule, *expressio unius, exclusio alterius* (Lemmon *v.* People, 20 N. Y. 562, 605).

68. Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. ed. 597.

69. *Ex p.* Allis, 12 Ark. 101.

70. State *v.* Sorrells, 15 Ark. 664; People *v.* La Salle County, 100 Ill. 495; McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

71. People *v.* La Salle County, 100 Ill. 495; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535, 74 N. Y. St. 962 [*affirmed* in 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408]. But the constitutionality of a statute will not be sustained on the ground of prior enactments of the same character, unless such enactments have been uniform. Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535, 74 N. Y. St. 962 [*affirmed* in 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408].

72. State *v.* Sorrells, 15 Ark. 664.

But non-user or abandonment by the government of a right or power granted by a constitution will not defeat the right, and its exercise may be resumed at the discretion of the government. McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

73. See *supra*, IV, B, 2, b.

74. *Alabama.*—Sadler *v.* Langham, 34 Ala. 311.

Maryland.—State *v.* Mayhew, 2 Gill (Md.) 487.

Massachusetts.— Rogers *v.* Goodwin, 2 Mass. 475.

Michigan.—Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

Ohio.— Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471.

See 10 Cent. Dig. tit. "Constitutional Law," § 14.

75. *Alabama.*— *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722.

California.—Board of R. Com'rs *v.* Market St. R. Co., 132 Cal. 677, 64 Pac. 1065; Burgoyne *v.* San Francisco County, 5 Cal. 9.

Colorado.— People *v.* Le Fevre, 21 Colo. 218, 40 Pac. 882; People *v.* Wright, 6 Colo. 92.

Georgia.— Howell *v.* State, 71 Ga. 224, 51 Am. Rep. 259.

Illinois.— People *v.* Loewenthal, 93 Ill. 191; Bunn *v.* People, 45 Ill. 397; Jarrot *v.* Jarrot, 7 Ill. 1.

Indiana.— Hovey *v.* State, 119 Ind. 386, 21 N. E. 890; Maize *v.* State, 4 Ind. 342.

Iowa.— Allen *v.* Clayton, 63 Iowa 11, 18 N. W. 663, 50 Am. Rep. 716.

Kentucky.— Collins *v.* Henderson, 11 Bush (Ky.) 74.

Massachusetts.— Portland Bank *v.* Apthorp, 12 Mass. 252; Kendall *v.* Kingston, 5 Mass. 524.

Michigan.— McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

Nebraska.—Jackson *v.* Washington County, 34 Nebr. 680, 52 N. W. 169.

Texas.—Cordova *v.* State, 6 Tex. App. 207.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

See 10 Cent. Dig. tit. "Constitutional Law," § 14.

76. State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72; State *v.* Parkinson, 5 Nev. 15;

any length of time, would be to occasion great injury to those who would be affected by such a change; and it is to avoid such injustice that courts have often yielded to policy and expediency in adopting practical constructions of constitutional provisions and statutes by the other departments of the government, even though erroneous; and in view of these considerations, in all cases where there is doubt as to the meaning of such provision or statute, courts will adopt and follow contemporaneous and practical construction by the other departments.[77]

(II) *Legislative Construction*—(A) *Generally.* Practical construction of constitutional provisions by the legislative department, in the enactment of laws, necessarily has great weight with the judiciary, and is sometimes followed by the latter when clearly erroneous.[78] But this is a matter of policy only, for it is emphatically the province of the judiciary to construe the constitution;[79] and where the judicial and the legislative construction of a constitutional provision conflict the judicial construction prevails.[80] If the meaning of such provision is clear and unambiguous, legislative construction thereof is entitled to no weight;[81] but if the meaning is doubtful, a practical construction thereof by the legislature will be followed by the courts if it can be done without doing violence to the fair meaning of the words used in order to sustain the constitutionality of a statute.[82]

(B) *Long Acquiescence.* Legislative construction of constitutional provisions, adopted and acted on with the acquiescence of the people for many years is entitled to great weight with the courts,[83] and will not be disturbed except for mani-

Brooks *v.* Memphis, 4 Fed. Cas. No. 1,954, 3 Centr. L. J. 356.

77. *Kentucky.*— Hughes *v.* Hughes, 4 T. B. Mon. (Ky.) 42.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; State *v.* Mayhew, 2 Gill (Md.) 487.

Michigan.— Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256; People *v.* State Treasurer, 23 Mich. 499; Britton *v.* Ferry, 14 Mich. 53.

Mississippi.— Plummer *v.* Plummer, 37 Miss. 185.

New York.— People *v.* Dayton, 55 N. Y. 367; Contant *v.* People, 11 Wend. (N. Y.) 511.

Pennsylvania.—Norris *v.* Clymer, 2 Pa. St. 277; Farmers', etc., Bank *v.* Smith, 3 Serg. & R. (Pa.) 63.

Wisconsin.— Scanlan *v.* Childs, 33 Wis. 663.

United States.— Union Ins. Co. *v.* Hoge, 21 How. (U. S.) 35, 16 L. ed. 61; Edwards *v.* Darby, 12 Wheat. (U. S.) 206, 6 L. ed. 603.

See 10 Cent. Dig. tit. "Constitutional Law," § 14.

78. Rogers *v.* Goodwin, 2 Mass. 475. See also Board of R. Com'rs *v.* Market St. R. Co., 132 Cal. 677, 64 Pac. 1065; Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147.

79. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

80. Brown Shoe Co. *v.* Hill, 51 La. Ann. 920, 25 So. 634; State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624; State *v.* Parler, 52 S. C. 207, 29 S. E. 651; Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

81. Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862.

82. State *v.* Tingey, 24 Utah 225, 67 Pac. 33. Contemporaneous construction of constitutional provisions, according to the popular understanding of them, is not entitled to much weight; but the practical application of such provisions at the time of their adoption is strong evidence of their correct interpretation. McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

Legislative construction that is not uniform, continuous, and concurring, is not entitled to much weight. Maize *v.* State, 4 Ind. 342; Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535. And a construction by the legislature of a constitutional provision in restraint of its authority, or where the constitutional question has not been considered by it, will not be given much weight by the courts. Maize *v.* State, 4 Ind. 342.

Legislative appointments.— In the absence of constitutional prohibition against it appointments to office by the legislature for a long period of time raises a presumption that the people intended that the legislature should so appoint. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572. Where it is generally held that the legislature has no constitutional authority to appoint local officers to office, the question not being free from doubt, and such authority having been exercised both prior and subsequent to the adoption of the constitution, an appointment by the legislature of the officers of a state institution was sustained. Hovey *v.* State, 119 Ind. 386, 21 N. E. 890. But see State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

83. *California.*— Ferris *v.* Coover, 11 Cal. 175.

fest error.[84] The injustice that would inevitably result by the disturbing of such constructions after a long period of acquiescence therein, during which many rights will necessarily have been acquired, is a very strong argument against it.[85]

(III) *Restriction of Such Construction.* But the course of legislation will

Colorado.— Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147.

Illinois.— Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123.

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Kentucky.— Hughes *v.* Hughes, 4 T. B. Mon. (Ky.) 42.

Maryland.— Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; State *v.* Mayhew, 2 Gill (Md.) 487.

Massachusetts.— Essex Co. *v.* Pacific Mills, 14 Allen (Mass.) 389; Cobb *v.* Kingman, 15 Mass. 197; Rogers *v.* Goodwin, 2 Mass. 475.

Michigan.—Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

Minnesota.— Faribault *v.* Misener, 20 Minn. 396; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

Missouri.— Shipp *v.* Klinger, 54 Mo. 238.

New Jersey.— Kenney *v.* Hudspeth, 59 N. J. L. 504, 37 Atl. 67.

New York.— Rumsey *v.* People, 19 N. Y. 41; Wallack *v.* New York, 3 Hun (N. Y.) 84.

Pennsylvania.— Lavery *v.* Com., 101 Pa. St. 560; Cronise *v.* Cronise, 54 Pa. St. 255; Moers *v.* Reading, 21 Pa. St. 188.

Texas.— Chambers *v.* Fisk, 22 Tex. 504.

United States.— Stuart *v.* Laird, 1 Cranch (U. S.) 299, 2 L. ed. 115; U. S. *v.* Mackenzie, 30 Fed. Cas. No. 18,313, 1 N. Y. Leg. Obs. 371.

See 10 Cent. Dig. tit. "Constitutional Law," § 15.

84. Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

85. *Illinois.*— Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Indiana.— Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278.

Massachusetts.— Rogers *v.* Goodwin, 2 Mass. 475.

Ohio.— Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471.

Wisconsin.— Scanlan *v.* Childs, 33 Wis. 663.

United States.— Stuart *v.* Laird, 1 Cranch (U. S.) 299, 2 L. ed. 115; U. S. *v.* Mackenzie, 30 Fed. Cas. No. 18,313, 1 N. Y. Leg. Obs. 371.

See 10 Cent. Dig. tit. "Constitutional Law," § 15.

Policy and expediency will be kept in view where there has been long acquiescence in legislative construction of constitutional provisions or statutes that is clearly erroneous, for in all such cases property rights will necessarily have been acquired under a construction of long standing; and in such cases courts will yield to an erroneous construction (Rogers *v.* Goodwin, 2 Mass. 475) or decline to reverse it to the extent of declaring all legislative action in pursuance of it an absolute nullity where great interests are involved, and the public will be made to suffer by the adoption of a different construction, and the effect would necessarily be retroactive (Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471). See also Rumsey *v.* People, 19 N. Y. 41, where the organization of a county was not declared void for want of power, on the ground of public policy, after there had been representation in the assembly during several sessions.

Constant exercise of power by the legislature for seventy years from the adoption of a constitution will be deemed conclusive evidence of its right to exercise such power. State *v.* Mayhew, 2 Gill (Md.) 487. See also Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Rogers *v.* Goodwin, 2 Mass. 475.

Constitutionality not passed upon second time.— An act declared unconstitutional soon after it was passed, and remaining unenforced for over twenty years, will not be questioned a second time in an attempt to enforce rights under it. Hughes *v.* Hughes, 4 T. B. Mon. (Ky.) 42.

Constitutionality of an act supported by long line of adjudications, and treated by the government as constitutional, will not be inquired into. Ferris *v.* Coover, 11 Cal. 175.

Constitutionality of "Legal Tender Act" of congress, not questioned in a state court after being declared valid by the United States supreme court. Essex Co. *v.* Pacific Mills, 14 Allen (Mass.) 389.

State statutes have been declared invalid by the courts of states other than those enacting them, on the ground that they contravene the constitutions of the states where enacted. Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051; Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Simonds *v.* Simonds, 103 Mass. 572, 4 Am. Rep. 576; Stoddart *v.* Smith, 5 Binn. (Pa.) 355. See also New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233. But such a declaration, after a statute had been repeatedly recognized and acted upon as valid by the legislature enacting it, is considered a delicate matter and requires a case free from doubt. Ryan *v.* Vanlandingham, 7 Ind. 416. See also Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051.

Unquestioned existence for years of law of Mexican confederation, under which rights were acquired, is strong proof that such law

not be allowed to control the judiciary in its construction of constitutional provisions.[86] Long, continuous, and unquestioned exercise of legislative power in the enactment of laws is evidence that such laws are constitutional, but it is not conclusive;[87] nor can practical construction of a plain constitutional provision be allowed to distort or in any way change its natural meaning;[88] and courts will declare void an act passed, even in the exercise of discretionary power, if it plainly violates the fundamental law of the state.[89]

c. Other or Previous Constitutions — (I) *In General.* A written constitution may be abrogated or wholly abolished, and a new one established in its place; but this could scarcely, if ever, be done without retaining in the new many of the terms and provisions of the old, and as to all such as are retained the purpose of retention becomes of material importance; and it is therefore an established rule of construction that where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised constitution, it will be presumed to have been retained with a knowledge of that construction, and courts will feel bound to adhere to it.[90]

(II) *Borrowed Provisions.* It is an established rule of construction that whenever, in framing a constitution, provisions from the constitutions of other states are adopted, the judicial constructions of all such provisions from the other states are presumed to have been also adopted.[91]

was considered constitutional and valid by the proper authority. Chambers *v.* Fisk, 22 Tex. 504.

Technical objections.— Long acquiescence is conclusive against purely technical objections. Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

86. State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72. See also Wanser *v.* Hoos, 60 N. J. L. 482, 38 Atl. 449, 64 Am. St. Rep. 600.

87. Sadler *v.* Langham, 34 Ala. 311; Greencastle Tp. *v.* Black, 5 Ind. 557; Wallack *v.* New York, 3 Hun (N. Y.) 84; Swift, etc., Co. *v.* U. S., 14 Ct. Cl. 481; Hahn *v.* U. S., 14 Ct. Cl. 305.

88. Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

89. Where the constitution required a two-thirds vote for the passing of appropriations for "local or private purposes," it was held that an appropriation for improving a harbor passed by less than a two-thirds vote was void and that the legislature was not the final judge as to what was a "local purpose." People *v.* Allen, 42 N. Y. 378.

90. *Alabama.*— Taylor *v.* State, 131 Ala. 36, 31 So. 371; Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529; *Ex p.* Roundtree, 51 Ala. 42.

Illinois.— People *v.* La Salle County, 100 Ill. 495.

Iowa.— McGregor *v.* Baylies, 19 Iowa 43.

Kentucky.— Eskridge *v.* Carter, 16 Ky. L. Rep. 760, 29 S. W. 748.

Louisiana.—State *v.* Board of Assessors, 35 La. Ann. 651.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Minnesota.—Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13

Wisconsin.— Wisconsin Cent. R. Co. *v.* Taylor, 52 Wis. 37, 8 N. W. 833; Atty.-Gen. *v.* Brunst, 3 Wis. 787.

Abandonment by the legislature of one method of choosing presidential electors and the adoption of another for a term of years was held not to impair the right to readopt the former method. McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

Contingent provisions made for temporary or occasional use are not to be construed so as to conflict with the general purpose of the instrument. People *v.* Potter, 47 N. Y. 375.

Nature of suspended constitutional provisions will be considered in construing a provision adopted in its place. McGregor *v.* Baylies, 19 Iowa 43.

91. *California.*— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Idaho.— Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

Illinois.— Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Patterson *v.* Lynde, 112 Ill. 196.

Indiana.— Langdon *v.* Applegate, 5 Ind. 327.

Massachusetts.— Com. *v.* Hartnett, 3 Gray (Mass.) 450.

Mississippi.— Daily *v.* Swope, 47 Miss. 367.

Montana.— State *v.* Fortune, 24 Mont. 154, 60 Pac. 1086; State *v.* State Bd. of Equalization, 18 Mont. 473, 46 Pac. 266.

Nevada.— Hess *v.* Pegg, 7 Nev. 23; State *v.* Parkinson, 5 Nev. 15.

New Jersey.— Werts *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819. 38 L. R. A. 773.

United States.— Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. ed. 819.

See 10 Cent. Dig. tit. "Constitutional Law," § 17.

Constitutions of two other states.— If in construing a constitutional provision of

d. Proceedings of Constitutional Conventions. When from any cause the meaning of a constitutional provision is doubtful, courts will examine the proceedings of the constitutional convention that framed the constitution, with a view to ascertaining the meaning,[92] in like manner as they will examine the proceedings of a legislature, in order to determine the meaning of a doubtful provision of a statute. In examining the proceedings of a convention it is the intent of the people, through their representatives, that is sought for; but with the legislature it is the intent of the representatives themselves that is sought for; and generally the proceedings of a legislature are regarded as more conclusive and more satisfactory as a source of information than those of a convention.[93] But in either case, where the proceedings clearly point out the objects and purposes of the doubtful provision, the aid to be obtained is valuable as a means of interpretation. Where the proceedings of a convention are to be examined, the history and condition of the times, the evils that existed, requiring remedies, the discussions before the people in the election of delegates, and issues under consideration may be consulted with profit. All such details tend to show the intent, as expressed in the work of the convention.[94]

e. Recourse to Common Law. Constitutions themselves, being instruments in the nature of reënactments of an acknowledged system of principles,[95] coeval

doubtful meaning it is found to be similar to like provisions to be found in the constitutions of two other states, and the courts of both the parent states hold opposite views thereon, that construction will be preferred which is believed to have been in contemplation of the framers of the constitution when such provision was adopted. Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

Legislative construction of a constitutional provision that is subsequently adopted by another state is regarded as high authority by the courts of the adopting state. Langdon *v.* Applegate, 5 Ind. 327.

The first eight amendments to the federal constitution were to incorporate certain principles fixed in English jurisprudence, and the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations to be put upon them. Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 604, 40 L. ed. 819.

The rule applies only to previous, and not to subsequent, constructions. Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503.

The rule in adopting, with borrowed constiutional provisions and statutes, their constructions, is manifestly just and right; for if it were intended to exclude any known constructions of such provisions or statutes, the necessary presumption is that their terms would be so changed when they are adopted as to effect that intention. Myrick *v.* Hasey, 27 Me. 9, 45 Am. Dec. 583; Com. *v.* Hartnett, 3 Gray (Mass.) 450; Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; 6 Dane Abr. 613.

Same rule also applies to statutes adopted from other states. Com. *v.* Hartnett, 3 Gray (Mass.) 450. And see, generally, STATUTES.

92. *Illinois.*— Springfield *v.* Edwards, 84 Ill. 626.

Louisiana.— State *v.* New Orleans, 35 La. Ann. 532.

Massachusetts.— Opinion of Justices, 126 Mass. 557.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107; Crowell *v.* Lambert, 9 Minn. 283; Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13.

Nevada.— State *v.* Doron, 5 Nev. 399.

New York.— Clark *v.* People, 26 Wend. (N. Y.) 599; Coutant *v.* People, 11 Wend. (N. Y.) 511; People *v.* Purdy, 2 Hill (N. Y.) 31.

Ohio.— State *v.* Kennon, 7 Ohio St. 546; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1; Cass *v.* Dillon, 2 Ohio St. 607.

South Carolina.— State *v.* Parler, 52 S. C. 207, 29 S. E. 651.

Tennessee.— State *v.* Cloksey, 5 Sneed (Tenn.) 482.

Utah.— State *v.* Norman, 16 Utah 457, 52 Pac. 986.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Taylor, 52 Wis. 37, 8 N. W. 833.

Wyoming.— Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

See 10 Cent. Dig. tit. "Constitutional Law," § 16.

Court will not be influenced by debates in constitutional convention, where such convention was divided into two factions, and the constitution reported and adopted by a joint committee from each. Taylor *v.* Taylor, 10 Minn. 107.

93. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; Richardson *v.* Treasurer Hill Min. Co., 23 Utah 366, 65 Pac. 74.

94. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95.

95. *Alabama.*— Mobile *v.* Stonewall, 53 Ala. 570.

California.— People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

with, and a part of, the common law itself, and subject to judicial interpretation from their inception, it necessarily follows that the definitions of terms used in constitutions and statutes are to a great extent to be found in the common law,[96] and in the common usage and understanding of those terms according to the institutions of the country in which they originated and were brought into use in the administration of government.[97] The common law is not a controlling influence in the construction of constitutional provisions to the same extent that it is in the construction of statutes,[98] yet it has a great influence in dealing with such questions. It has been held that a constitutional amendment in derogation of the common law should be strictly construed.[99] But so close an application is going to extremes and may tend directly to defeat the purposes for which an amendment has been enacted. The doctrine has not been applied in later decisions in the same state.[1]

8. Implied Powers and Restraints. It would not be practicable, if possible, in a written constitution, to specify in detail all of its objects and purposes or the means by which they are to be carried into effect. Such prolixity in a code designed as a frame of government has never been considered necessary or desirable;[2] therefore constitutional powers are often granted or restrained in general terms, from which implied powers and restraints necessarily arise. The implied

Indiana.— State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Durham *v.* State, 117 Ind. 477, 19 N. E. 327.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— People *v.* Draper, 15 N. Y. 532.

See Cooley Const. Lim. (6th ed.) 75; and 10 Cent. Dig. tit. "Constitutional Law," § 13.

"We must keep in mind that the constitution was not framed for a people entering into a political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all or nearly all the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed." People *v.* Draper, 15 N. Y. 532, 537. Similar language is used by McKinstry, J., in People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

96. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 629; Mobile *v.* Stonewall Ins. Co., 53 Ala. 570; *Ex p.* Roundtree, 51 Ala. 42; State *v.* Sorrells, 15 Ark. 664; English *v.* State, 31 Fla. 340, 12 So. 689; Flavell's Case, 8 Watts & S. (Pa.) 197.

Indictment by grand jury, as mentioned in bill of rights, means such grand juries as were known to the common law; and recourse to common law to ascertain the meaning of the terms of statutes and constitutions is necessary. English *v.* State, 31 Fla. 340, 12 So. 689. And statutes authorizing indictments by a two-thirds vote are unconstitutional. English *v.* State, 31 Fla. 340, 12 So. 689; State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50.

97. "It is a universal rule dictated by common sense, for the interpretation of contracts, and applicable to all instruments, that if there is anything ambiguous in the terms in which they are expressed, they should be explained by the common use of those terms in the country where they are made." The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38 [*quoting* Pothier Obl. No. 94].

98. Cooley Const. Lim. (6th ed.) 75.

99. A constitutional amendment acknowledging the separate estate of married women was held not to confer power to convey without the consent of the husband, being in derogation of the common law, and not expressly conferring the right to convey. Brown *v.* Fifield, 4 Mich. 322. *Contra*, White *v.* Zane, 10 Mich. 333.

1. See also Rankin *v.* West, 25 Mich. 195; De Vries *v.* Conklin, 22 Mich. 255; Tillman *v.* Shackleton, 15 Mich. 447, 93 Am. Dec. 198; Tong *v.* Marvin, 15 Mich. 60; Watson *v.* Thurber, 11 Mich. 457; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Farr *v.* Sherman, 11 Mich. 33; White *v.* Zane, 10 Mich. 333.

English decisions.— But it is also a rule of construction, applicable to constitutions and statutes, that recourse to the English decisions will not be had, in order to ascertain the meaning of the terms used, if by a series of decisions of the supreme court having jurisdiction or legislative construction the words in question have received a meaning different from that of the English law. The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38. See also Flavell's Case, 8 Watts & S. (Pa.) 197.

2. Per Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

powers and restrictions to be found in constitutional provisions are therefore a very important element to be considered. It is an established rule of construction that where a constitution confers a power or enjoins a duty it also confers, by implication, all powers that are necessary for the exercise of the one or for the performance of the other.[3] And it is also an established rule of construction that where the means by which a power granted shall be exercised are specified no other or different means for the exercise of such power can be implied, even though considered more convenient or effective than the means given in the constitution.[4]

3. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

If a statute is inhibited by the general scope and purpose of the fundamental law, it is invalid, although it does not contravene any express provision of the constitution. State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

Implied powers of the United States.— "Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." Per Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 193, 4 L. ed. 529. It is not necessary, for the exercise of a power by the federal government, that it should be expressly granted in the federal constitution, or that it should be "clearly and directly traceable to some one of the specified powers" granted. Any number of the powers granted, or all of them, may be combined and considered together, and any power necessary to carry out the general purposes of any or all of the powers specified will be considered granted by implication, and as an incidental means of executing the powers specifically granted. Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287.

Congress has implied power, as the legislature of a sovereign nation, to make treasury notes a legal tender in payment of private debts. Juilliard *v.* Greenman, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204. Congress has implied power to protect settlers in making entries on the public lands (U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673); to supervise federal elections (*Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274); to enact laws regulating commerce on navigable waters within the limits of the states, to the exclusion of state legislation (Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23). See also U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; U. S. *v.* Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304.

Powers of congress to charter banks see Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; 1 Kent Comm. 248–255; 2 Story Const. §§ 1, 259, 271.

United States courts have implied power under the constitution to restrain by injunction the obstruction of railways, thereby hindering and delaying the transportation of the United States mail. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

In construing either the federal or the state constitutions, it is regarded as a safe rule "to look to the nature and objects of the particular powers, duties, and rights with all the lights and aids of contemporary history, and give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." State *v.* Glenn, 18 Nev. 34, 40, 1 Pac. 186: Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Story Const. § 405*a*.

4. "That other powers than those expressly granted, may be, and often are, conferred by implication, . . . is too well settled to be doubted. Under every constitution, the doctrine of implication must be resorted to, in order to carry out the general grants of power. A constitution cannot, from its very nature, enter into a minute specification of all of the minor powers, naturally and obviously included in and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one, or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient." Field *v.* People, 3 Ill. 79, 83.

Constitutional inhibitions arising by implication are equally as effective as those arising by expression (Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272), "as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated." Where a grant of legislative power, made in general, indefinite terms, is followed by an enumeration clearly and explicitly made, such enumeration must be construed as limiting and explaining the general terms. *In re* Opinion of Court, 4 N. H. 565.

"Where the power is granted in general terms, the power is to be construed as co-

9. Irreconcilable and Ineffective Provisions — a. In General. Where full effect cannot be given to a constitutional provision, it will be enforced as far as possible;[5] and if two provisions are irreconcilably repugnant, the last in order of time and local position will be preferred.[6] And a particular intent, incompatible with a general intent, will be treated as an exception.[7]

b. Constitutional Amendments. The terms of a constitutional amendment are not to be taken as controlling in the construction of a constitution as it previously stood.[8]

c. Bill of Rights. The bills of rights inserted in the American constitutions contain a declaration of general principles as a basis of government, copied from Magna Charta and the English Bill of Rights of 1689. These bills are regarded as parts of the constitutions in which they are recited, and are to be construed with other constitutional provisions.[9] But in view of their origin and long use they cannot be regarded as introducing new matters or prescribing new conditions. Their purpose is to preserve ancient principles rather than to establish modern principles.[10] But to what extent they are to control or to be controlled in the construction of constitutional provisions are questions on which the authorities are not harmonious.[11]

D. Operation and Effect — 1. Time of Taking Effect — a. In General. The time when a constitution takes effect is of importance, and often becomes material in the course of litigation. The manifest intent of the framers of the instrument, to be gathered from the instrument itself, controls in the determination of such question.[12]

extensive with the terms, unless some clear restriction upon it is deducible — expressly or by implication — from the context." Story Const. § 424.

State constitutions.— The case of Field *v.* People, 3 Ill. 79, applies the doctrine of implied powers and restraints to a state constitution quite as fully as it has ever been applied to the federal constitution.

5. Cummings *v.* Spaunhorst, 5 Mo. App. 21.

6. Quick *v.* White Water Tp., 7 Ind. 570. See also Chance *v.* Marion County, 64 Ill. 66, holding that where a constitutional provision will bear two constructions, the one consistent with, and the other inconsistent with, a preceding section, clearly expressed, the former will prevail, that effect may be given to both.

7. Warren *v.* Shuman, 5 Tex. 441; Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921. See also Jackson *v.* State, 87 Md. 191, 38 Atl. 504, holding that where the constitution speaks in plain language with reference to a particular matter, courts cannot place a different meaning on the words employed, because the literal interpretation is inconsistent with other parts of the constitution in relation to other subjects.

Irreconcilable statutes.— Where a general intention is expressed in the act, and also a particular intention incompatible therewith, the last shall not restrain the significance of the first. Andree *v.* Fletcher, 2 T. R. 161, 164, 3 T. R. 266, 1 Rev. Rep. 701; Churchill *v.* Crease, 5 Bing. 177, 7 L. J. C. P. O. S. 63, 2 M. & P. 415, 15 E. C. L. 530. See also, generally, Statutes.

8. Norton *v.* Brandham, 21 S. C. 375.

9. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

10. "They are conservatory instruments rather than reformatory." Per Cooley, J., in Weimer *v.* Bunbury, 30 Mich. 201, 214.

11. In some cases it has been held that the bill of rights is the governing and controlling part of a constitution, and that all other provisions are to be expanded, and their operation restricted or extended with reference to it. So held in Matter of Dorsey, 7 Port. (Ala.) 293, but the court nevertheless refused to admit an attorney to practice where the constitution, although conflicting with the bill of rights, inhibited the holding of civil office by persons who had been engaged in dueling. But in other cases bills of rights have been treated as of a directory rather than of a mandatory character, and it has been held that the constitution should prevail where its provisions conflict with the bill of rights. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572. See also Com. *v.* Plaisted, 148 Mass. 375, 378, 383, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142, holding a statute organizing a municipal police board valid, and sustaining a police regulation authorizing the arrest of a member of the salvation army corps while engaged in public worship, for playing a musical instrument without license. But *compare* State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624; People *v.* Albertson, 55 N. Y. 50.

12. Seneca Min. Co. *v.* Osmun, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; Real *v.* People, 42 N. Y. 270.

b. Upon Ratification — (I) *In General.* Provisions are always made designating the time when constitutional amendments or new constitutions shall take effect, the usual language of such being that the amendment shall become a part of the constitution if adopted by a majority of the electors, or that the new constitution shall become effective if adopted by a majority of the electors, and if nothing further is added the instrument will take effect immediately upon ratification, that is, on the day the vote is cast.[13]

(II) *Constitution of State Admitted to the Union.* When a state is admitted to the Union, upon the approval of congress, its constitution takes effect from the date of ratification by its people and not from the date of its admission to the Union.[14]

c. Upon Canvass of Returns or Executive Proclamation. If, however, the language of the instrument is that it shall take effect upon the canvass of the election returns, if adopted by a majority of the electors, or upon proclamation of the result by the executive, it will not take effect until such canvass is completed,[15]

13. *Colorado.*— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— *In re* Advisory Opinion to Governor, 34 Fla. 500, 16 So. 410.

Illinois.— Wade *v.* La Moille, 112 Ill. 79; Schall *v.* Bowman, 62 Ill. 321.

Louisiana.— State *v.* Morgan City, 32 La. Ann. 81.

Maryland.— Worman *v.* Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716.

Michigan.— Seneca Min. Co. *v.* Osmun, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770.

New York.— Real *v.* People, 42 N. Y. 270.

North Carolina.— Pemberton *v.* McRae, 75 N. C. 497.

Texas.— Peak *v.* Swindle, 68 Tex. 242, 4 S. W. 478; Baker *v.* State, (Tex. Crim. 1893) 24 S. W. 31.

See 10 Cent. Dig. tit. "Constitutional Law," § 18.

Effect upon ratification.— Where a constitution provided that amendments proposed thereto should become a part thereof if adopted by a majority of the electors voting for such amendments, it was held that an amendment receiving the requisite vote became operative on the day the vote was cast. *In re* Advisory Opinion to Governor, 34 Fla. 500, 16 So. 410. And see Wade *v.* La Moille, 112 Ill. 79; Schall *v.* Bowman, 62 Ill. 321. Where one section of a constitutional article providing for the submission of proposed amendments to the electors at the next general election, after having passed the legislature, was amended providing for submission at the next spring or autumn elections, as the legislature should direct, and another section of the same article relating to revision, provided that all amendments should take effect at the commencement of the year after their adoption, it was held that the object of the change in the amended section was to avoid waiting to the end of the year, and that amendments took effect under it on adoption by the requisite vote of the electors. Seneca Min. Co. *v.* Osmun, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770.

Fractions of days.— Where a town had voted to issue bonds on the same day, but at an earlier hour, than that in which a new constitution was adopted prohibiting such issue, it was held that fractions of days would be considered and that the bonds were valid. Louisville *v.* Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775.

14. Bouthemy *v.* Dreux, 10 Mart. (La.) 1; Peak *v.* Swindle, 68 Tex. 242, 4 S. W. 478; Campbell *v.* Fields, 35 Tex. 751; *In re* Deckert, 2 Hughes (U. S.) 183, 7 Fed. Cas. No. 3,728, 3 Am. L. Rec. 96, 13 Am. L. Reg. N. S. 624, 8 Am. L. Rev. 786, 1 Am. L. T. Rep. N. S. 336, 1 Centr. L. J. 316, 320, 6 Chic. Leg. N. 310.

Constitutions of reconstructed states took effect upon ratification by their peoples, not upon admission to representation in congress; approval of such constitutions by congress were conditions precedent to representation in congress of the reconstructed states. Campbell *v.* Fields, 35 Tex. 751; *In re* Deckert, 2 Hughes (U. S.) 183, 7 Fed. Cas. No. 3,728, 3 Am. L. Rec. 96, 13 Am. L. Reg. N. S. 624, 8 Am. L. Rev. 786, 1 Am. L. T. Rep. N. S. 336, 1 Centr. L. J. 316, 320, 6 Chic. Leg. N. 310. The suspension of statutes of limitations in reconstructed states was held to be operative from the date of ratification by the people. Peak *v.* Swindle, 68 Tex. 242, 4 S. W. 478.

15. *Louisiana.*— State *v.* Pardee, 32 La. Ann. 638; State *v.* Morgan City, 32 La. Ann. 81; Williams *v.* Douglass, 21 La. Ann. 468; State *v.* Dubuc, 9 La. Ann. 237; Sigur *v.* Crenshaw, 8 La. Ann. 401; Legendre *v.* McDonough, 6 Mart. N. S. (La.) 513.

Minnesota.— Duluth *v.* Duluth St. R. Co., 60 Minn. 178, 62 N. W. 267; Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

New York.— People *v.* Gardiner, 59 Barb. (N. Y.) 198; People *v.* Norton, 59 Barb. (N. Y.) 169.

Pennsylvania.— Com. *v.* Collins, 8 Watts (Pa.) 331.

Tennessee.— Bilbrey *v.* Poston, 4 Baxt. (Tenn.) 232.

Texas.— Sewell *v.* State, 15 Tex. App. 56;

or such proclamation issued.[16] And also if by provision of statute the vote on a constitutional amendment is regulated by general election laws of the state, and by such law election returns are to be canvassed by the secretary of state and the result certified to by him to the executive, to be proclaimed by him, a constitutional amendment that has been adopted by the necessary vote will not take effect until such vote is canvassed.[17]

d. Old Continues Until New Takes Effect. When a new constitution takes effect, the old constitution ceases to exist. Notwithstanding this fact, however, all authority in all departments under the old constitution continues until the new is in full effect.[18]

2. Prospective and Retrospective Operation — a. In General. Constitutional provisions, like statutes, always operate prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation was intended.[19]

b. Constitutional Restrictions — (i) *As to Municipal Taxation.* Constitutional provisions limiting the power of municipal taxation, for purposes of improvement, to a certain percentage of the taxable property, do not apply to municipal assessments or other obligations contracted prior to the adoption[20] of such

Ellis *v.* Cleburne, (Tex. Civ. App. 1896) 35 S. W. 495; Texas Water, etc., Co. *v.* Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393; Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353.

See 10 Cent. Dig. tit. "Constitutional Law," § 18.

16. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; Bilbrey *v.* Poston, 4 Baxt. (Tenn.) 232.

The executive proclamation is not essential to make operative an amendment that has received the requisite vote under constitutional provisions. Wilson *v.* State, 15 Tex. App. 150.

17. Where a constitution provided that amendments thereto should be deemed valid and binding if adopted by a majority of the qualified voters, and a statute provided that such vote should be conducted and returns thereof made to the secretary of state as provided by law, as in cases of elections of state officers, canvassed, and the result certified by the secretary of state to the governor, who should issue his proclamation declaring such amendments ratified, if such vote was found sufficient, it was held that amendments took effect upon the canvass of the vote and not before. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. A constitutional provision prohibiting the introduction of slaves into a state for sale as merchandise after a certain date, but allowing settlers to introduce them for their own use until a certain time, was held directory to the legislature and inoperative until acted upon by statute. Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85; Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800. But see Brien *v.* Williamson, 7 How. (Miss.) 14; Glidewell *v.* Hite, 5 How. (Miss.) 110; Green *v.* Robinson, 5 How. (Miss.) 80.

18. Carrollton *v.* Board of Metropolitan Police, 21 La. Ann. 447; Diamond *v.* Cain, 21 La. Ann. 309; State *v.* Dubuc, 9 La. Ann. 237; Sigur *v.* Crenshaw, 8 La. Ann. 401; Bouthemy *v.* Dreux, 10 Mart. (La.) 1.

Old officers.— To obviate the inconvenience of an interregnum between the displacement of the old and the organization of the new government, old incumbents hold office, not until the expiration of their terms, but until their successors under the new constitution are qualified, unless otherwise provided for. State *v.* Dubuc, 9 La. Ann. 237; Sigur *v.* Crenshaw, 8 La. Ann. 401. Old officers are not bound to enforce a new constitution, as they do not derive their power under it. Bouthemy *v.* Dreux, 10 Mart. (La.) 1.

19. *California.*— Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91.

Colorado.— Strickler *v.* Colorado Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245.

Kentucky.— Long *v.* Louisville, 97 Ky. 364, 17 Ky. L. Rep. 253, 30 S. W. 987; Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

Louisiana.— Lloyd *v.* Hamilton, 52 La. Ann. 861, 27 So. 275.

Maryland.— New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Missouri.— State *v.* Holladay, 66 Mo. 385.

New York.— *In re* Gibson, 21 N. Y. 9.

South Carolina.—Bourknight *v.* Epting, 11 S. C. 71.

Texas.— Orr *v.* Rhine, 45 Tex. 345.

See 10 Cent. Dig. tit. "Constitutional Law," § 20.

20. *Illinois.*— Chicago *v.* Rumsey, 87 Ill. 348.

Indiana.—Powell *v.* Madison, 107 Ind. 106, 8 N. E. 31.

Iowa.— Davenport Gas Light, etc., Co. *v.* Davenport, 13 Iowa 229.

Missouri.— State *v.* Hannibal, etc., R. Co., 151 Mo. 120, 13 S. W. 406.

Pennsylvania.— Perkins *v.* Slack, 86 Pa. St. 270.

United States.— *In re* Copenhaver, 54 Fed. 660; U. S. *v.* New Orleans, 17 Fed. 483.

provisions; and the same rule applies to an enlargement of municipal power to tax.[21]

(II) *As to Incurring Municipal Indebtedness.* So constitutional inhibitions against municipal donations, investments in private enterprises, or other modes of contracting indebtedness do not apply to municipal contracts entered into prior to the time such inhibitions went into effect.[22]

(III) *As to Civil and Political Rights.* Constitutional provisions requiring executive officers to take prescribed oaths apply only to subsequent appointments;[23] and prohibitions against the gaining of residences for the purpose of voting, by persons who are kept at the public expense in public institutions do not affect the rights of persons who have acquired such residences prior to the adoption of such provisions.[24]

c. Constitutional Changes — (I) *Affecting Property Rights* — (A) *In General.* The adoption of constitutional provisions abrogating or otherwise affecting property rights operate prospectively and have no effect upon property rights that are vested at the time of their adoption,[25] unless it clearly appears, expressly or by necessary implication. that they were intended to operate retrospectively.

(B) *Of Married Women.* The adoption of provisions exempting the property of married women at the time of marriage or subsequently acquired from liability

See 10 Cent. Dig. tit. "Constitutional Law," § 20.

21. Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

22. Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369, 33 N. Y. St. 411 [*affirming* 50 Hun (N. Y.) 601, 2 N. Y. Suppl. 514, 18 N. Y. St. 485]; Rogers *v.* Smith, 5 Hun (N. Y.) 475; Clay County *v.* Savings Soc., 104 U. S. 579, 26 L. ed. 856.

23. Stone *v.* Healy, 5 Conn. 278.

Homestead and exemption provisions operate prospectively only, and are effective from the time of their adoption. Lloyd *v.* Hamilton, 52 La. Ann. 861, 27 So. 275.

A provision restricting preëmption of certain land to actual settlers thereon is operative as to both prior and subsequent applicants. Mosley *v.* Torrence, 71 Cal. 318, 12 Pac. 430; Dillon *v.* Saloude, 68 Cal. 267, 9 Pac. 162; Johnson *v.* Squires, 55 Cal. 103.

24. Matter of Griffiths, 16 Misc. (N. Y.) 128, 38 N. Y. Suppl. 953, 74 N. Y. St. 542.

Such prohibitions apply to the inmates of soldiers' homes, and operate to preserve the voting status of those who enter such institutions to be kept at public expense, as it stood at the time of entry. Powell *v.* Spackman, (Ida. 1901) 65 Pac. 503; Lawrence *v.* Leidigh, 58 Kan. 594, 50 Pac. 600, 62 Am. St. Rep. 631; Walcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215; *In re* Garvey, 147 N. Y. 177, 41 N. E. 439, 69 N. Y. St. 393; *In re* Goodman, 146 N. Y. 284, 40 N. E. 769, 66 N. Y. St. 617; People *v.* Cady, 143 N. Y. 100, 37 N. E. 673, 60 N. Y. St. 474, 25 L. R. A. 399; Silvey *v.* Lindsay, 107 N. Y. 55, 13 N. E. 444. *Contra*, Stewart *v.* Kyser, 105 Cal. 459, 39 Pac. 19; People *v.* Holden, 28 Cal. 123; Wood *v.* Fitzgerald, 3 Oreg. 568; Darragh *v.* Bird, 3 Oreg. 229.

25. *California.*— Mosley *v.* Torrence, 71 Cal. 318, 12 Pac. 430; Dillon *v.* Saloude, 68 Cal. 267, 9 Pac. 162; Johnson *v.* Squires, 55 Cal. 103.

Louisiana.— Bohn *v.* Bossier, 29 La. Ann. 144; Whitehead *v.* Watson, 19 La. Ann. 68.

Maryland.— Williams *v.* Johnson, 30 Md. 500, 96 Am. Dec. 613.

Pennsylvania.— Gloninger *v.* Pittsburgh, etc., R. Co. 139 Pa. St. 13, 27 Wkly. Notes Cas. (Pa.) 497, 21 Atl. 211.

Rhode Island.— Coggeshall *v.* Groves, 16 R. I. 18, 11 Atl. 296.

An amendment prohibiting the sale of intoxicating liquors as a beverage does not defeat a right of action for the breach of the condition of a bond given in pursuance of a license in force when the amendment was adopted. Coggeshall *v.* Groves, 16 R. I. 18, 11 Atl. 296.

Corporate stock, provision against increase in, without consent of majority, after notice, not applicable to corporation chartered prior to adoption of provision. Gloninger *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 13, 27 Wkly. Notes Cas. (Pa.) 497, 21 Atl. 211.

Provisions for tax-sales.— Where a provision directed that the legislature should provide, in any case where it was necessary to sell real estate for the non-payment of taxes, that a return of such taxes should be made to some officer having authority to receive taxes and that there should be no sale of property for such taxes except by such officer upon an order or judgment of a court of record; and another provision declared that "all laws in force at the adoption of this constitution, not inconsistent therewith, and all rights, . . . claims, and contracts . . . shall continue to be as valid as if this constitution had not been adopted," it was

for the husband's debts or contracts does not apply to vested rights of the husband in the wife's property at the time of the adoption of such provisions.[26]

(II) *Affecting Judicial Proceedings.* Provisions changing rights of action from one class of persons to another,[27] removing statutory limitations as to amounts to be recovered,[28] changing the right to a special fund,[29] abrogating the jurisdiction of a court,[30] creating rights of appeal,[31] limiting the time for bringing actions,[32] or changing the procedure for removals from office,[33] do not affect the rights of parties to pending actions at the time such provisions take effect, unless an intention to the contrary is clearly shown.[34]

3. Repeal of Existing Laws, Constitutions, or Charters — a. In General. When a new constitution containing provisions repealing all laws inconsistent therewith goes into operation, the effect is that all laws, whether legislative enactments or constitutional provisions, that are inconsistent with such constitution are repealed, while all such laws or provisions that are not inconsistent with it and in force at the time of its adoption remain in force.[35] New constitutions operate

held that such provisions were to be construed together, so that judgments for taxes obtained before the adoption of the constitution would be valid. Garrick *v.* Chamberlain, 97 Ill. 620.

A provision making mortgages, for the purpose of taxation, an interest in land, is not retroactive in its operation. Beckman *v.* Skaggs, 59 Cal. 541.

Tax exemptions.— Provisions exempting certain manufactures from taxation are not retroactive, and are not applicable to assessments levied the year before and collectable the year after the adoption of such provision. New Orleans *v.* L'Hote, 35 La. Ann. 1177. Tax exemptions are strictly construed, and the article claimed to be exempt must be mentioned or it will be excluded. State *v.* American Sugar-Refining Co., 51 La. Ann. 562, 25 So. 447. A provision exempting school property, and including all other, is prospective, and applies to corporations whose charters exempt their property from taxation. Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123.

The constitutional abolition of slavery did not defeat an action to recover damages for previous conversion of a slave. Williams *v.* Johnson, 30 Md. 500, 96 Am. Dec. 613. *Contra,* Whitehead *v.* Watson, 19 La. Ann. 68.

26. Walton *v.* Parish, 95 N. C. 259; Rugh *v.* Ottenheimer, 6 Oreg. 231, 25 Am. Rep. 513. And see Starr *v.* Hamilton, Deady (U. S.) 268, 22 Fed. Cas. No. 13,314.

Contracts between husband and wife.— Changes in constitutions, or statutes enacted under them, affecting the marital relations do not apply to contracts between husband and wife. Walton *v.* Parish, 95 N. C. 259.

27. Edmondson *v.* Kentucky Cent. R. Co., 16 Ky. L. Rep. 459, 28 S. W. 789.

28. Isola *v.* Weber, 147 N. Y. 329, 41 N. E. 704, 69 N. Y. St. 691 [*reversing* 13 Misc. (N. Y.) 97, 34 N. Y. Suppl. 77, 68 N. Y. St. 32, 1 N. Y. Annot. Cas. 384]; O'Reilly *v.* Utah, etc., Stage Co., 87 Hun (N. Y.) 406, 34 N. Y. Suppl. 358, 68 N. Y. St. 432.

Former constitution governs the rights of the parties to an action instituted prior to the time the present constitution became effective. McHugh *v.* Louisville Bridge Co., 23 Ky. L. Rep. 1546, 65 S. W. 456.

29. McGeehan *v.* Burke, 37 La. Ann. 156.

30. Chartersville *v.* Lyon, 69 Ga. 577; Bryan *v.* State, 4 Iowa 349; Knox *v.* Gurnett, 28 La. Ann. 601; Halbert *v.* Martin, (Tex. Civ. App. 1895) 30 S. W. 388.

Order for sale of land by probate court, granted to an administrator before adoption of a constitution transferring probate jurisdiction to a district court, was held to be valid. Halbert *v.* Martin, (Tex. Civ. App. 1895) 30 S. W. 388.

31. Rogers *v.* Goldthwaite, McGloin (La.) 127.

32. Grigsby *v.* Peak, 57 Tex. 142.

Constitutional provision limiting time for bringing action, in cases of persons under disabilities, to seven years after the removal of such disabilities, instead of five years, as before, applies to persons whose disabilities had already been removed when such provision was adopted, provided the cause of action was not already barred by law. Grigsby *v.* Peak, 57 Tex. 142.

33. Where a judgment for the removal of a sheriff from office without the intervention of a jury had been rendered, but before affirmance a constitutional provision was adopted permitting such removals only for causes found by juries, it was held that the judgment for removal would not be affirmed. Gordon *v.* State, 47 Tex. 208.

34. Adoption of a constitution giving exclusive jurisdiction of a designated class of cases to a particular court, without reservation as to pending suits, supersedes the jurisdiction of the court formerly authorized to entertain them, even as to pending actions, and a plea to jurisdiction will be sustained. Knox *v.* Gurnett, 28 La. Ann. 601.

35. *Illinois.*— Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798; Chance *v.* Marion County, 64 Ill. 66.

Iowa.— Scott *v.* Davenport, 34 Iowa 208.

prospectively only, and all preëxisting laws remain undisturbed, unless an intent to repeal all such is expressed or necessarily implied.[36]

b. Repeal by Implication. Repeal by implication is not favored[37] and no law

Kansas.— Kilpatrick *v.* State, 5 Kan. 673.

Kentucky.— Com. *v.* Grinstead, 21 Ky. L. Rep. 1444, 55 S. W. 720.

Missouri.— Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

Ohio.— State *v.* Medbery, 7 Ohio St. 522; Cass *v.* Dillon, 2 Ohio St. 607; State *v.* Dudley, 1 Ohio St. 437.

Pennsylvania.— *In re* Election Officers, 9 Pa. Dist. 83.

South Carolina.— Mauldin *v.* Greenville, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284; Cohen *v.* Hoff, 3 Brev. (S. C.) 500.

Texas.— Collins *v.* Tracy, 36 Tex. 546.

See 10 Cent. Dig. tit. "Constitutional Law," § 21; and, generally, *infra*, IV, D, 3, b.

36. *Arkansas.*— Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

California.—Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

Kentucky.— Wright *v.* Woods, 96 Ky. 56, 16 Ky. L. Rep. 337, 27 S. W. 979; Piper *v.* Gunther, 95 Ky. 115, 15 Ky. L. Rep. 462, 23 S. W. 872.

Louisiana.— State *v.* Pickett, 46 La. Ann. 7, 14 So. 340; New Orleans *v.* Eclipse Tow-Boat Co., 33 La. Ann. 647, 39 Am. Rep. 279; New Orleans *v.* Meister, 33 La. Ann. 646; New Orleans *v.* Vergnole, 33 La. Ann. 35; Chalmers *v.* White, 2 Mart. N. S. (La.) 315.

Maine.— Lunt *v.* Hunter, 16 Me. 9.

Massachusetts.— McNeil *v.* Bright, 4 Mass. 282.

Mississippi.— Mahorner *v.* Hooe, 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706.

Pennsylvania.— Indiana County *v.* Indiana County Agricultural Soc., 85 Pa. St. 357.

South Dakota.— Kirby *v.* Western Union Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Virginia.— Chahoon *v.* Com., 20 Gratt. (Va.) 733.

United States.— Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410; Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163.

See 10 Cent. Dig. tit. "Constitutional Law," § 21 *et seq.*

Acts making certain counties liable for destruction of property by mobs were not repealed by the adoption of new constitution. Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670.

A constitutional amendment authorizing legislation for the purpose of securing uniform taxation by municipal authorities does not repeal the law in force at time of adoption. Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548. See also New Orleans *v.* Eclipse Tow-Boat Co., 33 La. Ann. 647, 39 Am. Rep. 279; Pegram *v.* Cleveland County, 64 N. C. 557.

A constitutional inhibition against legislation authorizing towns and counties to loan their credit to associations or corporations, or to become stock-holders therein except upon a two-thirds vote, was held prospective and not controlling as to laws in force when it was adopted. State *v.* Macon County Ct., 41 Mo. 453. See also State *v.* Pickett, 46 La. Ann. 7, 14 So. 340; State *v.* Lacombe, 12 La. Ann. 195; County Com'rs *v.* Nichols, 14 Ohio St. 260; Citizens' Bank *v.* Wright, 6 Ohio St. 318; Winston *v.* State, 32 Tex. Crim. 59, 22 S. W. 138; Fremont County *v.* Perkins, 5 Wyo. 166, 38 Pac. 915.

Laws in force in Louisiana on its admission as a state were not affected by the federal constitution. State *v.* Lacombe, 12 La. Ann. 195; Chalmers *v.* White, 2 Mart. N. S. (La.) 315.

Laws repealed or annulled.— A compact between states relating to the navigation of river, entered into under confederation, became inoperative upon the adoption of the federal constitution. South Carolina *v.* Georgia, 93 U. S. 4, 23 L. ed. 782. An amendment to the federal constitution forbidding states to deprive of property without due process of law applies to a taking after its adoption, under authority of a prior statute. Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828]. The adoption of a constitutional amendment declaring all laws enacted, and all acts of the government during a certain period, unconstitutional, null, and void from the beginning, except certain judicial decisions rendered, validates only such decisions as are specified in such amendment. Parks *v.* Jones, 2 Coldw. (Tenn.) 172. A colonial statute authorizing an abutting owner to build one half of a party wall on a neighbor's land, and compelling the neighbor to pay one half of the expense when he built thereon was deemed repugnant to principles of constitution subsequently adopted. Wilkins *v.* Jewett, 139 Mass. 29, 29 N. E. 214. The adoption of a constitution inhibiting the loan of municipal credit or money to aid corporations or associations repeals prior statutes authorizing the bonding of towns for railroad purposes, except as to prior contracts. Buffalo, etc., R. Co. *v.* Collins, 5 Hun (N. Y.) 485. See also State *v.* Jumel, 35 La. Ann. 537.

Submission to vote of "taxable inhabitants," on the question of incurring municipal indebtedness, instead of to the "qualified voters," was held invalid. St. Joseph, etc., R. Co. *v.* Buchanan County Ct., 39 Mo. 485.

37. *Alabama.*— Parker *v.* Hubbard, 64 Ala. 203; Iverson *v.* State, 52 Ala. 170.

Indiana.— Indianapolis Water Works Co.

is ever repealed by not being enforced;[38] and therefore an intent to abrogate the whole system of the laws of a state by a change in its fundamental law must be clearly expressed or necessarily implied. But repeal by implication is more common in cases of constitutions than it is with statutes, although the same considerations control in both cases.[39]

c. Repeal by Amendments. Amendments to constitutions or statutes are not regarded as if they had been parts of the original instruments, but are considered rather in the nature of codicils or second instruments, altering or rescinding the originals to the extent to which they are in conflict, and of course are to be treated as having a force superior to the originals to the extent of such conflict.[40] If a constitutional amendment does not in terms expressly repeal a constitutional provision, yet if it covers the same subject provided for in such provision, the

v. Burkhart, 41 Ind. 364; Blain *v.* Bailey, 25 Ind. 165.

Iowa.— State *v.* Berry, 12 Iowa 58.

Louisiana.— Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

Maine.— Towle *v.* Marrett, 3 Me. 22, 14 Am. Dec. 206.

New Jersey.— Naylor *v.* Field, 29 N. J. L. 287.

Ohio.— Hirn *v.* State, 1 Ohio St. 15; Dodge *v.* Gridley, 10 Ohio 173.

Wisconsin.— Atty.-Gen. *v.* Brown, 1 Wis. 513.

See 10 Cent. Dig. tit. "Constitutional Law," § 21.

38. Homer *v.* Com., 106 Pa. St. 221, 51 Am. Rep. 521. And see Pearson *v.* International Distillery, 72 Iowa 348, 34 N. W. 1.

39. Prouty *v.* Stover, 11 Kan. 235.

Laws repealed by implication.— Act taking power from governor to sell railroad property to enforce lien thereon under prior statute, on default in payment of interest on state bonds, was repealed by subsequent constitutional article providing for enforcement of lien in accordance with original terms, and repealing all laws inconsistent with the constitution. State *v.* Chappell, 74 Mo. 335. Where an act providing for the establishment of a court to take the place of the court of common pleas of a county, to take effect at a future date, previous to which a new constitution went into effect providing that courts of common pleas should "cease to exist at the expiration of the present terms of office of the several judges," it was held that the act establishing such court was inoperative. *Ex p.* Snyder, 64 Mo. 58. Act empowering state officer to sue and be sued in his name of office as to claims relating to state institution was repealed by subsequent constitutional provision creating board of public lands and buildings. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873. But see Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773, as to right of passenger to ride on railroad ticket under statute, after creation of railroad commission by constitution, empowered to fix rates. Act holding domestic railway companies to same liability for injuries to servants, from negligence of superiors, was annulled by constitutional provision against foreign corporations enjoying greater rights or privileges than domestic corporations. Criswell *v.* Montana Cent. R. Co., 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554. Act authorizing appointment of auctioneers by governor, with advice and consent of the council, and prescribing penalties for sales at auction by others than such appointees, was abrogated by subsequent constitutional provision authorizing such appointments to be made with the advice and consent of the senate, and omitting the penalties. People *v.* Gautier, 2 Wheel. Crim. (N. Y.) 77. See also Fraser *v.* Alexander, 75 Cal. 147, 16 Pac. 757; McTigue *v.* Com., 99 Ky. 66, 17 Ky. L. Rep. 1418, 35 S. W. 121; Union Pac. R. Co. *v.* Saunders County, 7 Nebr. 228; Baker *v.* North Pennsylvania R. Co., 5 Wkly. Notes Cas. (Pa.) 292.

Local option suspends but does not repeal statutes, and prosecutions for violation of liquor law continue after its adoption. Winterton *v.* State, 65 Miss. 238, 3 So. 735. See Winston *v.* State, 32 Tex. Crim. 59, 22 S. W. 138.

Legislative reservations.— Where the right of repeal is reserved in an act passed, associations formed under it cannot, by reënacting its provisions in their charters, claim the benefit of a contract, and come within the inhibition of the federal constitution. Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163.

40. *Arkansas.*— State *v.* Cox, 8 Ark. 436.

Louisiana.— Sigur *v.* Crenshaw, 8 La. Ann. 401.

New York.— People *v.* Angle, 109 N. Y. 564, 17 N. E. 413, 16 N. Y. St. 647; Popfinger *v.* Yutte, 102 N. Y. 38, 6 N. E. 259.

North Carolina.— State University *v.* McIver, 72 N. C. 76.

Oregon.— Wood *v.* Fitzgerald, 3 Oreg. 568.

South Carolina.— Bray *v.* Florence, 62 S. C. 57, 39 S. E. 810.

Tennessee.— Fuller *v.* McFarland, 6 Heisk. (Tenn.) 79.

Texas.— Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

See 10 Cent. Dig. tit. "Constitutional Law," § 21.

amendment will be regarded as a substitute for it and as suspending it;[41] and the same rule applies to statutes.[42]

d. Subsequent Legislation Necessary to Render Constitution Effective. Sometimes new constitutional provisions are treated as inoperative until rendered effective by subsequent legislation, and in such cases those whose rights are affected by such provisions remain as before their adoption, until the enactment of statutes rendering them effective as a preliminary measure.[43]

e. Constitutions and Ordinances For Territories. Upon the succession of a territory to statehood and the adoption of a constitution by its people that has received the approval of congress, all constitutions and ordinances framed by the federal authorities for the purpose of the territorial government become suspended,[44] giving full force and effect to the new state constitution so adopted.

41. People *v.* Angle, 109 N. Y. 564, 17 N. E. 413, 16 N. Y. St. 647; Popfinger *v.* Yutte, 102 N. Y. 38, 6 N. E. 259.

42. **Repealing statutes.**— Where a new statute covers the whole subject to which it relates all prior statutes on the same subject are repealed by implication.

Indiana.— Dowdell *v.* State, 58 Ind. 333.

Kansas.— State *v.* Studt, 31 Kan. 245, 1 Pac. 635.

Mississippi.— Clay County *v.* Chickasaw County, 64 Miss. 534, 1 So. 753.

Nevada.— State *v.* Rogers, 10 Nev. 319.

New Mexico.— Tafoya *v.* Garcia, 1 N. M. 480.

New York.— Lyddy *v.* Long Island City, 104 N. Y. 218, 10 N. E. 155.

Oregon.— Stingle *v.* Nevel, 9 Oreg. 62.

United States.— Red Rock *v.* Henry, 106 U. S. 596, 1 S. Ct. 434, 27 L. ed. 251; U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085; U. S. *v.* Barr, 4 Sawy. (U. S.) 254, 24 Fed. Cas. No. 14,527, 15 Alb. L. J. 472, 9 Chic. Leg. N. 308, 23 Int. Rev. Rec. 193.

But see Gaston *v.* Merriam, 33 Minn. 271.

See also, generally, STATUTES.

43. Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

An act providing for the assessment of damages by five commissioners, for property taken for public use, was held not to be repealed as to a corporation previously existing by a subsequent constitutional article providing for such assessment by a jury of twelve, in the absence of a statute authorizing procedure in accordance with a constitutional requirement. Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

A constitutional provision that only persons entitled to vote and hold office should be eligible to sit as jurors was held to be inoperative to repeal an existing law in the absence of legislation. Chahoon *v.* Com., 20 Gratt. (Va.) 733. See also Wright *v.* Woods, 96 Ky. 56, 16 Ky. L. Rep. 337, 27 S. W. 979; State *v.* Third Judicial Dist. Ct., 14 Mont. 476, 37 Pac. 7; Calhoun County *v.* Galbraith, 99 U. S. 214, 25 L. ed. 410; Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163.

A provision abrogating capital punishment, except where the legislature shall otherwise enact, does not exempt from punishment acts committed before its adoption; but leaves the offender liable to punishment under a former law to any extent less than death, at the discretion of the court, pending legislative action. State *v.* King, 69 N. C. 419.

44. *Illinois.*— People *v.* Thompson, 155 Ill. 451, 40 N. E. 307; Phœbe *v.* Jay, 1 Ill. 268.

Indiana.— Depew *v.* Wabash, etc., Canal, 5 Ind. 8.

Louisiana.— Chalmers *v.* White, 2 Mart. N. S. (La.) 315.

Michigan.— La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155.

Wisconsin.— Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109.

United States.— Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487; Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. ed. 442.

See 10 Cent. Dig. tit. "Constitutional Law," § 22.

The ordinance of 1787, passed by congress for the government of the Northwest Territory, was superseded in such territory by the state constitutions, which were subsequently adopted by the people of the states comprising that territory. Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487; Woodman *v.* Kilbourn Mfg. Co., 1 Abb. (U. S.) 158, 1 Biss. (U. S.) 546, 30 Fed. Cas. No. 17,978, 6 Am. L. Reg. N. S. 238. And the same rule applied to all subsequently acquired territory to which the rights secured by that ordinance were extended by congress. Permoli *v.* New Orleans Municipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739. The ordinance of 1787 was superseded by the federal constitution, placing all of the states upon an equality, after which jurisdiction of the federal courts under that ordinance ceased. Strader *v.* Graham, 10 How. (U. S.) 82, 13 L. ed. 337.

Reconstruction.—Upon the reëstablishment of permanent state governments in the Confederate states, after the withdrawal of the military governments maintained by federal authority, the people of such states had the power to continue in force or annul the provisional constitutions or laws enacted by the military governments. Jefferson Parish *v.*

f. Prohibition of Local and Special Laws — (I) *In General.* Constitutional provisions prohibiting the enactment of local or special laws in particular cases are prospective in their operation and do not affect past legislation.[45] The constitutionality of acts granting local and special privileges in numerous instances, passed prior to the adoption of prohibitive constitutional provisions, have been called in question; but in most cases have been held valid,[46] since such provisions only operate prospectively. But few decisions to the contrary for stated reasons have been rendered.[47]

(II) *Affecting Charters of Municipal Corporations.* The adoption of a constitution or amendments thereto inconsistent with the provisions of the charters of municipal corporations has the effect of repealing all such provisions as are inconsistent with the constitution so adopted.[48]

(III) *Affecting Charters of Private Corporations.* On the other hand the effect is not the same as to the provisions of charters granted to private

Burthe, 21 La. Ann. 325; Parks *v.* Jones, 2 Coldw. (Tenn.) 172.

45. *California.*— Nevada School Dist. *v.* Shoecraft, 88 Cal. 372, 26 Pac. 211; Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311.

Colorado.— People *v.* Grand County, 6 Colo. 202.

Illinois.— Covington *v.* East St. Louis, 78 Ill. 548.

Indiana.— Davidson *v.* Koehler, 76 Ind. 398; State *v.* Barbee, 3 Ind. 258.

Louisiana.—Pecot *v.* St. Mary, 41 La. Ann. 706, 6 So. 677.

Missouri.— State *v.* Thileneus, 48 Mo. 479; State *v.* Cape Girardeau, etc., R. Co., 48 Mo. 468.

Ohio.— Allbyer *v.* State, 10 Ohio St. 588.

Texas.— Bohl *v.* State, 3 Tex. App. 683.

See 10 Cent. Dig. tit. "Constitutional Law," § 23.

46. The following local and special legislation has been held valid, under the prospective operation of subsequent prohibitive constitutional provisions: A city charter, except as otherwise repugnant. People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124.

An act granting power to certain municipal and quasi-municipal corporations to issue railroad-aid bonds and to subscribe for stock. Fosdick *v.* Perrysburg, 14 Ohio St. 472; Knox County *v.* Nichols, 14 Ohio St. 260; State *v.* Union Tp., 8 Ohio St. 394; Thompson *v.* Kelly, 2 Ohio St. 647; Cass *v.* Dillon, 2 Ohio St. 607.

An act granting the right to lay railroad tracks in streets. Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

An act regulating the practice of a discontinued court held in terms. Piper *v.* Gunther, 95 Ky. 115, 15 Ky. L. Rep. 462, 23 S. W. 872.

An act for the laying, levying, assessment, and collection of taxes, except so far as repugnant. Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

An act exempting municipal bonds from taxation. McCreight *v.* Camden, 49 S. C. 78, 26 S. E. 984.

47. The following acts have been held invalid under the operation of such provisions:

An act incorporating a municipal fire department, authorizing its members to determine the amount necessary for maintenance, and authorizing the assessment of a list of buildings by assessors proportionate to the liability to injury by fire. Taylor *v.* Smith, 50 N. J. L. 101, 11 Atl. 321.

Acts regulating practice in courts of particular counties, and authorizing the appointment of reporters therefor. O'Connor *v.* Leddy, 64 Ill. 299; People *v.* Rumsey, 64 Ill. 44.

An act exempting municipal bonds from taxation as to bonds not issued. Merchants' Ins. Co. *v.* Newark, 54 N. J. L. 138, 23 Atl. 305. But see McCreight *v.* Camden, 49 S. C. 78, 26 S. E. 984.

48. Public School Trustees *v.* Taylor, 30 N. J. Eq. 618. See also Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309, holding that where the provisions of a city charter were in conflict with the general law and void when adopted, the subsequent amendment, in 1896, to section 6, article 11, of the constitution, which so changed it that the charter provisions would have been harmonious therewith, did not operate to give life to such provisions. And see People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124; Henning *v.* Stengel, 23 Ky. L. Rep. 1793, 66 S. W. 41, 67 S. W. 64; State *v.* New Orleans, 52 La. Ann. 1604, 28 So. 116. But see Covington *v.* Highlands Dist., 24 Ky. L. Rep. 433, 68 S. W. 669 (holding that a special act of the legislature incorporating a taxing district with many of the governmental powers of towns and cities was not repealed by the constitution, although that instrument prohibits the legislature from passing such special laws in the future, and provides for the repeal of all laws inconsistent with its provisions); Martin *v.* Laurens School Dist., 57 S. C. 125, 35 S. E. 517.

The adoption of a constitutional provision limiting municipal indebtedness to an amount for which provision should be made at the time of incurring, by direct taxation, for the payment of the interest annually and the principal within a prescribed time, was held to be a repeal of limitations in a city charter against levying taxes in excess of a prescribed

corporations. Generally constitutional changes do not affect the charters of private corporations previously granted,[49] or subsequently amended by legislation;[50] but it has been held that the adoption of constitutional provisions regulating condemnation proceedings repealed all forms of such proceedings prescribed by charters of private corporations previously granted.[51]

4. Self-Executing Provisions — a. In General. While no part of a constitution is to be regarded as immaterial or advisory, there are many provisions which do not directly confer power so that rights under them can be enforced, but merely confer power to be exercised when the legislature, in its discretion, shall deem it wise. A constitutional provision authorizing suits to "be brought against the state, in such courts as may be by law provided,"[52] may confer a right to prosecute a claim against the state; but it is evident that no such claim could be prosecuted until the legislature shall see fit to establish courts for that purpose, or authorize those established to entertain jurisdiction; and until this is done any rights conferred under such a provision must lie dormant,[53] because the means by which they may be enforced are not supplied. Examples of this kind are numerous. Provisions declaring that all property shall be taxed in proportion to its value, "to be ascertained as provided by law,"[54] making it the duty of the legislature to enact laws submitting questions of local option to a vote of the electors[55] or declaring that the state shall control the manufacture and sale of intoxicating liquors, under laws to be prescribed by the legislature,[56] are all of this character, and cannot be enforced until aided by supplemental legislation. They are not therefore self-executing provisions. But provisions declaring that taxes within a limited jurisdiction shall be uniform, and all property not exempt from taxation by the constitution shall be assessed at its fair value,[57] making officers of banks who receive deposits after a knowledge that such banks are insolvent individually

amount. East St. Louis *v.* People, 124 Ill. 655, 17 N. E. 447.

49. State *v.* Roosa, 11 Ohio St. 16.

Ferry licenses granted under a territorial law and acquiesced in by congress for twenty-five years were held not to be repealed by an organic law of the territory inhibiting the granting of private charters or special privileges. Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

A provision in a railroad charter authorizing counties to subscribe to its stock, without submission to a vote, was not repealed by the adoption of a subsequent constitution prohibiting such subscriptions. State *v.* Greene County, 54 Mo. 540.

50. The adoption of a constitutional amendment requiring the formation of corporations to be under general statutes was held not to be applicable to a charter previously granted by the legislature and subsequently amended by it. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373.

51. Perrysburgh Canal, etc., Co. *v.* Fitzgerald, 10 Ohio St. 513.

Ky. Const. § 59, subs. 4, prohibiting the legislature from passing local or special acts to regulate the punishment of crimes, in conjunction with Ky. Stat. § 1202, providing for the punishment of the offense of embezzlement by any officer or agent of any bank, operated to repeal a bank charter granted by special act of the legislature prior to the adoption of the constitution, to the extent that it provided for the punishment of the offense of embezzlement of the bank's funds by any of its officers or agents. Com. *v.* Porter, 24 Ky. L. Rep. 364, 68 S. W. 621.

52. *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567.

53. *California.*— People *v.* Lake County, 33 Cal. 487.

Louisiana.— Bowie *v.* Lott, 24 La. Ann. 214.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Mississippi.— Mississippi Mills *v.* Cook, 56 Miss. 40.

Pennsylvania.—Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476.

See 10 Cent. Dig. tit. "Constitutional Law," § 32.

54. McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737.

"Where a constitutional provision . . . lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of a certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative." Davis *v.* Burke, 179 U. S. 399, 403, 21 S. Ct. 210, 45 L. ed. 249.

55. Adams *v.* Kelley, (Tex. Civ. App. 1898) 45 S. W. 859.

56. State *v.* Bradford, 13 S. D. 201, 83 N. W. 47, 12 S. D. 207, 80 N. W. 143.

57. Louisville, etc., R. Co. *v.* Barboursville, 105 Ky. 174, 20 Ky. L. Rep. 1105, 48 S. W. 985.

liable,[58] or declaring that railroad companies shall carry freight for all parties at the same rate and fixing penalties for refusing,[59] confer rights and fix liabilities that can be enforced immediately, and without the aid of supplemental legislation. They are therefore self-executing. A self-executing provision then is one which supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed.[60]

b. Determination of Character of Such Provisions. It is not always easy to determine what are or what are not self-executing provisions, nor are the authorities upon this subject reconcilable. Where the provision supplies the rule for enforcement and fixes a penalty for violations there can be no doubt as to its character. It is not only self-executing but prohibitive, and renders void all statutes in conflict therewith.[61] But a provision may be both prohibitive[62] and mandatory[63] and not self-executing. The question in such cases is always one of intention, and to determine the intent the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances,[64] and to determine these questions from which the

58. Mallon *v.* Hyde, 76 Fed. 388. See also Rice *v.* Howard, (Cal. 1902) 69 Pac. 77.

59. Louisville, etc., R. Co. *v.* Com., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

60. *California.*— People *v.* Hoge, 55 Cal. 612; Ewing *v.* Oroille Min. Co., 56 Cal. 649.

Colorado.— Keady *v.* Owers, (Colo. 1902) 69 Pac. 509.

Illinois.— Hills *v.* Chicago, 60 Ill. 86.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Nebraska.— State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98; State *v.* Weston, 4 Nebr. 216. See also Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

Tennessee.— Friedman *v.* Mathes, 8 Heisk. (Tenn.) 488.

United States.— Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249.

See 10 Cent. Dig. tit. "Constitutional Law," § 32.

"**The term self-executing,** as applied to a constitutional provision, has reference only to whether such a provision is enforceable without any specific remedy therefor given by the written law." Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604.

"**A constitutional provision which is complete in itself** needs no further legislation to put it in force, but is self-executing." Davis *v.* Burke, 179 U. S. 393, 21 S. Ct. 210, 45 L. ed. 249.

"**Provisions of State Constitutions which do not require subsequent legislation** to enforce them are self-executing." Hyatt *v.* Allen, 54 Cal. 353, 360.

61. Louisville, etc., R. Co. *v.* Com., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

62. Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85.

63. Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809 [*reversing* 14 N. Y. App. Div. 483, 43 N. Y. Suppl. 1033].

Prohibitive provisions not self-executing.— A provision prescribing a form of oath for public officers and providing that no other test shall be required does not inhibit the legislature from prescribing a different form substantially the same. *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293. A provision requiring legislation against the emancipation of slaves unless sent out of the state is not self-executing. Jackson *v.* Collins, 16 B. Mon. (Ky.) 214. The fourteenth amendment to the federal constitution is not self-executing. Rothermel *v.* Meyerle, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366. In Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800 (Story, J., dissenting), the court had under consideration a clause of the constitution of Mississippi prohibiting the introduction of slaves into that state as merchandise or for sale after the year 1833, except such as might be introduced by actual settlers previous to the year 1845, but fixed no penalties for violations; and it was held, although by a divided court, that the provision was not self-executing and remained inoperative in the absence of supplemental legislation. Subsequently the same question came before the court of errors of Mississippi, where the ruling in Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800, was disapproved and the provision held to be self-executing. Brien *v.* Williamson, 7 How. (Miss.) 14; Glidewell *v.* Hite, 5 How. (Miss.) 110; Green *v.* Robinson, 5 How. (Miss.) 80. And afterward, on the strength of the construction of the provision by the state court, the question was again brought before the supreme court of the United States in Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85, but the court reaffirmed its former ruling in Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800, holding that the provision was not self-executing.

64. Illinois Cent. R. Co. *v.* Ihlenberg, 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393. See also Rowan *v.* Runnels, 5 How. (U. S.) 134, 12 L. ed. 85; Groves *v.* Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800.

intention is to be gathered the court will resort to extrinsic matters when this is necessary.[65]

c. Prohibitions and Restrictions — (I) *In General.* Although the absence of a penalty for violations of a constitutional provision is a circumstance which is given much weight in some cases in determining its force, it is by no means a conclusive test; and the rule favored by the weight of authority is that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independent of any legislative action.[66] While legislation may be desirable and beneficial it is void to the extent to which it is adverse to such provisions.[67]

(II) *Against Fraud, Gaming, Usury, and Taking Property by Right of Eminent Domain.* Provisions designed to protect the public against fraud,[68] gaming,[69] usurious contracts,[70] discriminating charges by railroads,[71] and the taking of private property by right of eminent domain,[72] without just compensation, are self-executing and will be enforced without supplemental legislation, unless it

65. Fusz *v.* Spannhorst, 67 Mo. 256.

66. *Alabama.*— American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Arkansas.— St. Louis R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

California.— Hilton *v.* Heverin, (Cal. 1886) 11 Pac. 27; Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3.

Georgia.— Arnett *v.* Decatur County, 75 Ga. 782.

Illinois.— East St. Louis *v.* People, 124 Ill. 655, 17 N. E. 447; Law *v.* People, 87 Ill. 385; People *v.* Palmer, 64 Ill. 41; Hills *v.* Chicago, 60 Ill. 86.

Kentucky.— Com. *v.* Jones, 73 Ky. 725.

Louisiana.— Bowie *v.* Lott, 24 La. Ann. 214.

Mississippi.— Brien *v.* Williamson, 7 How. (Miss.) 14; Glidewell *v.* Hite, 5 How. (Miss.) 110; Green *v.* Robinson, 5 How. (Miss.) 80.

Missouri.— Householder *v.* Kansas City, 83 Mo. 488.

Nebraska.— State *v.* Weston, 4 Nebr. 216.

South Dakota.— Dakota Synod *v.* State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418.

Tennessee.— Yerger *v.* Rains, 4 Humphr. (Tenn.) 259; Bass *v.* Nashville, Meigs (Tenn.) 421, 33 Am. Dec. 154.

See 10 Cent. Dig. tit. "Constitutional Law," § 33.

Illustrations.— A provision limiting the power of any of the departments of the government, and inhibiting the performance of particular acts by an officer is self-executing. Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798. A provision that a district court shall hold continuous sessions of ten months, held alternately in each parish as the public interest might require, is self-executing. State *v.* Voorhies, 50 La. Ann. 807, 24 So. 276. A prohibition against foreign corporations doing business within the state without having a place of business therein, and an agent for service of process, has been held to be self-executing. American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90. *Contra*, St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

67. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3; Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625.

68. Provisions making officers of banking institutions individually liable for deposits received after a knowledge that the bank is insolvent or making the stock-holders liable to creditors over the amount of their stock for liabilities incurred while they were in office are self-executing. Farmers' L. & T. Co. *v.* Funk, 49 Nebr. 353, 68 N. W. 520; Mallon *v.* Hyde, 76 Fed. 388.

69. A prohibition against the enactment of laws authorizing lotteries and commanding the enactment of laws prohibiting the sale of lottery tickets is self-executing. Yerger *v.* Rains, 4 Humphr. (Tenn.) 259; Bass *v.* Nashville, Meigs (Tenn.) 421, 33 Am. Dec. 154.

70. A provision making all contracts for a rate of interest above a certain per cent usurious and requiring the legislature to prescribe penalties for violations is self-executing and renders void all contracts made in violation. Bandel *v.* Isaac, 13 Md. 202; Quinlan *v.* Smye, 21 Tex. Civ. App. 156, 50 S. W. 1068; Dill *v.* Ellicott, Taney (U. S.) 233, 7 Fed. Cas. No. 3,811.

71. A provision that railway companies shall carry freight for all parties at the same rate and fixing penalties for violations is self-executing and renders void all statutes that are in conflict. Louisville, etc., R. Co. *v.* Com., 105 Ky. 179, 20 Ky. L. Rep. 371, 48 S. W. 416, 43 L. R. A. 550.

A prohibition against charging greater rates by railroad companies for transportation over shorter than longer distances in the same direction is self-executing. Central Iron Works *v.* Pennsylvania R. Co., 5 Pa. Dist. 247, 17 Pa. Co. Ct. 651.

72. Woodward Iron Co. *v.* Cabaniss, 87 Ala. 328, 6 So. 300; People *v.* McRoberts, 62 Ill. 38; Hickman *v.* Kansas City, 120 Mo. 110, 41 Am. St. Rep. 684, 23 L. R. A. 658; Householder *v.* Kansas City, 83 Mo. 488; Johnson *v.* Parkersburg, 16 W. Va. 402, 37 Am. Rep. 779. *Contra*, Lamb *v.* Lane, 4

appears that they were intended to remain inoperative in the absence of such legislation. The intent in such cases is to be found in the express language of the provisions or by necessary implication.[73]

(III) *Limitation and Equalization of Taxation.* Provisions that property shall be assessed for taxes under general laws and by uniform rules according to its value,[74] and restricting the power of municipal corporations to incur indebtedness to such amounts as they shall make provisions for payment of within a prescribed time, and interest annually, by direct taxation at the time of incurring such indebtedness,[75] are self-executing. But it has been held that such a limitation on the power of such a corporation to incur indebtedness is inoperative in the absence of supplemental legislation.[76] And in all of the cases on this subject, if it appears from the provision that anything remains to be done to complete the objects contemplated, it is to that extent inoperative, and will remain so until all such requirements are complied with.[77] Provisions authorizing municipal authorities to levy taxes,[78] providing for an increase in the rate in taxation on submission to a vote of the taxpayers[79] or for assessments by a jury or by commissioners,[80] requiring the legislature to provide a uniform system of taxation,[81] requiring the exemption of certain property from taxation by general laws,[82] and provisions for the collection of taxes without suit,[83] and declaring that all taxes shall be uniform, to be collected under general laws,[84] are not self-executing and require supplemental legislation to render them effective.

Ohio St. 167; Long *v.* Billings, 7 Wash. 267, 34 Pac. 936; Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847.

73. Thus where a constitutional provision prohibiting fraudulent practices by the officers of banking institutions declared the acts prohibited to be crimes and left the punishment thereof to be prescribed by the legislature, it was held that such a provision was inoperative in the absence of supplemental legislation, and that neither civil nor criminal liability attached for violations thereof, until legislation was enacted fixing the punishment therefor. Fusz *v.* Spaunhorst, 67 Mo. 256.

74. *Illinois.*— People *v.* Auditor, 12 Ill. 307.

Kentucky.— Louisville, etc., R. Co. *v.* Barboursville, 105 Ky. 174, 20 Ky. L. Rep. 1105, 48 S. W. 985.

Louisiana.— Davis *v.* Green, 40 La. Ann. 281, 4 So. 445.

Missouri.— Hannibal, etc., R. Co. *v.* State Bd. Equalization, 64 Mo. 294.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

New Jersey.— State *v.* Newark, 39 N. J. L. 380.

See 10 Cent. Dig. tit. "Constitutional Law," § 33.

A provision limiting the rate of taxation and allowing such rate to be increased by statute or popular vote is self-executing and requires no further action. St. Joseph Bd. Public Schools *v.* Pattan, 62 Mo. 444.

Special assessments — Sale without redemption.— A statute providing that street railway companies shall pave their right of way, and authorizing a levy of assessments to pay costs thereof on refusal to do so is not unconstitutional because no provisions are made for the redemption of sales of realty for the non-payment of taxes for special assessments, as provided by constitutional provision, said provision being self-executing. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

75. East St. Louis *v.* People, 124 Ill. 655, 17 N. E. 447.

76. Holtzhauer *v.* Newport, 94 Ky. 396, 15 Ky. L. Rep. 188, 22 S. W. 752.

77. New Orleans *v.* Wood, 34 La. Ann. 732.

78. Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

79. Surget *v.* Chase, 33 La. Ann. 833.

80. People *v.* Ulster County, 3 Barb. (N. Y.) 332.

81. Williams *v.* Detroit, 2 Mich. 560.

82. A provision that the legislature "shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes" is not self-executing. Engstad *v.* Grand Forks County, 10 N. D. 54, 84 N. W. 577.

A provision giving the legislature power to tax the real estate of municipal corporations not used for municipal purposes is not self-executing (New Castle *v.* County Treasurer, 2 Pa. Dist. 95); nor is a provision empowering the legislature to authorize municipal corporations to levy taxes (Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548).

A provision that all property not exempt shall be taxed in proportion to its value, to be ascertained as provided by law, is not self-executing. McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737.

83. New Orleans *v.* Wood, 34 La. Ann. 732.

84. Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476; Leigh Iron Co. *v.* Lower Macungie Tp., 81 Pa. St. 482.

A prohibition of taxation without the con-

(iv) *Civil Service and Appointments to Office.* A constitutional provision declaring that appointments and promotions in the civil service shall be according to merit and fitness, to be ascertained as far as possible by examinations, which, so far as possible, shall be competitive, has been held to be self-executing, and that courts, in a proper case, would pronounce appointments made in violation thereof illegal, in the absence of supplemental legislation.[85]

(v) *Removal From Office.* Constitutional provisions empowering courts to remove certain county officers from office, for causes specified, and others defined by law, upon being found guilty by juries,[86] are self-executing; and so also are provisions declaring offices vacant upon indictment and conviction of the incumbents for official misconduct or neglect[87] of duty.

(vi) *Criminal Proceedings.* Provisions relating to and governing criminal prosecutions by indictment and information for offenses committed before the adoption of a provision relating to criminal procedure are governed by it after it takes effect.[88]

(vii) *Provisions Conferring Judicial Power.* Constitutional provisions conferring judicial powers are self-executing and vest the courts with original jurisdiction[89] unless an intention to the contrary appears.

d. Provisions Conferring Privileges and Imposing Liabilities — (i) *In General.* Constitutional provisions conferring privileges and imposing liabilities

sent of the people or their representatives in the legislature does not restrict the power of the legislature to repeal acts imposing taxation or inhibit the collection of taxes that have been assessed. Augusta *v.* North, 57 Me. 392, 2 Am. Rep. 55.

A provision authorizing the taxation of trades and professions, except agricultural and mechanical pursuits, does not restrict the power of the legislature to tax retailers of spirituous liquors. Napier *v.* Hodges, 31 Tex. 287.

85. People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399 [*affirming* 91 Hun (N. Y.) 101, 34 N. Y. Suppl. 641, 36 N. Y. Suppl. 677, 71 N. Y. St. 696]. But see Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809, where it was held that this same provision was ineffective until the enactment of legislation providing for such examinations. See also *In re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447 [*affirming* 89 Hun (N. Y.) 292, 35 N. Y. Suppl. 161].

86. No legislation is necessary in order to authorize a district judge to remove a county attorney or other county official from office for official misconduct, under a constitutional provision authorizing such removals for offenses prescribed, and others defined by law. Trigg *v.* State, 49 Tex. 645.

87. A provision authorizing the removal of county judges, justices of the peace, sheriffs, and other county officers, upon indictment or presentment for official misconduct or neglect, in such manner as may be prescribed by law, offices to become vacant upon conviction, is self-executing. Lowe *v.* Com., 3 Metc. (Ky.) 237.

Where court is disqualified.— A provision that where a court is for any reason disqualified to sit upon a case the parties interested may by consent appoint a proper person to try such case is self-executing. Parker County *v.* Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924.

88. A provision that no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, is self-executing. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. Where a new constitution provided that all indictments for offenses committed before or after its adoption should be prosecuted as if no change had been made, except as otherwise provided, and repealed all laws inconsistent therewith, it was held that prosecutions for offenses committed prior to its adoption were governed by it after it went into effect. State *v.* Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238.

Provision for prosecution on an information of the public prosecutor after a commitment by magistrate is self-executing. Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249.

89. State *v.* Gleason, 12 Fla. 190; State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

Provision limiting the number of grand jurors to twelve is self-executing. Wells *v.* Com., 15 Ky. L. Rep. 179, 22 S. W. 552; Sanders *v.* Com., 13 Ky. L. Rep. 820, 18 S. W. 528.

Provision that the supreme court shall have original jurisdiction in habeas corpus proceedings is self-executing. *In re* Rafferty, 1 Wash. 382, 25 Pac. 465.

Provisions not self-executing.— Provision that the court of appeals shall have appellate jurisdiction only in habeas corpus, mandamus, and prohibition. Price *v.* Smith, 93 Va. 14, 24 S. E. 474. Provision vesting power in courts to change venue, to be exercised in the manner to be provided by law.

are held to be self-executing in cases where the language used is positive and independent of legislative action. But such provisions will be held to be inoperative in cases where the object sought to be accomplished by them is made to depend in whole or in part upon subsequent legislation.[90]

(II) *Liability of Stock-Holders For Demands Against Corporations.* By the weight of authority constitutional provisions designed to secure dues and demands against corporations by imposing liability therefor upon the stockholders thereof to an amount in addition to the stock held by each, by declaring that such demands shall be so secured, and by such other means as shall be provided by law, are not self-executing.[91]

(III) *Authority to Frame Municipal Charters.* The authorities do not agree as to whether constitutional provisions authorizing cities of a limited number of inhabitants to frame charters for themselves are self-executing.[92]

Wattson *v.* Chester, etc., R. Co., 83 Pa. St. 254. Provisions for removal of pending cases from territorial to state courts, upon the organization of territories into states, the procedure for removal to be under the direction of the legislature. McCollom *v.* Pipe, 7 Kan. 189. Where a constitutional amendment gave district courts jurisdiction to try cases of contested elections, and a statute merely provided that any qualified voter in such districts might contest elections therein, in courts of competent jurisdiction, in such manner as has or may be prescribed, it was held that such elections could not be contested without further legislation. Odell *v.* Wharton, 87 Tex. 173, 27 S. W. 123.

Federal constitution.— That clause in the federal constitution giving the supreme court of the United States original jurisdiction in a class of cases specified, and appellate in all others, is self-executing; and an act of congress purporting to give that court original jurisdiction in cases other than those so specified is invalid. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 173, 177, 2 L. ed. 60. But another clause in the same section which vests the judicial power in the supreme court and in such inferior courts as congress shall from time to time ordain and establish is not self-executing, since congress is given discretionary power to apportion the jurisdiction conferred. Roback *v.* Taylor, 2 Bond (U. S.) 36, 20 Fed. Cas. No. 11,877, 4 Int. Rev. Rec. 170, 14 Pittsb. Leg. J. (Pa.) 137. The provision therefore is in part self-executing and in part it is not; and the same is true of the fifteenth amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and declares that "Congress shall have power to enforce this article by appropriate legislation." To the extent to which this provision defines the general rights of citizens to vote, and inhibits discriminations, it is mandatory, prohibitive, and self-executing; but the conferring upon congress power to enforce by appropriate legislation is an indication that it is incomplete and that something more may be required to make it effective. U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563.

A statute void in part does not render inoperative the valid portion, when enacted in pursuance of a self-executing constitutional provision. Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147.

90. McKusick *v.* Seymour, 48 Minn. 158, 50 N. W. 1114; Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281.

Election of officers.— Provision that members or stock-holders of corporations may cast the whole number of votes for one candidate for office or distribute them as preferred is self-executing. Pierce *v.* Com., 104 Pa. St. 150.

Provision that railroad companies shall have the right to connect their lines does not authorize proceedings to connect them without supplemental legislation; but where such companies are not hostile to each other courts will enforce such a provision in the absence of such legislation. Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 15 Fed. 650 [*reversed* in 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291]. *Compare* Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 4 Woods (U. S.) 360, 10 Fed. 497, holding such a provision not to be self-executing.

91. French *v.* Teschemaker, 24 Cal. 518; Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380; Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; Morley *v.* Thayer, 3 Fed. 737. *Contra*, Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163 [*reversing* 44 Ill. App. 186]; Chester Nat. Bank *v.* Zinser, 55 Ill. App. 510; Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124; Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426; Howell *v.* Manglesdorf, 33 Kan. 194, 5 Pac. 759. In Willis *v.* Maborn, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281, a provision imposing such liability, except as to stock-holders of manufacturing corporations, and making no reference to subsequent legislation, was held self-executing.

92. Provision authorizing cities of one hundred thousand inhabitants to frame char-

(iv) *Appropriations of Public Funds.* Constitutional provisions authorizing appropriations of the public funds for public or private purposes or for charities are held to be self-executing.[93]

(v) *Homestead Exemptions.* In some cases constitutional provisions exempting homesteads from forced sales for debts and other liabilities are held to be self-executing, while in others the contrary has been held, according to the apparent intent of the instrument.[94]

(vi) *Poor Debtor Exemptions.* A constitutional provision requiring the protection of poor debtors by the enactment of wholesome laws has been held to be self-executing,[95] but the contrary has been held, except where fraud is proved.[96]

(vii) *Mechanics' Liens and Other Individual Rights.* Constitutional provisions declaring in favor of mechanics' liens and requiring the speedy enactment of legislation to enforce such liens are held ineffective;[97] and the same is generally true of all provisions which are merely declaratory of rights and do not supply the means by which they may be enforced.[98]

e. What Provisions Are Not Self-Executing — (i) *In General.* As above

ters was held to be self-executing and operative without legislation. People *v.* Hoge, 55 Cal. 612. *Contra,* Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625, holding that a provision authorizing cities of twenty thousand inhabitants to frame charters is not self-executing to the extent of invalidating legislation prescribing the manner of exercising the power.

Provision that in incorporated towns of five thousand inhabitants justices of the peace shall receive such salaries as may be provided by law, but no fees, was held to be self-executing, the population to be ascertained by the courts, according to the last federal census. Anderson *v.* Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137.

93. Provision prescribing the manner of drawing money from the state treasury justifies the rejection of claims authorized by prior laws, but not covered by such provision. State *v.* Holladay, 64 Mo. 526. See also State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98 (holding a provision, requiring the indorsement of state officers on state bonds donated for purposes of internal improvement that same were "issued pursuant to law," to be self-executing); State *v.* Weston, 4 Nebr. 216 (holding a provision requiring the state auditor to draw warrants for the payment of the salaries of constitutional officers to be self-executing).

Charity.— Provision authorizing state aid to private institutions for the maintenance of aged indigent persons, to be paid *pro rata* to such towns, cities, and counties as establish such institutions, was held to be self-executing. San Francisco *v.* Dunn, 69 Cal. 73, 10 Pac. 191.

94. If the provision specifies the number of acres or limits the value of the premises to be exempt it is self-executing and no legislation to make it effective will be required. Miller *v.* Marx, 55 Ala. 332. See also Beecher *v.* Baldy, 7 Mich. 488; Martin *v.* Hughes, 67 N. C. 293; Wilson *v.* Cochran, 31 Tex. 677, 98 Am. Dec. 553. See also Adrian *v.* Shaw, 82 N. C. 474, holding that a provision exempting a homestead of limited value, to be selected by the owner, or in lieu thereof city or village lots with buildings thereon was self-executing. But if it merely provides that the legislature shall protect by law from forced sale a certain portion of the homestead and other property of the heads of families, it is not self-executing, and will remain inoperative until made effective by supplemental legislation. Holt *v.* Williams, 13 W. Va. 704; Speidel *v.* Schlosser, 13 W. Va. 686. Provision that "the right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to the heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value to be fixed by law" does not in the absence of supplemental legislation confer any rights capable of being enforced. Roesler *v.* Taylor, 3 N. D. 546, 58 N. W. 342. See also Noble *v.* Hook, 24 Cal. 638; Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108.

But equitable remedies to enforce the rights of a wife in the homestead have been held to lie in the absence of such legislation. Goldman *v.* Clark, 1 Nev. 607.

95. Green *v.* Aker, 11 Ind. 223.

96. A provision exempting debtors from imprisonment for debt except for fraud is not self-executing. Spice *v.* Steinruck, 14 Ohio St. 213.

97. Provision that mechanics shall have a lien upon property for the benefit of which they have furnished labor or materials, to be enforced by efficient laws to be speedily enacted, confers no enforceable rights in the absence of supplemental legislation. Spinney *v.* Griffith, 98 Cal. 149, 32 Pac. 974.

98. Appeal.— Provision granting a right of appeal, without providing the manner by which it may be perfected, requires supplemental legislation to make such a right available. Ohio, etc., R. Co. *v.* Lawrence County, 27 Ill. 50.

Injuries suffered.— Provision that every

stated,[99] if constitutional provisions merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, they are not self-executing,[1] and will remain inoperative until rendered effective by supplemental legislation.[2] Provisions of this character are numerous in all constitutions and treat of a variety of subjects.[3]

(II) *Provisions Regulating Municipal Government.* Constitutional provisions requiring the establishment of a system of municipal government, without prescribing the territorial limits of the towns, counties, or districts, or indicating the officers or means by which they are to be governed, are not self-executing; and the range, area, population, and machinery of government and all other details will depend upon legislative action.[4] The same is true of provisions regulating sales of land under public authority.[5] But a provision authorizing cities having a population prescribed to frame charters for their own government is self-executing.[6]

(III) *Provisions Regulating Salaries.* Constitutional provisions requiring the legislature to fix by law the compensation of county officers and clerks are not self-executing[7] and repeal no existing laws upon the subject until legislative action is taken.[8]

(IV) *Provisions Regulating Elections.* Constitutional provisions fixing municipal elections upon a particular date,[9] or declaring that "the judges of the

person injured shall have adequate remedy by due process of law gives no additional remedies for injuries suffered until provided for by the legislature. State *v.* Dubuclet, 28 La. Ann. 698. But a provision that "knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby" is self-executing. Illinois Cent. R. Co. *v.* Ihlenberg, 75 Fed. 873, 875, 21 C. C. A. 546, 34 L. R. A. 393.

99. See *supra*, IV, D, 4, a.

1. "In civil governments, rights are enforced by rules and methods having the authority of law, and they can be legally enforced in no other way. The high behests of the organic law are not always self-enforcing; the manner in which its commands are to be obeyed is often left to be provided by the legislative branch of the government. To this branch of the State government the organic law delegates the power to prescribe rules and principles by which its provisions are to be made practically useful, and especially so when the organic law itself is silent on the subject. Without such prescribed rules established by law, courts have no guide by which to proceed in their investigation of litigated questions." State *v.* Dubuclet, 28 La. Ann. 698, 704.

A constitutional provision requiring the performance of an act, but providing neither officers, the means nor the mode in which the act shall be performed, is not self-executing. Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

2. *Alabama.*— Brown *v.* Seay, 86 Ala. 122, 5 So. 216.

California.— *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Mississippi.— Mississippi Mills *v.* Cook, 56 Miss. 40.

Missouri.— St. Joseph Bd. Public Schools *v.* Patten, 62 Mo. 444.

North Dakota.— Engstad *v.* Grand Forks County, 10 N. D. 54, 84 N. W. 577.

Pennsylvania.—Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476.

Washington.— State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116.

See 10 Cent. Dig. tit. "Constitutional Law," § 32.

3. Brown *v.* Seay, 86 Ala. 122, 5 So. 216; State *v.* Bradford, 13 S. D. 201, 83 N. W. 47, 13 S. D. 207, 80 N. W. 143; Adams *v.* Kelley, (Tex. Civ. App. 1898) 45 S. W. 859; Mercur Gold Min., etc., Co. *v.* Spry, 16 Utah 222, 52 Pac. 382.

4. *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425; People *v.* Provins, 34 Cal. 520; Com. *v.* Harding, 87 Pa. St. 343.

But all such provisions, so far as they indicate the means of government, are self-executing, and unauthorized statutes in pursuance thereof will be disregarded. Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147.

5. Provision requiring land sold at public sales to be subdivided into lots is inoperative until the mode of giving it effect is prescribed by statute. Bohn *v.* Bossier, 29 La. Ann. 144; Bowie *v.* Lott, 24 La. Ann. 214.

6. People *v.* Hoge, 55 Cal. 612.

7. Myers *v.* English, 9 Cal. 341; Norman *v.* Cain, 17 Ky. L. Rep. 492, 31 S. W. 860; Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148; Lewis *v.* Lackawanna County, 200 Pa. St. 590, 50 Atl. 162; Com. *v.* Collis, 10 Phila. (Pa.) 430, 32 Leg. Int. (Pa.) 239.

8. Norman *v.* Cain, 17 Ky. L. Rep. 492, 31 S. W. 860; Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148; Com. *v.* Collis, 10 Phila. (Pa.) 430, 32 Leg. Int. (Pa.) 239.

9. State *v.* Patton, 32 La. Ann. 1200.

supreme, circuit, and county courts shall be chosen at the first election held under the provisions" of a constitution to be adopted, "and thereafter as provided by law," are inoperative in the absence of supplemental legislation.[10]

(v) *Provisions Regulating Private Corporations.* Provisions extending franchises, powers, and privileges to private corporations, or declaring liabilities against them, and leaving the regulation of the powers granted to the legislature,[11] or the liabilities declared to be enforced by such means as shall be provided by law,[12] are not self-executing.

(vi) *Effect on Existing Laws*—(a) *Generally.* Where future legislation is necessary in order to give force and effect to a constitutional provision, all existing laws remain in force until such legislation is enacted,[13] except such laws as are repugnant to such provision when it was adopted.[14]

(b) *Failure of Legislature to Act.* While self-executing constitutional provisions operate wholly independent of legislative action,[15] a provision that is not self-executing has only a moral force so far as legislative action is concerned; and until such action is taken existing laws remain in full force and operation.[16]

10. State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Constitutional amendment separating two offices before combined and providing that the legislature should provide for biennial elections is not self-executing. Blake *v.* Ada County, (Ida. 1897) 47 Pac. 734.

11. Provision giving corporations the right to construct telephone lines, and making them common carriers, with the right of eminent domain, to be given effect under reasonable regulations of the legislature, is not self-executing, and give telephone companies no right to the use of the public streets. State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116.

12. Provision for securing dues from corporations by declaring stock-holders individually liable therefor to an additional amount equal to the stock held by each and such other means as shall be provided by law is not self-executing. Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804; Tuttle *v.* National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; Woodworth *v.* Bowles, 61 Kan. 569, 60 Pac. 331; Hancock Nat. Bank *v.* Farnum, 20 R. I. 466, 40 Atl. 341; Morley *v.* Thayer, 3 Fed. 737.

Provision that no foreign corporations should do business in the state unless it maintained one or more places of business therein, and had an authorized agent or agents to accept service of process, is not self-executing. Sherwood *v.* Wilkins, 65 Ark. 312, 45 S. W. 988.

13. *Kentucky.*—Norman *v.* Cain, 17 Ky. L. Rep. 492, 31 S. W. 860.

Maryland.—State *v.* Sluby, 2 Harr. & M. (Md.) 480.

New York.—Matter of Sweeley, 12 Misc. (N. Y.) 174, 33 N. Y. Suppl. 369, 67 N. Y. St. 257.

North Dakota.—Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148.

Pennsylvania.—Wattson *v.* Chester, etc., R. Co., 83 Pa. St. 254; Sheppard *v.* Collis, 1 Wkly. Notes Cas. (Pa.) 494.

Virginia.—Chahoon *v.* Com., 20 Gratt. (Va.) 733.

West Virginia.—Doddridge County *v.* Stout, 9 W. Va. 703.

See 10 Cent. Dig. tit. "Constitutional Law," § 25.

The adoption of the federal constitution did not repeal state revenue laws before the act of congress providing for collection of duties. State *v.* Sluby, 2 Harr. & M. (Md.) 480. Persons who had been engaged in insurrection and lawfully holding office before the promulgation of the fourteenth amendment to the federal constitution prohibiting the holding of office by such persons were not removed therefrom by the direct and immediate effect of that amendment, but could perform their official functions until action was taken by congress. Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

14. The adoption of a constitutional provision that is not self-executing repeals all existing laws that are repugnant to it, even though it is left without legislation to give it active force. Matter of Sweeley, 12 Misc. (N. Y.) 174, 33 N. Y. Suppl. 369, 67 N. Y. St. 257.

15. Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147; People *v.* Rumsey, 64 Ill. 44; People *v.* McRoberts, 62 Ill. 38; People *v.* Bradley, 60 Ill. 390; Beecher *v.* Baldy, 7 Mich. 488. See also *supra*, IV, D, 4, a.

16. Erie County *v.* Erie, 113 Pa. St. 360, 6 Atl. 136; Lehigh Iron Co. *v.* Lower Macungie Tp., 81 Pa. St. 482; Chahoon *v.* Com., 20 Gratt. (Va.) 733; Doddridge County *v.* Stout, 9 W. Va. 703.

It can make no difference how plainly the duty of the legislature may be pointed out by such provisions or how much public (Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1; Lamb *v.* Lane, 4 Ohio St. 167; *In re* State Census, 6 S. D. 540, 62 N. W. 129) or private (Wiederanders *v.* State, 64 Tex. 133; Quin-

5. Mandatory and Directory Provisions — a. In General. What constitutional provisions are to be regarded as directory merely and not mandatory is a subject on which the authorities do not agree. Some cases hold that no constitutional provisions are to be regarded as directory merely, to be obeyed or not according to the discretion of the departments of the government to which they are addressed.[17] But the cases in which constitutional provisions relating to the mode of procedure of the legislature in the enactment of laws have been held to be directory,[18] are numerous, although such provisions have been held to be mandatory.[19] By the weight of authority the provision that no bill shall become a law which embraces more than one subject, and requiring that subject to be expressed in the title, is mandatory.[20] But it is a settled rule of construction, as shown by an examination of the decisions, that all constitutional provisions are to be taken as mandatory unless it expressly appears, or is necessarily implied from the instrument, that some provision is intended as directory merely.[21]

b. What Provisions Are Directory. In most cases the constitutional provisions that have been held to be directory merely, and not mandatory, are provisions addressed to the legislative department with reference to the course of procedure in the enactment of laws[22] or to the structure of the acts to be passed,[23]

lan *v.* Smye, 21 Tex. Civ. App. 156, 50 S. W. 1068) interests may require legislative action, there is no remedy if such action is not taken (Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1; *In re* State Census, 6 S. D. 540, 62 N. W. 129).

17. "It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative." People *v.* Lawrence, 36 Barb. (N. Y.) 177, 186. See also Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233, holding that constitutional provisions cannot be regarded as directory.

18. *California.*—Washington *v.* Page, 4 Cal. 388.

Kansas.— Laurent *v.* State, 1 Kan. 313.

Maryland.— McPherson *v.* Leonard, 29 Md. 377.

Mississippi.— Hill *v.* Boyland, 40 Miss. 618; Swann *v.* Buck, 40 Miss. 268.

Missouri.— St. Louis *v.* Foster, 52 Mo. 513; Cape Girardeau *v.* Riley, 52 Mo. 424, 14 Am. Rep. 427.

New York.— People *v.* Chenango, 8 N. Y. 317.

Ohio.— *Ex p.* Falk, 42 Ohio St. 638; Pim *v.* Nicholson, 6 Ohio St. 176; Miller *v.* State, 3 Ohio St. 475.

See 10 Cent. Dig. tit. "Constitutional Law," § 34½.

19. State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738; Lemmons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

The provision in the federal constitution requiring senators and representatives in congress and the members of the several state legislatures to take an oath to support the constitution of the United States has been held to be mandatory and indispensable. Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625 [*overruling* Hill *v.* Boyland, 40 Miss. 618].

20. *Alabama.*— Weaver *v.* Lapsey, 43 Ala. 224.

Georgia.— Prothro *v.* Orr, 12 Ga. 36.

Missouri.— State *v.* Miller, 45 Mo. 495.

Tennessee.—State *v.* McCann, 4 Lea (Tenn.) 1; Cannon *v.* Mathes, 8 Heisk. (Tenn.) 504.

Texas.— State *v.* McCracken, 42 Tex. 383; San Antonio *v.* Gould, 34 Tex. 49; Cannon *v.* Hemphill, 7 Tex. 184.

See 10 Cent. Dig. tit. "Constitutional Law," § 34½.

Contra.— *In re* Boston Min., etc., Co., 51 Cal. 624; Pierpont *v.* Crouch, 10 Cal. 315; Washington *v.* Page, 4 Cal. 388; Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643; Oshe *v.* State, 37 Ohio St. 494; State *v.* Covington, 29 Ohio St. 102; Pim *v.* Nicholson, 6 Ohio St. 176.

21. Varney *v.* Justice, 86 Ky. 596, 9 Ky. L. Rep. 743, 6 S. W. 457; People *v.* Lawrence, 36 Barb. (N. Y.) 177.

22. Dorchester County Com'rs *v.* Meekins, 50 Md. 28; Anderson *v.* Baker, 23 Md. 531, holding the provision declaring that the legislature should enact laws in articles and sections to be directory. See also *In re* Roberts, 5 Colo. 525; State *v.* Mead, 71 Mo. 266; Cottrell *v.* State, 9 Nebr. 125, 1 N. W. 1008, holding provisions prescribing the manner for signing bills by the presiding officers of the two houses to be directory. But see State *v.* Glenn, 18 Nev. 34, 1 Pac. 186; State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807, holding to the contrary.

Provision for the reading of bills on three different days, except in emergencies, was held to be directory. Miller *v.* State, 3 Ohio St. 475. *Contra*, Ryan *v.* Lynch, 68 Ill. 160; Ramsey County *v.* Heenan, 2 Minn. 330.

Provision for entering yeas and nays on the journal on final passage is directory. People *v.* Chenango, 8 N. Y. 317. *Contra*, Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

23. McPherson *v.* Leonard, 29 Md. 377; St. Louis *v.* Foster, 52 Mo. 513; Cape Girardeau *v.* Riley, 52 Mo. 424, 14 Am. Rep. 427; Swann *v.* Buck, 40 Miss. 268, holding the

or provisions which leave with the legislature discretionary power to determine when action shall be taken or whether or not any action shall be taken;[24] such as provisions inhibiting the enactment of special laws where general laws can be made applicable[25] or authorizing legislation to promote internal improvements,[26] and provisions requiring legislation providing for the election or appointment of officers.[27]

c. What Provisions Are Mandatory. The great majority of all constitutional provisions are mandatory,[28] and it is only such provisions as, from the language used, in connection with the objects in view, may be said to be addressed to the discretion of some person or department, that courts have held to be directory; and these provisions in most cases have been those addressed to the legislative department with reference to the mode of procedure in the enactment of laws as above stated.[29] But provisions of this kind will be treated as mandatory if the language used justifies it, even though the proceedings to which they refer are but formal.[30] Whatever is prohibited or positively enjoined must be obeyed; therefore all prohibitions and restrictions are necessarily mandatory.[31] So also all provisions that designate in express terms the time or manner of doing particular acts and are silent as to performance in any other manner are mandatory and must be followed.[32]

d. Legislature Must Obey Constitutional Mandate. The legislature is in duty bound to perform all duties imposed upon it by the constitution, but if it fails to

provisions declaring that the style of all laws passed shall be, "Be it enacted by the legislature," to be directory. *Contra*, Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180; State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738.

24. Provision making it the duty of the legislature to enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction does not require that religious instruction be given in the public schools. Board of Education *v.* Minor, 23 Ohio St. 211, 13 Am. Rep. 233.

Bill for continuing acts for incorporation until after future election, notice to be given, is directory. McClinch *v.* Sturgis, 72 Me. 288.

Provision requiring courts to decide every point arising upon the record, and to give reasons therefor in writing is directory and does not affect the doctrine of *res judicata*. Hall *v.* Virginia Bank, 15 W. Va. 323.

25. Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184; State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

26. Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1.

27. Com. *v.* Clark, 7 Watts & S. (Pa.) 127; *In re* Baldwin, 7 Heisk. (Tenn.) 414.

Provision for the reorganization of senatorial and representative districts after the taking of the census is directory. Rumsey *v.* People, 19 N. Y. 41.

28. Provision in a bill of rights declaring that all property subject to taxation "ought to be taxed in proportion to its value" was held to be mandatory. Life Assoc. of America *v.* St. Louis County Bd. Assessors, 49 Mo. 512.

Duties and compensation of officers.— Provision that the legislature shall prescribe by law the number, duties, and compensation of the officers and employees of both branches of the legislature was held to be mandatory. People *v.* Spruance, 8 Colo. 307, 6 Pac. 831.

Uniform laws.— Provision that all general laws shall have uniform operation is mandatory and a statute in violation thereof is void. *Ex p.* Falk, 42 Ohio St. 638. And a provision that all laws relating to courts shall be of uniform operation is mandatory. *Ex p.* White, 5 Colo. 521.

29. See *supra*, IV, D, 4, a.

30. Provision requiring the vote on the final passage of a bill to be entered on the journal is imperative. Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571. And so is a provision that "no bill shall become a law until the same shall have been signed by the presiding officer of each house in open session" (State *v.* Mead, 71 Mo. 266), and a provision requiring that indictment should conclude "against the peace and dignity of the State" (Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293).

31. Nougues *v.* Douglass, 7 Cal. 65, holding a provision against incurring indebtedness in excess of a certain limit to be mandatory. See also Matter of Clinton St., 2 Brewst. (Pa.) 599. But see *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293, holding that the legislature may prescribe a form of oath for public officers, formally different from that prescribed by the constitution, notwithstanding a constitutional prohibition that no other test for the holding of office should be required. See also *supra*, IV, D, 4, c.

32. State *v.* Johnson, 26 Ark. 281; Varney *v.* Justice, 86 Ky. 596, 9 Ky. L. Rep. 743, 6

do so, and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy.[33]

e. Mandatory Statutes. Statutes are frequently treated as directory merely; but not so with statutes that are enacted in obedience to the mandates of a constitution. Statutes so enacted are mandatory and not directory.[34]

6. Provisions Relating to Public Office — a. In General. Public offices are created, and their tenure, compensation, manner of choosing and removing the incumbents, and all regulations, including power to abolish, are prescribed either by constitutional provisions or by statutes enacted in pursuance of such provisions.[35] An office created by a constitution cannot be enlarged or restricted in scope by statute or filled in any other manner than that prescribed by the constitution itself.[36] Upon the adoption of a constitution no official functions can be exercised otherwise than is provided by such constitution; all existing officers cease to be such when it goes into operation,[37] and all vacancies occurring thereafter must be filled according to the manner prescribed in such constitution.[38]

S. W. 457; *In re* Opinion of Justices, 18 Me. 458.

33. Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201. Where a mandatory constitutional provision requiring the enactment of laws providing for the enumeration of the state census for the apportionment of senators and representatives was not obeyed, it was held that there was no remedy, since the enactment of laws was wholly within the discretion of the legislature. *In re* State Census, 6 S. D. 540, 62 N. W. 129. See also Bull *v.* Conroe, 13 Wis. 233, holding that it was the duty of the legislature to obey a constitutional mandate in the enactment of laws, but that there was no remedy in case of its failure to act.

Provision authorizing suits to be brought against the state in such courts as may be by law provided imposes no duty on the legislature to establish courts for such a purpose. *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567.

34. State *v.* Pierce, 35 Wis. 93. See also, generally, Statutes.

Directory and mandatory statutes. — It is not always easy to determine what statutes are directory or mandatory. The use or omission of negative words is often decisive. Stayton *v.* Hulings, 7 Ind. 144; Rex *v.* St. Gregory, 2 A. & E. 99, 4 N. & M. 137, 29 E. C. L. 65; Rex *v.* Hipswell, 8 B. & C. 466, 2 M. & R. 474, 15 E. C. L. 232. But this test is by no means certain. Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262. A statute imposing a duty and providing means for performance is mandatory. Veazie *v.* China, 50 Me. 518. The word "may" is mandatory in an act providing that commissioners "may" be appointed by a court to determine public rights, and cannot be construed as directory by agreement of the parties. Monmouth *v.* Leeds, 76 Me. 28.

"Ought" is mandatory in a constitutional provision relating to uniform taxation. Life Assoc. of America *v.* St. Louis County Bd. Assessors, 49 Mo. 512. All acts designed for the security of the citizens, to insure equality of taxation, "to enable every one to know, with reasonable certainty, for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed" are mandatory. But acts designed for information of assessors and officers and to "promote method, system, and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of taxpaying citizens" are directory. Torrey *v.* Millbury, 21 Pick. (Mass.) 64, 67. Where that which is to be done is the essence of that required the act is mandatory. Rex *v.* Loxdale, 1 Burr. 445. See People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Schermerhorn, 19 Barb. (N. Y.) 540.

35. *Ex p.* Danley, 24 Ark. 1. See also U. S. Rev. Stat. (1878), § 1765.

As to acts of officers under unconstitutional statutes see *infra*, IV, D, 7, e, (II).

A salary is not necessary to the creation of a public office (Hendricks *v.* State, 20 Tex. Civ. App. 178, 49 S. W. 705), but some provision of law is necessary, otherwise it cannot exist either *de facto* or *de jure* (Ward *v.* Cook, 78 Ill. App. 111).

As to who are public officers see State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

36. People *v.* Bollam, 182 Ill. 528, 54 N. E. 1032.

37. *Ex p.* Danley, 24 Ark. 1; State *v.* Holcomb, 46 Nebr. 88, 64 N. W. 437.

Statute fixing date for election that conflicts with a constitution subsequently adopted is repealed, but such a date may be remedied by a subsequent statute. State *v.* Fiala, 47 Mo. 310.

The adoption of a provision for the election by vote, of officers to take the place of those previously elected by the legislature, under constitutional authority, repeals such authority to elect, and the salary attached by statute. Reynolds *v.* McAfee, 44 Ala. 237.

38. State *v.* Straat, 41 Mo. 58.

Where a constitution made no limitation as to duration of the term of office of notaries public, and a subsequent constitution fixed the term of all officers not otherwise

An office created by statute, without constitutional authority, is void; and an appropriation to pay the salary thereof is invalid.[39]

b. Changes in Mode of Election or Appointment. Since a constitution does not operate retrospectively, any changes in the manner of electing or appointing to office, by constitutional amendment, or by the adoption of a new constitution, will not affect the tenure of office of present incumbents,[40] unless an intention that such changes should have such an effect is expressed or necessarily implied.

c. Removals From Office. Provisions for removals from office for official misconduct[41] or neglect of duty operate immediately upon conviction;[42] but the contrary has been held in cases of disqualification merely for political reasons,[43] and where the public interests would be made to suffer by immediate removal under the disqualifying effect of a constitutional amendment.[44]

d. Abolition of Office. Constitutional provisions abolishing state offices do not inhibit the establishment of other offices in their stead, unless an intention that such provisions shall have that effect is expressed or necessarily implied;[45] nor is a constitutional prohibition against legislative interference with municipal improvements, through the appointment of special commissions to perform municipal functions, retrospective, nor do they repeal prior commissions or prevent future action by them.[46]

provided for at four years, it was held that the term of office of notaries public who were appointed prior to the adoption of the last constitution was limited to four years after its adoption. State *v.* Percy, 5 La. Ann. 282.

39. State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72.

"Where an office is created by law, and one not contemplated nor its tenure declared by the constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged, or terminated by law, as public exigency or policy may require." Taft *v.* Adams, 3 Gray (Mass.) 126, 130.

40. *Arkansas.*— State *v.* Scott, 9 Ark. 270.

California.— Board of Com'rs *v.* Board of Trustees, 71 Cal. 310, 12 Pac. 224; People *v.* Whiting, 64 Cal. 67, 28 Pac. 445.

Indiana.— Hovey *v.* State, 119 Ind. 395, 21 N. E. 21.

Kansas.— Prouty *v.* Stover, 11 Kan. 235.

Massachusetts.— Opinion of Justices, 3 Gray (Mass.) 601.

See 10 Cent. Dig. tit. "Constitutional Law," § 26.

Provision that "judges not learned in the law, in office at the time of the adoption of the constitution," should not be judges of certain courts specified, and that all persons in office should serve their term out was held not to be applicable to "judges not learned in the law," and in office when such constitution was adopted. *In re* Associate Judges, 31 Leg. Int. (Pa.) 118, 6 Leg. Gaz. (Pa.) 46.

41. Trigg *v.* State, 49 Tex. 645.

42. Lowe *v.* Com., 3 Metc. (Ky.) 237.

Removal by executive.— Where power is given the executive to remove for neglect of duty his action is not reviewable by the courts (State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228); but opportunity for defense must be given (Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128). But the right to a hearing must be expressly secured to the officer. Donahue *v.* Will County, 100 Ill. 94.

43. Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. N. S. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

44. Where a judge, having been lawfully appointed to office by one of the Confederate states during the reconstruction period, and by whom persons convicted of crimes had been sentenced, afterward became disqualified for such office for having been engaged in insurrection against the federal government, by the adoption of the fourteenth amendment to the federal constitution, disqualifying persons who had been so engaged, it was held that such judge was not removed by the adoption of such amendment, that he held office *de facto* if not *de jure*, and that his official acts were valid. Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

45. Provision "abolishing the office of supreme court commissioner does not prevent the legislature from conferring upon other officers the powers exercised by such commissioner." Cushman *v.* Johnson, 13 How. Pr. (N. Y.) 495. See also Elton *v.* Geissert, 10 Phila. (Pa.) 330, 32 Leg. Int. (Pa.) 116.

Where an act devolved the powers and duties of a board of supervisors upon the board of aldermen in so far as the constitution permitted, and a subsequent constitutional amendment removed all restraints from a further transfer of such power, it was held that the board of supervisors was abolished by such act upon the adoption of the amendment. Billings *v.* New York, 68 N. Y. 413.

46. Board of Com'rs *v.* Board of Trustees, 71 Cal. 310, 12 Pac. 224.

7. Validating and Curative Provisions[47] — **a. In General.** It is a rule of general application that where a defect in a proceeding consists of an omission, the necessity for the performance of which the legislature might have dispensed with by prior statute, a subsequent statute dispensing with such performance retrospectively is valid. So also if the defect consists in some act which the legislature might have rendered directory merely or immaterial, by prior statute, a subsequent statute, designed to have the same effect, by validating defective execution, is valid.[48]

b. As to Defective Deeds and Other Instruments — (i) *In General.* In general legislation curing formal defects in deeds and other written instruments, and giving to them the same validity as though they had been properly executed, is constitutional; and as between the original parties to such instruments such legislation renders them valid and binding to all intents and purposes.[49]

(ii) *Deeds of Married Women.* The deeds of married women, invalid for formal defects, may be validated by subsequent legislation.[50]

c. As to Defective Tax Assessments. It is well settled that statutes validating and confirming defective and informal assessments of taxes, so as to render collectable future assessments — and without attempting to legalize prior invalid

47. Further as to curative acts see *infra*, X, B; and, generally, Statutes.

48. Thus where a sale of land of infant tenants in common, under orders of court, in a partition suit, was purchased by a company of persons who wished to subdivide it and sell it in parcels, and the sale confirmed in the names of all, but by mutual agreement and for convenience the deed was made to one of them only, the conveyance was found to be defective, because it did not follow the order of sale. A subsequent statute providing that the deed, upon satisfactory proof being offered that it was duly executed, should have the same effect as though made to purchasers was sustained. Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed 787. See also Blake *v.* People, 109 Ill. 504; Boyce *v.* Sinclair, 3 Bush (Ky.) 261; Weed *v.* Donovan, 114 Mass. 181; State *v.* Luther, 56 Minn. 156, 57 N. W. 464.

Statutes of this character may divest one of a right of action in his favor or subject him to a liability which originally did not exist; but this objection even is not a valid one and as against it such statutes will be sustained. Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. 431; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Exchange Bank Tax Cases, 21 Fed. 99.

49. Formal defects in the execution of deeds may be cured by subsequent legislation, although a future right of action might be defeated thereby. Acts curing formal defects in the execution or acknowledgment of deeds debar those who might have relied on such defects of what would otherwise have been a legal vested right. But such acts have been frequently decided to be constitutional. Chestnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237. For defective certificate of acknowledgment not cured by statute see Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412.

Not an interference with vested rights. — It is not considered that such legislation deprives any one of any vested rights. Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124. See Cooley Const. Lim. (6th ed.) 378.

Illustrations. — The deed of a non-resident executor, defective for non-compliance with the *lex loci rei sitæ*, may be validated by subsequent legislation (Smith *v.* Callaghan, 66 Iowa 582, 24 N. W. 50; De Zbranikov *v.* Burnett, 10 Tex. Civ. App. 442, 31 S. W. 71; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542); and so may a draft, invalid for want of a revenue stamp at the time of execution, in accordance with the acts of congress, be validated by affixing a stamp afterward, in accordance with a subsequent statute (State *v.* Norwood, 12 Md. 195; Atwell *v.* Grant, 11 Md. 101; Gibson *v.* Hibbard, 13 Mich. 214). And a deed invalid for want of sufficient witnesses, as between the parties, may be validated by subsequent legislation; but as to intervening third parties such legislation is invalid. Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441; Green *v.* Drinker, 7 Watts & S. (Pa.) 440. But a deed made contrary to restrictions against alienation in a will (Russell *v.* Rumsey, 35 Ill. 372; Shonk *v.* Brown, 61 Pa. St. 320), or a deed executed by a person of unsound mind are both fatally defective so far as legislation is concerned (Routsong *v.* Wolf, 35 Mo. 174).

50. Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876.

Such deeds have been validated by subsequent legislation where the name of the grantor was omitted from the granting clause by mistake (Goshorn *v.* Purcell, 11 Ohio St. 641), where the grantor had been illegally divorced (Wistar *v.* Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241), and where the deed was executed under an invalid power of attorney (Dentzel *v.* Waldie, 30 Cal. 138; Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124).

seizures and sales — are constitutional. To this extent the authorities are uniform.[51] And it is also well settled that curative statutes may cover any irregularities in the course of proceedings for the enforcement of any lawful[52] demand, including irregularities in the assessment and collection of taxes. But whether or not such statutes, by retrospective operation, can confer jurisdiction so as to validate a prior illegal proceeding to enforce payment of taxes assessed is a question on which the authorities are not uniform.[53] But in no case can the owner be precluded from impeaching the validity of tax deeds, conveying his property for non-payment of taxes.[54]

d. As to Municipal Contracts and Proceedings. In most cases statutes validating void contracts and defective proceedings of municipal corporations are valid. Legislation validating such contracts and proceedings has been sustained in the following cases: Acts validating defective execution of county bonds for

51. *Massachusetts.*— Grover *v.* Pembroke, 11 Allen (Mass.) 88; Freeland *v.* Hastings, 10 Allen (Mass.) 570; Fowler *v.* Danvers, 8 Allen (Mass.) 80.

Michigan.— Brevoort *v.* Detroit, 24 Mich. 322.

Minnesota.— Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Comer *v.* Folsom, 13 Minn. 219; Kunkle *v.* Franklin, 13 Minn. 127.

New York.— Brewster *v.* Syracuse, 19 N. Y. 116; Guilford *v.* Chenango County, 13 N. Y. 143.

Pennsylvania.— Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

52. Hart *v.* Henderson, 17 Mich. 218, 222, per Cooley, C. J.

53. In Iowa, Wisconsin, and Pennsylvania it has been held that legislation which legalizes and renders collectable a tax that is invalid and uncollectable, and supplies means by which payment may be enforced, does not impair any vested rights of the taxpayer, and that such legislation, by its retrospective operation, may constitutionally disbar future causes of action and defeat pending litigation which otherwise would have been a legal vested right, entitling the defeated party to a judgment in his favor. Clinton *v.* Walliker, 98 Iowa 655, 68 N. W. 431; Tuttle *v.* Polk, 84 Iowa 12, 50 N. W. 38; Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; Iowa R. Land Co. *v.* Soper, 39 Iowa 112; Boardman *v.* Beckwith, 18 Iowa 292; Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; May *v.* Holdridge, 23 Wis. 93; Cross *v.* Milwaukee, 19 Wis. 509; Tallman *v.* Janesville, 17 Wis. 71. And see Knowlton *v.* Rock County, 9 Wis. 410.

But in California, Illinois, Massachusetts, Michigan, and New York this doctrine has been denied, so far as the powers of the legislature to change the legal status of parties to litigation by legalizing invalid proceedings to enforce payment of demands are concerned; and the supreme court of the United States also favors the rule maintained in the last-mentioned states.

California.— People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677. But courts will not look behind the assessment to inquire into alleged irregularities, which have been declared valid by curative legislation. People *v.* Todd, 23 Cal. 181.

Illinois.— Marshall *v.* Silliman, 61 Ill. 218. See also People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278, holding that the legislature has no power to compel a city to incur a debt for local improvements.

Massachusetts.— Wall *v.* Wall, 124 Mass. 65. See also Forster *v.* Forster, 129 Mass. 559.

Michigan.— Hart *v.* Henderson, 17 Mich. 218.

New York.— Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

United States.— Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

Remedy to enforce payment.— Where a statute makes a tax a perpetual lien upon real estate, without providing means to enforce, a subsequent statute, supplying such means, without creating any additional lien for prior assessments, is valid. Schoenheit *v.* Nelson, 16 Nebr. 235, 20 N. W. 205.

54. *Arkansas.*— Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Pope *v.* Macon, 23 Ark. 644.

Illinois.— Reed *v.* Tyler, 56 Ill. 288; Wilson *v.* McKenna, 52 Ill. 43; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240.

Indiana.— White *v.* Flynn, 23 Ind. 46; Wantlan *v.* White, 19 Ind. 470.

Iowa.— McCready *v.* Sexton, 29 Iowa 365, 4 Am. Rep. 214; Corbin *v.* Hill, 21 Iowa 70; Allen *v.* Armstrong, 16 Iowa 508.

Louisiana.— *In re* Lake, 40 La. Ann. 142, 3 So. 479.

Michigan.— Hart *v.* Henderson, 17 Mich. 218; Case *v.* Dean, 16 Mich. 12; Grosebeck *v.* Seeley, 13 Mich. 329.

Mississippi.— Dingey *v.* Paxton, 60 Miss. 1038.

Missouri.—Abbott *v.* Lindenbower, 42 Mo. 162, 46 Mo. 291.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; People *v.* Mitchell, 45 Barb. (N. Y.) 208.

Wisconsin.— Dean *v.* Brochsenius, 30 Wis. 236; Smith *v.* Cleveland, 17 Wis. 556.

railroad purposes;[55] unauthorized issue by townships of railroad aid bonds;[56] unauthorized subscriptions of railroad stock by towns, cities, and counties;[57] void subscription of railroad stock by counties;[58] void issue of county bonds for construction of county road;[59] defective municipal bonds to pay soldiers' bounties;[60] defective conveyance of real estate by county;[61] contracts of towns, cities, and counties, void for want of precedent authority;[62] unauthorized loan by county;[63] and also acts authorizing repayment in subsequent bonds of proceeds received from sales of prior void bonds,[64] prohibiting counties from denying the validity of bonds on which they have received subscriptions and paid interest,[65] and imposing payment of equitable claims, unenforceable[66] at law. So too acts vali-

55. Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942; Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722. See also Redd *v.* Henry County, 31 Gratt. (Va.) 695, 16 S. E. 722, as to an act validating a defective county bond for the purpose of internal improvement.

56. Shurtleff *v.* Wiscasset, 74 Me. 130; State *v.* Miller, 66 Mo. 328.

57. *Connecticut.*— Bridgeport *v.* Housatonic R. Co., 15 Conn. 475.

Indiana.— Bartholomew County *v.* Bright, 18 Ind. 93.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

New York.— People *v.* Mitchell, 35 N. Y. 551.

Virginia.— Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722.

United States.— Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177.

58. People *v.* Ingham County, 20 Mich. 95; Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294. *Contra,* Marshall *v.* Silliman, 61 Ill. 218; Williams *v.* Roberts, 88 Ill. 11; Barnes *v.* Lacon, 84 Ill. 461; Cairo, etc., R. Co. *v.* Sparita, 77 Ill. 505; Wiley *v.* Silliman, 62 Ill. 170, holding that the legislature has no power to validate a void issue of municipal bonds for railroad purposes.

59. Bradley *v.* Franklin County, 65 Mo. 638; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67, 22 L. ed. 825.

60. *Connecticut.*— Stuart *v.* Warren, 37 Conn. 225; Bartholomew *v.* Harwinton, 33 Conn. 408; Booth *v.* Woodbury, 32 Conn. 118; Baldwin *v.* North Branford, 32 Conn. 47.

Illinois.— Johnson *v.* Campbell, 49 Ill. 316; State *v.* Sullivan, 43 Ill. 412.

Indiana.— Sithin *v.* Shelby County, 66 Ind. 109; Fulton County *v.* Onstott, 29 Ind. 384; Miller *v.* Putnam County, 29 Ind. 75; Nave *v.* King, 27 Ind. 356; Miami County *v.* Bearss, 25 Ind. 110; Coffman *v.* Keightly, 24 Ind. 509; King *v.* Course, 24 Ind. 202.

Maine.— Thompson *v.* Pittston, 59 Me. 545; Winchester *v.* Corinna, 55 Me. 9.

New Jersey.— State *v.* Demarest, 32 N. J. L. 528; State *v.* Reed, 31 N. J. L. 133.

61. Barton County *v.* Walser, 47 Mo. 189. See also Blum *v.* Looney, 69 Tex. 1, 4 S. W. 857.

62. *Connecticut.*— Bridgeport *v.* Housatonic R. Co., 15 Conn. 475.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

Massachusetts.— Grover *v.* Pembroke, 11 Allen (Mass.) 88; Freeland *v.* Hastings, 10 Allen (Mass.) 570; Fowler *v.* Danvers, 8 Allen (Mass.) 80.

Michigan.— People *v.* Ingham County, 20 Mich. 95.

Minnesota.— Wilson *v.* Buckman, 13 Minn. 441; Comer *v.* Folsom, 13 Minn. 219; Kunkle *v.* Franklin, 13 Minn. 127, 97 Am. Dec. 226.

Missouri.—Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294.

New Jersey.— State *v.* Union, 33 N. J. L. 350.

New York.— People *v.* Mitchell, 35 N. Y. 551.

Pennsylvania.— Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Texas.— Nolan County *v.* State, 83 Tex. 182, 13 S. W. 823; Blum *v.* Looney, 69 Tex 1, 4 S. W. 857; Morris *v.* State, 62 Tex. 728.

Wisconsin.— Single *v.* Marathon County, 38 Wis. 363; Blount *v.* Janesville, 31 Wis. 648.

But an act validating reimbursement by town of money paid by one to relieve himself from draft is unconstitutional. Moulton *v.* Raymond, 60 Me. 121; Thompson *v.* Pittston, 59 Me. 545.

63. Halstead *v.* Lake County, 56 Ind. 363. See Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173.

64. State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698.

65. Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823.

66. Where municipal bonds providing for payment of interest were issued to a gaslight company, and payment of their principal guaranteed by such company, pursuant to a city ordinance, it was held that the guarantee was for both principal and interest, for the benefit of both the holders and the city; and that an act of the legislature imposing liability for payment of such bonds upon the city, which had received benefits thereunder, was valid. The court said: "The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the Legislature to require the payment of a claim

dating invalid municipal ordinances passed by a city council organized under an unconstitutional statute,[67] resolutions of a city council not passed in accordance with requirements of a city charter,[68] irregular action of a board of supervisors, because taken at a special meeting instead of a regular meeting;[69] defective proceedings of a school board, taken at a meeting improperly called,[70] and defective municipal elections[71] have been sustained.

e. **Unconstitutional Statutes** — (i) *In General.* An unconstitutional statute is absolutely null and void *ab initio*, having no binding force;[72] and cannot be validated by a subsequent constitutional amendment removing the legislative restriction by which its enactment was prohibited.[73] Nor has a legislature any authority to validate an unconstitutional proceeding.[74] Validating constitutional provisions do not operate retrospectively, unless they are intended to so operate; and therefore unconstitutional legislation is not validated by the subsequent adoption of constitutional amendments or other provisions merely authorizing the enactment of such legislation and without expressing any intent to validate it.[75] But if from the language of the validating amendment or other provision

for which an equivalent has been received, and from the payment of which the City can only escape on technical grounds, would seem to be clear." New Orleans *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

67. Chester *v.* Pennell, 169 Pa. St. 300, 32 Atl. 408; Melick *v.* Williamsport, 162 Pa. St. 408, 29 Atl. 917; Devers *v.* York City, 150 Pa. St. 208, 24 Atl. 668.

Reviving of ordinances.— An act validating a city ordinance, passed by the city council for the purpose of reviving a former ordinance that had been repealed, has been sustained. Morris *v.* State, 62 Tex. 728.

68. State *v.* Union, 33 N. J. L. 350; State *v.* Newark, 27 N. J. L. 185.

69. Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1.

70. Stratford First School Dist. *v.* Ufford, 52 Conn. 44.

71. Fox *v.* Kendall, 97 Ill. 72.

72. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677; Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

Where a decision adjudging a statute unconstitutional is overruled the statute is considered valid from the beginning. Pierce *v.* Pierce, 46 Ind. 86. And see Whaley *v.* Gaillard, 21 S. C. 560.

73. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309. See also People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

Louisiana.— Homer *v.* Blackburn, 27 La. Ann. 544.

Michigan.— Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; Mt. Pleasant *v.* Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193; Dewar *v.* People, 40 Mich. 401, 29 Am. Rep. 545.

Nevada.— Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 31 Pac. 434; State *v.* Tufly, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374; State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738.

Pennsylvania.— Berghaus *v.* Harrisburg, 122 Pa. St. 289, 16 Atl. 365; Shoemaker *v.* Harrisburg, 122 Pa. St. 285, 16 Atl. 366.

South Carolina.— Cohen *v.* Hoff, 3 Brev. (S. C.) 500.

See 10 Cent. Dig. tit. "Constitutional Law," § 27.

Such statutes are regarded as though they had never been in existence (State *v.* Tufly, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374), and are not included in constitutional provisions intended to continue existing laws in force until altered or repealed by legislative action, such provisions having reference only to such laws as are constitutional and valid (Cohen *v.* Hoff, 3 Brev. (S. C.) 500).

Municipal charters.— Provision in a municipal charter, authorizing licenses for the sale of intoxicating liquors, when the constitution prohibited such licenses, was held not to be validated by a subsequent constitutional amendment authorizing the granting of such licenses. Dewar *v.* People, 40 Mich. 401, 29 Am. Rep. 545. For the same ruling as to an ordinance authorizing such licenses see Village of Mt. Pleasant *v.* Vansice, 43 Mich. 361, 38 Am. Rep. 193. As to a municipal charter not in conflict with constitution see People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124. Where under a penal statute against sales of intoxicating liquors a municipal charter lawfully authorizing such sales was repealed, it was held that sellers under the authority of such a charter were liable to criminal prosecution. Johnson *v.* State, 3 Lea (Tenn.) 469, 31 Am. Rep. 648. Provision in a city charter, in conflict with the general laws and void when adopted, was held not to be validated by a subsequent constitutional amendment changing the law so as to harmonize with such charter. Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309.

74. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677; Marshall *v.* Stillman, 61 Ill. 218. See also People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

Effect of declaring statute unconstitutional see *infra*, IV, G, 6.

75. See cases cited *supra*, note 73, relating to municipal charters.

it expressly or by necessary implication appears that it was intended to operate retrospectively by validating antecedent unconstitutional legislation, all such legislation to which such a provision relates will be rendered valid, without reënactment by the legislature. Thus constitutional provisions enacted in accordance with the federal constitution, confirming and validating acts of illegal legislative bodies,[76] provisions continuing existing laws in force,[77] and provisions authorizing legislation upon a subject upon which it has already been enacted, without constitutional authority,[78] operate retrospectively and render valid all such prior legislation.[79]

(II) *Acts Done Thereunder.* All acts done under, or in pursuance of, an unconstitutional statute are null and void so far as such acts can have any effect upon the subjects acted upon;[80] and by the weight of authority an officer who acts under such a statute in the discharge of what he supposes to be his duties,[81]

76. Retrospective ordinance and constitutional provisions, in accordance with the federal constitution, confirming and validating such acts of the illegal legislative bodies that met during the war as were not in aid of insurrection, were held to be effective, rendering such acts valid. Smith *v.* Ordinary, 44 Ga. 504; Calhoun *v.* Kellogg, 41 Ga. 231.

77. Constitutional provision continuing laws enacted by the legislature in force makes them as valid as if reënacted by the legislature. Henry *v.* State, 26 Ark. 523.

Laws continued in force.— Common-law process, authorized by congress in a territory, continued in force after the adoption of a state constitution, without legislation. Liss *v.* Wilcoxen, 2 Colo. 7, 85. See also Stebbins *v.* Anthony, 5 Colo. 273. A municipal charter granted before the adoption of a constitution is not abrogated by such a constitution, unless in conflict with it. People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124.

Statute void in part.— Where only a part of a statute is repugnant to the constitution, that part only will be declared void (Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381), unless the parts are inseparably connected (People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124; Mathias *v.* Cramer, 73 Mich. 5, 40 N. W. 926; Turner *v.* Fish, 19 Nev. 295, 9 Pac. 884).

78. Where a constitutional amendment granted power to provide for the organization of drainage districts and vested the corporate authorities thereof with authority to construct levees and to keep in repair those previously constructed, it was held that such amendment included levees constructed under the authority of a prior statute, although such statute was invalid. Blake *v.* People, 109 Ill. 504.

Acts conferring jurisdiction on a court in certain cases and prescribing the mode of procedure, without constitutional authority, were validated by a subsequent constitutional amendment conferring such jurisdiction. Cobb *v.* Cohron, (Tex. Civ. App. 1894) 26 S. W. 846. See also Pratt *v.* Allen, 13 Conn. 119.

Laws passed subsequent to adoption of a constitution, providing for the payment of a percentage of the gross receipts of the earnings of a railroad company, in lieu of taxes, invalid when passed, were held to be validated by a subsequent constitutional amendment. State *v.* Luther, 56 Minn. 156, 57 N. W. 464.

79. *Arkansas.*— Henry *v.* State, 26 Ark. 523.

Colorado.— People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124; Stebbins *v.* Anthony, 5 Colo. 273; Liss *v.* Wilcoxen, 2 Colo. 7, 85.

Connecticut.— Pratt *v.* Allen, 13 Conn. 119.

Illinois.— Blake *v.* People, 109 Ill. 504.

Kansas.— Kilpatrick *v.* State, 5 Kan. 673.

Minnesota.— State *v.* Luther, 56 Minn. 156, 57 N. W. 464.

Texas.— McMullen *v.* Hodge, 5 Tex. 34; Cobb *v.* Cohron, (Tex. Civ. App. 1894) 26 S. W. 846.

See 10 Cent. Dig. tit. "Constitutional Law," § 27.

80. *Arkansas.*— Bragg *v.* Tuffts, 49 Ark. 554, 6 S. W. 158.

California.— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

Indiana.— Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Strong *v.* Daniel, 5 Ind. 348.

Massachusetts.— Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Clark *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

Michigan.— Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

Nevada.— *Ex p.* Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; Meagher *v.* Storey County, 5 Nev. 244.

New York.— Clark *v.* Miller, 54 N. Y. 528.

Wisconsin.— Campbell *v.* Sherman, 35 Wis. 103.

United States.— Woolsey *v.* Dodge, 6 McLean (U. S.) 142, 30 Fed. Cas. No. 18,032; Astrom *v.* Hammond, 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

See 10 Cent. Dig. tit. "Constitutional Law," § 27.

81. As to acts of officers under unconstitutional statutes see *infra*, IV, G, 6, c, (III).

is not protected by it, but some cases hold to the contrary so far as protection to the officer is concerned.[82]

8. Recognition of Existing Laws Pending Constitutional Changes. Where a constitutional amendment or a new constitution adopted changes the mode of choosing officers and provides that present officers shall continue in office until their successors are chosen and qualified,[83] that the existing condition of things continue until organization under such amendment or constitution is perfected "as if no change had taken place,"[84] or that the duties of the officers shall "remain in full force though the same be contrary" to such constitution, to be performed until organization under such constitution,[85] the effect is that all officers continue in office and all of the functions of government continue until organization under such amendment or constitution is perfected.

9. Statutes Passed and Acts Done in Anticipation of Constitutional Amendments. Statutes enacted in anticipation of the adoption of constitutional amendments prescribing the manner of giving effect to such amendments, in accordance with directory provisions[86] thereof, or making appropriations of the public domain for the public[87] use are valid, in the absence of constitutional provisions prohibiting such legislation. But executive appointments, made in anticipation of vacancies in office, pending constitutional changes, are illegal and will be disregarded;[88] and a change of the return-day in judicial process, in anticipation of the adoption of a new constitution providing for such a change, is invalid.[89]

E. Particular Constitutions Considered — 1. Federal Constitution — a. Grant of Power. Under the American system of government the supreme authority resides in the people.[90] No legislative body that is governed by a written constitution, which it is bound to obey, possesses sovereign powers to the fullest extent.[91] It can make no laws that are not according to and consonant

82. See *infra*, IV, G, 6, c, (III).

83. *In re* Oliverez, 21 Cal. 415.

84. Dufau *v.* Massicot, 3 Mart. (La.) 289; Bermudez *v.* Ibanez, 3 Mart. (La.) 1; State *v.* Giles, 2 Pinn. (Wis.) 166, 1 Chandl. (Wis.) 112, 52 Am. Dec. 149, holding that temporary laws, adopted for convenience during constitutional changes, were not subject to constitutions adopted until after permanent organization, or continued in force thereafter.

85. Sigur *v.* Crenshaw, 8 La. Ann. 401.

Contingent provisions for effect of see People *v.* Potter, 47 N. Y. 375.

86. Where a constitutional amendment providing for the election of sheriff directed that such election be "in such manner as shall be prescribed by law," it was held that an act providing for such election and enacted before the amendment was consummated was valid. Pratt *v.* Allen, 13 Conn. 119.

87. An act setting apart one half of a public domain for the support of public schools, passed in anticipation of the adoption of a constitutional amendment allowing donations of land to railroads was held to be valid in the absence of constitutional provisions forbidding such legislation. Galveston, etc., R. Co. *v.* Gross, 47 Tex. 428.

88. The appointment of a harbor-master by the governor to fill a vacancy that would occur during the legislative recess, and pending the adoption of a new constitution and a change of government, was invalid. Ivy *v.* Lusk, 11 La. Ann. 486; Sigur *v.* Crenshaw, 8 La. Ann. 401.

89. As changes in the judicial system could take effect only when the ratification of the constitution was officially ascertained. Watson *v.* Miller, 55 Tex. 289.

90. Cooley Bl. Comm. 50 note.

Original source of power. — At the adoption of the federal constitution all governmental powers were in the states, and under the division of those powers, made by the adoption of that instrument, the federal government received only such powers as were granted to it, and the states retained the residuum, except so far as those powers were extinguished by prohibitions upon the states. Thayer *v.* Hedges, 22 Ind. 282. This is true except as to the powers exercised by the colonial congress under the confederation, and which never belonged to, and never were exercised by the states as individuals. The power over peace and war, the regulation of foreign trade, and all other intercourse with foreign nations, and the general regulation of all subjects that pertain to international law, were never exercised by the states in any way except in their aggregate capacity; and that any state ever possessed absolute sovereignty is a proposition that cannot be successfully maintained. Story Const. § 183 *et seq.*; Von Holst Const. Hist. c. 1; 1 Webster Works 128; 2 Marshall Life Washington, c. 2; Declaration of Rights by Colonial Congress of 1765; Cooley Const. Lim. (6th ed.) 7.

91. Cooley Bl. Comm. 50, 53 and notes.

No legislative body in America, either federal or state, is possessed of any such powers

with the fundamental laws that have been prescribed for its government by the people, who are superior to both the law-making power and the constitutions themselves. All written constitutions therefore are limitations upon legislative[92] powers or the sovereignty which in all organized governments must reside somewhere. Under our system of government the sovereignty, so far as it can be exercised by governmental means, is divided between the federal and state authorities, each being sovereign in its own[93] sphere; and both are subject to such constitutional limitations and restrictions as the people, acting in their national capacity in the one case and in their state capacities in the other, have seen fit to prescribe for both.[94] The constitution of the United States, then, is a grant of power.[95]

b. Federal and State Governments Distinguished. The government of the United States is a government of limited and restrained powers, while the governments of the several states are general and residuary as to all powers exercised by them. All national authority is derived from the constitution of the United

as the British house of commons is possessed of, in which, under the English constitution, the sovereignty of the empire resides. Cooley Bl. Comm. 50 *et seq.*

92. Cooley Bl. Comm. 50, 53 and notes.

93. "The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'" McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 405, 4 L. ed. 579.

"The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved." Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 435, 1 L. ed. 440. See also *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092. "The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye." Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

"The courts of the states are as much bound to uphold the supremacy of the constitution of the United States, as are the federal courts, or as they are to sustain the constitutions and laws of their several states. This obligation may perhaps even extend to declaring unconstitutional a provision in the state constitution under which the court exercised jurisdiction. But the conflict between the state and the federal constitution must certainly be a very clear one to call for so solemn a decision." Romine *v.* State, 7 Wash. 215, 219, 34 Pac. 924.

94. Barron *v.* Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

The government of the United States is, emphatically and truly, a government of the people. "In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." Per Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 405, 4 L. ed. 579. See also *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; *Ex p.* Siebold, 100 U. S. 395; U. S. *v.* Cathcart, 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756.

"The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests." Per Marshall, C. J., in Barron *v.* Baltimore, 7 Pet. (U. S.) 243, 247, 8 L. ed. 672.

95. *Arkansas.*— Hawkins *v.* Filkins, 24 Ark. 286; State *v.* Ashley, 1 Ark. 513.

Connecticut.—Pratt *v.* Allen, 13 Conn. 119.

Florida.— Cotten *v.* Leon County, 6 Fla. 610.

Iowa.— Purcell *v.* Smidt, 21 Iowa 540.

Louisiana.— State *v.* Nathan, 12 Rob. (La.) 332.

Nebraska.— State *v.* Moore, 40 Nebr. 854, 59 N. W. 755, 25 L. R. A. 774.

Pennsylvania.— Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

Texas.— Logan *v.* State, 5 Tex. App. 306; *Ex p.* Mabry, 5 Tex. App. 93.

United States.— Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; U. S. *v.* Cathcart, 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756; Spooner *v.* McConnell, 1 McLean (U. S.) 337, 22 Fed. Cas. No. 13,245.

See 10 Cent. Dig. tit. "Constitutional Law," § 31.

States, in which the powers of the federal government are enumerated.[96] But not so with the governments of the several states; their original powers they received through charters from the British crown, which served as their constitutions during the colonial period, and up to the time of the framing and adopting of state constitutions by them or their peoples during or after the revolutionary period;[97] and all powers that are not expressly or by necessary implication granted to the United States, in the federal constitution, remain with the several states or with the people, being necessarily inherent in the state governments or in the people who have established such governments.[98]

c. Interpretation — (i) *In General.* There have always been two schools of constructionists with a view to construing the federal constitution, the one contending for a strict, and the other for a liberal, construction of that instrument; but the doctrine of the strict constructionists has never advanced beyond theory.[99]

(ii) *Grants of Power and Restrictions.* It is also a rule of construction, applicable to the federal constitution, with reference to grants of power to the United States and restrictions upon the states, that where no exceptions are made in terms none will be made by implication.[1]

96. "The powers delegated by the proposed Constitution, to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite." The Federalist, No. 45 (by Madison).

"The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 326, 4 L. ed. 97, per Story, J. See also Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

97. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

Only two of the colonial charters, those of Connecticut and Rhode Island, survived the revolutionary period. Connecticut framed and adopted a state constitution in 1818 and Rhode Island in 1843. See Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581.

98. The legislature of a state does not look to its constitution for a grant of its powers, but exercises all powers compatible with civil government, unless restrained by some express inhibition or by clear implication, to be found in either the state constitution or in the federal constitution. *In re* Dorsey, 7 Port. (Ala.) 293; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216; People *v.* Draper, 15 N. Y. 532; Sill *v.* Corning, 15 N. Y. 297. But see *contra*, State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

99. By a series of early decisions, which have since been followed, the rule was established that the federal constitution, like other constitutions, is to be given a fair and reasonable construction, so as to promote the objects and purposes for which it was established; and that the extremes of both an enlarged construction, which would extend the meaning of words beyond their natural import, and a narrow construction, which would render the general government unequal to the objects for which it was instituted, are to be avoided. In Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 187, 6 L. ed. 23, Marshall, C. J., said: "This instrument [the federal constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded." See also North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713: *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 479; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

1. The constitution does not in terms extend the jurisdiction of the federal courts to all controversies between states, yet in

(III) *Limitations Upon Powers of Government.* But it is a rule of construction, applicable to the federal constitution, that where it imposes limitations upon the powers of the government, without reference to the states, such limitations will be held to be restrictions upon the powers of the federal government only, and this rule applies to all cases where the states are not mentioned.[2]

(IV) *Implied Prohibitions to States.* The granting of particular powers to the United States, in the federal constitution, does not necessarily prohibit the states, by implication, from exercising the same powers.[3] But in all cases of conflict, or where the exercise by the states of the powers so granted would defeat the purpose for which they have been granted to the federal government, the grant is an implied prohibition to the states to exercise the same powers.[4]

(V) *Powers Not to Be Assumed.* It is a settled principle of construction, applicable to the federal constitution, that powers are not to be assumed as possessed by the federal government other than those granted in the constitution itself.[5]

(VI) *Prohibitions Against Impairing Obligations of Contracts.*[6] By the weight of authority, the provision in the federal constitution which prohibits the states from passing laws impairing the obligations of contracts does not apply to the United States,[7] but the contrary has been held by some state courts.[8]

terms it excludes none. It was held that such jurisdiction was given. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

2. *Connecticut.*— Colt *v.* Eves, 12 Conn. 243.

Georgia.— Campbell *v.* State, 11 Ga. 353.

Kansas.— State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Massachusetts.— Bigelow *v.* Bigelow, 120 Mass. 320; Com. *v.* Hutchings, 5 Gray (Mass.) 482.

New York.—*In re* Smith, 10 Wend. (N. Y.) 449; Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

Ohio.— Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

United States.— Spies *v.* Illinois, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. ed. 80; Presser *v.* Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659; Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269; Fox *v.* Ohio, 5 How. (U. S.) 410, 12 L. ed. 213; Livingston *v.* Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751; Barron *v.* Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672.

See 10 Cent. Dig. tit. "Constitutional Law," § 30.

3. The rule in such cases is that where the exercise of such powers by the states will not conflict with the exercise of the same by the federal government the states may exercise such powers. U. S. *v.* New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867, 10 Law Rep. 127.

State insolvency laws furnish a good illustration of this principle. Subject to the power of congress, under the federal constitution, to adopt a uniform system of bankruptcy, the states may enact insolvency laws. But state insolvency laws are suspended upon the enacting by congress of bankruptcy laws. Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See also, generally, BANKRUPTCY.

4. "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 193, 4 L. ed. 529, per Marshall, C. J. See also Dobbins *v.* Erie County, 16 Pet. (U. S.) 435, 10 L. ed. 1022; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

5. Thayer *v.* Hedges, 22 Ind. 141; Mayer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97; Shollenberger *v.* Brinton, 52 Pa. St. 9; State *v.* Davis, 12 S. C. 528. See also Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

Every grant of power to the federal government is limited to those expressly mentioned in the federal constitution or those arising therefrom by necessary implication. State *v.* Davis, 12 S. C. 582. A prohibition of power to the states does not operate, by implication, as a grant of power to the United States. Thayer *v.* Hedges, 22 Ind. 141.

6. Further as to impairing obligations of contracts see *infra*, IX.

7. George *v.* Concord, 45 N. H. 434; Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Blocmer *v.* Stolley, 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559, 1 Fish. Pat. Rep. 376; Evans *v.* Eaton, Pet. C. C. (U. S.) 322, 8 Fed. Cas. No. 4,559, 1 Robb Pat. Cas. 68; Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337.

8. Hopkins *v.* Jones, 22 Ind. 310; Territory *v.* Reyburn, McCahon (Kan.) 134.

d. Amendments — (I) *In General.* The amendments to the federal constitution, adopted during the period of reconstruction, after the war, in no way disturbed the general division of powers between the federal and the state governments.[9]

(II) *The Fourteenth Amendment.* The fourteenth amendment to the federal constitution, prohibiting the states from denying to citizens of the United States equal protection under the laws, did not add anything to any rights which one citizen may claim over another. The only duty resting upon the United States under this amendment is to see to it that the states do not deny to any person this protection by discriminating legislation.[10]

(III) *The Fifteenth Amendment.* The fifteenth amendment to the federal constitution, prohibiting the United States, or any state, from abridging the right of citizens of the United States to vote, on account of "race, color, or previous condition of servitude," created no privileges or immunities of any one class of citizens over another. It only prohibited discrimination against any class of citizens of the United States, and annulled all state laws and constitutional provisions that were in conflict therewith.[11]

(IV) *The Tenth Amendment.* The tenth amendment to the federal constitution, declaring that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people, is construed to mean that powers not "expressly" delegated to the United States are reserved to the states.[12]

(V) *The First Amendment.* The first amendment to the federal constitution, prohibiting congress from abridging the right of the people to assemble and to petition the government for redress of grievances, was not intended to limit the powers of the states over their own citizens, but to operate upon the federal government alone.[13]

2. State Constitutions — a. In General. The constitutions of the several states, unlike the federal constitution, are not grants of power. On the contrary they are limitations upon the legislative powers of the states.[14] A state constitu-

9. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521.

10. The purpose of the fourteenth amendment to the federal constitution was not to protect individual rights from individual invasion, but to nullify and render void all state legislation or state action denying equal rights and privileges to citizens of the United States; and congress has no right, under that amendment, to enact laws in the nature of municipal legislation or to punish crime not committed against any law of the United States. The Civil Rights Cases, 109 U. S. 13, 3 S. Ct. 18, 27 L. ed. 835; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also, generally, Civil Rights, 7 Cyc. 161.

A statute against embezzlement by officers of banking institutions, whether incorporated or not, does not discriminate under the operation of the fourteenth amendment to the federal constitution, in not applying to the officers of other unincorporated institutions. Com. *v.* Porter, 24 Ky. L. Rep. 364, 68 S. W. 621.

A statute requiring a greater license-fee from persons not residing within certain counties does not discriminate under such amendment, the amendment not being self-executing. Rothermel *v.* Meyerle, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366.

11. Wood *v.* Fitzgerald, 3 Oreg. 568. See also, generally, Elections.

Right to vote is not one of the privileges or immunities of citizens of the United States, and the states may abridge the rights of their citizens to vote, so long as it is done by uniform legislation, operating upon all citizens alike. Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; Minor *v.* Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627.

Many of the state constitutions prescribed qualifications for voters prior to the adoption of the federal constitution and were regarded by the framers of the federal constitution as being consistent with a republican form of government. Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521.

12. Padelford *v.* Savannah, 14 Ga. 438.

13. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588, holding that the right of citizens to peaceably assemble and petition congress for any grievances within the jurisdiction of the federal authorities is a right belonging to national citizenship, and such a right is under the protection of the United States.

14. *Alabama.*— *In re* Dorsey, 7 Port. (Ala.) 293.

tion is the supreme written will of the people of the state, who have adopted it as a framework or basis of their government, subject only to the limitations to be found in the federal constitution.[15] A state constitution generally defines to a certainty what powers are to be exercised by each branch of the government, what powers are delegated to the legislative department, and what powers are reserved to the people,[16] or not to be exercised. But however definite the powers to be exercised under a state constitution may be pointed out, the legislative powers of the states are very general and very indefinite, notwithstanding; and the generally accepted doctrine is that they may pass any acts that are not expressly, or by necessary implication, inhibited by their own constitutions or by the federal constitution.[17]

b. Validity of Statutory Provisions — (i) *Constitutionality in General.* It is a settled principle that a statute that is repugnant to the constitution to which

Arkansas.— State *v.* Sorrells, 15 Ark. 664; State *v.* Ashley, 1 Ark. 513.

California.— Beals *v.* Amador County, 35 Cal. 624; *Ex p.* McCarthy, 29 Cal. 395; Bourland *v.* Hildreth, 26 Cal. 161; *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Colorado.— Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074; People *v.* Wright, 6 Colo. 92.

Connecticut.— Booth *v.* Woodbury, 32 Conn. 118; Lowrey *v.* Gridley, 30 Conn. 450; Pratt *v.* Allen, 13 Conn. 119.

Florida.— Cotten *v.* Leon County, 6 Fla. 610.

Illinois.— Hawthorn *v.* People, 109 Ill. 302, 50 Am. Rep. 610; Winch *v.* Tobin, 107 Ill. 212; Munn *v.* People, 69 Ill. 80; People *v.* Raynolds, 10 Ill. 1; People *v.* Marshall, 6 Ill. 672.

Indiana.— Hovey *v.* State, 119 Ind. 395, 21 N. E. 21; Lafayette, etc., R. Co. *v.* Griger, 34 Ind. 185.

Iowa.— Purczell *v.* Smidt, 21 Iowa 540; McMillen *v.* Lee County Judge, 6 Iowa 391.

Kentucky.— Griswold *v.* Hepburn, 2 Duv. (Ky.) 20.

Louisiana.— Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182; Bozant *v.* Campbell, 9 Rob. (La.) 411; Le Breton *v.* Morgan, 4 Mart. N. S. (La.) 138.

Maine.— Winchester *v.* Corinna, 55 Me. 9.

Michigan.— Atty.-Gen. *v.* Preston, 56 Mich. 177, 22 N. W. 261.

Nebraska.— State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

New Hampshire.— Concord R. Co. *v.* Greely, 17 N. H. 47.

New York.— People *v.* Flagg, 46 N. Y. 401; Chenango Bank *v.* Brown, 26 N. Y. 467; People *v.* Draper, 15 N. Y. 532.

Pennsylvania.— Lewis' Appeal, 67 Pa. St. 153; Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272; Philadelphia *v.* Field, 58 Pa. St. 320; Com. *v.* Hartman, 17 Pa. St. 118; *In re* Clinton St., 2 Brewst. (Pa.) 599.

South Carolina.— *Ex p.* Lynch, 16 S. C. 32.

Tennessee.— Stratton *v.* Morris, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353; Davis *v.* State, 3 Lea (Tenn.) 376.

Texas.— Holley *v.* State, 14 Tex. App. 505; Logan *v.* State, 5 Tex. App. 306; *Ex p.* Mabry, 5 Tex. App. 93.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

Virginia.— Com. *v.* Drewry, 15 Gratt. (Va.) 1.

West Virginia.— Bridges *v.* Shallcross, 6 W. Va. 562.

Wisconsin.— Bushnell *v.* Beloit, 10 Wis. 195.

See 10 Cent. Dig. tit. "Constitutional Law," § 30.

15. Taylor *v.* Governor, 1 Ark. 21.

16. Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

17. *Alabama.*— Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529.

California.— People *v.* Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, 125 and note; Ferris *v.* Coover, 11 Cal. 175.

Delaware.— State *v.* Allmond, 2 Houst. (Del.) 612.

Illinois.— Field *v.* People, 3 Ill. 79.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Adams *v.* Howe, 14 Mass. 340, 345, 7 Am. Dec. 216.

Missouri.— Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268.

New York.— People *v.* Draper, 15 N. Y. 532; Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535, 74 N. Y. St. 962; People *v.* Learned, 5 Hun (N. Y.) 626; People *v.* Lawrence, 54 Barb. (N. Y.) 589; De Camp *v.* Eveland, 19 Barb. (N. Y.) 81; Barker *v.* People, 20 Johns. (N. Y.) 457.

Pennsylvania.— Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Shapeless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

South Carolina.— State *v.* County Treasurer, 4 S. C. 520.

See 10 Cent. Dig. tit. "Constitutional Law," § 30.

Contra.— *Indiana.*— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

Kansas.— Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

the law-making power enacting it is subject cannot become a law.[18] And by the weight of authority, statutes passed by the state legislatures, and free from objections on constitutional grounds, must be enforced,[19] for the power of a state to enact laws within its constitutional limits is supreme.[20] The only test of the validity of an act regularly passed by a state legislature is whether or not it violates the state or federal constitutions in express terms or by clear implication.[21] Courts are never at liberty to question the wisdom or policy of an act of the legislature,[22] their duty being to enforce such acts as are passed to the extent to which they are found to be constitutional and no further.[23] There are cases, however, which hold to the contrary.[24]

(II) *Limits of Legislative Power.* In the absence of constitutional restrictions, the limits of the powers of the state legislatures to enact laws are not well defined.[25] Subject only to prescribed constitutional restraints, the state legislatures have been compared to the British parliament,[26] whose "power and jurisdiction," according to Sir Edward Coke, "is transcendent and absolute."[27] While such a comparison is too radical for American institutions, in which unlimited powers are unknown,[28] it is impossible to reconcile all of the decisions

Nebraska.— State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

North Carolina.— People *v.* McGowan, 68 N. C. 520; People *v.* Johnson, 68 N. C. 471; People *v.* McKee, 68 N. C. 429.

Ohio.— Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

18. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

19. Where an act is plain and unambiguous, and free from objections on constitutional grounds, the courts are bound to enforce it, irrespective of how unjust or oppressive it may be in the penalties it pronounces. Avery *v.* Pima County, (Ariz. 1900) 60 Pac. 702. See also Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Merchants' Union Barb-Wire Co. *v.* Brown, 64 Iowa 275, 20 N. W. 434; Leonard *v.* Wiseman, 31 Md. 201.

20. The powers of the legislature, beyond the limits imposed by the federal and state constitutions, are unlimited. Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68, holding that a statute authorizing the subdivisions of the state government to engage in the sale of liquor was constitutional.

21. Purnell *v.* Mann, 105 Ky. 87, 20 Ky. L. Rep. 1146, 48 S. W. 407, 20 Ky. L. Rep. 1396, 49 S. W. 346, 21 Ky. L. Rep. 1129, 50 S. W. 264, all doubts being resolved in favor of its validity.

An act, to be unconstitutional, must be prohibited by the constitution in terms or by necessary implication. Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 53 L. R. A. 837.

22. *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

Although a statute is unreasonable it will not be held void, unless some of its provisions are in conflict with the constitution. State *v.* Bolden, 107 La. 116, 31 So. 393.

A statute making void all contracts containing an agreement to restrict free competition in the production or sale of any commodity produced by agriculture is constitutional. Bingham *v.* Brands, 119 Mich. 255, 77 N. W. 940.

23. Where there is a conflict between an act of the legislature and the constitution, the statute must yield to the extent of the repugnancy, but no further. Scott *v.* Flowers, 61 Nebr. 620, 85 N. W. 857.

24. See *infra*, note 25 *et seq.*

25. Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162, holding that a state cannot pronounce its own deed invalid.

26. Thorpe *v.* Rutland, etc., Co., 27 Vt. 140, 62 Am. Dec. 625.

27. 4 Inst. 36. See also 1 Bl. Comm. 161.

28. Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360; Cleveland Citizens' Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455. See also Cooley Const. Lim. (6th ed.) 102.

"With those judges, who assert the omnipotence of the legislature, in all cases, where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist what I know is not only an incredible supposition, but a most remote improbability, a case of the direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary." Per Hosmer, C. J., in Goshen *v.* Stonington, 4 Conn. 209, 225, 10 Am. Dec. 121. See also opinions of Story, J., in Wilkinson *v* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542, and of Chase, J., in Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648. But see the opinion of Iredell, J., in Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

Most of the decisions which deal with these questions are to be found in cases in which the constitutionality of statutes deemed to be in contravention of natural justice or natural right (see *infra*, IV, E, 2, b, (III)) or in contravention of the spirit of the constitution have been drawn in question (see *infra*, IV,

of the courts upon the subject of the limits of the legislative powers of the states, in the absence of written constitutional restrictions defining such limits; and equally difficult is it to find a decision attempting to deal with this subject that has received the approval of an undivided court, or one that is not otherwise weakened by being directly opposed by preceding or succeeding decisions within the same jurisdiction; and if it could be said that the decisions were in harmony where the same question has been passed upon by the courts in parallel cases, the conflict in cases where the same principle has been involved in other cases would still be irreconcilable.

(III) *Statutes Contravening Natural Justice and Common Right.* It may be stated as a general principle that statutes will not be held unconstitutional merely because they are unjust and repugnant to the general principles of justice, liberty, or rights not expressed in constitutional provisions.[29] The contrary has been held in some cases,[30] and very strong *dicta* to the same effect are to be found in other cases where the acts in question were either sustained[31] or

E, 2, b, (IV)). Some of the legislation of this character has involved the personal and property rights as between individuals, but the most of it has been in relation to statutes which have been held to infringe upon the right of local self-government by authorizing municipal taxation, for municipal, local, and other purposes, without municipal consent, or by authorizing state control of municipal affairs by establishing local boards, vested with authority to control municipal affairs, and by prescribing conditions and qualifications for the selection of local officers tending to give a preference to any one class (see *infra*, IV, E, 2, b, (VI)).

29. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Dorman *v.* State, 34 Ala. 216.

Arizona.— Avery *v.* Pima County, (Ariz. 1900) 60 Pac. 702.

Georgia.— Macon, etc., R. Co. *v.* Little, 45 Ga. 370; Powers *v.* Dougherty County Inferior Court, 23 Ga. 65; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Praigg *v.* Western Paving, etc., Co., 143 Ind. 358, 42 N. E. 750.

Louisiana.— State *v.* Bolden, 107 La. 116, 31 So. 393; State *v.* Hufty, 11 La. Ann. 303.

Massachusetts.—Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216.

Michigan.— Reithmiller *v.* People, 44 Mich. 280, 6 N. W. 667; People *v.* Gallagher, 4 Mich. 244.

Missouri.— *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726; Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

Nebraska.— Scott *v.* Flowers, 61 Nebr. 620, 85 N. W. 857. *Compare* State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

Ohio.— Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

Pennsylvania.— Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Com. *v.* Hartman, 17 Pa. St. 118; Com. *v.* McCloskey, 2 Rawle (Pa.) 369.

United States.— Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Forsythe *v.* Hammond, 68 Fed. 774; Minge *v.* Gilmour, Brunn. Col. Cas. (U. S.) 383, 17 Fed. Cas. No. 9,631, 1 Car. L. Repos. 34.

See 10 Cent. Dig. tit. "Constitutional Law," § 37.

30. *Connecticut.*— Camp *v.* Rogers, 44 Conn. 291. But *compare* Linsley *v.* Hubbard, 44 Conn. 109, 26 Am. Rep. 431; White *v.* Stamford, 37 Conn. 578; Booth *v.* Woodbury, 32 Conn. 118.

Maryland.— State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

New York.— Bradshaw *v.* Rodgers, 20 Johns. (N. Y.) 103.

Pennsylvania.— Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354.

South Carolina.— Bowman *v.* Middleton, 1 Bay (S. C.) 252; Ham *v.* McClaws, 1 Bay (S. C.) 93, holding that statutes violating the plain principles of common right and reason were void. In Bowman *v.* Middleton, 1 Bay (S. C.) 252, the statute complained of divested a person of his freehold, and was held void "as it was against common right, as well as against magna charta." In Ham *v.* McClaws, 1 Bay (S. C.) 93, 98, the court say: "It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles."

West Virginia.— State *v.* Fire Creek Coal, etc., Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359.

United States.— Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

31. "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will

held to be repugnant to express constitutional provisions and void;[32] and even the English decisions are not free from similar expressions of opinion,[33] although the absolute authority of parliament was never questioned by the English judges.[34]

(iv) *Statutes Contravening Spirit of Constitution.* The validity of statutes deemed to be in violation of the spirit supposed to pervade all constitutions has been considered at much length by the courts in a variety of cases; but an examination of the authorities upon this subject leads to the conclusion that the principle involved is more properly a question of construction of some necessarily implied constitutional restriction, resulting more from express constitutional provisions than otherwise.[35] The generally accepted rule is that courts will not declare a statute void merely because in their opinion it is opposed to the spirit supposed to pervade the constitution.[36] The authorities are not in harmony upon this question; but in nearly all of the cases where statutes have been held to be prohibited by the spirit of the constitution, or nature and structure of the government, the acts in question have also been held to be in violation of some express or implied constitutional restriction.[37]

(v) *Statutes Against Public Policy and Morals.* Nor will courts

of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." Per Story, J., in Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 657, 7 L. ed. 542.

"There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established." Per Chase, J., in Calder *v.* Bull, 3 Dall. (U. S.) 386, 388, 1 L. ed. 648.

32. "We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito.*" Per Story, J., in Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 50, 3 L. ed. 650, holding an act of the legislature of Virginia divesting a church of property acquired by it prior to the Revolution unconditional and void. See also Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

33. Where an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall adjudge it to be void. Bonham's Case, 8 Coke 114*a*. Referring to this case, Lord Holt said that "the observation of Lord Coke was not extravagant, but was a very reasonable and proper saying." London *v.* Wood, 12 Mod. 669.

34. 1 Bl. Comm. 160; 4 Coke Inst. 36.

Leading case.— Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648, is the ruling case on this subject, in which it was held that if congress or a state legislature pass a law, within the general scope of their constitutional power, the courts cannot pronounce it void merely because, in their judgment, it is contrary to the principles of natural justice; and the great weight of authority favors the rule as laid down in this case. Cooley Const. Lim. (6th ed.) 197.

35. See *supra*, IV, C, 8.

State legislatures are subject to implied restrictions, and therefore an act of the legislature may be declared void although not expressly prohibited by the constitution. Lexington *v.* Thompson, 24 Ky. L. Rep. 384, 68 S. W. 477, 57 L. R. A. 775.

36. *California.*— *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 27 Am. St. Rep. 106, 14 L. R. A. 755; Cohen *v.* Wright, 22 Cal. 293.

Colorado.— People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; People *v.* Rucker, 5 Colo. 455.

Indiana.— Logansport *v.* Seybold, 59 Ind. 225; Horning *v.* Wendell, 57 Ind. 171.

New York.— Benson *v.* Albany, 24 Barb. (N. Y.) 248.

Ohio.— Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; State *v.* Cincinnati, 19 Ohio 178.

Tennessee.— State *v.* Staten, 6 Coldw. (Tenn.) 233.

United States.— Reeves *v.* Corning, 51 Fed. 774.

See 10 Cent. Dig. tit. "Constitutional Law," § 38.

37. Where the constitution contained no provision prohibiting the taking of private property for public use without just com-

declare statutes void on the ground that they are against sound public policy and morals and liable to lead to corruption and oppression.[38]

(VI) *Statutes Infringing Upon Right of Local Self-Government.* The objections to such statutes are that they deprive the inhabitants of municipal corporations of the right of local self-government, and that the enactment of such legislation is beyond the powers of the legislature, in the absence of express constitutional provisions authorizing it. In many well-considered cases upon this subject the doctrine of an implied constitutional guaranty of the right of local self-government, derived from the principles of the common law and the English constitution, has been maintained; and in states where this doctrine prevails a statute that is deemed to infringe upon the right of local self-government by interfering with the administration of municipal affairs by the local authorities will be held invalid, even though it violates no express constitutional provision, while in states where this doctrine is not recognized, statutes designed to control the administration of municipal affairs by the state authorities will be sustained, unless it can be shown that by express or necessary implication they violate some constitutional provision. By the weight of authority such statutes are valid, and the reasoning on which they have been sustained is that the state legislatures are proprietary governments, possessing plenary powers, subject only to express constitutional restrictions, and therefore vested with inherent power to pass any legislation not inhibited by the letter of the constitutions to which they are subject; while on the other hand the principle on which such statutes have been held invalid is that the state legislatures, like congress, derive their powers from the people, subject to the constitutional restrictions prescribed in the federal and state constitutions; and therefore are not vested with inherent power to legislate, except so far as they are authorized by the constitutions to which they are subject; and the right of local self-government, being secured to the people by the several English bills of rights, the customs and general policy of English and American institutions, and antedating the adoption of the constitutions themselves, is necessarily inherent in the people, and, without their consent, expressed in constitutional provisions that they have framed and adopted, cannot be taken away by legislative authority.

In Alabama any act of the legislature is regarded as constitutional unless it violates some express provision of the state or federal constitutions, and political rights of municipal corporations do not vest as against the state.[39]

pensation, it was held that such prohibition was implied from the nature and structure of our system of government, if not prohibited by necessary implication in provisions of the bill of rights. *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321. The legislature has full power, except where expressly restrained, and a statute will not be declared void because it appears to the court that it violates certain parts of the constitution. People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123.

An act allowing attorney's fee in addition to certain claims against railroad companies for stock killed, if such claims were not paid within a prescribed time, was held not to be in violation of the principles of republican government. Gulf, etc., R. Co. *v.* Ellis, (Tex. 1892) 18 S. W. 723, 17 L. R. A. 286, 87 Tex. 19, 26 S. W. 985.

An act allowing a loser of money at gaming — or any person in his behalf if loser refuse to sue — to recover such money was held not to be contrary to the principles of the federal or state constitutions. Neal *v.* Todd, 28 Ga. 334.

An act organizing a police district out of several counties, to be governed by police commissioners to be appointed by the governor, with the consent of the senate, was held not to be a violation of the spirit of the constitution. People *v.* Draper, 15 N. Y. 532 [*affirming* 25 Barb. (N. Y.) 344]. But see Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People *v.* Albertson, 55 N. Y. 50.

The oppressive execution of a statute, so as to violate the spirit of the constitution, does not render such statute unconstitutional. People *v.* City Prison, 81 Hun (N. Y.) 434, 30 N. Y. Suppl. 1095, 63 N. Y. St. 283.

38. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

39. An act establishing a board of police commissioners for a city and vesting the

In Arkansas municipal corporations are regarded as agents of the state government, and subject to legislative control so far as the municipal officers are concerned.[40]

In California municipal corporations are regarded as subdivisions of the state government, and subject to legislative control so far as the exercise of political power is concerned.[41] The legislature may elect officers of state institutions, readjust municipal indebtedness so as to impose greater burdens,[42] and enforce payment of equitable claims against municipal corporations;[43] but its authority to validate illegal assessments for municipal purposes has been denied.[44]

In Colorado the right of local self-government is in all respects subordinate to the power of the legislature.[45]

In Connecticut the doctrine of local self-government, except as guaranteed in express constitutional provisions, is not recognized. The legislature may impose assessments against municipal corporations for local improvements not within their limits.[46]

In Florida the legislature exercises plenary powers over all public highways, including both streets in cities and county roads, and may authorize apportionment between municipal corporations of moneys raised by special tax levied by counties for the repair of public thoroughfares.[47]

county judge of probate with power to appoint such commissioners to office was held constitutional. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529. See also Moulton *v.* Reid, 54 Ala. 320, holding that municipal corporations are agencies of the state government, and that the legislature may provide for the selection of municipal officers, either by election or by appointment, or in any other mode at its discretion.

40. State *v.* Jennings, 27 Ark. 419.

41. The legislature may divide municipal corporations, and readjust indebtedness so as to impose a greater rate of taxation than taxpayers were liable for prior to the division. Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.

Municipal corporations are subdivisions of the state government, created by the state for public purposes, and the power to create and control them is in the legislature. Payne *v.* Treadwell, 16 Cal. 221. But see the opinion of McKinstry, J., in People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

The legislature has power to validate invalid conveyances of real estate by municipal corporations. Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73.

42. Election of trustees of a state library by the legislature is constitutional. People *v.* Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, 125 and note.

43. Creighton *v.* San Francisco, 42 Cal. 446; Sinton *v.* Ashbury, 41 Cal. 525; People *v.* Burr, 13 Cal. 343.

44. Where a lot of land was omitted in an assessment for local improvements, and an act was passed validating the assessment, it was held that the whole assessment was unconstitutional and void and that the legislature had no power to validate it. People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677.

45. An act establishing a board of public works, the members thereof to be appointed by the governor, with the advice and consent of the senate, and vested with power to make municipal improvements, to pay out municipal funds, and adjust municipal obligations was held constitutional, the right of local self-government being a matter of policy rather than of constitutional construction. *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481.

46. The legislature may require a town to contribute a part of the expense in maintaining a highway outside of the town limits, by which the town is benefited; and representation of such town in the legislature imposing the contribution, and assessed by commissioners not appointed by the town, is a sufficient answer to the objection that the town is assessed by such commissioners without representation. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

The right of municipal corporations to regulate their finances, independent of the legislature, is not recognized as a right derived from the common law. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

An act legalizing and rendering obligatory upon a city a prior unauthorized subscription by it of railroad stock, with a provision for its ratification by the electors of such city, the act to take effect upon such ratification, was held to be valid. Bridgeport *v.* Housatonic R. Co., 15 Conn. 475.

The legislature, when in its opinion intersecting lines of railways within city limits are dangerous, may compel such railways and the city to remove the danger by purchasing the right of way and to change the grade, and may apportion the expense thereof among them or impose it upon any of them. Woodruff *v.* Catlin, 54 Conn. 277, 6 Atl. 849.

47. But it cannot authorize municipal taxation for other than public purposes. Duval

In Georgia municipal corporations are subdivisions of the state government and hold all property acquired by them for public use as a public trust, and they may be divested of it by the legislature.[48]

In Illinois municipal corporations are regarded as agencies of the state government, subject to legislative control. The legislature may abridge or extend their powers or impose additional burdens by general laws.[49] But statutes imposing municipal indebtedness for local improvements, without the consent of the taxpayers, have been held void.[50]

In Indiana municipal corporations are wholly subject to legislative control in their property rights, but the right of local self-government has been held to be inherent in them and not to be impaired by legislative action in establishing local boards to control municipal affairs.[51]

In Iowa municipal corporations hold property used for public purposes as a

County Com'rs *v.* Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416.

The legislature may authorize the construction of street railways in city streets without the consent of the municipal authorities. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

48. Where a city had built a county jail and was afterward vested by statute with the entire government thereof, a subsequent statute repealing the former and vesting the jail in the county court and sheriff was held to be valid. State *v.* Savannah, R. M. Charlt. (Ga.) 250.

An act validating a void subscription of railroad stock by a municipal corporation was held to be constitutional. Bass *v.* Columbus, 30 Ga. 845.

An act authorizing the construction of a street railway through streets and squares of a city without its consent or compensation was held to be valid. Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602.

49. Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688.

The legislature may compel municipal corporations to support their paupers as an exercise of police power. Fox *v.* Kendall, 97 Ill. 72. And it may take from them powers granted in their charters to license the sale of spirituous liquors, although the proceeds received therefrom are used for the support of such paupers. Gutzweller *v.* People, 14 Ill. 142.

The legislature may transfer the control of city streets to park commissioners to be controlled by them for driving purposes. People *v.* Walsh, 96 Ill. 232, 36 Am. Rep. 135.

Regulating sale of liquor.— An act providing for the repeal or continuing in force of municipal ordinances regulating the sale of spirituous liquors, after the annexation of a city enacting such ordinances, to another was held to be valid in Swift *v.* Klein, 163 Ill. 269, 45 N. E. 219.

50. Gaddis *v.* Richland County, 92 Ill. 119; Cairo, etc., R. Co. *v.* Sparta, 77 Ill. 505; Marshall *v.* Silliman, 61 Ill. 218; Wider *v.* East St. Louis, 55 Ill. 133; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

An act authorizing municipal officers to levy assessments not incidental to their offices and validating a void proceeding to levy a municipal tax was held to be void in Marshall *v.* Silliman, 61 Ill. 218.

51. Municipal corporations have no vested rights as against the state as far as property rights are concerned. This has been maintained in a long line of uniform decisions. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Coffin *v.* State, 7 Ind. 157; State Bank *v.* Madison, 3 Ind. 43; Sloan *v.* State, 8 Blackf. (Ind.) 361. But with respect to the political rights that they may possess as against the state, different conclusions have been reached. It has been held, by a divided court, (1) that the right of local self-government antedated the adoption of the constitution, (2) that it was an inherent right vested in the inhabitants of municipal corporations prior to their incorporation, (3) that the legislature was powerless to take it away, (4) and that statutes organizing boards vested with power to control the police and fire departments of cities and towns were unconstitutional and void. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. But an election by the legislature of officers of an institution created by statute was sustained. Hovey *v.* State, 119 Ind. 395, 21 N. E. 21. And in State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, a statute providing for the appointment of local police commissioners by state officers was held "not an invasion of the right of local self-government," and valid, the court saying that the act was "simply the exercise of the power to provide for the selection of peace officers of the State."

An act directing that fines collected by a city for violations of a city ordinance be used for the support of friendless women within its limits was held to be valid. Indianapolis *v.* Indianapolis Home for Friendless Women, 50 Ind. 215.

An act incorporating a city and giving it the exclusive right to license the sale of spirituous liquors confers no rights that cannot be divested by subsequent legislation. Sloan *v.* State, 8 Blackf. (Ind.) 361.

public trust, and subject to legislative control, but private property acquired by them will be protected.[52]

In Kansas the authority of the legislature to establish local boards to control municipal affairs has been sustained;[53] but its inherent authority has been denied, the court holding that the people, in their primary capacity, possessed all political power of the state, and that they could delegate a particular part of it to the legislature to exercise, or exercise it themselves.[54]

In Kentucky it has been held that the legislature cannot interfere with the right of local self-government by fixing the compensation of municipal employees, and that the legislature is subject to implied restrictions which it cannot violate.[55]

In Louisiana the legislature may control municipal police affairs by the establishment of local boards, vested with full powers.[56]

In Maine the legislature cannot authorize municipal taxation for other than public purposes,[57] nor can it exonerate one municipal corporation from its obligations with another.[58]

52. An act authorizing the construction of a railroad through city streets, the fee to which was in the city, and without its consent or compensation to it, was held to be valid (Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455), but this case recognizes the right of municipal corporations to acquire private property, of which they cannot be divested without compensation. See Mosher *v.* Independent School Dist., 44 Iowa 122 (denying the power of the legislature to pass an act requiring the payment of a void municipal obligation); Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56 (holding that the legislature has no power to release municipal assessments of taxes against railroads, and that such assessments were contracts within the protection of the constitution, and vested property not to be taken without consent).

The legislature may extend the limits of municipal corporations without the consent of the inhabitants affected by the change. Morford *v.* Unger, 8 Iowa 82.

53. A statute authorizing the appointment of a local board of police commissioners by the state authorities to manage the police affairs of a city was held to be within the powers of the legislature and constitutional. State *v.* Hunter, 38 Kan. 578, 17 Pac. 177.

54. Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

55. An act establishing a board of police commissioners for the city of Louisville, to be elected by the people, was held to be valid. Police Com'rs *v.* Louisville, 3 Bush (Ky.) 597. But in a recent case an act fixing the compensation of the officers and members of a city fire department was held to be in violation of the right of local self-government and void. It was also held that state legislatures are subject to "implied restrictions," and therefore an act of the legislature may be declared void although not expressly prohibited by the constitution. Lexington *v.* Thompson, 24 Ky. L. Rep. 384, 68 S. W. 477; McDonald *v.* Louisville, 24 Ky. L. Rep. 271, 68 S. W. 413. In Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642, the right of municipal corporations to acquire corporate rights beyond the control of the legislature is conceded.

Where one section of a constitution provided that "inferior state officers, not specifically provided for in the Constitution, might be appointed or elected, in such manner as may be prescribed by law," and another section provided that the legislature might provide for the election or appointment of such other ministerial and executive officers as might from time to time be necessary, it was held that the legislature had power to create, by statute, a board of penitentiary commissioners, and to provide for their election by the legislature. Sinking Fund Com'rs *v.* George, 20 Ky. L. Rep. 938, 47 S. W. 779.

Exemption from taxation.—Property owned by municipal corporations and used by them for the purpose of administering municipal government has been held to be exempt from taxation by the state, in the absence of statutory exemption; but otherwise with property owned by them and not used for such purposes. Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624.

56. Diamond *v.* Cain, 21 La. Ann. 309. See also Reynolds *v.* Baldwin, 1 La. Ann. 162, distinguishing the difference between municipal charters in England and America, and denying the doctrine of vested rights of municipal corporations as against the state government.

57. An act validating the vote of a town to loan its credit to the promoters of a private enterprise, to be secured by mortgage thereon, in order to induce such promoters to engage in manufacture within town limits, was held to be unconstitutional; and an injunction to restrain the issue of bonds by the town, in pursuance of such vote, was granted. Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185, the purpose of the enterprise in this case being held to be private.

As to an act validating defective issue of municipal railroad-aid bonds see Shurtleff *v.* Wiscasset, 74 Me. 130.

58. Where an act incorporating part of a town with a new town provided that the lat-

In Massachusetts a statute will be sustained unless it can be shown that it violates some right that is guaranteed by the constitution, and state control of municipal police affairs is not regarded as an abridgment of the right of local self-government.[59] The legislature exercises general control over the affairs of municipal corporations, and may consolidate them, distributing their property and apportioning their indebtedness.[60] And statutes authorizing municipal taxation for public purposes are valid, but if such purposes be not strictly public, such statutes will be held invalid, even though the assessment has been approved by the municipal authorities.[61]

In Maryland[62] statutes regulating the police departments of municipal corporations are held to be constitutional; but provisions in their charters prescribing qualifications for office in such departments, in relation to political matters, are void.[63]

ter should support its proportion of all the paupers then supported in whole or in part by the original town, a subsequent act exonerating the new town from such liability in future was held to be unconstitutional and void, as impairing the obligation of contracts. Bowdoinham *v.* Richmond, 6 Me. 112, 19 Am. Dec. 197. See also Brunswick *v.* Litchfield, 2 Me. 28, holding that an act of the legislature validating marriages between paupers, so far as construed to impose upon municipal corporations liability for supplies furnished to such paupers, prior to the act, was unconstitutional.

59. It has been held: (1) that a statute establishing a board of police commissioners for the city of Boston, to be appointed by the governor from the two principal political parties, was constitutional; (2) and that a rule of such board for the government of "itinerant musicians," for the violation of which a member of a salvation army corps was arrested while engaged in public worship, was valid. The court say: "It is also suggested, though not much insisted on, that the statute is unconstitutional, because it takes from the city the power of self-government, in matters of internal police. We find no provision of the Constitution with which it conflicts, and we cannot declare an act of the Legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution." Com. *v.* Plaisted, 148 Mass. 375, 383, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142, the bill of rights being pleaded as a defense.

A statute authorizing commissioners to construct a subway in a city, at the city's expense, with power to lease for a term of years, the electors of such city having voted therefor, was held to be constitutional. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

But a statute requiring a city to transfer without compensation a cemetery purchased by it for the purpose of discharging its statutory obligations was held unconstitutional. Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515.

60. Stone *v.* Charlestown, 114 Mass. 214.

The legislature may abolish a school district and impose its debt upon the town in which it was situate. Whitney *v.* Stow, 111 Mass. 368.

Where the legislature by special statute laid out a bridge as a public highway and imposed the expenses of repairing and maintaining upon such towns as commissioners appointed by a court had reported to be benefited thereby, a subsequent special statute transferring future expenses for maintenance and repairs upon such towns as a second commission to be appointed by the governor should determine were benefited, or that would be benefited by such bridge was held to be valid. Scituate *v.* Weymouth, 108 Mass. 128.

No rights vest in towns under a statute compelling adjoining towns to contribute toward maintenance of a public bridge. Weymouth, etc., Fire Dist. *v.* Norfolk County Com'rs, 108 Mass. 142.

61. A statute authorizing municipal taxation in aid of the poor of a city, who had suffered in consequence of a disastrous fire, was held not to be for a public purpose, and therefore invalid. Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39. But a statute imposing taxation for the support of the ministry was held to be valid. Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216.

Statute authorizing the appointment of supervisors of elections by courts was held to be invalid. Election Supervisors' Case, 114 Mass. 247, 19 Am. Rep. 341.

62. The legislature has power to create or abolish municipal corporations, to amend their charters, to annul their laws, to extend or diminish their powers, to extend or limit their boundaries, or to consolidate them at its discretion. Groff *v.* Frederick City, 44 Md. 67; Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591.

Mandatory statute requiring a city to maintain a bridge within its limits as a public highway was held to be valid. Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446.

63. The court ruled that where the constitution and the bill of rights conflict, the constitution prevails, being in the nature of

In Michigan statutes establishing municipal boards, vested with power to control municipal affairs, and to impose taxation for the purpose of local improvement, are held unconstitutional as being an abridgment of the right of local self-government.[64] So also statutes precluding the electors from voting for all candidates for office by prescribing cumulative voting,[65] and acts tending to exclude any class of citizens from obtaining municipal office, to the exclusion of others, have been held invalid.[66] But a statute authorizing the appointment of a city board of health by the state authorities was sustained.[67]

In Minnesota the legislature has the power to impose municipal taxation, for the purpose of local improvements, through the establishment of local boards, vested with authority to levy taxes for such purposes.[68]

In Missouri municipal corporations are regarded as agencies of the state for the purpose of administering local government, and are subject to legislative control.[69]

In Montana, under the constitution, the legislature cannot impose municipal taxation for municipal purposes, and the right of local self-government is recognized as within the spirit of our governmental system.[70]

a limitation upon the bill of rights; but intimated quite strongly that a provision in the city charter relating to the police board, providing that "no Black Republican, or supporter of the Helper Book, shall be appointed to any office under such Board," was void and inoperative. Baltimore *v.* State, 15 Md. 376, 484, 74 Am. Dec. 572.

64. See Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202, holding that the legislature cannot compel a city to bear the whole expense of a county building.

65. Maynard *v.* Board of Commissioners, 84 Mich. 228.

66. A statute providing for the selection of a municipal board of police commissioners from the two principal political parties represented in the city council was held unconstitutional, on the ground that it prescribed conditions for the holding of office by some citizens to the exclusion of others. People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

67. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

The selection of park commissioners for a city is local and municipal and cannot be made without the consent of the local authorities, but if such authorities ratify the acts of such commissioners after their appointment by the legislature such appointment will be sustained. People *v.* Lothrop, 24 Mich. 235.

The legislature has power to fix the salaries of municipal officers, and to change the amounts thereof during official terms, unless restrained by constitutional provisions; and it may delegate such power to the municipal authorities. Wyandotte *v.* Drennan, 46 Mich. 478, 9 N. W. 500. See also Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638, holding that the legislature may fix the salaries of city officers, unless it had delegated the power to do so to the city authorities. But Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492, holds that purely municipal business can be controlled only by the municipal authorities.

A statute authorizing a state officer to supervise the appropriation of state lands for the purpose of local improvement was held not to be an infringement upon the right of local self-government, and therefore valid. Sparrow *v.* State Land Office Com'rs, 56 Mich. 567, 23 N. W. 315.

68. Daley *v.* St. Paul, 7 Minn. 390.

69. In Missouri it has been held: (1) that an act establishing a municipal board of police was constitutional; (2) that a county was an agency of the state government; (3) that while the legislature could not take from a county its property, it could direct the mode in which the property should be used for the county's benefit. State *v.* St. Louis County Ct., 34 Mo. 546. For a provision in a city charter relative to proceedings for objections to assessments of taxes, held void as depriving of property without due process of law, see Barber Asphalt Paving Co. *v.* Ridge, 169 Mo. 376, 68 S. W. 1043.

An act imposing upon a city the expense of a stenographer of court having jurisdiction of criminal cases arising within its jurisdiction was held to be valid. Young *v.* Kansas City, 152 Mo. 661, 54 S. W. 535.

An act compelling a city to provide a building for holding court and conveniences for its officers is constitutional. State *v.* Field, 119 Mo. 593, 24 S. W. 752.

A city park was held to be owned in a quasi-private capacity, as distinguished from a political capacity, and its control held to be a matter of purely local concern. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

70. A statute requiring municipal corporations to purchase water plants only from private parties to whom they had given franchises for water-supplies was held to be a violation of a constitutional provision prohibiting municipal taxation by the state for municipal purposes, "as well as the spirit of our governmental system, which recognizes

In Nebraska statutes designed to control municipal affairs, by the establishment of local boards, vested with municipal powers, are regarded as a violation of the right of local self-government, repugnant to the bill of rights, and void.[71]

In New Hampshire municipal corporations are entirely under legislative control, and may be created or abolished by statute.[72] But they may acquire rights to private property which cannot be divested by statute.[73]

In New Jersey the legislature is held to have constitutional power to authorize local improvements and to impose municipal taxation therefor, through the establishment of local boards, vested with full control for the purpose of such improvements.[74]

In New York[75] the courts have held both ways as to the power of the legislature to control municipal affairs by the establishment of local boards.[76] The legislature may supervise municipal appointments to office by prescribing civil

'that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.'" Helena Consol. Water Co. *v.* Steele, 20 Mont. 1, 13, 49 Pac. 382, 37 L. R. A. 412.

71. In a case considered at much length, the court, although not without division, held: (1) that the right of local self-government in cities and towns antedated the constitution; (2) that the legislature was powerless to take it away without their consent; (3) that the bill of rights was not an enumeration of all of the powers reserved to the people; (4) that a statute repugnant to the rights retained by the people, expressed or implied, was unconstitutional and void; (5) that it was not essential that a statute should contravene any express provision of the constitution in order to justify the courts in declaring it invalid, and that if it was inhibited by the general scope and purpose of the fundamental law, it was as much invalid as though it was forbidden by the letter of the constitution. State *v.* Moores, 55 Nebr. 480, 76 N. W. 175, 41 L. R. A. 624.

72. Berlin *v.* Gorham, 34 N. H. 266.

A statute creating a new town out of portions of existing towns and apportioning the property between them was held to be valid, even if considered as impairing the obligation of contract. Bristol *v.* New Chester, 3 N. H. 524.

73. A statute diverting property left to a town by the legislature to the benefit of individuals was held invalid as impairing the obligation of contract within the meaning of the federal constitution. Spaulding *v.* Andover, 54 N. H. 38.

74. An act appointing commissioners to lay out streets for a township and to assess the damages therefor was held to be constitutional. State *v.* Seymour, 35 N. J. L. 47.

Municipal boards, conducting municipal business under authority of statute, are regarded as agents of the legislature. State *v.* Board of Finance, 38 N. J. L. 259. See Paterson *v.* Useful Manufactures Soc., 24 N. J. L. 385; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61, holding that municipal charters are grants of power from the legislature, and not contracts vesting rights in the municipal authorities.

75. In People *v.* Morris, 13 Wend. (N. Y.) 325, 331, the court say: "It is an unsound and even absurd proposition, that political power, conferred by the legislature, can become a vested right as against the government in any individual or body of men. It is repugnant to the genius of our institutions, and the spirit and meaning of the constitution; for by that fundamental law, all political rights not there defined, and taken out of the exercise of legislative discretion, were intended to be left subject to its regulation. If corporations can set up a vested right as against the government to the exercise of this species of power, because it has been conferred upon them by the bounty of the legislature, so may any and every officer under the government do the same."

76. The constitution of New York, unlike most of those of the other states, contains no bill of rights; but the decisions in that state on this subject are quite as conflicting as any to be found elsewhere. In People *v.* Shepard, 36 N. Y. 285; People *v.* Draper, 15 N. Y. 532, the right of the state authorities to establish municipal boards of control was maintained. But these cases have been overruled by the more recent cases of Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People *v.* Albertson, 55 N. Y. 50, both of which hold, although not without a divided court, that the right of local self-government in cities and towns cannot be impaired by statutes establishing local boards of control and prescribing qualifications for the officers of such boards, or the method by which they shall be selected. The case of Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408, may perhaps be considered as settling the question that the legislature cannot control municipal police affairs by legislation, unless it has been uniform and continuous.

An act establishing a police district court, not bounded by county, town, or city lines, conferring exclusive jurisdiction upon the justice thereof in cases mentioned, and authorizing the appointment of a local police board

service regulations,[77] and it may authorize commissioners to lay out and improve city streets, independent of the municipal authorities.[78]

In Ohio the theory of local self-government is denied, and the legislature may control municipal affairs by creating state or municipal boards, vested with full powers;[79] but its authority to prohibit municipal electors from voting for all of the candidates for local police commissioners or to control the work in the construction of a state house has been denied.[80]

In Oregon municipal corporations are subject to legislative control, and the legislature may compel them to incur indebtedness for local improvements.[81]

In Pennsylvania municipal corporations are regarded as agents of the state in the administration of municipal affairs, subject to legislative control;[82] and the doctrine of local self-government, by implied constitutional guaranty, is not recognized.

In Rhode Island the theory of local self-government, otherwise than as expressed in the state constitution, is not recognized.[83]

In Tennessee municipal franchises are public grants subject to legislative control and may be amended, modified, or revoked at the discretion of the legislature.[84]

by the state authorities was held unconstitutional. People *v.* Porter, 90 N. Y. 68.

77. Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.

78. *Re* Woolsey, 95 N. Y. 135.

An act appointing commissioners to widen a public street, and authorizing it to be done by them in a different manner from that in which the local authorities were authorized by law to do it, was held to be constitutional. People *v.* McDonald, 69 N. Y. 362.

Mandatory statute requiring towns to issue railroad-aid bonds for the benefit of a railroad whose line of construction was to intersect the towns affected was held to be unconstitutional. People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

The right of the legislature to impose municipal taxation when in its judgment the purpose is a public one in which the municipality has an interest is asserted in Duanesburg *v.* Jenkins, 57 N. Y. 177.

An act authorizing assessment for the improvement of a street was held to be constitutional. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

A franchise to a municipal corporation to maintain a ferry was held to be *publici juris* as to the rights of passengers and *privati juris* as a source of revenue, a contract within the protection of the federal constitution, and also a vested right not to be taken away by the legislature. Benson *v.* New York, 10 Barb. (N. Y.) 223.

An act making municipal corporations liable for the destruction of property by mobs within their limits was held to be constitutional. Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248.

79. State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; State *v.* Covington, 29 Ohio St. 102. But an act creating a board to direct the work in the building of a state-house was held to be invalid. State *v.* Kennon, 7 Ohio St. 546.

80. State *v.* Constantine, 42 Ohio St. 437, 51 Am. Rep. 833. See also Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

81. Mandatory statute requiring a city to purchase bridges and ferries within its limits, to maintain them as public thoroughfares, and to levy taxes therefor, was held to be constitutional. Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171. But a statute requiring a county to pay the debt of a city within its limits is invalid. An act granting the use of public property of a city to a railroad for railroad purposes was held to be valid. Portland, etc., Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

82. Philadelphia *v.* Fox, 64 Pa. St. 169.

The legislature may compel municipal corporations to maintain bridges as public highways within their limits, but cannot exercise the same power with reference to quasi-public corporations. Erie *v.* Erie Canal Co., 59 Pa. St. 174.

The right of local self-government is not a right derived from the principles of the common law, and the constitutionality of a statute must be determined from express constitutional provisions, and not by reference to any system of general principles of natural right or justice. Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759. See also Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801.

83. A statute authorizing the appointment of a municipal police board by the governor was held not to be an interference with local self-government and therefore valid; also that an unwritten theory of local self-government did not enter into the provisions of the state constitution. Newport *v.* Horton, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330.

84. Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495. An act creating municipal corporations and conferring municipal powers upon a legislative council, one half of

In Vermont the rights and franchises of municipal corporations are held not to vest as against the state.[85]

In Wisconsin[86] the legislature cannot extend the terms of office of municipal officers beyond the official terms for which they have been elected by municipal authority,[87] or compel municipal taxation for public purposes that are not local and municipal.[88]

The United States courts do not recognize the doctrine of local self-government further than it is guaranteed in express constitutional provisions.[89]

F. Persons Entitled to Raise Constitutional Questions — 1. In General. It is a firmly established principle of law that no one can be allowed to attack a statute as unconstitutional who has no interest in it and is not affected by its provisions.[90]

the members thereof to be appointed by the state authorities for a prescribed term, and all members to be elected after the expiration of the first term, was held to be constitutional. Luehrman *v.* Shelby County Taxing Dist., 2 Lea (Tenn.) 425.

85. So far as public municipal franchises or their exercise are concerned the legislature may enlarge, restrain, exclusively control, or abolish them. Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 784.

The right of land in said town, for the benefit of schools, is, by the charter, placed under the care of the inhabitants of the town, without reference to their being owners of the soil, or original grantees. And the legislature can exercise no power over it, to vary the appropriation, without the consent of the town. Poultney *v.* Wells, 1 Aik. (Vt.) 180.

But the contrary has been held with reference to the right of a town, under its charter, to land for the benefit of schools. Thus an act authorizing an agent appointed by county authority to purchase spirituous liquors at the expense of a town, to be sold as its agent, without the consent of the town, express or implied, was held to be unconstitutional. Atkins *v.* Randolph, 31 Vt. 226.

86. **An act extending the limits of a city so as to include land owned by an adjoining town** was held to be invalid, although the right of the legislature to repeal the municipal charters and apportion the property was conceded. Milwaukee *v.* Milwaukee, 12 Wis. 93.

87. O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831. See also State *v.* Hamilton, 88 Wis. 135, 59 N. W. 593.

88. A statute to compel a city to reimburse its treasurer for soldiers' bounties, paid by him under mistake, was held to be unconstitutional. State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622. See also Hasbrouck *v.* Milwaukee, 13 Wis. 38, 80 Am. Dec. 718, holding a statute ratifying a municipal appropriation for local improvements in excess of the limit prescribed insufficient in the absence of municipal consent to such statute. And to the same effect are Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578; Fisk *v.* Kenosha, 26 Wis. 23.

The legislature cannot divert funds raised by municipal taxation for a particular purpose to another purpose of the same general character without the consent of the municipal authorities. Thus money raised by municipal taxation to erect a building for a high school cannot be used by the state in the construction of a building for a normal school against the will of the inhabitants who have raised the money. State *v.* Haben, 22 Wis. 660.

89. "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." Per Brewer, J., in Williams *v.* Eggleston, 170 U. S. 304, 310, 18 S. Ct. 617, 42 L. ed. 1047. See also Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 18 S. Ct. 617, 25 L. ed. 699; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650. It is only where a statute purporting to exercise police powers has no real or substantial relation to the protection of the public health, safety, peace, and morals, or is a palpable invasion of the rights secured by the fundamental law, that the courts will declare it void. Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512.

A local regulation, under which taxes are imposed, should not be held by the United States courts to be inconsistent with the federal constitution, unless that conclusion is unavoidable. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 877, 43 L. ed. 823.

90. *Alabama.*—Shehane *v.* Bailey, 110 Ala. 308, 20 So. 359; Jones *v.* Black, 48 Ala. 540.

District of Columbia.— U. S. *v.* Marble, 3 Mackey (D. C.) 32.

Florida.— Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

Georgia.— Deal *v.* Singletary, 105 Ga. 466, 30 S. E. 765; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

Idaho.— McGinniss *v.* Davis, (Ida. 1901) 65 Pac. 364.

Indiana.—Wilkinson *v.* Board of Childrens' Guardians, 158 Ind. 1, 62 N. E. 481; Gallup *v.* Schmidt, 154 Ind. 196, 54 N. E. 384, 56 N. E. 443; Pittsburg, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Switzerland County *v.* Reeves, 148 Ind. 467, 46 N. E. 995.

Kansas.— State *v.* Smiley, 65 Kan. 240, 69 Pac. 199; Kansas City *v.* Union Pac. R. Co., 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321.

This rule applies to all cases both at law and in equity,[91] and is equally applicable in both civil and criminal proceedings. All constitutional inhibitions against the taking of private property without due process of law and all constitutional guaranties of equal rights and privileges are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons.[92]

2. CITIZENS. Citizens are not entitled to treat an unconstitutional statute as without the color of authority.[93]

3. CREDITORS. Creditors will not be allowed to question a statute's validity [94]

Kentucky.— Com. *v.* Wright, 79 Ky. 22, 42 Am. Rep. 203; Marshall *v.* Donovan, 10 Bush (Ky.) 681.

Louisiana.— State *v.* Lanier, 47 La. Ann. 568, 17 So. 130.

Maine.— Williamson *v.* Carlton, 51 Me. 449.

Mississippi.—Dejarnett *v.* Haynes, 23 Miss. 600.

Missouri.— Cunningham *v.* Current River R. Co., 165 Mo. 270, 65 S. W. 556.

Nebraska.— State *v.* Stevenson, 18 Nebr. 416, 25 N. W. 585.

North Dakota.— State *v.* Donovan, 10 N. D. 203, 86 N. W. 709; State *v.* McNulty, 7 N. D. 169, 73 N. W. 87.

Ohio.— Reeves *v.* Griffin, 4 Ohio S. & C. Pl. Dec. 461.

South Dakota.— State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

Virginia.— Antoni *v.* Wright, 22 Gratt. (Va.) 833.

Wisconsin.— State *v.* Currens, 111 Wis. 431, 87 N. W. 561.

United States.— Red River Valley Nat. Bank *v.* Craig, 181 U. S. 548, 21 S. Ct. 703, 45 L. ed. 994; Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84; U. S. *v.* Moriarty, 106 Fed. 886; Mason *v.* Rollins, 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252; Duer *v.* Small, 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116, 7 Am. L. Reg. 500, 17 How. Pr. (N. Y.) 201.

See 10 Cent. Dig. tit. "Constitutional Law," § 39.

91. Courts of chancery have no powers to examine statutes generally to determine their constitutionality, or to restrain their enforcement, except in the course of judicial administration, in cases in which some constitutional right can be shown to be violated. Gibbs *v.* Green, 54 Miss. 592.

Equity will not enjoin the enforcement of an alleged unconstitutional statute unless the complainant can show that his personal or property rights will be prejudiced by the enforcement of such statute. Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181, holding that the right to have a license issued to sell spirituous liquors is not a property right, and dismissing petition to restrain enforcement of a statute inhibiting the issue of such licenses. See also Burnside *v.* Lincoln County Ct., 86 Ky. 423, 9 Ky. L. Rep. 635, 6 S. W. 276, denying petition to obtain a license to sell spirituous liquors, refused upon the casting of a prohibitory vote under a local option act.

A petition to restrain the enforcement of the internal revenue act requiring bonds to be given as a condition precedent to doing business, and prescribing limits for location of distilleries was dismissed, no injury to petitioner being shown. Mason *v.* Rollins, 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

92. *Idaho.*—The validity of a revenue statute was not passed upon where the attacking party failed to show that he had been injured by it. McGinniss *v.* Davis, (Ida. 1901) 65 Pac. 364.

Indiana.— Where a bill of rights provided that no man's particular services should be demanded without compensation, it was held that the validity of a statute requiring members of a board of guardians for children to serve without compensation could not be questioned in proceedings by such board to obtain custody of the children. Wilkinson *v.* Board of Childrens' Guardians, 158 Ind. 1, 62 N. E. 481.

Louisiana.— Where a statute was passed purporting to deal with one's property, but not taking it, imposing obligations upon its owner, or subjecting him to trouble or expense, except so far as was voluntarily incurred, it was held that he acquired no rights under such statute which entitled him to question the power of the legislature to repeal it. Hays *v.* New Orleans, 34 La. Ann. 311.

Michigan.— The constitutionality of statute affecting municipal corporations cannot be questioned by persons not representing such corporations. Carlisle *v.* Saginaw, 84 Mich. 134, 47 N. W. 444.

New York.— A constitutional inhibition against taking private property without due process of law was held to be for the benefit of property-owners only. People *v.* Turner, 49 Hun (N. Y.) 466, 2 N. Y. Suppl. 253, 18 N. Y. St. 26.

See 10 Cent. Dig. tit. "Constitutional Law," § 39.

93. State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

94. Smith *v.* Inge, 80 Ala. 283.

A municipal corporation may attack the validity of a statute under which it has issued bonds, although the provision alleged to render such statute unconstitutional was for its benefit. Loeb *v.* Columbia Tp., 91 Fed. 37.

Under a constitutional provision prohibit-

where their rights are unaffected by it, and this rule applies to sales of property of debtors on credit.[95]

4. Officers. By the weight of authority, ministerial officers cannot contest the constitutionality of a statute as a defense in proceedings against them for disobeying its mandates.[96] But the contrary has been held so far as proceedings to enforce the performance of such a statute is concerned.[97]

5. Parties to Contracts and Persons Injured. The same rules apply to statutes impairing the obligation of contracts. Only those whose rights are invaded by such statutes are entitled to question their validity.[98] Not only must the party attacking the validity of a statute on the ground that it impairs the obligation of the contract be able to show that he has been injured by the infraction, but he must be a party to the contract, the obligation of which he alleges to be impaired, or he will not be heard to complain.[99]

6. In Criminal Proceedings. In all criminal prosecutions the accused, to entitle him to raise the question of the constitutionality of a statute, must show that his rights are affected by it,[1] and when this is done he will be allowed to question

ing the legislature from extinguishing or diminishing individual or corporate indebtedness to the state or to municipal corporations, it was held that a city was entitled to attack the validity of a statute of limitation barring the collection of taxes assessed by it. Oliver *v.* Houston, 22 Tex. Civ. App. 55, 54 S. W. 940.

95. Small *v.* Hodgen, 1 Litt. (Ky.) 16. See also *infra*, IV, F, 9, i.

In proceedings to contest the validity of a statute applying to executions issued on judgments it must be shown that such executions were issued on judgments of the class named in the statute. Stevens *v.* Stevens, 4 T. B. Mon. (Ky.) 524.

96. U. S. *v.* Marble, 3 Mackey (D. C.) 32.

Election inspector, indicted for stating the result of an election contrary to statute was held not to be entitled to contest the validity of such statute in defense. Hall *v.* People, 90 N. Y. 498.

In proceedings to enjoin the removal of an officer by a municipal board, the constitutionality of a statute creating such board cannot be questioned. Reeves *v.* Griffin, 4 Ohio S. & C. Pl. Dec. 461.

97. Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365, holding that a ministerial officer, on whom a duty is imposed by statute, may deny the validity of such statute in proceedings to compel the performance of such duty.

Officers de facto, acts of, as to the rights of the public are valid. State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

98. State *v.* New Orleans, 32 La. Ann. 726; New Orleans Canal, etc., Co. *v.* New Orleans, 12 La. Ann. 364. Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047 [*affirming* 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465]; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569; Coffin *v.* Portland, 27 Fed. 412.

99. *Alabama.*— Smith *v.* Inge, 80 Ala. 283.

Connecticut.— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Georgia.— Padelford *v.* Savannah, 14 Ga. 438.

Indiana.— Currier *v.* Elliot, 141 Ind. 394, 39 N. E. 554.

Kentucky.— Sullivan *v.* Berry, 83 Ky. 198, 4 Am. St. Rep. 147.

New Jersey.— State *v.* Essex County, 45 N. J. L. 504.

Pennsylvania.— Craig *v.* Pittsburg First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

United States.—Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569.

See 10 Cent. Dig. tit. "Constitutional Law," § 39.

1. *Kansas.*— State *v.* Smiley, 65 Kan. 240, 69 Pac. 199.

Kentucky.— Com. *v.* Porter, 24 Ky. L. Rep. 364, 68 S. W. 621.

Missouri.—The validity of a statute requiring a deposit to be made on an application for change of venue, to be paid to the court trying the case if the application is granted, cannot be questioned by a person indicted, on the ground of conflict with the constitutional inhibition against changes in the salaries of officers during terms of office. Cunningham *v.* Current River R. Co., 165 Mo. 270, 65 S. W. 556. The validity of a statute requiring that barbers be licensed by a state board appointed by the governor on the recommendation of the barbers' protective association cannot be attacked by defendant in a prosecution for pursuing the trade of a barber without such license, since only the governor can raise such a question. *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218.

North Dakota.— Search warrant, defendant in, cannot plead the invalidity of statute under which it was issued, on the ground that it authorizes the unlawful seizure of the

only such provisions of the statute as apply to his own rights as distinguished from other rights.[2]

7. With Respect to Statutes Affecting Title to Realty — a. In General. The constitutionality of a statute affecting the title to real estate cannot be questioned by those who have no interest in such real estate.[3]

b. Relating to Condemnation For Public Use. In all proceedings under statutes authorizing the condemnation of real estate taken for public use, the constitutionality of such statutes can be questioned only by persons having an interest in the real estate affected.[4]

property of others than himself. State *v.* McNulty, 7 N. D. 169, 73 N. W. 87.

Ohio.— Where a statute allowed municipal corporations to prohibit the sale of spirituous liquors upon condition that they return to the liquor-dealers a ratable portion of the taxes paid by them for the unexpired portion of the year, it was held that one convicted of illegal sales in violation of a municipal ordinance passed in accordance with such statute could not question the validity of the statute, because it did not provide a fund out of which the ratable portion of the tax for the unexpired term could be paid. State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59; Van Wert *v.* Brown, 47 Ohio St. 477, 25 N. E. 59.

Rhode Island.—Where the evidence fails to show a violation of the statute the accused cannot question its constitutionality. State *v.* Taft, 20 R. I. 645, 40 Atl. 758; State *v.* Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428. Nor can one prosecuted under one part of a statute be allowed to plead the invalidity of another independent portion of the same statute. State *v.* Snow, 3 R. I. 64. The validity of a statute prescribing what shall be *prima facie* evidence of a common nuisance in prosecutions for illegal sales of spirituous liquors will not be considered where it did not appear that defendant was not convicted upon the fullest and most direct evidence required by the common law. State *v.* Paul, 5 R. I. 185.

South Carolina.— One indicted for selling spirituous liquor contrary to an act prohibiting all such sales by individuals, and granting to the state the exclusive right to sell such liquors, can question the validity of only that portion of the act prohibiting such sales by individuals. State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39.

United States.— In criminal proceedings against a census enumerator for making a false return, under an act of congress requiring him to obtain information relating to manufactories, he was held not to be entitled to plead the unconstitutionality of such act, on the ground that it authorized the taking of private property without compensation. U. S. *v.* Moriarty, 106 Fed. 886.

See 10 Cent. Dig. tit. "Constitutional Law," § 39.

2. The exclusion of women from a jury in a criminal proceeding, if unconstitutional, cannot be pleaded by a man convicted of crime; his rights are not invaded, and only a woman convicted can raise such a question. McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. See State *v.* Bixman, 162 Mo. 1, 62 S. W. 828, holding that one convicted of selling uninspected beer manufactured in the state, in violation of statute, could not question the validity of such statute with reference to imported beer. See also State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664.

3. The right of state to grant lands of Indians is a political question, and cannot be considered in proceedings between citizens, neither of whom derives title from the Indians. Jackson *v.* Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500.

An act vesting lands escheated to the state, upon alienage of heirs, in widow of decedent, cannot be questioned by strangers having no legal title to the inheritance. Den *v.* McKeon, 24 N. J. L. 566.

Remainder-men, validity of statutes affecting title of, cannot be questioned by strangers. Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543.

The validity of a statute admitting to probate an unattested will of a person deceased, without heirs, cannot be contested by the public administrator. *In re* Sticknoth, 7 Nev. 223.

A vendee of real estate, in a suit by a corporation for the purchase-price, cannot question the validity of an act directing the land to vest in such corporation, after a conveyance to trustees and notice from trustees not to pay. Fox *v.* Union Academy, 6 Watts & S. (Pa.) 353.

4. Switzerland County *v.* Reeves, 148 Ind. 467, 46 N. E. 995.

As to condemnation proceedings generally see EMINENT DOMAIN.

In proceedings by a state to restrain a railroad company from operating its road, the constitutionality of a statute alleged to impair the obligation of a contract with reference to land cannot be raised unless the landowners are before the court as parties to such proceedings. People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

The validity of an act declaring a river a public highway, without making provision for compensation to the riparian owners, can be questioned only by such owners. An action by a town for damages cannot be maintained. Pierrepont *v.* Loveless, 72 N. Y. 211.

The validity of a statute condemning land taken for a cemetery, without making any provision for damages to land from which

8. With Respect to Discriminations. The denial of equal rights and privileges by discriminating legislation can be pleaded only by those who can show that they belong to the class discriminated against. This has been held in numerous cases, and the rule applies to all cases affecting civil rights of every kind, and to all cases in which property rights only are affected.[5] White persons cannot question the validity of statutes imposing taxation upon colored persons, where the latter are not allowed to vote upon the question of such taxation,[6] nor can white persons contest the validity of statutes excluding colored persons from serving as jurors.[7]

9. Estoppel or Waiver — a. In General. A person may, by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution;[8] and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition.[9] This rule is of universal application in civil proceedings, and also in many crimi-

that condemned is taken. was held not to be subject to question by persons failing to show that they had other land than that taken. Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271.

The validity of a statute declaring a turnpike to be a highway, and authorizing assessment of damages for the taking thereof to be made by commissioners, to be paid by counties, cannot be questioned by such counties in proceedings affecting such assessments as against towns and abutting owners. Hingham, etc., Bridge, etc., Corp. *v.* Norfolk, 6 Allen (Mass.) 353.

A party whose land has been assessed for widening of a street may question the constitutionality of a statute authorizing. Aster *v.* New York, 37 N. Y. Super. Ct. 539.

5. Kansas City *v.* Union Pac. R. Co., 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321, holding valid an act authorizing the extension of city limits over adjoining lands, except agricultural, and denying the right of parties having no interest in such statute to question its validity.

As to civil rights generally see Civil Rights, 7 Cyc. 158.

Where the right to a certificate to practise medicine without passing an examination depended upon a statute, it was held that the applicant could not question the validity of such statute. State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

Neither a railroad company nor its receiver can question a claim set up as preferred, on the ground that the act giving such claim a preference discriminates against citizens of other states. Brown *v.* Ohio Valley R. Co., 79 Fed. 176.

Nor can a private corporation whose rights are not affected by an act be allowed to plead its invalidity in behalf of municipal corporations. Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301. See also Carlisle *v.* Saginaw, 84 Mich. 134, 47 N. W. 444, denying the right of persons not representing municipal corporations to question the validity of statutes affecting the rights of such corporations.

The validity of statutes imposing assessments of taxes upon non-residents according to their business interests represented in the state, and authorizing the collection of their personal tax from resident firms of which they were members, cannot be questioned alone by the non-resident members of such firms. Duer *v.* Small, 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116, 7 Am. L. Reg. 500, 17 How. Pr. (N. Y.) 201.

6. Norman *v.* Boaz, 85 Ky. 557, 9 Ky. L. Rep. 127, 4 S. W. 316; Eakins *v.* Eakins, 14 Ky. L. Rep. 562, 20 S. W. 285. See also Reid *v.* Eatonton, 80 Ga. 755, 6 S. E. 602, refusing an injunction to restrain the sale of school bonds, on application of white persons, on the ground of discrimination against colored persons.

Electors whose constitutional rights are alleged to be infringed upon by an election law may maintain an action to contest it. Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

Person, if entitled to register to vote, and who fails to show that he was ever registered, or that he ever made application to be registered, cannot question the validity of a statute prescribing conditions for registering of voters. Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84.

7. The validity of a statute excluding colored persons from serving upon juries cannot be questioned by white persons. Haggard *v.* Com., 79 Ky. 366; Com. *v.* Wright, 79 Ky. 22, 42 Am. Rep. 203. But such a statute will be held to be invalid on the application of colored persons who have been tried by juries composed exclusively of white persons. Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664.

The exclusion of women from serving as jurors, if unconstitutional, is not subject to question by a male defendant convicted of crime. McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710.

8. Pierce *v.* Somerset R. Co., 171 U. S. 641, 19 S. Ct. 64, 43 L. ed. 316.

9. Pleading, in bar to an indictment, was held to be a waiver of the right to object to

nal prosecutions where only the party waiving his constitutional privilege is concerned.[10] In cases of misdemeanor, the consent of the accused to the trial by less than twelve jurors is valid and binding upon him;[11] but the rule is otherwise in capital cases,[12] and also in cases of felony, unless the constitution allows a trial by less than twelve jurors in express terms.[13] But statutes permitting defendants in criminal prosecutions for misdemeanors to elect to be tried by the court instead of by a jury are valid.[14]

b. By Individuals. A waiver of a constitutional provision precludes the party waiving it from afterward claiming protection under it,[15] even though it was adopted solely for his benefit;[16] and such a waiver is binding as to both past and future transactions.[17]

c. By Officers. Officers who act under a statute are not entitled to plead that such statute is unconstitutional in proceedings against them for official misconduct,[18] nor is such a plea available in suits against them to recover moneys received by them in the course of their official duty.[19] The same rule has been

the constitutionality of a law by which the grand jury was made up. U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

An officer receiving money for acts done under a law cannot attack its constitutionality. People *v.* Bunker, 70 Cal. 212, 11 Pac. 703.

10. Giving samples of milk to a health officer gratuitously, in accordance with a city ordinance, was held to be an estoppel to the plea that such ordinance was unconstitutional. State *v.* Stone, 46 La. Ann. 147, 15 So. 11.

Accepting and acting under a license to sell spirituous liquors as a common victualer was held to be an estoppel to the plea that defendant was not a duly licensed common victualer in a criminal prosecution for a violation of the terms of such license. Com. *v.* Rourke, 141 Mass. 321, 6 N. E. 383. See also People *v.* Bunker, 70 Cal. 212, 11 Pac. 703; U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

11. *Alabama.*— Connelly *v.* State, 60 Ala. 89, 31 Am. Rep. 34.

Iowa.— State *v.* Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148; State *v.* Polson, 29 Iowa 133.

Kentucky.—Murphy *v.* Com., 1 Metc. (Ky.) 365.

Massachusetts.— Com. *v.* Dailey, 12 Cush. (Mass.) 80.

Minnesota.— State *v.* Sackett, 39 Minn. 69, 38 N. W. 773.

Nevada.— State *v.* Borowsky, 11 Nev. 119.

Wisconsin.— State *v.* Currens, 11 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

See 10 Cent. Dig. tit. "Constitutional Law," § 41.

12. Murphy *v.* State, 97 Ind. 579; State *v.* Carman, 63 Iowa 130, 18 N. W. 691, 50 Am. Rep. 741.

13. *Illinois.*— Harris *v.* People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153.

Indiana.— Allen *v.* State, 54 Ind. 461; Brown *v.* State, 16 Ind. 496; Brown *v.* State, 8 Blackf. (Ind.) 561.

Kentucky.— Tyro *v.* Com., 2 Metc. (Ky.) 1; Murphy *v.* Com., 1 Metc. (Ky.) 365.

Michigan.— Swart *v.* Kimball, 43 Mich. 443, 5 N. E. 635; Hill *v.* People, 16 Mich. 351.

Minnesota.—State *v.* Everett, 14 Minn. 439.

Mississippi.— Dowling *v.* State, 5 Sm. & M. (Miss.) 664; Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520.

Missouri.— State *v.* Davis, 66 Mo. 684, 27 Am. Rep. 387; State *v.* Mansfield, 41 Mo. 470; Vaughan *v.* Scade, 30 Mo. 600.

Montana.— Kleinschmidt *v.* Dunphy, 1 Mont. 118.

New Hampshire.— Opinion of Justices, 41 N. H. 550.

New York.— Cancemi *v.* People, 18 N. Y. 128.

North Carolina.— State *v.* Stewart, 89 N. C. 563.

Ohio.— Williams *v.* State, 12 Ohio St. 622; Work *v.* State, 2 Ohio St. 296, 59 Am. Dec. 671.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

Virginia.— Mays *v.* Com., 82 Va. 550.

Wisconsin.— State *v.* Lockwood, 43 Wis. 403.

See 10 Cent. Dig. tit. "Constitutional Law," § 41.

14. State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27; Edwards *v.* State, 45 N. J. L. 419; Dillingham *v.* State, 5 Ohio St. 280.

15. Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

16. Baker *v.* Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387.

17. New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494, 60 N. Y. St. 352, holding that a waiver of an objection to payment in accordance with the provision of an unconstitutional statute was operative as to the past and the future.

18. Police officers, on trial for official misconduct, cannot attack the validity of a statute authorizing the destruction of property (Newman *v.* People, 23 Colo. 300, 47 Pac. 278) or the validity of the statute under which they hold office (Dodd *v.* Board of Police Com'rs, 56 N. J. L. 258, 28 Atl. 311).

19. A sheriff, in a suit against him to compel the payment of a school tax to a school-

held to apply in the case of a defendant who was charged with an attempt to bribe an officer.[20]

d. By Corporations. Where corporations have been organized which proceed to do business under the provisions of a statute, and receive benefits under it, they cannot be heard to allege that such a statute is unconstitutional.[21] The laws under which corporations organize become a part of their charters and are binding upon them.[22]

e. By the Government. The doctrine of waiver and estoppel applies to acts of the government the same as in other cases. Thus where the state made a statute passed by its legislature the basis of a suit, it was held that it was not entitled to question the constitutionality of the statute.[23]

f. Assent to Taking Private Property For Public Use. Property-owners who assent to the taking of their property for public use, under statutes authorizing it to be so taken, are estopped to deny the constitutionality of such statutes.[24] And those who proceed to condemn property under such statutes are estopped[25] to

board, in accordance with statute, cannot defeat recovery by setting up the invalidity of such statute. Board of Education *v.* Kenan, 112 N. C. 566, 17 S. E. 485. The same rule applies to a prosecuting attorney collecting delinquent taxes, and attempting to retain attorney's fees out of the same. Spokane County *v.* Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830. See also People *v.* Bunker, 70 Cal. 212, 11 Pac. 703.

20. A person charged with an attempt to bribe officer cannot collaterally attack the statute creating the office and providing for the method of filling it. State *v.* Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660.

21. *Iowa.*— Gano *v.* Minneapolis, etc., R. Co., 114 Iowa 713, 87 N. W. 714, 87 Am. St. Rep. 393, 55 L. R. A. 263.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69.

Maryland.— State *v.* Baltimore, etc., R. Co., 34 Md. 344.

New York.— New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494, 60 N. Y. St. 352.

Wisconsin.— Madison, etc., Plank Road Co. *v.* Reynolds, 3 Wis. 287.

22. Alabama, etc., R. Co. *v.* Odeneal, 73 Miss. 34, 19 So. 202. See also, generally, CORPORATIONS.

An acceptance of a charter by a corporation with a provision authorizing summary proceedings against it was held to be an estoppel to the plea that such provision was unconstitutional. Nolensville Turnpike Co. *v.* Quinby, 8 Humphr. (Tenn.) 476.

But the continuance of a foreign corporation to do business after the enactment of an unconstitutional statute imposing conditions upon it is not an implied assent to such conditions. San Francisco *v.* Liverpool, etc., Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425.

As to proceedings by quo warranto see *infra*, IV, F, 9, i, (IV).

23. State *v.* Board of Liquidators, 28 La. Ann. 121. So where the government continued for a long time without objection to pay bounties to the manufacturers of sugar, after the repeal of the law authorizing the payment of such bounties, it was held that the equitable obligation of the government to pay such bounties was not affected by the constitutionality of such law. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

An illegal eviction by a state of a lessee of public works, under an invalid statute, was held to be binding upon the state, and the lessee entitled to surrender the leased premises. State *v.* Public Works, 7 Ohio Dec. (Reprint) 446, 3 Cinc. L. Bul. 265.

But the state, in proceedings by quo warranto to try title to a corporate franchise, may question the constitutionality of a statute. Atty.-Gen. *v.* Perkins, 73 Mich. 303, 41 N. W. 426. As to proceedings by quo warranto see *infra*, IV, F, 9, i, (IV).

And a county may impeach the validity of its bonds, issued in violation of constitutional provisions. Sutliff *v.* Lake County, 147 U. S. 230, 13 S. Ct. 318, 37 L. ed. 145; Dixon County *v.* Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. ed. 360.

24. Haskell *v.* New Bedford, 108 Mass. 208; Columbus *v.* Sohl, 44 Ohio St. 479, 8 N. E. 299; State *v.* Mitchell, 31 Ohio St. 592; Walker *v.* Charleston, 1 Bailey Eq. (S. C.) 443; Minneapolis, etc., R. Co. *v.* Nester, 3 N. D. 480, 57 N. W. 510.

As to condemnation proceedings generally see EMINENT DOMAIN.

Landowners having notice of proceedings under a statute to perfect drainage, making no objection thereto, and taking no appeal therefrom, waive their right to question the constitutionality of such statute, in proceedings to compel payment of assessments for the expense incurred. *In re* Tuthill, 50 N. Y. Suppl. 410.

25. A railroad company taking land under a statute authorizing condemnation proceedings cannot attack the validity of such statute on the ground that it imposes the payment of costs and attorney's fees as a condition to the exercise of the power granted. Gano *v.* Minneapolis, etc., R. Co., 114 Iowa 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55

deny their validity. So the right to compensation for property taken for public use may be waived by the owners from whom it is taken, and such assent may be implied from the acts of the parties.[26]

g. Assent to Taxation. Those who participate in proceedings to levy a tax for the purpose of local improvements,[27] or for any purpose from which they expect to be benefited,[28] cannot attack the validity of the tax levied in pursuance of such proceedings; but those who do not participate in such proceedings may contest the validity of such taxation.[29] Demanding or receiving taxes assessed under an unconstitutional statute limits all claims of the demanding party to the taxes so received or demanded.[30] And tax-collectors and their sureties are liable for taxes collected under invalid statutes, although no liability would attach if no collections were made.[31]

h. Procuring Enactment of Legislation. Those who procure the enactment of a statute, acquiesce in, ratify, or approve of it, or receive benefits under it, may become estopped from denying its constitutionality,[32] although it may be

L. R. A. 263. See also People *v.* Murray, 5 Hill (N. Y.) 468; Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

And for the application of the same rule to a municipal corporation see Roanoke City *v.* Berkowitz, 80 Va. 616.

26. Haskell *v.* New Bedford, 108 Mass. 208; Brown *v.* Worcester, 13 Gray (Mass.) 31; Hildreth *v.* Lowell, 11 Gray (Mass.) 345; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; *In re* Albany St., 11 Wend. (N. Y.) 149, 25 Am. Dec. 618.

27. Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438 [*distinguished* in Columbus *v.* Sohl, 44 Ohio St. 479, 8 N. E. 299].

Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, as against one who purchased, in the open market and on the advice of counsel, bonds which such assessments, if valid, would be used to pay, merely because they or some of them had secured the passage of the act providing for the improvement, had participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid. O'Brien *v.* Wheelock, 184 U. S. 450, 22 S. Ct. 354, 46 L. ed. 636 [*affirming* 95 Fed. 883, 37 C. C. A. 309].

License-tax.— Receiving a license, and giving a bond to perform the conditions thereof, in accordance with a statute, was held to be an estoppel to the plea that such statute was in violation of the interstate commerce laws. Ficklen *v.* Shelby County Taxing Dist., 145 U. S. 1, 12 S. Ct. 810, 36 L. ed. 601 [*distinguishing* Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694].

The validity of a special tax cannot be questioned by those who have petitioned for the passage of an ordinance authorizing its levy. Dupre *v.* Board of Police, 42 La. Ann. 802, 8 So. 593; Andrus *v.* Board of Police, 41 La. Ann. 697, 6 So. 603, 17 Am. St. Rep. 411, 5 L. R. A. 681.

28. Where, in anticipation of a draft, a portion of the inhabitants of a county at a meeting resolved in favor of borrowing money to pay bounties to volunteer soldiers, took part in borrowing money for such purpose, and in obtaining legislation authorizing the levy of a tax to reimburse the same, it was held that all who participated in such proceedings or ratified the same were estopped to deny the constitutionality of the law enacted, but as to all others such law was unconstitutional. Ferguson *v.* Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350.

29. Counterman *v.* Dublin Tp., 30 Ohio St 515, holding that a taxpayer who had knowledge of the efforts made to obtain the passage of an act authorizing an assessment for improvements, but taking no part therein, was not estopped to deny the constitutionality of such act. See also Tone *v.* Columbus, 39 Ohio St. 281, 48 Am. Rep. 438.

30. A city demanding and receiving, during a period of years, taxes assessed under an unconstitutional statute is not entitled to claim additional assessments during such years, on the ground that such statute is unconstitutional, and the recovery of judgment by it for such taxes, in a suit in which the validity of the statute is not questioned, does not estop the successful party from pleading the invalidity of such statute in subsequent litigation between the same parties. Philadelphia *v.* Ridge Ave. R. Co., 142 Pa. St. 484, 28 Wkly. Notes Cas. (Pa.) 106, 21 Atl. 982.

31. Wilson *v.* State, 1 Lea (Tenn.) 316; Chandler *v.* State, 1 Lea (Tenn.) 296.

32. Ferguson *v.* Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350.

An agreement by a party to abide the result of legislative action estops him from denying the validity of a statute destroying his claim. Walker *v.* Tipton, 3 Dana (Ky.) 3.

An exclusive ferry privilege within prescribed limits, the owner of which consents to the charter of a bridge company within such limits, is estopped to deny the constitutionality of such charter as impairing the obligation of the contract in the ferry grant. Morey *v.* Orford Bridge, Smith (N. H.) 91.

invalid as to others. This rule of estoppel does not, however, apply to voters in elections held under such statutes.[33]

i. Participating in Judicial Proceedings — (i) *In General.* A person may waive his constitutional rights by taking part, without objection, in judicial proceedings. In civil proceedings the acts of the parties to the litigation which by fair inference acknowledge the validity of a statute are binding, and will preclude such parties from attacking such statute as unconstitutional.[34] Instituting proceedings to enforce a right estops the plaintiff from denying the jurisdiction of the court in which he brings suit,[35] and the acceptance by parties in interest of emoluments to which they are entitled, and which are obtained through judicial proceedings to which they are not parties, also estops the parties so accepting from denying the jurisdiction of the court in which such proceedings were instituted.[36]

(ii) *Giving Bonds.* The giving of a bond conditioned to perform an undertaking in the course of judicial proceedings, in accordance with statutory provisions,[37] or the bringing suit for a breach of the condition of bonds so given,[38] will preclude the parties to the litigation from attacking the constitutionality of a statute authorizing such bonds to be given. But a surety merely may attack such a statute after default of his principal.[39]

(iii) *Proving Claims and Accepting Dividends.* The authorities are not agreed as to whether the proving by creditors of debts contracted prior to the

Special legislation.— Those who procure the enactment of such for their own benefit, cannot question its constitutionality. Chappell *v.* Doe, 49 Ala. 153; Brown County Treasurer *v.* Martin, 50 Ohio St. 197, 33 N. E. 1112.

33. The election of members of the legislature under an unconstitutional apportionment act does not estop the people from contesting the validity of the act before the succeeding election. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726. Nor does voting under an unconstitutional statute authorizing taxation estop the voter from denying the validity of such statute. Greencastle Tp. *v.* Black, 5 Ind. 557.

34. A failure to plead that a statute is unconstitutional in a suit on a bond given under it to dissolve an attachment on a vessel, and the entering into an agreement recognizing the validity of the statute by fair inference was held to be an estoppel to the plea that such a statute infringed upon the exclusive admiralty jurisdiction of the United States. Vose *v.* Cockcroft, 44 N. Y. 415. See also *In re* Tuthill, 50 N. Y. Suppl. 410; People *v.* Murray, 5 Hill (N. Y.) 468; Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

Pleading a former recovery in bar of an action was held to be an estoppel in a subsequent proceeding to impeach the validity of the judgment formerly recovered. Clay *v.* Buchanan, 69 Iowa 88, 28 N. W. 449.

A party procuring a judicial sale to be made cannot deny the validity of the law authorizing it. Hansford *v.* Barbour, 3 A. K. Marsh. (Ky.) 515.

Judgment creditors participating in execution sales on credit of their creditors' property cannot question the constitutionality of the statute authorizing such sales. Neilson *v.* Churchill, 5 Dana (Ky.) 333; McKinney *v.* Carroll, 5 T. B. Mon. (Ky.) 96; Chitty *v.* Glenn, 3 T. B. Mon. (Ky.) 424; Barnett *v.* Barbour, 1 Litt. (Ky.) 396.

35. Great Falls Mfg. Co. *v.* Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

36. The acceptance of emoluments of the estate of a deceased person from his administrator was held to be an estoppel *in pais* to the person so accepting, in a subsequent proceeding denying the jurisdiction of the court issuing the letter of administration. Drexel *v.* Berney, 122 U. S. 241, 7 S. Ct. 1200, 30 L. ed. 1219.

37. Giving a bond to prosecute an appeal from an award of land damages under the condemnation statute works an estoppel to the plaintiff to deny the constitutionality of the statute in proceedings to enjoin entry upon the land taken under it. Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

As to the effect of giving a bond to dissolve an attachment see Vose *v.* Cockcroft, 44 N. Y. 415.

38. An adverse claimant to goods taken on attachment or execution, after pursuing the remedy on an indemnity bond taken by an officer, on notice of claim, in accordance with a statute restricting his remedy to such an action, cannot deny the constitutionality of such a statute on the ground that it deprives him of his remedy against the officer. Dodd *v.* Thomas, 69 Mo. 364. See also Ralston *v.* Oursler, 12 Ohio St. 105, denying the right of a claimant to attack the validity of a similar statute, in a suit against a sheriff, after having pursued the statutory remedy on bond given by latter.

39. A surety in replevin, in proceedings to restrain a levy on his real estate, after the default of his principal, was held to be en-

enactment of an unconstitutional insolvent law, in an insolvency proceeding instituted under such law, and the acceptance of dividends from the estate of the insolvent, will preclude such creditors from attacking the validity of the law. It has been held that such an attack may be made by a creditor proving such a claim and receiving a dividend in a suit against the debtor.[40] But the contrary has been maintained.[41] And where the insolvent law is valid generally, it has been held that a prior creditor waives no rights by proving his claim and accepting a dividend.[42]

(IV) *Proceedings by Quo Warranto.* In proceedings instituted by the state, in the nature of quo warranto, to try the right of persons to a corporate franchise, the constitutionality of a statute under which the exercise of such right is claimed may be inquired into.[43]

G. Determination of Constitutional Questions — 1. In General. The judiciary is a coördinate branch of the government, and like the other departments is independent within its own sphere; and where an act of the legislature is repugnant to the constitution the courts not only have the power, but it is their duty to so declare it.[44] But it does not follow that the courts are authorized to

titled to attack the validity of the statute under which the bond was given. Strong *v.* Daniel, 5 Ind. 348.

40. Kimberly *v.* Ely, 6 Pick. (Mass.) 440, holding that a creditor whose debt was contracted prior to the enactment of an unconstitutional insolvent law might prove his claim in an insolvency proceeding instituted under such law, accept a dividend from the insolvent estate, and maintain an action for the balance due on the original claim after such law was declared unconstitutional.

41. See Van Hook *v.* Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246 [*affirming* 7 Paige (N. Y.) 373].

42. Elton *v.* O'Connor, 6 N. D. 1, 68 N. W. 84, 33 L. R. A. 524.

A foreign creditor, prosecuting a claim to judgment in a state court, without proving the same in insolvency or receiving a dividend, does not lose his remedy against the debtor by the discharge of the latter under a state insolvency law. Soule *v.* Chase, 39 N. Y. 342; Hick *v.* Hotchkiss, 7 Johns. Ch. (N. Y.) 297, 11 Am. Dec. 472; Sturgis *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. But it is otherwise if such creditor voluntarily makes himself a party to an insolvency proceeding. Clay *v.* Smith, 3 Pet. (U. S.) 411, 7 L. ed. 723. And where the debt is contracted within the state a certificate of discharge from a state insolvency court is a bar as against a foreign creditor. Stoddard *v.* Harrington, 100 Mass. 87, 97 Am. Dec. 80, 1 Am. Rep. 92; Burrall *v.* Rice, 5 Gray (Mass.) 539; Scribner *v.* Fisher, 2 Gray (Mass.) 43.

43. Atty.-Gen. *v.* Perkins, 73 Mich. 303, 41 N. W. 426.

44. *Alabama.*— Hawkins *v.* Roberts, 122 Ala. 130, 27 So. 327; Dyer *v.* Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655.

California.— People *v.* Burbank, 12 Cal. 378; Nougues *v.* Douglass, 7 Cal. 65.

Connecticut.— Bishop's Fund *v.* Rider, 13 Conn. 87.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

Georgia.— Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Beall *v.* Beall, 8 Ga. 210.

Illinois.— People *v.* Marshall, 6 Ill. 672; Phœbe *v.* Jay, 1 Ill. 268; People *v.* Forquer, 1 Ill. 104.

Indiana.— State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405; Maize *v.* State, 4 Ind. 342.

Kansas.— Mayberry *v.* Kelly, 1 Kan. 116.

Louisiana.—Hyde *v.* Planters' Bank, 8 Rob. (La.) 416; Nicholson *v.* Thompson, 5 Rob. (La.) 383; Le Breton *v.* Morgan, 4 Mart N. S. (La.) 138; Dutillet *v.* Dutillet, 3 Mart. N. S. (La.) 468; Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Brooks *v.* Weyman, 3 Mart. (La.) 16.

Maryland.— Whittington *v.* Polk, 1 Harr. & J. (Md.) 236; Wilson *v.* Hardesty, 1 Md. Ch. 66.

Massachusetts.— Norwich *v.* Hampshire County Com'rs, 13 Pick. (Mass.) 60; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344.

Mississippi.— Runnels *v.* State, Walk. (Miss.) 146.

Nevada.— State *v.* Arrington, 18 Nev. 412, 4 Pac. 735.

New York.—*Ex p.* McCollum, 1 Cow. (N. Y.) 550.

North Carolina.— Den *v.* Foy, 5 N. C. 58, 3 Am. Dec. 672; State *v.* ——, 2 N. C. 28.

Ohio.— Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77; Griffith *v.* Crawford County, 20 Ohio Appendix 1.

Pennsylvania.— Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184; Eakin *v.* Raub, 12 Serg. & R. (Pa.) 330; Moore *v.* Houston, 3 Serg. & R. (Pa.) 169; Stoddard *v.* Smith, 5 Binn. (Pa.) 355; Emerick *v.* Harris, 1 Binn. (Pa.) 416; Respublica *v.* Duquet, 2 Yeates (Pa.) 493;

supervise every act of the legislature or that they will inquire into the validity of all legislative proceedings that may have the force of laws.[45] Neither have the courts any authority to avoid the effect of failure of the legislature to perform its duty.[46]

2. What Courts May Determine — a. In General. It has been held that only the highest judicial tribunals have the power to declare an act of the legislature unconstitutional,[47] but inferior courts have exercised this power;[48] and it is now generally held that inferior courts of original jurisdiction have power to pass upon the validity of a statute and to declare it unconstitutional in proceedings before them in the course of judicial administration.[49] But this power is exercised by such courts with great caution.[50]

b. The Federal Judiciary. The authority of the federal courts to pass upon the constitutionality of legislation is limited to such acts as contravene or are repugnant to some provision of the federal constitution.[51]

Martin *v.* Bear, 5 Pa. L. J. Rep. 17, 3 Am. L. J. 457.

Texas.— Lastro *v.* State, 3 Tex. App. 363.

Vermont.— Starr *v.* Robinson, 1 D. Chipm. (Vt.) 257, 6 Am. Dec. 732.

Virginia.— Com. *v.* Caton, 4 Call (Va.) 5; Kamper *v.* Hawkins, 1 Va. Cas. 20.

United States.— Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 28 Fed. Cas. No. 16,857; Darby *v.* Wright, 3 Blatchf. (U. S.) 170, 6 Fed. Cas. No. 3,574.

The judiciary possess the power to declare laws contrary to the constitution void, as a necessary power inherent in their office. Le Breton *v.* Morgan, 4 Mart. N. S. (La.) 138. See also Myers *v.* English, 9 Cal. 341; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Miller *v.* State, 3 Ohio St. 475. And see *supra*, IV, B, 4.

"Whenever it is clear that the legislature has transcended its authority, and that a legislative act is in conflict with the constitution, it is imperatively required of the court . . . to declare the act inoperative and void." Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543. See also *supra*, IV, B, 4, b.

45. Miller *v.* State, 3 Ohio St. 475.

46. Myers *v.* English, 9 Cal. 341; *In re* State Census, 6 S. D. 540, 62 N. W. 129.

47. Ortman *v.* Greenman, 4 Mich. 291; *In re* Stahl, 1 Lanc. L. Rev. 329.

48. *In re* Stahl, 1 Lanc. L. Rev. 329.

49. State *v.* Lee, 106 La. 400, 31 So. 14 (holding that a court vested with original jurisdiction *ratione materiæ* and *ratione personæ* has the power to pass upon the constitutionality of a statute under which a criminal prosecution is conducted before it); Com. *v.* Franklin, 2 Am. L. J. N. S. 287 (holding that an inferior court of original jurisdiction has the power to decide as to the constitutionality of an act of the legislature); White *v.* Kendrick, 1 Brev. (S. C.) 469 (holding that a district court had authority to determine the constitutionality of acts of the legislature).

50. A statute will not be held unconstitutional by a trial court, unless its provisions are so clearly unconstitutional that there can be no reasonable doubt upon the subject. Ithaca *v.* Babcock, 36 Misc. (N. Y.) 49, 72 N. Y. Suppl. 519 [*affirmed* in 72 N. Y. App. Div. 260, 76 N. Y. Suppl. 49]. Nor will a statute be held unconstitutional at a special term, except in cases of plain conflict with the constitution (Smith *v.* Keteltas, 32 Misc. (N. Y.) 111, 66 N. Y. Suppl. 260 [*affirmed* in 62 N. Y. App. Div. 174, 70 N. Y. Suppl. 1065]), or by a single justice of an inferior court (People *v.* McDonald, 52 N. Y. Suppl. 898).

The supreme court, in case of a division in opinion upon constitutional questions, will not call in the justices of the circuit courts, when authorized to do so by constitutional provisions, where the question to be determined is one of public policy. Johnson *v.* Charleston, etc., R. Co., 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645.

51. U. S. *v.* The William, 28 Fed. Cas. No. 16,700, 2 Hall L. J. 255.

As to who must construe the federal constitution see *supra*, IV, B, 1, a.

It is only where congress has palpably exceeded the limits of its authority that the federal courts will intervene. U. S. *v.* Curtis, 12 Fed. 824.

It is within the scope of the federal judiciary to inquire into the rates of compensation fixed by municipal corporations and private corporations for appropriated water within a state, and to determine whether such rates deprive property-owners of their property without just compensation, and the court may annul the same if found unreasonable. San Diego Land, etc., Co. *v.* National City, 74 Fed. 79.

Where they are called upon to determine the rights of parties to litigation under a state law, the federal courts will not, in doubtful cases, adjudge a state statute to be in conflict with the state constitution, unless the highest court of the state has pronounced such statute unconstitutional. Fish *v.* Fond du Lac, 9 Fed. Cas. No. 4,813*a*, 12 Reporter 295.

c. The State Judiciary. In doubtful cases, where a question of conflict between a state statute and an act of congress is raised, the supreme court of a state will render such a judgment as will enable the parties to bring the case before the supreme court of the United States for review, and without expressing an opinion which would conclude the parties to the action.[52]

3. Purpose of Determining and What Will Not Be Determined — a. In General. The purpose of determining constitutional questions is to expound the laws enacted by the government, for the protection of both public and private rights, and for these purposes only can the constitutionality of a statute be questioned in any court. The validity of a constitutional provision,[53] or the legality of the structure of the government of which the court called upon to give its opinion forms a part, by virtue of the same constitutional enactment,[54] are questions that will not be passed upon; nor will acts of the legislature be declared absolutely void where great injury must necessarily result,[55] unless to prevent a most palpable violation of the constitution.[56] And courts are cautious about declaring the statutes of other states unconstitutional and will do so only when a very strong case is presented.[57]

b. Reality of Controversy and Necessity of Determination — (I) *In General.* It is a well-settled principle that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question;[58] and then only where the part of the statute alleged to

52. Hopkins *v.* Stockton, 2 Watts & S. (Pa.) 163. It is with the supreme court of the United States to determine finally whether legislation or action under state authority is due process of law. State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

As to who must construe state constitution see *supra*, IV, B, 1, b.

53. The validity of the acts of the people in a constitutional convention are not open to judicial inquiry. Anderson *v.* Baker, 23 Md. 531.

54. The validity of an election of officers after the adoption of a new constitution will not be determined by the court created or continued in power by such constitution. Loomis *v.* Jackson, 6 W. Va. 613.

55. Where the legislature, without constitutional authority, and for many years, had granted divorces, it was held that such divorces would not be declared void on account of the evil that would follow from such a declaration, but that the court would be content with a declaration that the exercise of such a power was unconstitutional, feeling confident that the practice would cease. Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471.

56. Where important and almost revolutionary results would follow from declaring a session of the legislature illegal, it was held that a most direct and palpable violation of the constitution must be shown before the court would intervene. Gormley *v.* Taylor, 44 Ga. 76.

57. A very strong case must be made out before a court will declare a statute of another state unconstitutional as contravening the constitution of the state enacting it. Hyde *v.* Planters' Bank, 8 Rob. (La.) 416; Illinois Bank *v.* Sloo, 16 La. 539, 35 Am. Dec. 223. But this will be done, even though the courts of the state enacting such statute have not passed upon it. Woodward *v.* Central Vermont R. Co., 180 Mass. 599, 62 N. E. 1051. See also Shoe, etc., Nat. Bank *v.* Wood, 142 Mass. 563, 8 N. E. 753; Simonds *v.* Simonds, 103 Mass. 572, 4 Am. Rep. 576; Stoddart *v.* Smith, 5 Binn. (Pa.) 355.

58. *Alabama.*— Hill *v.* Tarver, 130 Ala. 592, 30 So. 499; Shehane *v.* Bailey, 110 Ala. 308, 20 So. 359; Kansas City, M., etc., R. Co. *v.* Whitehead, 109 Ala. 495, 19 So. 705; Smith *v.* Speed, 50 Ala. 276.

Colorado.— Platte Land Co. *v.* Hubbard, (Colo. 1902) 69 Pac. 514.

Connecticut.— Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Crandall *v.* State, 10 Conn. 339.

Georgia.— Herring *v.* State, 114 Ga. 96, 39 S. E. 866; Board of Education *v.* Brunswick, 72 Ga. 358; Taylor *v.* Flint, 35 Ga. 124.

Idaho.— McGinnis *v.* Davis, (Ida. 1901) 65 Pac. 364; Howell *v.* Ada County, (Ida. 1898) 53 Pac. 542.

Illinois.— Joliet *v.* Alexander, 194 Ill. 457, 62 N. E. 861.

Indiana.— Hart *v.* Smith, (Ind. 1902) 64 N. E. 661; Shilling *v.* State, 158 Ind. 185, 62 N. E. 49; Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Seymour First Nat. Bank *v.* Greger, 157 Ind. 479, 62 N. E. 21; Martin *v.* State, 143 Ind. 545, 42 N. E. 911; Hoover *v.* Wood, 9 Ind. 286.

Iowa.— Dubuque, etc., R. Co. *v.* Diehl, 64 Iowa 635, 21 N. W. 117; McClure *v.* Owens,

be unconstitutional is involved in the controversy, and the remaining portion is incomplete and inoperative in itself.[59]

(II) *Friendly and Fictitious Suits, Waivers, Etc., and Suits For Costs.* The constitutionality of a statute will not be passed upon in a friendly[60] or in a fictitious[61] suit, upon waiver of other than constitutional questions involved,[62] upon the admissions of a district attorney,[63] or upon an agreed statement of facts.[64] Neither will the constitutionality of a statute be determined after it has been repealed, in a suit prosecuted for costs.[65]

(III) *Collateral Attack Upon Statutes on Applications For Provisional Remedies.* Nor will the constitutionality of a statute be determined collaterally upon an application for provisional remedies, such as motions collateral to the main issue, applications for injunctions, and mandamus,[66] nor will

21 Iowa 133. See also Youngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648.

Kentucky.— Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604.

Louisiana.—Bienvenu's Succession, 106 La. 595, 31 So. 193; St. Landry Parish *v.* Stout, 32 La. Ann. 1278. And see Globe Lumber Co. *v.* Griffeth, 107 La. 621, 31 So. 1010.

Maine.— Longley *v.* Longley, 92 Me. 395, 42 Atl. 798.

Maryland.—Summerson *v.* Schilling, 94 Md. 591, 51 Atl. 610.

Michigan.— Upton *v.* Kennedy, 36 Mich. 215; Weimer *v.* Bunbury, 30 Mich. 201.

Mississippi.— Hendricks *v.* State, 79 Miss. 368, 30 So. 708; Hallum *v.* Mobile, etc., R. Co., (Miss. 1899) 24 So. 909.

Missouri.— State *v.* Rich, 20 Mo. 393. Constitutional questions affecting the rights of persons will not be determined where such rights are not directly or necessarily involved. Watson Seminary *v.* Pike County Ct., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

Nebraska.— State *v.* Douglas County, 18 Nebr. 506, 26 N. W. 315.

Nevada.— State *v.* Curler, (Nev. 1902) 67 Pac. 1075; Burling *v.* Goodman, 1 Nev. 314.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

New York.— People *v.* New York County, 3 Abb. Dec. (N. Y.) 566, 2 Keyes (N. Y.) 288, 34 How. Pr. (N. Y.) 379; Livingston *v.* Livingston, 65 N. Y. App. Div. 242, 72 N. Y. Suppl. 487; Benson *v.* New York, 10 Barb. (N. Y.) 223.

Ohio.— Collins *v.* Bingham, 22 Ohio Cir. Ct. 533; State *v.* Price, 8 Ohio Cir. Ct. 25.

Pennsylvania.—Bedford *v.* Shilling, 4 Serg. & R. (Pa.) 401, 8 Am. Dec. 718.

South Carolina.— *Ex p.* Florence School, 43 S. C. 11, 20 S. E. 794.

Tennessee.— Gilreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. 250.

West Virginia.— Edgell *v.* Conaway, 24 W. Va. 747.

United States.— *Ex p.* Randolph, 2 Brock. (U. S.) 447, 20 Fed. Cas. No. 11,558.

See 10 Cent. Dig. tit. "Constitutional Law," § 43.

59. State *v.* Newton, 59 Ind. 173.

Where a statute may be completely executed without any violation of the constitution, or without further legislative action, it cannot be held unconstitutional or defective. People *v.* Rochester, 50 N. Y. 525.

Where sections of a statute provided a remedy for injuries to crops by live stock running uncontrolled, and provided a complete remedy within themselves it was held that such sections would not be declared unconstitutional, where the same sections, with others of the same statute, were assailed as unconstitutional. Shehane *v.* Bailey, 110 Ala. 308, 20 So. 359.

60. Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. ed. 176 [*affirming* 83 Mich. 592, 47 N. W. 489].

61. Brewington *v.* Lowe, 1 Ind. 21, 80 Am. Dec. 349.

62. The constitutionality of a statute will not be passed upon where other decisive questions are raised by the record and waived for the purpose of obtaining a judicial determination of the constitutional question, upon an agreed state of facts. Dubuque, etc., R. Co. *v.* Diehl, 64 Iowa 635, 21 N. W. 117.

63. Where the constitution prohibited the establishing of new counties by reducing the population of old counties below the legal rate of representation, and a new county had been formed by a reduction of the population of old counties below such limit, it was held, on a motion to quash an indictment found in such new county, and upon admission of the facts by the district attorney, that the constitutionality of no law could be determined upon such admissions. State *v.* Rich, 20 Mo. 393.

64. See Dubuque, etc., R. Co. *v.* Diehl, 64 Iowa 635, 21 N. W. 117; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. ed. 176.

65. Burbank *v.* Williams, 61 N. C. 37.

66. *Idaho.*— On an application for a mandamus by a private person, to enforce a private right. Wright *v.* Kelly, (Ida. 1895) 43 Pac. 565.

Maine.— On an application for a preliminary injunction, to restrain the operations of a railroad company, on the ground that its charter was unconstitutional. Deering *v.* York, etc., R. Co., 31 Me. 172. But an injunction to preserve rights under statute will

such a question be passed upon in hearings upon affidavits.[67] But the constitutionality of a statute will be determined on a motion to strike out a judgment entered under it;[68] and also in proceedings for mandamus to compel a court to take jurisdiction.[69]

4. Raising and Pointing Out Constitutional Infringements — a. In General. A constitutional question is raised when the constitutionality of a statute is denied on the one side and asserted upon the other, the one claiming that his rights will be infringed upon if the purposes contemplated by such statute are carried out, and the other claiming the right to carry out the purposes contemplated thereby.[70] The question of the constitutionality of a statute cannot be raised for the first time on appeal, and the record is conclusive as to the proceedings below.[71]

b. Pointing Out Specific Constitutional Provisions Infringed. A statute will not be declared void unless its invalidity is distinctly pointed out and clearly shown,[72] and therefore one who alleges that a statute is unconstitutional must point out the specific constitutional provision that is violated by it.[73]

be granted where it can be done without conclusively determining the constitutionality of such statute, if nothing appears against its constitutionality. Moor *v.* Veazie, 31 Me. 360. But on summary process upon petition for mandamus the constitutionality of a statute affecting the rights of third persons will not be determined. Smyth *v.* Titcomb, 31 Me. 272.

Missouri.— The constitutionality of a statute establishing counties cannot be questioned on a motion to quash an indictment found in a county alleged to be illegally established. State *v.* Rich, 20 Mo. 393.

New York.— The constitutionality of a statute will not be considered on a motion to strike out part of the complaint (Brien *v.* Clay, 1 E. D. Smith (N. Y.) 649), and should not be considered by a single justice on a collateral motion (Macomber *v.* New York, 17 Abb. Pr. (N. Y.) 35); nor will its constitutionality be determined upon a hearing upon affidavits (Havemeyer *v.* Ingersoll, 12 Abb. Pr. N. S. (N. Y.) 301).

North Carolina.— The constitutionality of a statute will not be determined on affidavits, in an application for an injunction. Smallwood *v.* Newbern, 90 N. C. 36.

United States.—An act of congress will not be declared unconstitutional on a motion for a provisional injunction (Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 22 Int. Rev. Rec. 33, 4 Ins. L. J. 829), or on a motion to remand a cause to a state court (Lamar *v.* Dana, 10 Blatchf. (U. S.) 34, 14 Fed. Cas. No. 8,005).

See 10 Cent. Dig. tit. "Constitutional Law," § 45.

67. See Havemeyer *v.* Ingersoll, 12 Abb. Pr. N. S. (N. Y.) 301; Smallwood *v.* Newbern, 90 N. C. 36.

68. Philadelphia *v.* Pepper, 2 Pa. Co. Ct. 287.

69. State *v.* Hocker, 36 Fla. 358, 18 So. 767.

70. Where the defendants, in proceedings to restrain the enforcement of a statute alleged to be unconstitutional, asserted the constitutionality of such statute and admitted that they intended to do the acts authorized by it and sought to be restrained, it was held that the constitutionality of the statute was directly raised, and that a determination of the constitutional question was necessary to a decision of the case. Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 40 N. Y. Suppl. 535, 74 N. Y. St. 962 [*distinguishing* People *v.* Crissey, 91 N. Y. 616].

The constitutionality of a statutory provision fixing the penalty for a contempt is not raised by showing that a sentence for contempt imposed by a chancellor coincided with the maximum of the statute. *In re* Murphy, 73 Vt. 115, 50 Atl. 817.

The constitutionality of a statute is not determined by what has been done under it, but by what may be done by virtue of its provisions. Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258.

When a constitutional inquiry relates to the legality of a court which assumes to act and involves its power to act in any case, it is unnecessary to make the preliminary objection to its exercise of jurisdiction; but when the court has power to act in any case, its exercise of jurisdiction over the particular acts must be brought to the attention of such court by objection of some kind before resort can be had to a remedy by an extraordinary writ. Hill *v.* Tarver, 130 Ala. 592, 30 So. 499.

71. The constitutionality of a statute will not be determined upon appeal, where it does not appear by the record that the decision of the court below was based upon that question. Hopson *v.* Murphy, 1 Tex. 314. See also, generally, Appeal and Error.

72. Crowley *v.* State, 11 Oreg. 512, 6 Pac. 70.

73. *Colorado.*— People *v.* Rucker, 5 Colo. 455.

Mississippi.— Rohrbacher *v.* Jackson, 51 Miss. 735.

Oregon.— Crowley *v.* State, 11 Oreg. 512, 6 Pac. 70.

5. Presumptions and Construction in Favor of Constitutionality — a. In General. Statutes are always presumed to be constitutional, and this presumption will be indulged in by the courts until the contrary is clearly shown.[74] This rule is one

Pennsylvania.— Northumberland County *v.* Zimmerman, 75 Pa. St. 26; *In re* League Island, 1 Brewst. (Pa.) 524.

South Carolina.— Mauldin *v.* Greenville, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284.

Tennessee.— Davis *v.* State, 3 Lea (Tenn.) 376.

Texas.— Houston, etc., R. Co. *v.* Harry, 63 Tex. 256.

See 10 Cent. Dig. tit. "Constitutional Law," § 44.

74. *Alabama.*— South, etc., Alabama R. Co. *v.* Morris, 65 Ala. 193; Zeigler *v.* South, etc., Alabama R. Co., 58 Ala. 594.

Arkansas.— Smithee *v.* Garth, 33 Ark. 17; State *v.* Sorrells, 15 Ark. 664; Eason *v.* State, 11 Ark. 481.

California.— *In re* Madera Irr. Dist., 92 Cal. 296, 29 Pac. 272, 27 Am. St. Rep. 106, 675, 14 L. R. A. 755; Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Bourland *v.* Hildreth, 26 Cal. 161; Pattison *v.* Yuba County, 13 Cal. 175; People *v.* Burbank, 12 Cal. 378; Burgoyne *v.* San Francisco County, 5 Cal. 9.

Colorado.— Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041; People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; Alexander *v.* People, 7 Colo. 155, 2 Pac. 894; People *v.* Rucker, 5 Colo. 455.

Connecticut.— Camp *v.* Rogers, 44 Conn. 291; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210.

Delaware.— Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

District of Columbia.— U. S. *v.* Seymour, 10 App. Cas. (D. C.) 294.

Florida.— State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72; Holton *v.* State, 28 Fla. 303, 9 So. 716; Cheney *v.* Jones, 14 Fla. 587; Cotten *v.* Leon County Com'rs, 6 Fla. 610.

Georgia.— Park *v.* Candler, 113 Ga. 647, 39 S. E. 89; Ivey *v.* State, 112 Ga. 175, 37 S. E. 398; Howell *v.* State, 71 Ga. 224, 51 Am. Rep. 259; Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717; Padelford *v.* Savannah, 14 Ga. 438; Carey *v.* Giles, 9 Ga. 253; Beall *v.* Beall, 8 Ga. 210; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Grimhall *v.* Ross, T. U. P. Charlt. (Ga.) 175.

Illinois.— Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435; Hawthorn *v.* People, 109 Ill. 302, 50 Am. Rep. 610; Chicago City R. Co. *v.* Smith, 62 Ill. 238; Bunn *v.* People, 45 Ill. 397; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543; Phœbe *v.* Jay, 1 Ill. 268; Havens, etc., Co. *v.* Diamond, 93 Ill. App. 557.

Indiana.— State *v.* Denny, 118 Ind. 382, 21 N. E. 274, 4 L. R. A. 65; Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698; Hays *v.* Tippy, 91 Ind. 102; Lucas *v.* Tippecanoe County, 44 Ind. 524; Groesch *v.* State, 42 Ind. 547; Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185; Brown *v.* Buzan, 24 Ind. 194; Stocking *v.* State, 7 Ind. 326; State *v.* Cooper, 5 Blackf. (Ind.) 258.

Iowa.— Gates *v.* Brooks, 59 Iowa 510, 6 N. W. 595, 13 N. W. 640; McGregor *v.* Baylies, 19 Iowa 43; Morrison *v.* Springer, 15 Iowa 304; McCormick *v.* Rusch, 15 Iowa 127, 83 Am. Dec. 401; State *v.* Davis County Judge, 2 Iowa 280.

Kansas.— State *v.* Barrett, 27 Kan. 213; Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425; State *v.* Barker, 4 Kan. 435; State *v.* Robinson, 1 Kan. 17.

Kentucky.— Collins *v.* Henderson, 11 Bush (Ky.) 74; McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447; Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; Board of Trustees, etc. *v.* Lexington, 23 Ky. L. Rep. 1470, 65 S. W. 350.

Louisiana.— Grinage *v.* Times Democrat Pub. Co., 107 La. 121, 31 So. 682; New Orleans *v.* Chappuis, 105 La. 179, 29 So. 721; State *v.* Capdevielle, 104 La. 561, 29 So. 215; State *v.* Clinton, 25 La. Ann. 401; Police Jury *v.* McDonogh, 8 La. Ann. 341; State *v.* Judge Fifth Judicial Dist., 5 La. Ann. 756; Hyde *v.* Planters' Bank, 8 Rob. (La.) 416; Nicholson *v.* Thompson, 5 Rob. (La.) 383; Le Breton *v.* Morgan, 4 Mart. N. S. (La.) 138; Dutillet *v.* Dutillet, 3 Mart. N. S. (La.) 468; Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Brooks *v.* Weyman, 3 Mart. (La.) 9. And see State *v.* Sonier, 107 La. 794, 32 So. 175.

Maine.— Williamson *v.* Carlton, 51 Me. 449; Lunt's Case, 6 Me. 412.

Maryland.— Beasley *v.* Ridout, 94 Md. 641, 52 Atl. 61; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Whittington *v.* Polk, 1 Harr. & J. (Md.) 236; Wilson *v.* Hardesty, 1 Md. Ch. 66.

Massachusetts.— Com. *v.* People's Five Cent Sav. Bank, 5 Allen (Mass.) 428; Dearborn *v.* Ames, 8 Gray (Mass.) 1; Norwich *v.* Hampshire County, 13 Pick. (Mass.) 60; Bullard *v.* Dame, 7 Pick. (Mass.) 239; Portland Bank *v.* Apthorp, 12 Mass. 252.

Michigan.— People *v.* Smith, 108 Mich. 527, 66 N. W. 382, 62 Am. St. Rep. 715, 32 L. R. A. 853; Atty.-Gen. *v.* Preston, 56 Mich. 177, 22 N. W. 261; Inkster *v.* Carver, 16 Mich. 484; Tyler *v.* People, 8 Mich. 320; Scott *v.* Smart, 1 Mich. 295.

Minnesota.— State *v.* Canada Cattle Car Co., 85 Minn. 457, 89 N. W. 66.

Mississippi.— Runnels *v.* State, Walk. (Miss.) 146.

Missouri.— State *v.* Thompson, 144 Mo. 314, 46 S. W. 191; *Ex p.* Renfrow, 112 Mo. 591,

of universal application, and the principle is equally well established that statutes will be so construed, wherever it is possible to do so, so that they shall harmonize with the constitution, to the end that they may be sustained.[75] Such a construc-

20 S. W. 682; State *v.* Watts, 111 Mo. 553, 20 S. W. 237; State *v.* Searcy, 111 Mo. 236, 20 S. W. 186; Wells *v.* Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; State *v.* Wiley, 109 Mo. 439, 19 S. W. 197; State *v.* Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676; Kelly *v.* Meeks, 87 Mo. 396; State *v.* Cape Girardeau, etc., R. Co., 48 Mo. 468; Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248; State *v.* Rich, 20 Mo. 393.

Nebraska.—State *v.* Babcock, 23 Nebr. 128, 36 N. W. 348. See also Rosenbloom *v.* State, (Nebr. 1902) 89 N. W. 1053, 57 L. R. A. 922.

Nevada.— State *v.* Humboldt County, 21 Nev. 235, 29 Pac. 974; Evans *v.* Job, 8 Nev. 322; State *v.* Doron, 5 Nev. 399; State *v.* Parkinson, 5 Nev. 15.

New Hampshire.— Orr *v.* Quimby, 54 N. H. 590; Rich *v.* Flanders, 39 N. H. 304.

New Jersey.— Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360; Olden *v.* Hallet, 5 N. J. L. 466.

New York.— People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; People *v.* Briggs, 50 N. Y. 553; People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123; Beecher *v.* Allen, 5 Barb. (N. Y.) 169; Ithaca *v.* Babcock, 36 Misc. (N. Y.) 49, 72 N. Y. Suppl. 519 [*affirmed* in 72 N. Y. App. Div. 260, 76 N. Y. Suppl. 49]; *In re* Brenner, 35 Misc. (N. Y.) 212, 70 N. Y. Suppl. 744; Clarke *v.* Rochester, 5 Abb. Pr. (N. Y.) 107; Hague *v.* Powers, 25 How. Pr. (N. Y.) 17; Morris *v.* People, 3 Den. (N. Y.) 381; *Ex p.* McCollum, 1 Cow. (N. Y.) 550.

North Carolina.— McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247; Neal *v.* Roberts, 18 N. C. 81; Newbern Bank *v.* Taylor, 6 N. C. 266; Den *v.* Foy, 5 N. C. 58, 3 Am. Dec. 672.

Ohio.— State *v.* Jones, 51 Ohio St. 492, 37 N. E. 945; Buttzman *v.* Whitbeck, 42 Ohio St. 223; Bronson *v.* Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Lehman *v.* McBride, 15 Ohio St. 573; Goshorn *v.* Purcell, 11 Ohio St. 641; Hill *v.* Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Miller *v.* State, 3 Ohio St. 475; Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77; Griffith *v.* Crawford County, 20 Ohio Appendix 1; State *v.* Garver, 23 Ohio Cir. Ct. 140; Wasson *v.* Wayne County, 27 Cinc. L. Bul. 134, 11 Ohio Dec. (Reprint) 475 [*reversed* in 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795].

Oregon.— Crowley *v.* State, 11 Oreg. 512, 6 Pac. 70.

Pennsylvania.—Powell *v.* Com., 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350; Pennsylvania R. Co. *v.* Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Durach's Appeal, 62 Pa. St. 491; Com. *v.* Erie R. Co., 62 Pa. St. 286, 1 Am. Rep. 399; Shollenberger *v.* Brinton, 52 Pa. St. 9; Speer *v.* School Directors, 50 Pa. St. 150; Kneass' Appeal, 31 Pa. St. 87; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Com. *v.* McWilliams, 11 Pa. St. 61; Moore *v.* Houston, 3 Serg. & R. (Pa.) 169; Stoddart *v.* Smith, 5 Binn. (Pa.) 355; Emerick *v.* Harris, 1 Binn. (Pa.) 416; Respublica *v.* Duquet, 2 Yeates (Pa.) 493; Hartman *v.* Weitmyer, 8 Pa. Dist. 223, 22 Pa. Co. Ct. 304; *In re* Clinton St., 2 Brewst. (Pa.) 599; *In re* League Island, 1 Brewst. (Pa.) 524.

South Carolina.—Mauldin *v.* Greenville, 42 S. C. 293, 20 S. E. 942, 46 Am. St. Rep. 723, 27 L. R. A. 284; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60; Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6; *Ex p.* Lynch, 16 S. C. 32.

South Dakota.— Bon Homme County *v.* Berndt, 15 S. D. 494, 90 N. W. 147; State *v.* Morgan, 2 S. D. 32, 48 N. W. 314.

Tennessee.— U. S. Saving, etc., Co. *v.* Miller, (Tenn. 1898) 47 S. W. 17; Tate *v.* Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221; State Bank *v.* Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

Texas.—Dwyer *v.* Hackworth, 57 Tex. 245; Goode *v.* McQueen, 3 Tex. 241; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Cordova *v.* State, 6 Tex. App. 207; Lastro *v.* State, 3 Tex. App. 363.

Utah.— Young *v.* Salt Lake City, 24 Utah 321, 67 Pac. 1066.

Vermont.— Bennington *v.* Park, 50 Vt. 178.

Virginia.— Com. *v.* Moore, 25 Gratt. (Va.) 951.

Washington.— Townsend Gas, etc., Co. *v.* Hill, 24 Wash. 469, 64 Pac. 778; Romine *v.* State, 7 Wash. 215, 34 Pac. 924.

West Virginia.— South Morgantown *v.* Morgantown, 49 W. Va. 729, 40 S. E. 15; Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278; Bridges *v.* Shallcross, 6 W. Va. 562; Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.— Smith *v.* Odell, 1 Pinn. (Wis) 449; Norton *v.* Rooker, 1 Pinn. (Wis.) 195.

United States.— Evans *v.* Nellis, 101 Fed. 920; Angle *v.* Chicago, etc., R. Co., 39 Fed. 912; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 39 Fed. 143; Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270; Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. 591; Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33; Adams *v.* Storey, 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66, 6 Hall L. J. 474; U. S. *v.* Mackenzie, 30 Fed. Cas. No. 18,313, 1 N. Y. Leg. Obs. 371.

See 10 Cent. Dig. tit. "Constitutional Law," § 46.

For general rules of construction see *supra*, IV, C.

75. *Alabama.*— Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238.

tion is regarded as a duty of the court, in passing upon the constitutionality of an act of the legislature.[76]

b. Degree and Extent of Such Presumptions — (i) *In General.* The authorities are not in harmony as to the degree of the presumption that will be indulged in in favor of the constitutionality of a statute, but the rule favored by the weight of authority is that every reasonable presumption will be made that a law enacted by the legislature is constitutional,[77] and that it intended all laws enacted by it to be reasonable and just.[78] But it has been held that the presumption in favor of the constitutionality of a statute was very slight.[79]

Georgia.— Ivey *v.* State, 112 Ga. 175, 37 S. E. 398.

Illinois.— Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435 [*reversing* 94 Ill. App. 281]; Newland *v.* Marsh, 19 Ill. 376.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Massachusetts.—Newhall *v.* Supreme Council A. L. of H., 181 Mass. 111, 63 N. E. 1; Com. *v.* Downes, 24 Pick. (Mass.) 227.

New Jersey.— Colwell *v.* May's Landing Water Power Co., 19 N. J. Eq. 245.

New York.— New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473; People *v.* Webb, 16 Hun (N. Y.) 42; Roosevelt *v.* Godard, 52 Barb. (N. Y.) 533.

North Carolina.— McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247.

Ohio.— Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321.

South Carolina.— Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60; Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705; Hayes *v.* Clinkscales, 9 S. C. 441.

Texas.— Wright *v.* Adams, 45 Tex. 134.

United States.— Singer Mfg. Co. *v.* McCollock, 24 Fed. 667.

See 10 Cent. Dig. tit. "Constitutional Law," § 46.

76. *California.*— French *v.* Teschemaker, 24 Cal. 518.

Illinois.— People *v.* Peacock, 98 Ill. 172.

Indiana.— Hovey *v.* State, 119 Ind. 395, 21 N. E. 21; McComas *v.* Krug, 81 Ind. 327, 42 Am. Rep. 135; Maize *v.* State, 4 Ind. 342.

Kansas.— Cherokee County *v.* State, 36 Kan. 337, 13 Pac. 558.

Kentucky.— Conner *v.* Com., 13 Bush (Ky.) 714.

Michigan.— Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308; Tabor *v.* Cook, 15 Mich. 322.

Mississippi.— Marsball *v.* Grimes, 41 Miss. 27.

North Carolina.— McGwigan *v.* Wilmington, etc., R. Co., 95 N. C. 428, 59 Am. Rep. 247; Granville County *v.* Ballard, 69 N. C. 18.

Oregon.— Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

See 10 Cent. Dig. tit. "Constitutional Law," § 46.

A statute authorizing the assessment of insurance associations to create an emergency fund by deducting a percentage from the face value of existing life certificates cannot be construed as authorizing an infringement of the obligation of such certificates. Newhall *v.* Supreme Council A. L. of H., 181 Mass. 111, 63 N. E. 1.

Where a statute is susceptible of two constructions, the one conforming to and the other contravening the constitution, that construction which conforms to the constitution will be adopted. Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435 [*reversing* 94 Ill. App. 281]. See also Ivey *v.* State, 112 Ga. 175, 37 S. E. 398; State *v.* Capdevielle, 104 La. 561, 29 So. 215.

77. *Arkansas.*— Smithee *v.* Garth, 33 Ark. 17.

District of Columbia.— U. S. *v.* Seymour, 10 App. Cas. (D. C.) 294, 305.

Florida.— State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72.

Kentucky.— Board of Trustees, etc. *v.* Lexington, 23 Ky. L. Rep. 1470, 65 S. W. 350.

Missouri.— State *v.* Thompson, 144 Mo. 314, 46 S. W. 191.

Utah.— Young *v.* Salt Lake City, 24 Utah 321, 67 Pac. 1066.

West Virginia.— South Morgantown *v.* Morgantown, 49 W. Va. 729, 40 S. E. 15.

A reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity. Board of Trustees, etc. *v.* Lexington, 23 Ky. L. Rep. 1470, 65 S. W. 350; Young *v.* Salt Lake City, 24 Utah 321, 67 Pac. 1066; South Morgantown *v.* Morgantown, 49 W. Va. 729, 40 S. E. 15.

78. Camp *v.* Rogers, 44 Conn. 291.

A statute will not be construed so as to subvert the rights of property, unless the intent to do so is expressed in terms too clear to admit of any doubt. Rutherford *v.* Greene, 2 Wheat. (U. S.) 196, 4 L. ed. 218.

Where a statute had been repeatedly enforced by the supreme court as valid, and business had been conducted and property rights acquired under it in accordance with such enforcement it was held that such statute would not be declared unconstitutional. U. S. Saving, etc., Co. *v.* Miller, (Tenn. 1897) 47 S. W. 17.

As to long acquiescence in law or construction thereof see *supra*, IV, C, 7, b, (II), (B).

79. That a law has been enacted affords little, if any, presumption that it is consti-

(II) *Presumptions as to Motives For Legislation.* Ignorance or improper motives in the enactment of legislation are never imputed to the legislature.[80] The courts will conclusively presume that no general laws are ever passed either through want of information on the part of the legislature or because it was misled by false representations of interested parties;[81] and a statute which violates, neither expressly nor by necessary implication, any constitutional provision, is itself conclusive evidence of its propriety and justice.[82] But the legislature cannot evade the purposes of the constitution, while keeping within the letter of its terms;[83] nor can it, under the guise of police power, enact measures which interfere with the citizens in the free pursuit of any lawful enterprise.[84]

(III) *Presumption That State Will Not Violate Federal Constitution.* It is presumed that a state legislature will not violate the federal constitution, and this presumption is very strong, so much so that it is the duty of the court, where an act of a state legislature is assailed as being in violation of the federal constitution, to make every possible presumption against such violation.[85] And the presumption that a state constitution does not violate the federal constitution is also very strong.[86]

(IV) *Where Part of Statute Is Held Unconstitutional.* While a statute is presumed to be constitutional, yet, when a part of it has been declared unconstitutional, the presumption in favor of constitutionality will not be indulged in as to the remaining portion.[87]

6. Effect of Declaring Statutes Unconstitutional — a. In General. The interpretation given to a statute or constitutional provision by a court of last resort is binding upon all departments of the government, including the legislature;[88] and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void,[89] from the date of its enactment, and not from the date on which it is judicially declared unconstitutional; and hence there is no presumption to be overcome, no disfavor to be encountered, by one who seeks to show its unconstitutionality. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572. But see State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, holding that an act of the legislature would not be declared unconstitutional, in the absence of the clearest proof.

80. Where an act authorized executors to sell real estate when heirs were *sui juris*, it was held that it would be presumed that such act was passed at the request of such heirs. Kneass' Appeal, 31 Pa. St. 87.

Where an act amending a town charter would be unconstitutional unless such town had a certain population, it was held that such population would be presumed to exist until the contrary was shown. Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278.

81. An inquiry as to representations made to the legislature to obtain a land grant to a railroad company was held to be improper. Angle *v.* Chicago, etc., R. Co., 39 Fed. 912; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 39 Fed. 143.

Special laws are presumed to be valid until it is shown beyond a reasonable doubt that a general law is applicable. Evans *v.* Job, 8 Nev. 322.

82. Flint, etc., Plank-Road Co. *v.* Woodhull, 25 Mich. 99, 12 Am. Rep. 233.

83. People *v.* Albertson, 55 N. Y. 50; Taylor *v.* Ross County, 23 Ohio St. 22.

As to statutes which contravene the spirit of the constitution see *supra*, IV, E, 2, b, (IV).

84. People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 64 N. Y. St. 51, 27 L. R. A. 718.

85. Padelford *v.* Savannah, 14 Ga. 438.

Where there was doubt as to whether an act requiring plaintiffs in suits for debts contracted prior to a certain date to pay taxes thereon before entry of judgment impaired the obligation of the contract within the inhibition of the federal constitution, it was held that such act would not be declared unconstitutional. Macon, etc., R. Co. *v.* Little, 45 Ga. 370.

86. Such conflict must be very clear to warrant a state court in declaring void a provision of the state constitution as in conflict with the federal constitution; but such a declaration would be an imperative duty in case of a clear conflict. Romine *v.* State, 7 Wash. 215, 34 Pac. 924. See also McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

87. South, etc., Alabama R. Co. *v.* Morris, 65 Ala. 193.

88. State *v.* Van Camp, 36 Nebr. 9, 91, 54 N. W. 113.

As to construction and effect see *supra*, IV, B, 4, a.

89. *Indiana.*— Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Pierce *v.* Pierce, 46 Ind. 86.

tional.[90] But a decision that a statute is unconstitutional, to be effective, must be distinct and positive.[91]

b. Amendments and Subsequent Legislation. Where a statute is declared unconstitutional, all acts amendatory thereof are without force or effect;[92] but unconstitutional legislation may be amended so as to render it constitutional, so far as future operation is concerned, by striking out the objectionable provisions or by supplying other provisions so as to make it conform to constitutional requirements;[93] and an unconstitutional act may be referred to in a subsequent valid act, in order to describe the powers conferred and the duties to be performed.[94]

c. Acts Done Under Unconstitutional Statutes — (I) *In General.* As a general rule all acts done under an unconstitutional law are void and of no effect;[95] but acts that are merely incidental to an unconstitutional legislative enactment, it seems, are valid.[96]

(II) *Judgments.* Judgments rendered in the course of judicial proceedings under unconstitutional statutes are void,[97] but the right to have such a judgment set aside, it seems, may be waived by voluntary action on the part of the defendant.[98]

(III) *Official Acts.* By the weight of authority, an unconstitutional law affords no protection to officers who act under it, neither can officers be punished

Kansas.— Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745.

Louisiana.— *In re* Fourth Drainage Dist., 34 La. Ann. 97.

Nebraska.— Finders *v.* Bodle, 58 Nebr. 57, 78 N. W. 480; State *v.* Van Camp, 36 Nebr. 9, 91, 54 N. W. 113.

South Carolina.— Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226; Whaley *v.* Gaillard, 21 S. C. 560.

United States.— Woolsey *v.* Dodge, 6 McLean (U. S.) 142, 30 Fed. Cas. No. 18,032; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 17 Fed. Cas. No. 8,541.

See 10 Cent. Dig. tit. "Constitutional Law," § 47.

As to validation of existing laws see *supra*, IV, D, 7.

90. Finders *v.* Bodle, 58 Nebr. 57, 78 N. W. 480.

Where a statute is held unconstitutional it will remain inoperative while such decision is maintained; but if it is subsequently reversed, such statute will be held valid from the date of its enactment. Pierce *v.* Pierce, 46 Ind. 86. See also Whaley *v.* Gaillard, 21 S. C. 560.

The original package decisions.— The effect of the decisions of the supreme court of the United States that state prohibitory laws were not operative upon liquors imported from other states and sold in the original packages did not annul such laws, and their reënactment was not necessary after the act of congress of August, 1890, providing that such imported liquors should be subject to state laws. Com. *v.* Calhane, 154 Mass. 115, 27 N. E. 881; State *v.* Lord, 66 N. H. 479, 29 Atl. 556; *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 [*reversing* 43 Fed. 556, 10 L. R. A. 444].

91. Factors, etc., Ins. Co. *v.* New Orleans, 25 La. Ann. 454.

92. Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226.

93. Lang *v.* Kiendl, 27 Hun (N. Y.) 66; State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737 [*affirming* 8 Ohio Cir. Ct. 523].

94. People *v.* Bircham, 12 Cal. 50.

95. An unconstitutional law has no inherent force, and confers no authority upon those claiming to act under it. Woolsey *v.* Dodge, 6 McLean (U. S.) 142, 30 Fed. Cas. No. 18,032; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

Bonds issued under an unconstitutional statute were held to be invalid. Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745; Whaley *v.* Gaillard, 21 S. C. 560.

96. Where an unconstitutional act creating a new county caused a vacancy in the office of sheriff, it was held that an appointment of a sheriff by the governor to fill such vacancy was valid. State *v.* Irwin, 5 Nev. 111.

The legislature may direct the payment of expenses incurred under an unconstitutional statute. People *v.* Bradley, 64 Barb. (N. Y.) 228.

97. A judgment for drainage taxes obtained under an unconstitutional statute was held to be void. *In re* Fourth Drainage Dist., 34 La. Ann. 97.

98. Where a judgment had been rendered in a suit upon a warrant of attorney, given under an unconstitutional statute, it was held that such judgment would not be set aside on the ground that the defendant could not have been compelled to execute such warrant. Van Steenwyck *v.* Sackett, 17 Wis. 645.

for refusing to obey it.[99] But in proceedings to compel performance of official duty, the provisions of an unconstitutional law purporting to dispense with such performance cannot be pleaded as a defense;[1] and it has been held that an unconstitutional statute has sufficient force as a law to protect officers acting under it.[2]

V. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

A. Legislative Powers and Delegation Thereof — 1. Nature and Scope. As above stated,[3] the legislature of a state has power to enact any laws that are not expressly or by necessary implication prohibited either by the federal constitution or by the constitution of the state enacting the law, the constitutionality of which is called in question.[4] There are *dicta* to the contrary in some cases,[5] but such a principle as a matter of law cannot be maintained.[6] The legislative powers are vested, under constitutional provisions, in a senate and house of representatives, to be elected by the people;[7] and such powers are usually granted in very broad and general terms, and include all such powers as may be necessary to carry the constitution into effect.[8] And while it is the province of the courts to say what the

As to validating and curative provisions see *supra*, IV, D, 7.

99. *Indiana.*— Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Strong *v.* Daniel, 5 Ind. 348.

Massachusetts.— Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

Michigan.— Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

Nevada.— *Ex p.* Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; Meagher *v.* Storey County, 5 Nev. 244.

New York.— Clark *v.* Miller, 54 N. Y. 528; Hover *v.* Barkhoof, 44 N. Y. 113.

Wisconsin.— Campbell *v.* Sherman, 35 Wis. 103.

United States.— Woolsey *v.* Dodge, 6 McLean (U. S.) 142, 30 Fed. Cas. No. 18,032; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

See 10 Cent. Dig. tit. "Constitutional Law," § 47.

1. Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623.

As to collateral attacks upon statutes see *supra*, IV, G, 3, b, (III).

2. In Iowa and Texas it has been held that unconstitutional statutes have sufficient force as laws to protect the officers who act under them. Henke *v.* McCord, 55 Iowa 378; Sessums *v.* Botts, 34 Tex. 335. And there is *dicta* to the same effect in State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

Mistake of officer.— An officer is liable civilly for refusing to execute a valid statute, under the impression that it is unconstitutional. Clark *v.* Miller, 54 N. Y. 528. And he is also liable for executing an unconstitutional statute, under the impression that it is constitutional. Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50. For the liability of officer for negligence see Hover *v.* Barkhoof, 44 N. Y. 113. A ministerial officer is liable to severe censure for presuming to disregard a law as unconstitutional. People *v.* Salomon, 54 Ill. 39.

Officer de facto.— The acts of an officer *de facto* are valid as to the rights of the public or of a third person. People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451. See Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 8 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

3. See *supra*, IV, E, 2, b.

4. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68.

Arizona.— Avery *v.* Pima County, (Ariz. 1900) 60 Pac. 702.

Georgia.— Macon, etc., R. Co. *v.* Little, 45 Ga. 370; Powers *v.* Dougherty County Inferior Ct., 23 Ga. 65; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Kentucky.— Purnell *v.* Mann, 105 Ky. 87, 20 Ky. L. Rep. 1146, 48 S. W. 407, 20 Ky. L. Rep. 1396, 49 S. W. 346, 21 Ky. L. Rep. 1129, 50 S. W. 264.

Louisiana.— State *v.* Bolden, 107 La. 116, 31 So. 393.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216.

Missouri.— *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726.

Pennsylvania.— Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

Utah.— State *v.* Cherry, 22 Utah 1, 60 Pac. 1103; Kimball *v.* Grantsville, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628.

See 10 Cent. Dig. tit. "Constitutional Law," § 48.

5. See Camp *v.* Rogers, 44 Conn. 291, and *supra*, IV, E, 2, b, (III).

6. See Cooley Const. Lim. (6th ed.) 197.

7. Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

8. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 244, 12 Am. St. Rep. 566, 2 L. R. A. 142; State *v.* Shields, 4 Mo. App. 259.

A constitutional provision authorizing the enactment of "all such laws as may be necessary to carry the constitution into effect"

law is, and to determine its application to particular cases, it is the province of the legislature to say what the law shall be in the future.[9]

2. IRREPEALABLE LEGISLATION. The power to amend and repeal legislation as well as to enact it is also vested in the legislature,[10] and a legislature cannot restrict or limit its right to exercise this power by prescribing modes of procedure for the repeal or amendment of statutes;[11] nor is an act of one legislature binding upon a future legislature.[12] But this does not apply to ministerial duties merely, performed by the legislature in compliance with a constitutional mandate,[13] or to rules prescribed by the legislature for the construction of statutes.[14]

3. ENCROACHMENT ON JUDICIARY — a. In General. The legislative power of a government, wherever it is undefined, will include both the judicial and the executive functions;[15] and it has been held that there are cases in which the legislative and judicial powers blend to such an extent that the exercise to a certain degree of judicial authority by the legislature in the enactment of laws is not open to objection as encroaching upon the province of the judiciary,[16] but this doctrine was subsequently denied in later decisions of the same court in which it was announced,[17] and it has not been reasserted. The distinction between

was held to authorize an act creating the office of court reporter. State *v.* Shields, 4 Mo. App. 259.

9. Shephard *v.* Wheeling, 30 W. Va. 479, 4 S. E. 635.

Conspiracy.— The legislature may make conspiracy to do an act punishable more severely than the doing of the act itself. Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269.

10. Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Milan, etc., Plank-Road Co. *v.* Husted, 3 Ohio St. 578.

11. Nevada County *v.* Hicks, 48 Ark. 515, 3 S. W. 524; Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Milan, etc., Plank-Road Co. *v.* Husted, 3 Ohio St. 578; Toledo Bank *v.* Toledo, 1 Ohio St. 622; Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563, holding unconstitutional acts of the legislature abridging its power to repeal or amend its acts. See also Brightman *v.* Kirner, 22 Wis. 54, denying the right of the legislature to bind a future legislature as to the mode of amending or repealing statutes.

12. *Arkansas.*— Files *v.* Fuller, 44 Ark. 273.

Florida.— Gonzales *v.* Sullivan, 16 Fla. 791; Internal Imp. Fund *v.* St. Johns R. Co., 16 Fla. 531.

Georgia.— Shaw *v.* Macon, 21 Ga. 280; Hamrick *v.* Rouse, 17 Ga. 56.

Indiana.—Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208.

Kansas.— Gilleland *v.* Schuyler, 9 Kan. 569.

Louisiana.— Renthrop *v.* Bourg, 4 Mart. (La.) 97.

New York.— Mongeon *v.* People, 55 N. Y. 613.

Wisconsin.— Brightman *v.* Kirner, 22 Wis. 54; Prentiss *v.* Danaher, 20 Wis. 311.

United States.— Bloomer *v.* Stolley, 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559, 1 Fish. Pat. Rep. 376, 8 West. L. J. 158.

See 10 Cent. Dig. tit. "Constitutional Law," § 49.

13. Where the constitution classified the judges of certain courts and provided that the legislature at its first session should divide them according to such classes, it was held that such division was a ministerial duty and binding upon subsequent legislatures. Leib *v.* Com., 9 Watts (Pa.) 200. But a constitutional amendment authorizing the legislature to direct the mode of appointment to certain offices authorizes subsequent legislatures to act upon the subject. Com. *v.* Clark, 7 Watts & S. (Pa.) 127.

14. A statute providing that subsequent statutes relating to the circuit courts should also relate to a county court of a particular county was held to be a rule of construction and valid. Prentiss *v.* Danaher, 20 Wis. 311. See also Mongeon *v.* People, 55 N. Y. 613.

As to construction of statutes and declaration as to existing law see *infra*, V, A, 3, d, (III).

A statute granting exclusive ferry privileges, and providing that such privileges should be continued forever, except in certain contingencies, was held to be valid and binding as to future legislatures, and also within the protection of the federal constitution against impairing the obligation of contract. East Hartford *v.* Hartford Bridge Co., 17 Conn. 79.

15. Cooper *v.* Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

16. Braddee *v.* Brownfield, 2 Watts & S. (Pa.) 271.

17. Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567.

The states are at liberty to unite their legislative and judicial functions if they see fit; there is nothing in the federal constitution to prevent it (Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458); and the judicial opinions that were delivered by the state senators of New York, when the senate

the legislative and the judicial functions is a vital one and not subject to alteration or change either by legislative action or by judicial decrees, for the lines which separate their powers are to be found in all constitutions, and are as much a part of them as though they were definitely and clearly defined.[18] The judiciary cannot consent that its province shall be invaded by either of the other departments of the government,[19] and it has been held that its province cannot be invaded even by a constitutional convention in the framing of a new constitution.[20]

of that state exercised judicial functions, are not unfamiliar (Hartshorne *v.* Sleght, 3 Johns. (N. Y.) 554).

Contested elections.— It has been held that the legislature may try and determine contested election cases without encroaching upon the judicial power. State *v.* Harmon, 31 Ohio St. 250. But see Segars *v.* Parrott, 54 S. C. 1, 31 S. E. 677, 865, denying the authority of the legislature to determine the result of the vote upon the adoption of a constitutional amendment.

18. The exercise by the legislature, either directly or through subordinate boards established by it, of the power to regulate the conduct of business in which the public have an interest, as to fix rates and charges for future observance, is wholly a legislative or administrative function; but after such action has been taken, whether it transcends the powers of the legislature is a question for judicial determination. The two functions are essentially and vitally different. The legislature cannot place its own acts beyond the constitutional jurisdiction of the courts; nor on the other hand can the courts regulate the conduct of business in which the public has an interest, by fixing rates or determining whether one rate is preferable to another, their province being limited to determining whether or not such rates as may be fixed by the legislature are in violation of any constitutional provision, and if so to enjoin their enforcement. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335. See also Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 L. ed. 484, 39 L. ed. 567; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. ed. 176; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970; Memphis, etc., R. Co. *v.* Southern Express Co., 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. ed. 791, 803; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 297; Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 839.

It is essential to the administration of the federal government that the lines which separate its three coördinate departments shall be clearly defined and followed, without any encroachment by any one of them on the powers confided to the others; and hence congress can exercise no function which is judicial, unless the right to do so is conferred upon it by the constitution. Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377.

Where the charter of a bridge company required it to enlarge its draws when necessary for the accommodation of navigation, it was held that the question whether such draws were suitable was a judicial one, to be determined by the courts and not by the legislature. Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339.

A statute assuming to divide the common property of corporations, and to determine the amount belonging to each, was held to be an encroachment upon the judiciary and void. Boykin *v.* Shafder, 13 La. Ann. 129.

Toll-rates and prices, power of the legislature to fix, see Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 43 N. Y. Suppl. 320; Beardsley *v.* New York, etc., R. Co., 17 Misc. (N. Y.) 256, 40 N. Y. Suppl. 1077.

19. Allison *v.* Louisville, etc., R. Co., 9 Bush (Ky.) 247.

20. Provisions in a new constitution, as framed and adopted, declaring what acts and decisions should be taken to be valid and what void, were held to be beyond the power of the convention and not binding upon the courts. Dickerson *v.* Acosta, 15 Fla. 514; McNealy *v.* Gregory, 13 Fla. 417. See also Powell *v.* Boon, 43 Ala. 459.

Implied prohibitions.— Constitutional provisions vesting the legislature with power to enact all necessary laws, to establish courts to determine all causes arising between persons within the state, and declaring that the legislative, executive, and judicial departments of the government ought to be kept separate and independent of each other were held to exclude the legislature, by implication, from exercising judicial functions. Merrill *v.* Sherburne, 1 N. H. 199, 8 Am. Dec. 52. See also State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101.

Where there were two claimants to a state office, an act of the legislature directing that the salary be paid to one of them was held invalid, as an attempted adjudication by the legislature as to the title to such office. State *v.* Carr, 129 Ind. 44, 28 N. E. 88, 28 Am. St. Rep. 163, 13 L. R. A. 177. See also Adams *v.* State, 156 Ind. 596, 59 N. E. 24.

Declaring what are nuisances see *infra*, VI, E, 7, a.

Regulating contempt see, generally, CONTEMPT.

b. Conferring Judicial Powers. The legislature has no authority to delegate judicial powers to executive or ministerial officers or to any class of persons charged with the performance of duties that are not judicial;[21] but it may authorize municipal corporations to perform many acts relating to their own self-government which are of a quasi-judicial character.[22]

c. Creating Offenses or Causes of Action by Prescribing the Elements Thereof. Statutes creating offenses or causes of action by prescribing the elements that shall constitute such offenses or by declaring what acts shall constitute a right of action, and giving a civil remedy therefor, are not regarded as encroachments upon the judicial power and are valid, so far as their prospective operation is concerned. Thus statutes declaring what shall constitute adulteration,[23] what is intoxicating,[24] what is wasteful,[25] what is a nuisance,[26] who shall be deemed fellow servants,[27] what decisions shall not be considered as authority in

Mo. Laws (1881), p. 87, providing that no benevolent association issuing certificates for the payment of money solely from the proceeds of assessments collected from the members shall be subject to the general insurance laws, and declaring that the object of the act is to remove doubts as to the true meaning and intent of the present law, exempts foreign fraternal societies from general insurance laws (Mo. Rev. Stat. (1889), §§ 5849, 5850), although the legislature cannot declare the meaning and intent of an existing law; that being a matter for the courts alone. Kern *v.* Supreme Council A. L. of H., 167 Mo. 471, 67 S. W. 252.

N. J. Pamphl. Laws (1900), p. 502, imposes a franchise tax on certain corporations, and section 8 provides that the act "shall not be considered to apply" to any corporation which has not or may not exercise any municipal franchise. It was held that section 8 is not invalid as a legislative attempt to control the courts in the interpretation of statutes, but is a limitation of the scope of the act itself, being equivalent to a provision that the act should not apply to the specified corporations. State *v.* Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230.

21. Willis *v.* Legris, 45 Ill. 289; State *v.* Smith, 15 Mo. App. 412.

22. *California.*— Provision in a city charter authorizing a municipal board of trustees to remove city officers for official misconduct was held to be valid, as not conferring judicial power. Croly *v.* Sacramento, 119 Cal. 229, 51 Pac. 323.

Louisiana.— Statutes authorizing a city council or a board of aldermen to impeach city officials for official misconduct do not confer judicial power. State *v.* Judges Civil Dist. Ct., 35 La. Ann. 1075; State *v.* Ramos, 10 La. Ann. 420. For a statute authorizing a city council to determine the rights of its members to seats see New Orleans *v.* Morgan, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232.

Missouri.— Provision in a city charter authorizing investigating committees of a city government to send for papers and to compel the attendance of witnesses under penalties was held not to be a delegation of judicial power. *In re* Dunn, 9 Mo. App. 255.

New Jersey.— Provision in a city charter that, unless two thirds of the persons assessed for municipal improvements should file their dissent, such assessments should be binding and conclusive, is not a delegation of judicial power. Wilson *v.* Trenton, 55 N. J. L. 220, 26 Atl. 83.

Oregon.— An act incorporating a city, granting it charter powers to recover invalid assessments for street improvements by declaring a lien upon the land of the owners chargeable and repealing all acts in conflict therewith is not invalid as being a delegation of judicial power, and authorizes the collection of assessments levied prior to its passage. Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

United States.— A statute authorizing the appointment of receivers by the comptroller for insolvent national banks and vesting them with power to make ratable assessments for the stock-holders thereof does not confer judicial power. Bushnell *v.* Leland, 164 U. S. 684, 17 S. Ct. 209, 41 L. ed. 598.

See 10 Cent. Dig. tit. "Constitutional Law," § 50.

23. A statute imposing a penalty for selling adulterated milk and declaring that the addition of water or any other substance thereto shall constitute adulteration is not judicial in character and is valid. State *v.* Schlenker, 112 Iowa 642, 84 N. W. 698, 84 Am. St. Rep. 360, 51 L. R. A. 347.

24. A declaration by the legislature that wine is intoxicating is not a judicial act and is valid. Jackson *v.* State, 19 Ind. 312.

25. A statute declaring the burning of natural gas in a flambeau light to be wasteful is not a judicial act and is valid. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

26. A statute prohibiting the deposit of sawdust in a lake was held not to be an exercise of judicial power and valid. State *v.* Griffin, 69 N. H. 1, 39 Atl. 260, 76 Am. St. Rep. 139, 41 L. R. A. 177.

27. A statute declaring what class of employees shall be deemed to be fellow servants in the future was held to be valid. Galveston, etc., R. Co. *v.* Worthy, (Tex. Civ. App. 1894) 27 S. W. 426.

the courts,[28] and also statutes giving remedies for the benefit of the representatives of persons who have been lynched by mobs,[29] have been held valid.

d. Declarative and Expository Legislation — (I) *In General.* A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or as to the meaning of another statute, and which declares what it is and ever has been.[30] Such a statute is necessarily retrospective, since it undertakes to declare what the law was before it was enacted, and its effect is to encroach upon the province of the judiciary, since it may put a different construction upon a statute than that which has been given to it by the courts. Thus after the courts had determined the rate at which insurance companies were taxable, under a statute, the legislature passed a subsequent statute declaring that such companies were taxable at a different rate from that determined by the courts, and also declared that the rate, as declared by the last statute, was the true intent and construction of the original statute.[31] A statute of this character is not objectionable because it declares the law in the past to have been what it declares it shall be in the future,[32] although it is for the courts to say what the law in the past was;[33] but such a statute cannot be made to operate retrospectively, so as to affect past controversies, thereby reversing decisions of the courts which have been previously rendered,[34] nor can such a statute be made to affect past transactions.[35]

(II) *Amending and Remedial Statutes.* Statutes amending prior unconstitutional or defective statutes and supplying the defects therein after they have been held unconstitutional are not objectionable as to future operation, and will be held valid as to past transactions, provided they supply the defects in such prior statutes merely, without assuming to determine the validity of proceedings taken under such statutes.[36] Legislation of this character is regarded as a modifi-

28. A statute prohibiting the reading of the English decisions rendered after the Declaration of Independence, as authorities in the courts of the state, and declaring that they should not be considered as authority in such courts, was held to be constitutional. Hickman *v.* Boffman, Hard. (Ky.) 348.

29. A statute authorizing the recovery of damages as penalties against counties by administrators of persons lynched therein was held not to be an exercise of judicial power by the legislature and therefore valid. Board of Champaign County *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738.

30. Bouvier L. Dict.

31. People *v.* New York, 16 N. Y. 424.

32. Union Iron Co. *v.* Pierce, 4 Biss. (U. S.) 327, 24 Fed. Cas. No. 14,367.

33. The legislature cannot declare what a law was, but it can declare what it shall be. McLeod *v.* Burroughs, 9 Ga. 213; Trask *v.* Green, 9 Mich. 358; Houston *v.* Bogle, 32 N. C. 496; Ogden *v.* Blackledge, 2 Cranch (U. S.) 272, 2 L. ed. 276; Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227.

34. Where a court has construed a statute and based a judgment thereon, which has become final, the legislature cannot affect such judgment by subsequent legislation declaring such statute to have a different meaning. Skinner *v.* Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Handley's Estate, 15 Utah 212, 49 Pac. 829, 62 Am. St. Rep. 926; Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591. And see *In re* Northampton, 158 Mass. 299, 33 N. E. 568.

A statute defining the words "once in jeopardy," as used in the constitution, to mean only "legal conviction," was held to be ineffective. Powell *v.* State, 17 Tex. App. 345.

The legislature cannot place a construction on the constitution that will be binding upon the courts. Lindsay *v.* U. S. Savings, etc., Assoc., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783; State *v.* McGrath, 95 Mo. 193, 8 S. W. 425; Wanser *v.* Hoos, 60 N. J. L. 482, 38 Atl. 449, 64 Am. St. Rep. 600; State *v.* Spears, (Tenn. Ch. 1899) 53 S. W. 247. As to judicial construction and effect of see *supra*, IV, B, 4.

35. Calhoun *v.* McLendon, 42 Ga. 405; James *v.* Rowland, 52 Md. 462; Reiser *v.* William Tell Sav. Fund Assoc., 39 Pa. St. 137; Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567.

36. A statute authorizing street commissioners, within a limited time after the building of new sewers, to assess the property specifically benefited thereby for the proportional cost and enacted as an amendment to a prior unconstitutional statute was held not to be an attempt to exercise judicial power by the legislature and valid. Hall *v.* Boston St. Com'rs, 177 Mass. 434, 59 N. E. 68.

An act amending a prior statute, and providing that such statute should govern certain contracts entered into before such statute took effect and prescribing the manner of enforcing such contracts was held to be

cation of prior legislation, in the nature of a reënactment, and not an assumption of judicial power by the legislature; or, more properly, it is a legislative construction of prior statutes, and is valid so far as future operation is concerned, and also as to past transactions if no judicial decrees have been rendered,[37] but invalid as to past transactions where such decrees have been rendered.[38]

(III) *Mandates to Judiciary Directing Construction of Statutes.* The question whether or not a statute violates the constitution is purely judicial, and cannot be determined by the legislature;[39] and therefore all statutes or mandates from the legislature to the judiciary, directing what construction shall be put upon existing statutes, are assumptions of judicial power and unconstitutional and void.[40]

valid as being a curative statute merely and not expository legislation. Iowa Sav., etc., Assoc. *v.* Selby, 111 Iowa 402, 82 N. W. 968.

A retrospective statute confirming and legalizing a contract made by a county which had been held invalid by the courts in an action thereon for want of precedent authority to contract on the part of such county is valid, since it does not attempt to annul a judgment of the court, but recognizes its validity by supplying the element found by the court to be wanting. Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173.

A statute directing municipal assessments for street improvements that have been paid by abutting owners to be returned to them, and that the amounts thereof be collected from the city at large, without declaring such assessments to be erroneous, does not in effect vacate assessments having the force of judgments, and is a valid exercise of legislative power. People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084.

37. *Georgia.*— Clay *v.* Central R., etc., Co., 84 Ga. 345, 10 S. E. 967.

Indiana.— Dequindre *v.* Williams, 31 Ind. 444.

Iowa.— Iowa Sav., etc., Assoc. *v.* Selby, 111 Iowa 402, 82 N. W. 968.

Kentucky.— Bryan *v.* Board of Education, 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276.

Maine.— Hunt *v.* Hunt, 37 Me. 333.

Massachusetts.— Cambridge *v.* Boston, 130 Mass. 357; Wales *v.* Wales, 119 Mass. 89.

New York.— People *v.* Wilson, 52 Hun (N. Y.) 388, 5 N. Y. Suppl. 280, 24 N. Y. St. 892; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309; People *v.* Globe Mut. L. Ins. Co., 60 How. Pr. (N. Y.) 82.

Pennsylvania.— *In re* Yost, 17 Pa. St. 524.

United States.— Singer Mfg. Co. *v.* McCollock, 24 Fed. 667; Stebbins *v.* Pueblo County, 2 McCrary (U. S.) 196, 4 Fed. 282.

See 10 Cent. Dig. tit. "Constitutional Law," § 51 *et seq.*

38. Sparhawk *v.* Sparhawk, 116 Mass. 315.

Thus where a statute relating to mechanics' liens had never received a judicial interpretation it was held competent for the legislature to provide by subsequent statute that the former statute should not be construed to extend to any other or greater interest in the land on which any buildings might be constructed than that of the person in possession at the time such construction was commenced, and who caused such buildings to be constructed. O'Conner *v.* Warner, 4 Watts & S. (Pa.) 223. But where there had been a judicial interpretation of such a statute, a subsequent statute extending such liens was held to be void. Gearing *v.* Hapgood, (Pa. 1888) 15 Atl. 920; Marsh *v.* Bower, (Pa. 1888) 15 Atl. 920; Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. St. 627. See also Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777, holding void a statute providing that a prior statute relating to mechanics' liens, in doubtful cases, should be construed to include the full amount of claims over attorney's fees and costs. And see *infra*, note 40.

39. *Illinois.*— Field *v.* People, 3 Ill. 79.

Missouri.— Householder *v.* Kansas City, 83 Mo. 488.

Nevada.— *Ex p.* Blanchard, 9 Nev. 101.

Pennsylvania.— *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193.

Wisconsin.— *In re* La Fayette County, 2 Pinn. (Wis.) 523, 2 Chandl. (Wis.) 212.

See 10 Cent. Dig. tit. "Constitutional Law," § 51.

40. *Arkansas.*— Files *v.* Fuller, 44 Ark. 273.

Louisiana.— New Orleans *v.* Louisiana Mut. Ins. Co., 26 La. Ann. 499; Cotton *v.* Brien, 6 Rob. (La.) 115.

Maryland.— Gough *v.* Pratt, 9 Md. 526.

Mississippi.— Planters' Bank *v.* Black, 11 Sm. & M. (Miss.) 43.

Missouri.— Householder *v.* Kansas City, 83 Mo. 488.

Nebraska.— Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173.

New York.— Salters *v.* Tobias, 3 Paige (N. Y.) 338.

Pennsylvania.— Com. *v.* Warwick, 172 Pa. St. 140, 33 Atl. 373; Haley *v.* Philadelphia, 68 Pa. St. 45, 8 Am. Rep. 153; Reiser *v.* William Tell Sav. Fund Assoc., 39 Pa. St. 137.

Tennessee.—Governor *v.* Porter, 5 Humphr. (Tenn.) 165.

United States.— Union Iron Co. *v.* Pierce, 4 Biss. (U. S.) 327, 24 Fed. Cas. No. 14,367.

See 10 Cent. Dig. tit. "Constitutional Law," § 51.

Defining departments.— A city ordinance defining the words, "heads of principal de-

(IV) *Operation of Repealing Statutes.* Repealing statutes are not objectionable so far as their prospective operation is concerned, but the extent to which they can be made to operate retrospectively is a judicial question and cannot be determined by the legislature. All legislation enacted for the purpose of determining whether a statute operated to repeal or suspend prior legislation is void.[41] But a legislative declaration as to the construction to be given to such statutes will not render them invalid. Such declarations are treated as surplusage so far as past transactions are concerned.[42]

e. Appointment and Removal of Trustees and Receivers — (I) *In General.* Acts appointing and removing trustees have been held to be valid.[43] The appointment of a receiver by the legislature to settle the affairs of an insolvent bank has been held not to be a judicial act, to the extent of being in violation of a constitutional provision vesting the judicial powers in the courts of the state.[44]

(II) *Authorizing Trust Companies to Act as Trustees.* An act authorizing trust companies to act as trustees and guardians is constitutional;[45] but one providing that certain corporations shall be accepted by courts as "sole security" where security is required is not.[46]

f. Changing Law and Construction of Statute After Decision. If a legislative act has received a judicial construction it cannot be disturbed by a remedial statute.[47]

partments," as used in a statute, is invalid as an invasion upon the province of the judiciary. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

Fixing boundaries.— A statute declaring a municipal boundary to have been fixed at a certain place by a prior statute was held to be invalid as an attempted legislative construction of a former statute. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277. But see *In re* Farnum, 51 N. H. 376, holding valid an act for the relocation of school-houses, and declaring how it should apply.

A statute declaring that the word "trustee" in a prior statute against embezzlement shall apply to guardians is not void as being judicial in character. Com. *v.* Kaufman, 9 Pa. Super. Ct. 310.

Usurious contracts.— A statute authorizing loan associations to raise money among their members for building purposes, and providing that dues and fines, although in excess of the legal rate of interest, should not be construed as usurious contracts, was held to be valid, and not an exercise of judicial power by the legislature. Nebraska Loan, etc., Assoc. *v.* Perkins, 61 Nebr. 254, 85 N. W. 67. *Contra*, in Alabama, where it is held that after a decision of the court holding the premiums on such contracts to be usurious and void, a statute passed declaring that such contracts, both prior and subsequent, should not be treated as usurious or render such associations amenable to the laws, was expository legislation and void as to such prior contracts. Lindsay *v.* U. S. Savings, etc., Assoc., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783. And see Denny *v.* West Philadelphia Sav., etc., Assoc., 39 Pa. St. 154; Reiser *v.* William Tell Sav. Fund Assoc., 39 Pa. St. 137.

41. Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227.

42. Repealing statutes taking away rights to recover penalties and providing that they shall not be construed so as to affect pending actions are not objectionable, but can have no effect upon such actions in the absence of any such declarations as to construction. Parmelee *v.* Lawrence, 48 Ill. 331; Epps *v.* Smith, 121 N. C. 157, 28 S. E. 359; Rood *v.* Chicago, etc., R. Co., 43 Wis. 146.

43. Tindal *v.* Drake, 60 Ala. 170, a private statute appointing a trustee to execute a certain trust created by deed was held to be valid.

The trustees appointed in a deed died, and the county court was suspended by the legislature, so that the vacancy could not be filled. An act appointing a trustee was held valid. Hindman *v.* Piper, 50 Mo. 292. See State *v.* Adams, 44 Mo. 570; Clarke *v.* Van Surlay, 15 Wend. (N. Y.) 436.

44. Carey *v.* Giles, 9 Ga. 253.

45. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

46. Matter of American Banking, etc., Co., 4 Pa. Dist. 757, 17 Pa. Co. Ct. 274, 37 Wkly. Notes Cas. (Pa.) 297, 26 Pittsb. Leg. J. N. S. 213.

47. *Georgia.*— Calhoun *v.* McLendon, 42 Ga. 405.

Indiana.— The general assembly cannot set aside or dissolve an injunction and authorize the collection of assessments which the court has declared to be illegal. Searcy *v.* Patriot, etc., Turnpike Co., 79 Ind. 274.

Maryland.— Baltimore *v.* Horn, 26 Md. 194.

Massachusetts.— Denny *v.* Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

Missouri.— McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457.

g. Conferring and Withdrawing Jurisdiction. Legislation extending the jurisdiction of the courts[48] or withdrawing it[49] is not an exercise of judicial power by the legislature, and is valid, unless repugnant to the constitution.[50] And the legislature may confer upon courts of chancery powers which inherently belong to the supreme court.[51]

h. Conferring Functions Upon Judges Instead of the Court. Where the legislature has full power over a subject-matter, it may confer such powers upon judges rather than upon the courts;[52] but where it has no power it can confer none upon either judges or courts.[53] It has been held that the legislature may confer judicial power upon a judge where, under the constitution, such power can be exercised only by the courts;[54] but by the weight of authority such legislation is unconstitutional and void.[55]

Ohio.— The Schooner Aurora Borealis *v.* Dobbie, 17 Ohio 125.

Pennsylvania.— Lambertson *v.* Hagan, 2 Pa. St. 22.

Texas.— Milam County *v.* Bateman, 54 Tex. 153.

United States.— Pennsylvania *v.* Wheeling Co., 18 How. (U. S.) 421, 15 L. ed. 435; *In re* Virginia Coupon Cases, 25 Fed. 641, 647, 654, 666.

But see Conery *v.* New Orleans Water-Works Co., 41 La. Ann. 910, 7 So. 8 (holding that a judicial decree interpreting a contract authorized by the legislature cannot prevent further legislation authorizing an amendment to the contract, the annulment thereof, or a new contract); Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27 (holding that the ringing of mill bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour); Guilford *v.* Cornell, 18 Barb. (N. Y.) 615 (an act not trenching on judicial power). See also Municipality No. 1 *v.* Wheeler, 10 La. Ann. 745.

See 10 Cent. Dig. tit. "Constitutional Law," § 83.

48. Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665.

Authorizing courts to perform the ceremony of adoption was held not to be an interference with the judiciary. Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

Extending and transferring jurisdiction, statutes relating to, held valid. See Lee *v.* Kalamazoo County Cir. Judge, 101 Mich. 406, 59 N. W. 644; Scott *v.* Smart, 1 Mich. 295.

The legislature has no power to authorize the courts to determine a constitutional question as an abstract proposition. Shephard *v.* Wheeling, 30 W. Va. 479, 4 S. E. 635. Nor can it confer judicial power upon the courts or upon judges where, under the constitution, such powers are confided to the courts. Norwalk St. R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794.

49. *Ex p.* McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264, holding the repeal of an act conferring certain jurisdiction on the circuit courts, although affecting pending cases, was not an assumption of judicial power. See also Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443, holding that although under Ind. Const. art. 7, § 4, declaring that "the Supreme Court shall have jurisdiction co-extensive with the limits of the State in appeals and writs of error, under such regulations and restrictions as may be prescribed by law," the legislature might not deprive the supreme court entirely of its appellate jurisdiction, it has the power, not only to enlarge, but from time to time contract, the same, as public policy may require, and may, within reasonable limits, prescribe the class of cases in which appeals may be taken.

50. Wiggins *v.* Williams, 36 Fla. 637, 13 So. 859, 30 L. R. A. 754, holding that, while the legislature may modify or expand chancery jurisdiction, it cannot thereby impair rights guaranteed by the constitution. See also *Ex p.* Harker, 49 Cal. 465.

51. A statute authorizing townships to pass ordinances directing an application by petition to a court of chancery to compel railroad companies to erect gates at crossings is not invalid as seeking to confer on such court a power inherently belonging to the supreme court and exercisable by mandamus. Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369.

52. Where the legislature had full power over the adoption of children it has been held that it might authorize the county judge to perform the ceremony of adoption. Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

53. Where the constitution divides the powers of the government into three distinct departments, and confides each department to separate magistrates, the legislature has no judicial power and can confer none upon a court or judge. Norwalk St. R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794.

54. A statute authorizing circuit judges to render judgment at chambers, upon frivolous demurrers where, under the constitution, judicial powers could be exercised only by the courts, was held to be valid. Clapp *v.* Preston, 15 Wis. 543.

55. A statute conferring upon the chief justice power to determine the title to pub-

i. Creation of Supreme Court Commissions or Special Courts of Appeals. Legislation authorizing the supreme court to appoint commissioners to assist the court in the performance of its duties is not an exercise of judicial power by the legislature, and is valid, since such legislation confers no judicial powers upon such commissioners;[56] and by the weight of authority the legislature may create such a tribunal by direct legislation and appointment.[57]

j. Declaring Minor of Full Age. It has also been held that in the absence of express constitutional restrictions the legislature may declare a minor of full age for the purpose of making contracts.[58]

k. Determining Amendment, Repeal, or Forfeiture of Franchise or Charter. If the legislature reserves to itself the power to repeal a charter or franchise it is to determine when the repeal shall be made.[59]

lic office where, under the constitution, the full court was vested with such power was held to be invalid. *In re* Cleveland, 51 N. J. L. 311, 17 Atl. 772. A statute authorizing circuit courts, "or a judge thereof," to proceed upon the petition of creditors, in cases of insolvent debtors, was held to be unconstitutional. Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611.

56. People *v.* Hayne, 83 Cal. 111, 23 Pac. 1, 17 Am. St. Rep. 211; *In re* Supreme Ct. Com'rs, 37 Nebr. 655, 56 N. W. 298; Sharpe *v.* Robertson, 5 Gratt. (Va.) 518; Smith *v.* Odell, 1 Pinn. (Wis.) 449.

57. Sharpe *v.* Robertson, 5 Gratt. (Va.) 518; Smith *v.* Odell, 1 Pinn. (Wis.) 449 (holding valid statutes creating special tribunals to assist the supreme court in the performance of its duties, and appointing the officers thereof); State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101 (denying the authority of the legislature to create and appoint supreme court commissioners to assist the court in the performance of its duties).

58. Dickens *v.* Carr, 84 Mo. 658.

59. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629, treated in Farrar's "Dartmouth College *v.* Woodward" (1819), and Shirley "On the Dartmouth College Causes" (1879). See also articles on legislative control over railway charters in 1 Am. L. Rev. 451, 2 Am. L. Rev. 25. And see the following cases:

Iowa.— Miners' Bank *v.* U. S., 1 Greene (Iowa) 553, Morr. (Iowa) 635, 43 Am. Dec. 115, repeal of bank charter.

Maryland.— American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15.

Massachusetts.— Cases in which the repeal or amendment of a charter has been held constitutional are: Thornton *v.* Marginal R. Co., 123 Mass. 32; Worcester, etc., R. Co. *v.* Railroad Com'rs, 118 Mass. 561; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Parker *v.* Metropolitan R. Co., 109 Mass. 506; Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.) 29; Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230; Fitchburg R. Co. *v.* Grand Junction R., etc., Co., 4 Allen (Mass.) 198; Massachusetts Gen. Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227; Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424. Certain limitations of the power to amend, alter, and repeal are given in Watuppa Reservoir Co. *v.* Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466; Oliver *v.* Washington Mills, 11 Allen (Mass.) 268; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106; Com. *v.* Essex Co., 13 Gray (Mass.) 239. Opinion of Justices, 9 Cush. (Mass.) 604, treats of the extent to which corporations created prior to March 11, 1831 (Mass. Rev. Laws, c. 109, § 3) are subject to be affected by general laws subsequently enacted.

Minnesota.— Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549.

New Jersey.— When the right to alter or amend, whenever the public good may require, is reserved, the legislature is to determine when the right shall be exercised. State *v.* Miller, 31 N. J. L. 521 [*affirming* 30 N. J. L. 368, 86 Am. Dec. 188].

Pennsylvania.— Under a constitution giving the legislature power to alter or revoke any charter when "in their opinion" the privileges granted become "injurious to the citizens of the commonwealth," the legislature is the judge as to when such privileges become injurious. Wagner Free Institute *v.* Philadelphia, 132 Pa. St. 612, 25 Wkly. Notes Cas. (Pa.) 437, 19 Atl. 297, 19 Am. St. Rep. 613.

See 10 Cent. Dig. tit. "Constitutional Law," § 73.

But see the following cases:

Illinois.—Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Louisiana.—American Printing House *v.* Dupuy, 37 La. Ann. 188.

Maine.— State *v.* Noyes, 47 Me. 189.

Michigan.—"The charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the State, and can not be set aside at the will of the legislature. Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the State as the one party, and the corporators as the other, which

1. Disposition or Sale of Property — (I) *In General.* The legislature has no power, independent of the courts, to determine a controversy as to the ownership of property.[60] All such legislation is an assumption of judicial power and void.[61] But under certain circumstances the legislature may authorize the sale or conversion of property,[62] although it cannot direct the application of the proceeds received therefor.[63] It is well settled that where trustees,[64] executors,[65] and persons not *sui juris*,[66] holding the legal title to real estate, and who, for any reason, are incompetent to make a conveyance thereof for the purpose of fulfilling a trust, the legislature has the power to authorize a conveyance in such cases, for the purpose of perfecting the terms of the trust; and it also has power to validate an invalid conveyance[67] or to perfect a defective title to real estate pending litigation for the same purpose,[68] although it cannot authorize a sale of real estate

neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation, as would be the contracts of private parties." Flint, etc., Plank Road Co. *v.* Woodhull, 25 Mich. 99, 101, 12 Am. Rep. 233.

Pennsylvania.— Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

See 10 Cent. Dig. tit. "Constitutional Law," § 73.

60. An act of the legislature appointing commissioners to determine the rights of parties to real estate was held to be void. Jackson *v.* Frost, 5 Cow. (N. Y.) 346.

The legislature has no authority to authorize the levying of contributions for a private purpose, or for a public purpose in which those by whom such contributions are to be paid have no interest. Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

The legislature has no power to vacate a final judgment of a court. State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925.

61. An act of the legislature extinguishing a mortgagor's title was held to be void. Ashuelot R. Co. *v.* Elliot, 58 N. H. 451.

Depriving of vested rights.—The legislature cannot take from a person rights acquired under a particular law, nor can it direct how the law shall be administered in relation to any particular right. Perry *v.* Clinton, etc., R. Co., 11 Rob. (La.) 404. A statute which spent its force on particular persons without having other objects in view was held to be a judicial sentence rather than a law and void. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72. A statute divesting a person of his freehold and passing it over to another was held to be void as against common right and Magna Charta. Bowman *v.* Middleton, 1 Bay (S. C.) 252. See also Ham *v.* McClaws, 1 Bay (S. C.) 93. A statute forbidding payments in store orders was held to be void as depriving persons *sui juris* of the right to make their own contracts. Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354. See also State *v.* Fire Creek Coal, etc., Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359, holding void a statute forbidding mining companies from selling to their employees merchandise at higher rates than to others.

62. Martin *v.* Bear, 5 Pa. L. J. Rep. 17, 10 Am. L. J. 457.

63. Edwards *v.* Pope, 4 Ill. 465; Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543; Saxton *v.* Mitchell, 78 Pa. St. 479; Shoenberger *v.* School Directors, 32 Pa. St. 34; Ervine's Appeal, 16 Pa. St. 256, 55 Am. Dec. 499; Martin *v.* Bear, 5 Pa. L. J. Rep. 17, 10 Am. L. J. 457; Arrowsmith *v.* Burlingim, 4 McLean (U. S.) 489, 1 Fed. Cas. No. 563, 1 Am. L. J. N. S. 448.

64. *Connecticut.*— Linsley *v.* Hubbard, 44 Conn. 109, 26 Am. Rep. 431.

Massachusetts.— Sohier *v.* Trinity Church, 109 Mass. 1.

Pennsylvania.— Kerr *v.* Kitchen, 17 Pa. St. 433; Sergeant *v.* Kuhn, 2 Pa. St. 393; Norris *v.* Clymer, 2 Pa. St. 277; Fullerton *v.* McArthur, 1 Grant (Pa.) 232; Ritter *v.* Bausman, 2 Woodw. (Pa.) 248.

Rhode Island.— *In re* Van Horne, 18 R. I. 389, 28 Atl. 341.

United States.— Stanley *v.* Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502.

A statute authorizing the sale of real estate to satisfy liens thereon is valid. Livingston *v.* Moore, Baldw. (U. S.) 424, 15 Fed. Cas. No. 8,416 [*affirmed* in 7 Pet. (U. S.) 469, 8 L. ed. 751].

Remainder-men and tenant for life, private statute authorizing conveyance of real estate, pursuant to agreement between, is valid, although some of the contracting parties are minors and *fême coverts.* Chappell *v.* Doe, 49 Ala. 153.

65. Bruce *v.* Bradshaw, 69 Ala. 360. See also *infra*, V, A, 3, l, (II).

66. Persons not *sui juris*, a statute authorizing conversion of funds of, for their benefit, is constitutional, but the line of distinction between the legislative and judicial powers will be kept steadily in view in such cases. Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758. See also Clusky *v.* Burns, 120 Mo. 567, 25 S. W. 585.

67. Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed. 787.

As to validating and curative statutes see *infra*, V, A, 3, r.

68. Kitchen *v.* Kerr, 7 Phila. (Pa.) 24, 7 Leg. Int. (Pa.) 11.

and a reinvestment of the proceeds for the purpose of perfecting the title thereto.[69] Statutes confirming defective titles generally are valid,[70] provided they do not assume to interfere with pending litigation.[71]

(II) *By Executors and Administrators.* Statutes authorizing executors and administrators to sell the real estate of the decedent to pay debts contracted during his lifetime are not regarded as an exercise of judicial power by the legislature and are valid;[72] and it is no objection to such statutes that they prescribe the terms of sale,[73] provide means for the distribution of the proceeds received,[74] or give discretionary power to the representative of the decedent to make such distributions,[75] provided that in the case of an executor powers are given him and duties are imposed upon him respecting such real estate under the terms of the will of the decedent. But where no such powers are given and no such duties are imposed, a statute authorizing an executor to sell real estate and make distribution of the proceeds, and enacted without the consent of the heirs, is void.[76] And statutes authorizing the sale of real estate to pay debts of the decedent, without providing for judicial proceedings to ascertain the amount of such debts,[77] or which authorize such sales for the purpose of paying debts of the estate found

69. A private statute authorizing the sale of lands devised to a tenant for life, with remainder over, and the investing of the funds for the benefit of the devisees, for the purpose of clearing the title, was held to be an infringement upon the judiciary and void. Miller *v.* Alexander, 122 N. C. 718, 30 S. E. 125.

70. San Francisco *v.* Beideman, 17 Cal. 443; Hart *v.* Burnett, 15 Cal. 530, holding valid a statute confirming a defective conveyance of real estate made by a city council.

As to validating and curative statutes see *infra*, V, A, 3, r.

71. Northern *v.* Barnes, 2 Lea (Tenn.) 603, holding invalid a statute providing for the more speedy execution of a conveyance of real estate pending litigation affecting the title thereof. But see Kitchen *v.* Kerr, 7 Phila. (Pa.) 11, 2 Leg. Int. (Pa.) 11.

72. *Alabama.*— Watson *v.* Oates, 58 Ala. 647; Holman *v.* Norfolk Bank, 12 Ala. 369.

Kansas.— A statute providing that where land is sold by an executor, administrator, guardian, or sheriff and is afterward recovered by any one for whose benefit it was sold or by any one claiming under him, the plaintiff shall not be entitled to possession until he has refunded the purchase-money and taxes, was held to be valid. Claypoole *v.* King, 21 Kan. 602.

Kentucky.— Shehan *v.* Barnett, 6 T. B. Mon. (Ky.) 592.

Mississippi.— Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636. See also Coleman *v.* Carr, Walk. (Miss.) 258.

Missouri.— Cargile *v.* Fernald, 63 Mo. 304.

Vermont.— Langdon *v.* Strong, 2 Vt. 234.

United States.— Watkins *v.* Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873.

See 10 Cent. Dig. tit. "Constitutional Law," § 56.

Infant heirs.—A statute authorizing an administrator to sell the lands of infant heirs and to hold the proceeds as assets to be disposed of according to law is not an exercise of judicial power and is valid. Doe *v.* Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732.

Persons of unsound mind.— A statute providing for election by a guardian of a devise under a will in lieu of dower, where the widow is of unsound mind, was held to be valid. Young *v.* Boardman, 97 Mo. 181, 10 S. W. 48.

Persons sui juris.— The legislature has authority to authorize an executor to sell the real estate of persons who are not *sui juris*, and to direct the investment of the proceeds thereof in trust in accordance with the will of the testator, and a purchaser of such real estate may be compelled to take title. But it has no such power where the parties are *sui juris*, and have a vested title. Kneass' Appeal, 31 Pa. St. 87.

73. Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636; Langdon *v.* Strong, 12 Vt. 234.

74. Shehan *v.* Barnett, 6 T. B. Mon. (Ky.) 592; Custer *v.* Com., 25 Pa. St. 375; Carter *v.* Com., 1 Grant (Pa.) 216; Langdon *v.* Strong, 12 Vt. 234.

An act authorizing the appointment by depositors in a banking institution of persons to receive the deposits not otherwise disposed of after the death of such depositors was held to be constitutional. Knorr's Appeal, 89 Pa. St. 93.

75. Holman *v.* Norfolk Bank, 12 Ala. 369; Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636; Watkins *v.* Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873.

76. Where a will gave an executor no power and imposed upon him no duty with respect to real estate it was held that a statute enacted without the consent of the heirs, authorizing the executor to sell the real estate of the decedent and hold the proceeds in trust for the payment of debts, expenses, and for distribution, was unconstitutional. Hegarty's Appeal, 75 Pa. St. 503.

77. A statute authorizing the sale of the real estate of the decedent by his adminis-

due by the legislature,[78] or which assume to cure defects or errors in judicial sales[79] are an exercise of judicial power by the legislature and unconstitutional.

(III) *By Guardians and Trustees.* By the weight of authority, the legislature has power to authorize the sale of the real estate of infants and persons *non compos mentis*, through guardians and trustees.[80] But such sales cannot be authorized by special statutes where a guardian duly appointed under general statutes is in charge of the property.[81]

m. Impairing Obligation of Contract and Declaring Forfeiture or Requiring Cancellation. It is not competent for the legislature to violate contracts, obligations, etc.[82] Hence it cannot determine that a contract, deed, or other obligation has been violated and require cancellation or forfeiture; this is a question which involves judicial inquiry.[83]

n. Investigations by Legislative Committees. Investigations by legislative or congressional committees, which are judicial in their nature, are unconstitutional.[84]

o. Prescribing Qualifications For Admission to the Bar. By the weight of authority, it rests with the courts to determine the qualifications of those who shall become attorneys and counselors at law by being admitted to practise as such.[85] But the right to practise law has been held to be a statutory right, sub-

trator to pay debts due from the estate, without providing means for judicial determination of the amount thereof, was held to be void as an exercise of a judicial power by the legislature. Rozier *v.* Fagan, 46 Ill. 404.

78. Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543.

79. An act ratifying defective and erroneous sales of real estate made by a probate court was held to be an invasion of the judicial power, in assuming to cure that which was defective for want of jurisdiction. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

80. *California.*— Brenham *v.* Davidson, 51 Cal. 352.

Illinois.— Mason *v.* Wait, 5 Ill. 127.

Massachusetts.— Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448; Rice *v.* Parkman, 16 Mass. 326.

Mississippi.— Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159.

Missouri.— Stewart *v.* Griffith, 33 Mo. 13, 82 Am. Dec. 148.

New York.— Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

Pennsylvania.— Kneass' Appeal, 31 Pa. St. 87; Myers' Appeal, 16 Wkly. Notes Cas. (Pa.) 137; Clark *v.* Miller, 2 Wkly. Notes Cas. (Pa.) 50.

Rhode Island.— Thurston *v.* Thurston, 6 R. I. 296.

United States— Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585.

Contra,— *In re* Opinion of Court, 4 N. H. 565, 572; Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

See 10 Cent. Dig. tit. "Constitutional Law," § 57.

A foreign guardian may be authorized by the legislature of the state where his ward's lands are situate to sell such lands upon the giving of a bond in accordance with the laws of such state. Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159.

A contract between a guardian and a corporation, in accordance with the provisions of its charter, fixing damages or releasing claims for the land of an infant taken under condemnation proceedings, was held to be valid, and not an invasion of the chancery powers of the courts. Louisville, etc., R. Co. *v.* Blythe, 69 Miss. 939, 11 So. 111, 30 Am. St. Rep. 599, 16 L. R. A. 251.

81. Lincoln *v.* Alexander, 52 Cal. 482, 28 Am. Rep. 639.

82. As to impairment of the obligations of contracts generally see *infra*, IX.

83. Hardy *v.* Montgomery Branch Bank, 15 Ala. 722; Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378; State *v.* Burgess, 23 La. Ann. 225; Perry *v.* Clinton, etc., R. Co., 11 Rob. (La.) 404; Butler *v.* Chariton County Ct., 13 Mo. 112.

84. Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377 (an investigation by a committee of congress of certain debtors of the United States is judicial in its nature); *In re* Pacific R. Commission, 12 Sawy. (U. S.) 559, 32 Fed. 241 (where the constitutionality of the act of March 3, 1887, "authorizing an investigation of the books, accounts, and methods of railroads which have received aid from the United States, and for other purposes" was passed upon).

An inquiry by the legislature into the affairs of a corporation was held not to be a judicial act. Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33. But see Allen *v.* Buchanan, 9 Phila (Pa.) 283, 30 Leg. Int. (Pa.) 76, holding that the judicial power of the United States cannot be extended by congress to cases not covered by the constitution.

85. *In re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; Splane's Petition, 123 Pa. St. 527, 16 Atl. 481; *Ex p.* Secombe, 19 How.

ject to legislative control, and a statute prescribing a test oath that the applicant is loyal to the federal government and to the state, as a prerequisite to admission to practice, has been held to be within the power of the legislature and constitutional.[86] And also statutes prescribing test oaths that the applicants have not been engaged in dueling have been sustained.[87] The line distinguishing between the legislative and judicial powers upon this subject cannot be said to be clearly drawn;[88] but in general statutes regulating the conditions for admission to the bar and prescribing the qualifications of the applicants will be sustained,[89] provided they do not attempt to deprive the court, in the exercise of its discretion, of the power to reject applications[90] or interfere with its prescribed rules.[91]

p. Requiring Courts to Write Opinions and Syllabi, Attest Evidence, and Report Decisions. The legislature has no power to require the courts to give the reasons for their decisions in writing,[92] or to attest transcripts of evidence given in trials before them;[93] nor has it any authority to require the courts to prepare syllabi or to report decisions.[94] All such duties are ministerial merely, and statutes imposing any such duties upon the courts are an encroachment upon the judiciary and invalid,[95] unless such duties are incidental to the judicial functions of the court, in the course of judicial administration.[96] So too a statute imposing

(U. S.) 9, 15 L. ed. 565. And see ATTORNEY AND CLIENT, 4 Cyc. 898.

The United States courts sustain this view and an act of congress prescribing a test oath that the applicant has never borne arms against the United States as a prerequisite to admission to practice in the federal courts has been held unconstitutional and void as an infringement on the rights of the judiciary. *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *In re* Shorter, 22 Fed. Cas. No. 12,811.

86. *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293.

87. *In re* Dorsey, 7 Port. (Ala.) 293; Baker *v.* People, 20 Johns. (N. Y.) 457.

88. The constitutionality of a statute authorizing the admission of women to the bar was questioned, but the applicant was admitted through deference to the legislature. *In re* Goodell, 48 Wis. 693, 81 N. W. 551.

89. A statute making a diploma from a law school conclusive evidence of the legal ability of the holder for admission to the bar was held to be constitutional. Matter of Cooper, 22 N. Y. 67, 11 Abb. Pr. (N. Y.) 301, 20 How. Pr. (N. Y.) 1 [*reversing* Matter of Graduates, 31 Barb. (N. Y.) 353, 10 Abb. Pr. (N. Y.) 348].

A statute prescribing only offenses for the commission of which attorneys shall be disbarred was held not to be an invasion of the province of the judiciary and valid. *Ex p.* Schenck, 65 N. C. 353.

90. A statute compelling the courts to admit to practice attorneys and counselors who had been admitted in certain other courts within the state, on presentation of a certificate of admission, was held to be unconstitutional as depriving the courts of their discretion. Splane's Petition, 123 Pa. St. 527, 16 Atl. 481.

91. A statute requiring the supreme court, up to a certain date, to grant licenses to practise law to law students who had commenced their studies before a certain date and studied a certain length of time, passed required examinations, or presented diplomas from a law school, and to refuse such licenses to those who had not complied with such requirements, was to be held an abrogation of rules previously adopted by such court, and void as an attempt to exercise judicial power by the legislature. *In re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519.

As to the power of the legislature to abrogate rules previously adopted by the supreme court see Bishop *v.* State, 30 Ala. 34; Texas, etc., R. Co. *v.* Saxton, 3 N. M. 443, 6 Pac. 206; Herndon *v.* Imperial F. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547.

92. Vaughn *v.* Harp, 49 Ark. 160, 4 S. W. 751; Houston *v.* Williams, 13 Cal. 24, 73 Am. Dec. 565.

93. A statute appointing official stenographic reporters for the courts, and providing that transcripts of the evidence prepared by them and containing all the evidence given at trials, shall be filed with the clerks of such courts and certified to by the judges as correct is an encroachment upon the judiciary and invalid, since it compels the judges to accept and attest as true that which such reporters have prepared. Adams *v.* State, 156 Ind. 596, 59 N. E. 24.

94. *Ex p.* Griffiths, 118 Ind. 83, 20 N. E. 513, 10 Am. St. Rep. 107, 3 L. R. A. 398; Matter of Headnotes, 43 Mich. 641, 8 N. W. 552.

95. *Ex p.* Griffiths, 118 Ind. 83, 20 N. E. 513, 10 Am. St. Rep. 107, 3 L. R. A. 398.

96. The duty of collecting inheritance taxes being necessarily incidental to the settlement of estates, a statute imposing the duty of making such collections upon probate courts was held valid. Union Trust Co. *v.* Wayne County Probate Judge, 125 Mich. 487, 84 N. W. 1101.

upon the court the performance of non-judicial duties and taking from it the exercise of judicial discretion has been held unconstitutional.[97]

q. Taxation of Lawyers. There is no implied prohibition, under constitutional provisions forbidding one department of the government to infringe upon the powers of another, that attorneys and counselors at law, who are necessarily officers of courts, shall not be taxed;[98] and statutes imposing taxes upon them are constitutional.[99]

r. Validating Instruments, Acts, Etc.— (i) *Deeds, Wills, Bonds, and Subscriptions.* The legislature cannot validate void instruments,[1] but can certain instruments irregularly made.[2]

(ii) *Municipal Ordinances and Contracts.* The legislature has power to validate defective municipal ordinances[3] and contracts,[4] and to give effect to proceedings taken under and in accordance with such ordinances and contracts,[5] without encroaching upon the judicial power.

(iii) *Records.* The legislature has power to validate defective records that are not judicial.[6]

(iv) *Taxes and Assessments.* Acts validating or invalidating taxes are generally regarded as intrusions upon the judicial function.[7]

97. A statute making it the duty of the courts, on application of the attorney-general, to authorize the examination of witnesses in proceedings against monopolies in certain cases was held to be unconstitutional, as imposing upon the courts the performance of non-judicial duties and the taking from them the exercise of judicial discretion. People *v.* Nussbaum, 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492 [*reversing* 32 Misc. (N. Y.) 1, 66 N. Y. Suppl. 129].

98. Trezvant *v.* State, (Tex. Crim. 1892) 20 S. W. 582; *Ex p.* Williams, 31 Tex. Crim. 262, 20 S. W. 580, 21 L. R. A. 783.

99. State *v.* Hibbard, 3 Ohio 63; *Ex p.* Williams, 31 Tex. Crim. 262, 20 S. W. 580, 21 L. R. A. 783.

1. Columbus, etc., R. Co. *v.* Grant County, 65 Ind. 427 (subscription); Den *v.* Barfield, 6 N. C. 391 (deed); Wilson *v.* Wood, 10 Okla. 279, 61 Pac. 1045 (deed); Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567 (wills).

2. The rule that the legislature cannot, by the enactment of a retrospective statute, exercise a judicial power does not apply to an act validating previous conveyances, nor does it apply to cases where the conveyance had been set aside for defective execution before the passage of the act, but where the appeal therefrom had not been decided until after its passage. Sidway *v.* Lawson, 58 Ark. 117, 23 S. W. 648. See also Sticknoth's Estate, 7 Nev. 223; State *v.* Pool, 27 N. C. 105 (ratification of invalid bond given by a sheriff); Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387 (confirmatory act assuming to cure an informality in certificate of magistrate); Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823 (act validating bond issues of counties made irregularly).

3. Morris *v.* State, 62 Tex. 728.

4. State *v.* Union, 33 N. J. L. 350.

Invalid municipal bonds, after they have been so declared, may be cured and rendered effective by subsequent legislation. A curative statute validating city bonds after they had been declared invalid is not, with respect to pending actions involving the validity of such bonds, an attempt to exercise judicial power. Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212. See also *supra*, IV, D, 7, d.

A statute validating a prior contract of county commissioners for transferring the records of deeds of an old county to a new county is not an exercise of judicial power and is valid. Erskine *v.* Steele County, 87 Fed. 630.

5. Where county commissioners, acting under an unconstitutional law, offered bounties for the destruction of gophers and issued county warrants in payment therefor, and a subsequent statute was passed validating such acts, it was held that the statute was operative as to such warrants only, and otherwise void as an encroachment upon the judiciary. Felix *v.* Wallace County, 62 Kan. 832, 62 Pac. 667, 84 Am. St. Rep. 424.

6. Thus a statute validating all unsigned records was held not to be an assumption of judicial power by the legislature and therefore valid. Cookerly *v.* Duncan, 87 Ind. 332.

7. *Kentucky.*— Marshall *v.* McDaniel, 12 Bush (Ky.) 378.

Massachusetts.— After the supreme court had decided a tax-sale invalid because of a defect in notice, a statute was passed providing that no sale based upon a notice similarly defective should be invalid, except sales, the validity of which had been questioned in suits already begun, and also land which has been alienated since the date of such previous decision. The statute was held unconstitutional. Forster *v.* Forster, 129 Mass. 559.

Michigan.— Moser *v.* White, 29 Mich. 59.

Nebraska.— Larson *v.* Dickey, 39 Nebr. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

s. With Respect to Damages, Liability, and Evidence — (I) *DAMAGES* — (A) *In General.* Statutes determining the rule or amount of damages have been declared both constitutional[8] and unconstitutional.[9]

(B) *Caused by State.* The legislature may appropriate money for damages caused to private property by the state.[10]

(II) *DETERMINING LIABILITY OR INDEBTEDNESS.* An act of the legislature determining the amount of indebtedness due from one person to another is void.[11]

(III) *PRESCRIBING RULES OF EVIDENCE AND EFFECT OF EVIDENCE.* The legislature has power to give greater effect to evidence than it possesses at common law[12] and in both civil and criminal proceedings it may declare what shall be *prima facie* evidence.[13] On the other hand it cannot prescribe what shall

West Virginia.— *Ex p.* Low, 24 W. Va. 620.

Wisconsin.— Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

See 10 Cent. Dig. tit. "Constitutional Law," § 80.

But see Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489 (where act requiring a tax-collector to receive from a certain corporation amount certified in payment of taxes, with a certain proviso, was not unconstitutional); Eve *v.* State, 21 Ga. 50 (where an act, so far as forbidding courts to interfere with tax executions on affidavit of illegality, was constitutional); Marion County *v.* Louisville, etc., R. Co., 91 Ky. 388, 12 Ky. L. Rep. 961, 15 S. W. 1061 (where an act validating past levy was constitutional); Doyle *v.* Newark, 34 N. J. L. 236 (where an act referring to certain assessments for street improvements which a court had adjudged to be illegal and ordering a new assessment was held not to be an infringement on the judicial power).

8. Jones *v.* Galena, etc., R. Co., 16 Iowa 6.

9. Isom *v.* Mississippi Cent. R. Co., 36 Miss. 300.

10. *In re* Senate Bill, 21 Colo. 69, 39 Pac. 1088; *In re* Green, 4 Md. Ch. 349.

11. The legislature cannot find the fact that there were debts due from a decedent's estate, in order to pass a law authorizing the administrator to pay the debts. Davenport *v.* Young, 16 Ill. 548, 63 Am. Dec. 320; Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543. And see State *v.* Hampton, 13 Nev. 439 (holding that an act providing for paying the indebtedness of a city, so far as undertaking definitely to fix the amount due to persons named therein, was unconstitutional); Pittsburgh, etc., R. Co. *v.* Gazzam, 32 Pa. St. 340. If no obligation legal or moral rests upon a board of education to pay an alleged claim, an act commanding the board to levy a tax for its payment is unconstitutional. Board of Education *v.* State, 51 Ohio St. 531, 38 N. E. 614, 46 Am. St. Rep. 558, 25 L. R. A. 770.

Provisions not unconstitutional.— An act ordering supervisors to audit and allow a claim already established by a judgment was valid. People *v.* San Francisco, 11 Cal. 206. An act assuming that there were debts unpaid which were incurred in the erection or repair of a bridge, but not undertaking to determine their nature, amount, or to whom or from whom due was not unconstitutional in Dennis *v.* Maynard, 15 Ill. 477; Shaw *v.* Dennis, 10 Ill. 405. See also Hingham, etc., Bridge, etc., Corp. *v.* Norfolk County, 6 Allen (Mass.) 353 (an act providing that a turnpike should be a public highway, that the court should appoint commissioners to award damages, etc., is not an invasion of judicial power); State *v.* Henry County, 41 Ohio St. 423 (an act providing that proof of the amount due each claimant should be made before a judge, and ordering the county commissioners to pay claims as so determined, is valid).

That an act as to the payment of bonds assumes them to be valid does not preclude the courts from inquiry into their validity. *In re* Bond Debt Cases, 12 S. C. 200; McLaughlin *v.* Charleston County, 7 S. C. 375.

Where the legislature has, by retrospective legislation, imposed a legal liability where none existed, the question whether there was such moral obligation as to support the act is with the judiciary. Craft *v.* Lofinck, 34 Kan. 365, 8 Pac. 359.

12. State *v.* Cunningham, 25 Conn. 195; *In re* Linn County, 15 Kan. 500. *Contra,* Wantlan *v.* White, 19 Ind. 470.

Person convicted of felony.— A statute making such a competent witness, but providing that his conviction may be proved to affect his credibility, was held to be valid. Sutton *v.* Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

13. *Connecticut.*— State *v.* Cunningham, 25 Conn. 195.

Massachusetts.— Com. *v.* Williams, 6 Gray (Mass.) 1.

Missouri.— St. Joseph *v.* Farrell, 106 Mo. 437, 17 S. W. 497.

New York.— People *v.* Cannon, 63 Hun (N. Y.) 306, 18 N. Y. Suppl. 25, 43 N. Y. St. 427 [*affirmed* in 139 N. Y. 32, 34 N. E. 759, 54 N. Y. St. 431].

North Carolina.— State *v.* Rogers, 119 N. C. 793, 26 S. E. 142.

Rhode Island.— State *v.* Mellor, 13 R. I. 666.

South Dakota.— State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

United States.— Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905.

be conclusive evidence,[14] as this would be an invasion of the province of the judiciary.[15]

t. With Respect to Process and Writs — (I) *Requiring and Restricting Issue of Writs.* The legislature has power to regulate and restrict the issue and use of writs by the courts,[16] but it cannot abolish the use of a writ where such action would tend to deprive the court of the means of exercising its discretionary powers. It may restrict the use of the writ of certiorari,[17] although it cannot abolish it;[18] and it may regulate the use of mandamus[19] and injunctions,[20] but it cannot forbid the issue of executions[21] or enlarge or restrict the use of prohibition.[22]

(II) *Regulating Service of Process.* The service of process is a subject which is within legislative control.[23] The legislature may authorize the running

See 10 Cent. Dig. tit. "Constitutional Law," § 59.

14. White *v.* Flynn, 23 Ind. 46; Martin *v.* Cole, 38 Iowa 141; Corbin *v.* Hill, 21 Iowa 70, holding void statutes making tax deeds conclusive evidence that the tax warrants were sufficient. See also U. S. *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519, holding unconstitutional an act of congress declaring in effect that unqualified acceptance of pardon by claimants to abandoned and captured property during insurrection, without a disclaimer of guilt, should be conclusive evidence of the acts pardoned.

Kan. Laws (1893), c. 100, making specification of weights in bills of lading conclusive evidence of their correctness, is unconstitutional, because depriving the courts of the judicial power to determine the weight and sufficiency of the evidence. Missouri, etc., R. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765.

15. U. S. *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519.

16. *California.*— Farmers' Co-operative Union *v.* Thresher, 62 Cal. 407; Camron *v.* Kenfield, 57 Cal. 550.

Michigan.— Eddy *v.* Lee Tp., 73 Mich. 123, 40 N. W. 792.

New Jersey.— Green *v.* Jersey City, 42 N. J. L. 118.

South Carolina.— Chamblee *v.* Tribble, 23 S. C. 70; State *v.* Gaillard, 11 S. C. 309; State *v.* County Treasurer, 4 S. C. 520.

Tennessee.— Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663.

See 10 Cent. Dig. tit. "Constitutional Law," § 58.

17. Where the constitution provided that inferior courts should have power to issue writs of certiorari in civil cases for the removal of causes from courts of inferior jurisdiction, upon sufficient cause shown, it was held that a statute prohibiting the use of certiorari and supersedeas to stay the collection of taxes was constitutional. Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663.

As to certiorari generally see CERTIORARI.

18. The legislature has power to regulate and to limit the use of this writ, but it cannot abolish it either directly or indirectly. Green *v.* Jersey City, 42 N. J. L. 118.

19. Where the constitution gave the courts of common pleas power to issue writs of mandamus and prohibition it was held that the legislature had power to exclude a previously existing remedy by prohibition in a particular case. State *v.* County Treasurer, 4 S. C. 520.

As to mandamus generally see MANDAMUS.

20. Statutes prohibiting the issue of injunctions or other process to stay proceedings for the assessment or collection of taxes are not an invasion of the province of the judiciary, where other remedies for the parties aggrieved are provided. Eddy *v.* Lee Tp., 73 Mich. 123, 40 N. W. 792; Chamblee *v.* Tribble, 23 S. C. 70; State *v.* Gaillard, 11 S. C. 309.

As to injunctions generally see INJUNCTIONS.

A statute declaring certain acts to be unlawful and commanding the courts to enjoin their performance, without proof that any injury had been done, was held to be an invasion of the province of the judiciary and invalid. Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808. See also Creech *v.* Pittsburgh, etc., R. Co., 11 Ohio Dec. (Reprint) 764, 29 Cinc. L. Bul. 112. But see Com. *v.* Farmers', etc., Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290, holding valid a statute authorizing commissioners appointed by the governor to examine into the affairs of banks, to fine and imprison such officers thereof as should refuse to obey process provided for the use of such commissioners, and requiring that injunctions issue from the courts, without hearing, upon a report from such commissioners that a bank was insolvent.

21. Legislation forbidding jury trials and the issuing of executions is an invasion upon the province of the judiciary and void. Barnes *v.* Barnes, 53 N. C. 366.

As to executions generally see EXECUTIONS.

22. Farmers' Co-operative Union *v.* Thresher, 62 Cal. 407; Camron *v.* Kenfield, 57 Cal. 550.

As to prohibition generally see PROHIBITION.

23. A statute authorizing service of process and the uniting of subjects of controversy which in ordinary suits in chancery would render a bill multifarious was held to be a

of process from one county into another[24] and prescribe constructive service in case of absent defendants.[25]

u. With Respect to Remedies and Procedure — (I) *Providing Remedies.* Where a right exists without a remedy, the legislature may provide a remedy, unless such remedy is repugnant to the constitution.[26]

(II) *Regulating Forms of Procedure* — (A) *In General.* The legislature has power to regulate and control the forms of procedure for the administration of justice in the courts,[27] subject only to express constitutional restrictions;[28] but it has no power to interfere with the discretionary powers of the courts in the course of judicial administration.[29]

regulation of practice within legislative control. U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

As to process generally see Process.

24. Tucker *v.* Real-Estate Bank, 4 Ark. 431.

25. What constructive service was necessary to give the courts jurisdiction to render judgments in suits against persons in the Confederate army was held to be a question for legislative discretion. Thomas *v.* Mahone, 9 Bush (Ky.) 111.

26. Thus where cases had been transferred from one county to another by virtue of a statute it was held that the legislature might provide that the counties from which such causes had been transferred should bear a portion of the expenses incurred on account of the trials of such causes by the county to which they were transferred. Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575.

Imperfect division of powers.— Where, under the constitution, the powers of the government are imperfectly divided, the legislature may divide such powers, giving to the courts such powers as may be necessary to the administration of justice. Livingston *v.* Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751.

Revival of actions.— An act reviving a cause of action, after it had been suspended by a prior statute, is constitutional; and such action may be maintained. Lewis *v.* McElvain, 16 Ohio 347; Johnson *v.* Bentley, 16 Ohio 97. See also Butler *v.* Toledo, 5 Ohio St. 225. And also an act giving a cause of action, after it has been extinguished by a prior statute, has been sustained. Bleakney *v.* Farmers, etc., Bank, 17 Serg. & R. (Pa.) 64; Hess *v.* Werts, 4 Serg. & R. (Pa.) 356. See also Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Robinson *v.* Bland, 2 Burr. 1077. But an act forbidden by statute is not legalized by a repeal of the statute merely, so as to give a right of action. Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

27. Blanchard *v.* Raines, 20 Fla. 467; Baldwin *v.* Bennett, 6 Rob. (La.) 309.

The legislature cannot impair the appellate powers of the courts, but it may point out the manner by which they shall be exercised, as when by appeal or writ of error. Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323.

28. Where the constitution provided that the legislature should regulate by law, if necessary, the procedure of all courts below the supreme court, it was held that the legislature had no power to prescribe rules and regulations for procedure of the supreme court and that a rule of such court, although contrary to a statute, must prevail. Herndon *v.* Imperial F. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547.

But the conferring of jurisdiction by the constitution does not prevent the legislature from prescribing the forms of procedure, provided it does not impair the constitutional powers of the court. *Ex p.* Harker, 49 Cal. 465.

Where the constitution vested the judicial power in the supreme court, subject to legislative restriction, and authorized writs of error from the district courts to the supreme court, under regulations to be prescribed by law, it was held that a statute prescribing that transcripts of appeal to the supreme court be typewritten or printed, at the election of the appellant, was invalid. Jordan *v.* Andrus, 26 Mont. 37, 66 Pac. 502.

An act extending the time for filing exceptions, and directing the manner of making up the record, was held to be unconstitutional, as being an attempt by the legislature to control the record of the courts. Johnson *v.* Gehbbauer, (Ind. 1902) 64 N. E. 855.

29. *California.*— An act providing for the sale of the interest of the state in certain property, and prescribing that no injunction shall issue restraining such sale, is invalid. Guy *v.* Hermance, 5 Cal. 73, 63 Am. Dec. 85.

Georgia.— A statute allowing the hearing of cases at the second term of the supreme court instead of the first, and pending proceedings for review, is unconstitutional. Goodman *v.* Morris, 59 Ga. 60.

Kentucky.— A statute making it the duty of the courts to take judicial notice of city ordinances relating to liens, in so far as they purported to render sufficient petitions for enforcing liens for street improvements, without stating the fact of the passage of such ordinances, was held to be invalid, as making such petitions depend upon legislative instead of judicial judgment. Johnson *v.* Ferrell, 8 Ky. L. Rep. 216, 1 S. W. 412.

New Jersey.— A statute providing that no judgment of the supreme court shall be reversed by the court of errors and appeals, unless concurred in by a majority of the members of such court competent to sit, is invalid. Clapp *v.* Ely, 27 N. J. L. 622.

(B) *Pleadings.* The regulation of pleadings by the legislature is not a usurpation of judicial functions,[30] and where the constitution recognizes the distinctions in the forms of pleadings, such forms may be abolished by statute.[31]

(III) *Authorizing Defaults, Dismissals, Revival of Judgments, and Executions.* The legislature may prescribe conditions on which defaults may be entered,[32] actions dismissed with costs,[33] or judgments revived in favor of sureties,[34] and it may also give written instruments, after default in payment, the force and effect of judgments, on which executions may be issued.[35]

(IV) *Fixing Time For Trials, Perfecting Appeals, Granting Reviews, and Excepting to Jurors.* The legislature may prescribe the terms of court at which cases shall stand for trial and forbid a continuance, a discontinuance, or a *nolle prosequi*, without cause shown and only with the consent of the court.[36] It may also limit the time for taking appeals,[37] the granting of reviews of invalid or erroneous judgments and other proceedings,[38] and taking exception to the disability of jurors.[39]

(V) *Compelling Arbitration.* Where the constitution provides for the submission of controversies to arbitration by consent of the parties, the legislature has no constitutional authority to provide for compulsory arbitration.[40]

(VI) *Regulating References.* Legislation providing for the trial of causes by auditors and referees and making their findings evidence, without concluding the parties thereby, is within the power of the legislature and valid.[41] In such cases the subordinate officers act under the direction of the courts, who may

Tennessee.—A statute allowing the supreme court, upon demand, to require the clerk of the inferior court to execute an order of sale of land is invalid as being an attempt by the legislature to regulate the decrees of the courts. Northern *v.* Barnes, 2 Lea (Tenn.) 603.

See 10 Cent. Dig. tit. "Constitutional Law," § 60.

30. Whiting *v.* Townsend, 57 Cal. 515.

31. Where the constitution recognized the distinctions between law and equity it was held that an act abolishing the distinctions in form between actions at law and suits in equity was valid, because it related solely to the manner of practice. Anonymous, 1 Code Rep. (N. Y.) 49, 2 Edm. Sel. Cas. (N. Y.) 18.

As to forms of actions generally see Actions, 1 Cyc. 734.

32. A statute providing for the default of defendant, upon the filing of an affidavit by plaintiff with the declaration in actions of contract, unless defendant files with his plea an affidavit of merits, was held not to be an exercise of judicial power. Honore *v.* Home Nat. Bank, 80 Ill. 489. See also Taggart *v.* Fox, 1 Grant (Pa.) 190.

33. A statute ordering dismissal with costs against a plaintiff applying for a change of venue, in case he fails within ten days from the order to give bond for costs of change, was held not to be an assumption of judicial power. Barkwell *v.* Chatterton, 4 Wyo. 307, 33 Pac. 940.

34. A statute giving a judgment debtor, who was a surety merely, the right to revive the judgment in his own name, after payment by him, to the same extent that plaintiff therein could if payment had not been made, although after the lapse of more than ten years from such payment, was held not to be an exercise of judicial power. Peters *v.* McWilliams, 36 Ohio St. 155.

35. A statute providing that forfeited delivery bonds shall have the force and effect of judgments on which executions may issue was held to be valid. Ruddell *v.* Magruder, 11 Ark. 578.

36. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

37. Boswell *v.* Boswell, 117 Ind. 599, 20 N. E. 264; Smythe *v.* Boswell, 117 Ind. 365, 20 N. E. 263. Where the legislature has power, under the constitution, to enlarge or restrict the jurisdiction of the supreme court, it may, within reasonable limits, prescribe the classes of cases in which appeals may be taken. Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

38. Traphagen *v.* West Hoboken Tp., 39 N. J. L. 232.

39. Whitehead *v.* Wells, 29 Ark. 99.

40. *In re* Compulsory Arbitration, 9 Colo. 629, 21 Pac. 474.

As to arbitration generally see Arbitration and Award, 3 Cyc. 568.

41. Underwood *v.* McDuffee, 15 Mich. 361, 93 Am. Dec. 194; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. 4; Janesville Cotton Mfg. Co. *v.* Ford, 55 Wis. 197, 12 N. W. 377; Home Ins. Co. *v.* Security Ins. Co., 23 Wis. 171.

As to references generally see References.

Prohibiting particular appointments without consent.— A statute prohibiting the appointment of clerks of courts as referees,

review and reverse the findings of such officers;[42] but legislation making the findings of such officers conclusive is an invasion of the province of the judiciary and unconstitutional.[43]

(VII) *Changing Venue and Transferring Causes.* Acts changing venue and transferring causes from one court to another are regarded as both constitutional[44] and unconstitutional.[45]

(VIII) *Directing Court to Take Bond.* The legislature has no power to authorize a court to take a bond in a different manner from that prescribed by the general statutes of the state.[46]

(IX) *Vacation, Modification, Rendition, and Validation of Judgments* —(A) *In General.* A state legislature has no power to annul[47] or set aside[48] a judgment rendered by either a state or a federal court,[49] nor has it any power to require the courts to grant new trials or rehearings in causes that have been once passed upon and determined.

(B) *Directing Reopening of Judgment.* Nor has the legislature any authority to direct the courts to reopen judgments and decrees for the purpose of retrial and rehearing in cases that have been passed upon and judicially determined.[50] But if the act merely authorizes a reopening and leaves all action with the discretion of the court it will be sustained.[51] And where the state has an interest in the subject-matter of a suit, a rehearing after the entry of judgment therein, it seems, may be authorized by statute.[52]

(C) *Directing What Judgment Shall Be Entered.* It has been held, although not without a divided court, that a statute directing that a particular judgment should not be entered in pending litigation, without the consent of some of the parties in interest, was constitutional.[53]

without the consent of the parties, was held to be unconstitutional, as divesting the courts of their constitutional powers. Standfast *v.* Crotty, 13 N. Y. Suppl. 584, 37 N. Y. St. 672.

42. Janesville Cotton Mfg. Co. *v.* Ford, 55 Wis. 197, 12 N. W. 377, holding valid a statute appointing referees to act under the direction of the court in making partition of water powers.

43. *In re* Booth, 3 Wis. 1, holding unconstitutional an act of congress authorizing United States commissioners to decide certain questions of fact preliminary to the delivery of fugitive slaves. See also Scott *v.* Sanford, 19 How. (U. S.) 393, 15 L. ed. 691.

44. Van Hoose *v.* Bush, 54 Ala. 342; *Ex p.* Hickey, 52 Ala. 228; Wright *v.* Ware, 50 Ala. 549; Smith *v.* Judge Twelfth Dist., 17 Cal. 547.

As to venue generally see VENUE.

45. Mabry *v.* Baxter, 11 Heisk. (Tenn.) 682; Brown *v.* Haywood, 4 Heisk. (Tenn.) 357.

46. A resolve of the legislature authorizing a probate court to take a foreign surety on an administrator's bond, where the statute required a resident surety, was held to be invalid. *Ex p.* Picquet, 5 Pick. (Mass.) 65.

47. Berrett *v.* Oliver, 7 Gill & J. (Md.) 191; Opinion of Supreme Court upon Act to Reverse Matter of Dorr, 3 R. I. 299.

48. People *v.* Saginaw County, 26 Mich. 22; Taylor *v.* Place, 4 R. I. 324.

49. U. S *v.* Peters, 5 Cranch (U. S.) 115, 3 L. ed. 53. *Contra*, Braddee *v.* Brownfield, 2 Watts & S. (Pa.) 271, a judgment rendered by state court.

50. All such legislation is an assumption of judicial power by the legislature, an infringement upon the judiciary, and unconstitutional. Sanders *v.* Cabaniss, 43 Ala. 173; Roche *v.* Waters, 72 Md. 264, 18 Atl. 866, 19 Atl. 535, 7 L. R. A. 533; Dorsey *v.* Dorsey, 37 Md. 64, 11 Am. Rep. 527; Marpole *v.* Cather, 78 Va. 239; Ratcliffe *v.* Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716.

51. Calvert *v.* Williams, 10 Md. 478.

52. A statute directing the attorney-general to apply for a rehearing in a suit in which public officers, in whose hands the legislature had placed trust funds were parties, was held not to be an exercise of judicial power by the legislature. Internal Imp. Fund *v.* Bailey, 10 Fla. 238.

53. Pending proceedings to abolish grade crossings in a city, under a prior statute, an act was passed providing that no change should be made in such grades, in the pending proceedings, without the consent of such city council. It was held by a majority of the court that such act was in effect an amendment to the prior statute authorizing the abolition of such crossings and not an arbitrary direction to the court to enter a particular judgment, and therefore valid. *In re* Northampton, 158 Mass. 299, 33 N. E. 568.

Pending proceedings to determine the vote on a question of the location of a county-

(D) *Validation and Modification of Judgment.* Nor has the legislature any authority to validate a defective or void judgment.[54] Neither can it modify an erroneous judgment, nor impair the remedies by which it may be enforced.[55] All such acts being judicial in character are not within the powers of the legislature.[56]

(E) *Reviving or Setting Aside Judgment.* The legislature cannot authorize the revival of a judgment in favor of certain persons,[57] nor can it set aside a judgment after it has become final, in order to grant relief that might have been obtained by appeal, as provided by law.[58]

(X) *Granting New Trials, Appeals, or Writs of Error and Review.* Granting new trials and special acts providing for appeals or writs of error and review are generally unconstitutional.[59]

(XI) *Interposition in Pending Litigation* — (A) *In General.* There is nothing in the federal constitution which forbids the state legislatures to exercise judicial powers,[60] or which prohibits them from interfering with the state courts

seat, a statute was enacted directing the county's business to be transacted at the place shown to have been selected on the face of the returns and was held to be valid. Du Page County *v.* Jenks, 65 Ill. 275.

54. Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438, holding void an act legalizing an invalid decree of divorce, granted where the court had no jurisdiction.

55. Campbell *v.* Corry, 8 Ohio Dec. (Reprint) 88, 5 Cinc. L. Bul. 516, holding invalid an act modifying a judgment affirming an assessment in which errors were subsequently discovered.

56. Tate *v.* Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221; Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77.

57. Tate *v.* Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221.

58. Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77, holding unconstitutional an act setting aside a judgment of a probate court, from which an administrator had neglected to take an appeal within the time prescribed by law. See also Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

59. *Alabama.*— The power to render judgments and decrees, to declare them void, or to set them aside and grant new trials is a judicial power and cannot be exercised by the legislature. Sanders *v.* Cabaniss, 43 Ala. 173.

Connecticut.— In Wheeler's Appeal, 45 Conn. 306, an exhaustive opinion shows that under the charter and down to a later period the legislature was not restrained from exercising judicial power and was accustomed to grant appeals and new trials. And see Hamilton *v.* Hemsted, 3 Day (Conn.) 332; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648 [*affirming* 2 Root (Conn.) 350].

Indiana.— Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443; Young *v.* State Bank, 4 Ind. 301, 58 Am. Dec. 630.

Maine.— Lewis *v.* Webb, 3 Me. 326.

Maryland.— The legislature may confer on the court of appeals the right to hear appeals in special cases, provided the judicial functions of the court are left untrammeled. State *v.* Northern Cent. R. Co., 18 Md. 193; Prout *v.* Berry, 2 Gill (Md.) 147. But see Miller *v.* State, 8 Gill (Md.) 145; Lawrence *v.* Hicks, 8 Gill & J. (Md.) 386; Berrett *v.* Oliver, 7 Gill & J. (Md.) 191.

Mississippi.— Lawson *v.* Jeffries, 47 Miss. 686, 12 Am. Rep. 342.

New Hampshire.— Pierce *v.* State, 13 N. H. 536; Merrill *v.* Sherburne, 1 N. H. 190, 8 Am. Dec. 52.

New Jersey.— Dodd *v.* Lyon, 49 N. J. L. 229, 12 Atl. 542; Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369.

Pennsylvania.— Baggs' Appeal, 43 Pa. St. 512, 82 Am. Dec. 583, an act as to review passed long after the distribution of a decedent's estate is unconstitutional. See also De Chastellus *v.* Fairchild, 15 Pa. St. 18, 53 Am. Dec. 570.

South Carolina.— Where there is no right of appeal from the findings of a subordinate court the legislature has no right to set aside such findings or to grant such an appeal. Segars *v.* Parrote, 54 S. C. 1, 31 S. E. 677, 865.

Texas.— Barnett *v.* State, (Tex. Crim. 1900) 62 S. W. 765.

Utah.— Statutes declaring that motions for new trials or rehearings should be entertained within a prescribed time after an adverse judgment to the applicants prior to the passage of an act relating to polygamous children were held to be void as invading the province of the judiciary. Handley's Estate, 15 Utah 212, 49 Pac. 829, 62 Am. St. Rep. 926.

Vermont.— Staniford *v.* Barry, 1 Aik. (Vt.) 314, 15 Am. Dec. 691; Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77.

Wisconsin.— The rule that the legislature cannot pass an act granting a new trial in a case determined by the court does not apply where the state is the only party affected. Calkins *v.* State, 21 Wis. 501. See also Davis *v.* Menasha, 21 Wis. 491.

See 10 Cent. Dig. tit. "Constitutional Law," § 69.

60. Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

pending litigation in the course of judicial administration;[61] but under the state constitutions the state legislatures cannot control or affect the result of litigation by legislation passed after causes of action have been submitted to the courts for judicial determination,[62] although in some cases such legislation has been sustained.[63]

(B) *Curing Defective Proceedings.* Nor has a legislature any constitutional authority to validate defective judicial proceedings, so as to affect in any way the rights of parties to pending litigation.[64]

(XII) *Releasing Persons Imprisoned For Debt.* Legislation providing for the release of poor debtors imprisoned for debt has also been held to be constitutional;[65] but there is authority to the contrary,[66] which would seem to be the better opinion.

(XIII) *Regulating Criminal Prosecutions, Punishment, and Sentence* —(A) *In General.* The legislature has power to declare what shall constitute crime and to prescribe the punishment therefor,[67] and what shall constitute a full

61. Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458, sustaining an act of the legislature of Pennsylvania declaring that the relation of landlord and tenant should exist where the supreme court had declared that it could not exist, whereby the rights of the parties were affected.

62. *Alabama.*— A statute to prevent discontinuances of undecided appeals was unconstitutional in so far as it affected appeals that were discontinued by operation of law. Carleton *v.* Goodwin, 41 Ala. 153.

Kansas.— A statute passed pending a suit to quiet title, assuming to establish the rights of the litigating parties, was held to be void. Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415.

Kentucky.— An act validating an illegal vote cast by a county judge in an election of directors of a corporation in which such county was a stock-holder was held to be unconstitutional. Allison *v.* Louisville, etc., R. Co., 9 Bush (Ky.) 247.

Louisiana.— Cases which have been submitted to the supreme court for decision are not subject to legislative control. Lanier *v.* Gallatas, 13 La. Ann. 175.

Tennessee.— An act passed pending litigation, calculated to operate retrospectively in favor of one of the parties, was unconstitutional. Williams *v.* Register of West Tennessee, Cooke (Tenn.) 214. See also Officer *v.* Young, 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268, holding void an act authorizing a person to appear in the name of a deceased plaintiff and prosecute an action without taking out letters of administration.

See 10 Cent. Dig. tit. "Constitutional Law," § 66.

63. Pending proceedings by quo warranto to oust one from an office for cause specified, an act passed forbidding removals from office for such a cause was held valid. Hawkins *v.* Com., 76 Pa. St. 15.

An act directing the reopening and readjustment of county treasurer's accounts, on equitable grounds in quasi-judicial proceedings, was held to be constitutional. Burns *v.* Clarion County, 62 Pa. St. 422.

A private statute providing that a decision of the supreme court quashing an order for the removal of a pauper should not be conclusive on the question of settlement was held supererogatory but not unconstitutional, the question not being conclusive on such question. West Buffalo *v.* Walker Tp., 8 Pa. St. 177.

64. *California.*— A statute legalizing defective pleadings, *pendente lite,* was held to be beyond the powers of the legislature. People *v.* Mariposa Co., 31 Cal. 196.

Kentucky.— A statute validating an invalid bill of exceptions was held to be unconstitutional. Yeatman *v.* Day, 79 Ky. 186.

Massachusetts.— A statute confirming an insolvency proceeding, after being adjudged invalid by the court, was held to be void. Denny *v.* Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

Pennsylvania.— A statute validating defective attachment of property was held to be unconstitutional. Richards *v.* Rote, 68 Pa. St. 248.

Vermont.— A statute directing a deposition not taken according to law to be read at trial was held to be invalid. Dupy *v.* Wickwire, 1 D. Chipm. (Vt.) 237, 6 Am. Dec. 729.

See 10 Cent. Dig. tit. "Constitutional Law," § 66.

65. *In re* Nichols, 8 R. I. 50.

Special insolvency statutes.— Special legislation reviving and extending the benefit of repealed insolvent laws to persons imprisoned for debt has been held to be a valid exercise of legislative power. Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660. See also *In re* Nichols, 8 R. I. 50.

66. Kendall *v.* Dodge, 3 Vt. 360; Lyman *v.* Mower, 2 Vt. 517; Keith *v.* Ware, 2 Vt. 174; Ward *v.* Barnard, 1 Aik. (Vt.) 121, holding void a statute releasing a poor debtor imprisoned on execution, and providing that his freedom from custody should not be deemed a breach of his prison bond.

67. An act of the legislature of Georgia declaring one guilty of treason, banishing him, and confiscating his property for serving in

defense,[68] together with the procedure governing criminal prosecutions;[69] but it cannot reverse a judgment of the court after conviction and sentence, either directly[70] or indirectly,[71] nor can it mitigate such sentence.[72] But the legislature may remit punishment by pardon and amnesty before the jurisdiction of the court attaches,[73] and statutes authorizing a ticket-of-leave system[74] by directors of prisons, the return of prisoners to the court imposing sentence, upon being found incorrigible,[75] and the removal of prisoners from one institution to another[76] have been sustained.

(B) *Requiring Instructions to Jury and Making Juries Judges of Law.* The legislature has no power to require the court to instruct the jury as to the different degrees of murder without regard to the evidence offered;[77] but it has been held that it may make the jury the judges of law in indictments for homicide,[78] although the authorities are not in harmony upon this question.[79]

v. With Respect to Highways. The legislature may, unless restrained by constitutional provisions, exercise directly, without delegating to any tribunal, the power it possesses over highways.[80]

the British army during the Revolution, was held not to be an exercise of judicial power, since the courts of the state had no jurisdiction over crimes committed without the state. Cooper *v.* Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

68. A statute permitting persons arrested for drunkenness to show that they have not been convicted for a like offense within a prescribed time, and ordering a discharge upon such showing, was held not to be an exercise of judicial power. Com. *v.* Morrisey, 157 Mass. 471, 32 N. E. 664.

69. An act providing that a judgment of conviction for error in disregarding a statute relating to instructions should not be reversed, in the absence of exceptions taken at the trial, unless such error was calculated to injure the defendant, is valid, and will be construed as a modification of the statute relative to instructions. Barnett *v.* State, (Tex. Crim. 1900) 62 S. W. 765.

70. Opinion of Supreme Court upon Act to Reverse Matter of Dorr, 3 R. I. 299.

71. A statute authorizing a person convicted of crime by a competent court, sentenced without appeal, and pardoned after serving part of his sentence, to present a claim for damages for improper conviction and sentence, was void as invalidating an unreversed judgment and construing a judgment of conviction as not final. Roberts *v.* State, 30 N. Y. App. Div. 106, 51 N. Y. Suppl. 691.

72. *Michigan.*— A statute authorizing a board of commissioners to parol prisoners after serving a portion of their sentence was held to be an exercise of judicial power and void. People *v.* Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285.

Missouri— An act relieving from penalties persons indicted upon the payment of costs and fee to prosecuting attorney was held to be invalid. State *v.* Sloss, 25 Mo. 291, 69 Am. Dec. 467.

Nevada.— A statute assuming to commute sentences imposed by the courts was held to be void as an assumption of judicial power. *Ex p.* Darling, 16 Nev. 98, 40 Am. Rep. 495.

Pennsylvania.— An act authorizing a deduction from the term of imprisonment, for good conduct of prisoner, was held to be unconstitutional as assuming judicial power. Com. *v.* Halloway, 42 Pa. St. 446, 82 Am. Dec. 526.

Tennessee.— A resolution of the legislature that a certain class of criminals should be discharged by the courts was held to be void as an assumption of judicial power. State *v.* Fleming, 7 Humphr. (Tenn.) 152, 46 Am. Dec. 73.

See 10 Cent. Dig. tit. "Constitutional Law," § 61.

73. An act pardoning offenses committed between 1861 and 1865 was held not to be an interference with the judicial power with respect to an indictment found in 1869, for an offense covered by such pardon, the legislature having remitted the punishment before the jurisdiction of the court attached. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 690.

74. State *v.* Peters, 43 Ohio St. 629, 4 N. E. 81; Matter of Kline, 6 Ohio Cir. Ct. 215.

75. *In re* Mason, 3 Wash. 609, 28 Pac. 1025.

76. A statute authorizing the removal of inmates of a reform school to a work-house as incorrigible was held not to be alteration of their sentence and therefore valid. *Ex p.* Cassidy, 13 R. I. 143.

77. State *v.* Hopper, 71 Mo. 425.

78. State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

79. Com. *v.* Anthes, 5 Gray (Mass.) 185.

80. People *v.* Ingraham County, 20 Mich. 95. See also Ellingham *v.* Wells County, 107 Ind. 600, 8 N. E. 9; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1 (an act validating an action of the county board in laying out a road); State *v.* Huggins, 47 Ind. 586 (vacation of a public highway); *In re* Clinton St., 2 Brewst. (Pa.) 598 (an act authorizing a town council to open a street); State *v.* Dexter, 10 R. I. 341 (stating the power of the legislature).

An act purporting to legalize an order of

4. Encroachment on Executive — a. In General. The legislature cannot deprive an executive officer of his constitutional power.[81]

b. Appointment and Removal of Officers. If the power to appoint and remove officers is given by the constitution to the executive,[82] it cannot as a rule be exercised by the legislature.[83]

county supervisors opening a road did not establish the road. Seibert *v.* Linton, 5 W. Va. 57.

81. Willis *v.* Owen, 43 Tex. 41. But see La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223 [*affirming* 32 Ct. Cl. 462], holding that a statute authorizing a suit to determine whether an award under a treaty was obtained by fraud did not trench on the constitutional functions of the president. See also The Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. And *compare* the following cases:

Connecticut.— Bradley *v.* New Haven, 73 Conn. 646, 48 Atl. 960.

Indiana.— Branham *v.* Lange, 16 Ind. 497.

Kentucky.— Pratt *v.* Breckinridge, 23 Ky. L. Rep. 1356, 65 S. W. 136, a statute creating a state board of election commissioners. See also Sweeney *v.* Coulter, 22 Ky. L. Rep. 885, 58 S. W. 784. The Goebel election law was held to be constitutional in Purnell *v.* Mann, 105 Ky. 87, 20 Ky. L. Rep. 1396, 1146, 50 S. W. 264, 49 S. W. 346, 48 S. W. 407. As to the act creating a board of penitentiary commissioners see Sinking Fund Com'rs *v.* George, 104 Ky. 260, 20 Ky. L. Rep. 938, 47 S. W. 779.

Maryland.— Baltimore *v.* Bonaparte, 93 Md. 156, 48 Atl. 735, valuation of property for taxation. The legislature has the power to require practitioners of medicine to obtain licenses from a board of examiners appointed by a private corporation. Scholle *v.* State, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411. The power of the legislature to enact a law permitting police commissioners to call out militia, etc., was considered in Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Michigan.— Atty.-Gen. *v.* Gramlich, (Mich. 1902) 89 N. W. 446 (an act invalid as attempting to confer upon aldermen authority which their constituents could not confer); Oren *v.* Bolger, (Mich. 1901) 87 N. W. 366.

Minnesota.—Foreman *v.* Hennepin County, 64 Minn. 371, 67 N. W. 207.

Missouri.— State *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

New York.— Buffalo Gas Co. *v.* Volz, 31 Misc. (N. Y.) 160, 64 N. Y. Suppl. 534.

North Carolina.— Cunningham *v.* Sprinkle, 124 N. C. 638, 33 S. E. 138.

Ohio.— State *v.* Bader, 12 Ohio Cir. Ct. 659 (an act authorizing county commissioners to improve an avenue and issue bonds to pay therefor is beyond legislative power); State *v.* Hamilton County, 54 Ohio St. 333, 43 N. E. 587 (an act conferring powers on county commissioners is invalid).

Oregon.—Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655.

Pennsylvania.— *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860,

See 10 Cent. Dig. tit. "Constitutional Law," § 86 *et seq.*

The general assembly cannot restrain the auditor from a reëxamination of vouchers to see whether they are correct. Morgan *v.* Buffington, 21 Mo. 549.

82. If the constitution does not interfere, the legislature may regulate appointments, the filling of vacancies, and the duration of terms. People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074. And see State *v.* Covington, 29 Ohio St. 102; State *v.* Kennon, 7 Ohio St. 546.

The legislature may change the mode of appointment to any office of legislative creation. State *v.* Crow, 20 Ark. 209; Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

Legislature may limit power of governor. — State *v.* Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

Power of appointment not exclusively an executive function.— See People *v.* Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

The constitution of Kansas providing that officers, not otherwise provided for, shall be chosen or appointed by law gives the legislature authority to make such appointments. Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669.

83. *Idaho.*— Taylor *v.* Stevenson, 2 Ida. 166, 9 Pac. 642.

Maine.— See State *v.* Coombs, 32 Me. 526.

Maryland.— Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

Missouri.— State *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

New York.— It was held in People *v.* Batchelor, 22 N. Y. 128, that the legislature cannot change the time of election of a successor of an officer, so as to prolong the term of his predecessor. But see People *v.* McKinney, 52 N. Y. 374; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302.

North Carolina.— State *v.* Tate, 68 N. C. 546; People *v.* Bledsoe, 68 N. C. 457; State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

Utah.—McCormick *v.* Thatcher, 8 Utah 294, 30 Pac. 1091, 17 L. R. A. 243.

United States.— U. S. Const. art. 2, § 2, vesting the appointing power in the executive precludes an exercise of such power by congress. Wood *v.* U. S., 15 Ct. Cl. 151. See also Stuart *v.* Laird, 1 Cranch (U. S.) 299, 2 L. ed. 115.

See 10 Cent. Dig. tit. "Constitutional Law," § 88.

An act authorizing the coroner to temporarily fill the office of sheriff, until the executive

c. Invasion of the Pardoning Power and Remission of Fines.[84] If the power to pardon and remit fines is confided to the executive by the constitution it cannot be exercised by the legislature;[85] but otherwise if limitations are imposed upon it.[86]

makes an appointment, is valid under the constitution. State *v.* Monk, 3 Ala. 415.

An act providing that commissioners of highways of a town shall also be drainage commissioners of the township is not invalid as a legislative assumption of the appointing power. Kilgour *v.* Drainage Com'rs, 111 Ill. 342.

An act selecting one upon whom powers should be conferred and not attempting an appointment has been held to be valid. State *v.* Coombs, 32 Me. 526.

An act of congress providing for the condemnation of land for public uses and for a commission of five to select and appraise its value, three to be appointed by the president, the other two being army officers specially designated by the act, is not unconstitutional because of such designation. U. S. *v.* Cooper, 20 D. C. 104, 124.

Appointment of railroad commissioners may be provided for by legislature. Eddy *v.* Kincaid, 28 Oreg. 537, 41 Pac. 156, 655; Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.

Municipal corporations may be established, incorporated, reorganized, and consolidated and the officers necessary for these purposes appointed by the legislature. State *v.* Swift, 11 Nev. 128; State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439; Roche *v.* Jones, 87 Va. 484, 12 S. E. 965; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425.

Power of congress as to providing for members of a commission charged with public duties see Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

An act removing seat of government, etc., was not repugnant to the organic act of the territory. Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

The constitution giving the legislature sole power to impeach for corruption or crime does not limit the governor's power to remove. Atty.-Gen. *v.* Hambitzer, 99 Mich. 380, 58 N. W. 617; Atty.-Gen. *v.* Berry, 99 Mich. 379, 58 N. W. 617; Atty.-Gen. *v.* Jochin, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699. See Fuller *v.* Ellis, 98 Mich. 96, 57 N. W. 33.

The constitution vesting the executive powers in the governor does not preclude the legislature from passing an act making the governor, auditor, treasurer, secretary of state, and attorney-general a board for the selection of prison directors. French *v.* State, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113 [*distinguishing* State *v.* Corby, 122 Ind. 17, 23 N. E. 678; State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; State *v.* Hyde, 121 Ind. 20, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79]. See also Hovey *v.* State, 119 Ind. 395, 21 N. E. 21; Hovey *v.* State, 119 Ind. 386, 21 N. E. 890.

The register and other officers for the disposal of land granted to the territory in aid of a canal are not civil officers within the meaning of the organic law of the territory giving the executive the right to appoint all civil officers. U. S. *v.* Hatch, 1 Pinn. (Wis.) 182.

84. As to pardon generally see PARDONS.

85. *Alabama.*— Haley *v.* Clark, 26 Ala. 439.

Arkansas.— The pardoning power resides where the constitution places it. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

Georgia.— Ogletree *v.* Dozier, 59 Ga. 800.

Michigan.— People *v.* Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285.

Missouri.— State *v.* Sloss, 25 Mo. 291, 69 Am. Dec. 467.

New York.— The legislature may remit a separable part of the punishment, but cannot impose a lighter. Harting *v.* People, 22 N. Y. 95.

Tennessee.—An act which shortens for good behavior the period of imprisonment is void, in so far as it affects those serving a term when it was passed. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

United States.— U. S. *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519.

See 10 Cent. Dig. tit. "Constitutional Law," § 87.

86. *Arkansas.*— If the constitution limits the pardoning power to cases of convicted criminals, the legislature may pass a general act of amnesty of offenses committed prior to a certain date, the perpetrators of which have not been tried and convicted. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

California.— *Ex p.* Wadleigh, 82 Cal. 518, 23 Pac. 190.

Illinois.— Rankin *v.* Beaird, 1 Ill. 163.

Iowa.— State *v.* Foraker, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206.

North Carolina.— State *v.* Manuel, 20 N. C. 144.

Ohio.— *In re* Kline, 6 Ohio Cir. Ct. 215. And see State *v.* Peters, 43 Ohio St. 629, 4 N. E. 81 (adoption by the directors of a state penitentiary of the ticket-of-leave system); *Ex p.* Scott, 19 Ohio St. 581 (a statute merely a modification of penalties prescribed for certain offenses and not unconstitutional).

Virginia.— Com. *v.* Caton, 4 Call (Va.) 5.

Washington.— *In re* Mason, 3 Wash. 609, 28 Pac. 1025.

United States.— Congress may provide that a witness required to give evidence tending

5. Delegation of Power — a. In General. While a legislative body cannot delegate the power to legislate,[87] the legislature may delegate the power to determine some facts or state of things upon which a statute makes or intends to make its own action depend.[88]

b. To Other States. Where a statute fixes the basis of taxation on insurance companies of other states upon the statutes of such other states, it has been claimed that a delegation of legislative power to other states arises.[89]

to incriminate himself shall never be prosecuted for the offense to which the testimony relates. Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. ed. 819.

See 10 Cent. Dig. tit. "Constitutional Law," § 87.

87. *Arkansas.*— Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6.

Colorado.— Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465. And see Williamson *v.* Arapahoe County, 23 Colo. 87, 46 Pac. 117.

District of Columbia.— Chapman *v.* U. S., 5 App. Cas. (D. C.) 122.

Kansas.— State *v.* Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662.

New Jersey.— Dexheimer *v.* Orange, 60 N. J. L. 111, 36 Atl. 706. See Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858.

North Dakota.—Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148.

Oregon.— Brown *v.* Fleishner, 4 Oreg. 132.

Pennsylvania.— Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

Rhode Island.— State *v.* Copeland, 3 R. I. 33.

Tennessee.— Fogg *v.* Union Bank, 1 Baxt. (Tenn.) 435.

Wisconsin.— *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112. See also Slinger *v.* Henneman, 38 Wis. 504.

See 10 Cent. Dig. tit. "Constitutional Law," § 89.

88. *Arkansas.*— Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6 [*citing* Cooley Const. Lim. (4th ed.), pp. 151, 152, on the *referendum*].

Colorado.— And see Williamson *v.* Arapahoe County, 23 Colo. 87, 46 Pac. 117; Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465, as to the power of the legislature to confer upon counties authority to use county funds, etc.

Georgia.— Haney *v.* Bartow County, 91 Ga. 770, 18 S. E. 28.

Indiana.— Rice *v.* State, 7 Ind. 332.

Kansas.— Mitchell *v.* Topeka, (Kan. App. 1898) 54 Pac. 292.

Kentucky.— Winston *v.* Stone, 102 Ky. 423, 19 Ky. L. Rep. 1483, 43 S. W. 397, delegation of power to courts to fix the number and the compensation of deputies, etc., is constitutional. See also Stone *v.* Wilson, 19 Ky. L. Rep. 126, 39 S. W. 49 [*distinguishing* Com. *v.* Addams, 95 Ky. 588, 16 Ky. L. Rep. 135, 26 S. W. 581].

Michigan.— Turner *v.* Detroit, 104 Mich. 326, 62 N. W. 405.

Minnesota.— State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442, act as to commission merchants not unconstitutional. See also State *v.* Wagener, 69 Minn. 206, 72 N. W. 67, 65 Am. St. Rep. 565, 38 L. R. A. 677. The fact that the taking effect of an act in a city is made contingent upon the vote of the council is not a delegation of legislative power. State *v.* Sullivan, 67 Minn. 379, 69 N. W. 1094. See also Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65; State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225.

Missouri.— Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600.

New York.— People *v.* Delaware Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850.

Pennsylvania.— Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

South Carolina.— State *v.* Stackhouse, 14 S. C. 417.

Texas.— Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

West Virginia.— Haigh *v.* Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.

United States.— *In re* Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154 [*affirming* 5 App. Cas. (D. C.) 122]. Leaving the matter of designating the marks, bands, and stamps of the commissioner of internal revenue (in the case of oleomargarine) with the approval of the secretary was held to involve no unconstitutional delegation of power. *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813. See McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684 (Utah enabling act); Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33; Dunlap *v.* U. S., 33 Ct. Cl. 135 (treating of the statute relative to the act as to the use of alcohol by manufacturers).

The obligation to lay out and improve highways is imposed on the state in its general capacity, and the legislature may control the work necessary in performing this duty, by whatsoever agency it may employ. State *v.* Atkin, 64 Kan. 174, 67 Pac. 519.

89. Clark *v.* Mobile Port, 67 Ala. 217. But see Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; People *v.* Philadelphia F. Assoc., 92 N. Y. 311, 44 Am. Rep. 380, holding that a statute providing that an insurance corporation of another state, seeking to do business here, shall pay to the superintendent of the insurance department, for taxes, fines, etc., an amount equal to that imposed by the "exist-

c. To Private Persons. The power to legislate cannot be delegated to individuals.[90]

d. To Private Corporations. While a legislature cannot delegate to private corporations authority to legislate,[91] yet if it has the right to accomplish a certain result it can endow a corporation with powers necessary to effect lawful purposes.[92]

e. To Officers — (i) *In General.* The grant of authority to various officers

ing or future laws" of the state of its origin, upon companies of this state seeking to do business there, when such amount is greater than that required for such purposes by the then existing laws of this state, is not an unlawful delegation of legislative power.

90. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309.

Kentucky.— Ohio, etc., R. Co. *v.* Todd, 12 Ky. L. Rep. 726, 15 S. W. 56.

Michigan.— People *v.* Bennett, 29 Mich. 451, 18 Am. Rep. 107.

Tennessee.— Fogg *v.* Union Bank, 1 Baxt. (Tenn.) 435.

Utah.— Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

See 10 Cent. Dig. tit. "Constitutional Law," § 91. But see Van Buren *v.* State, 24 Miss. 512.

An act requiring a railroad company to stop its trains at a station, etc., was held not to be void. State *v.* New Haven, etc., R. Co., 43 Conn. 351.

An act imposing a fine on one selling goods, etc., within a mile of a camp meeting without the consent of the parties in charge, was not unconstitutional. Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580.

Statute making change of holding court from one to another town dependent upon the performance of certain acts by the citizens of the latter town was not unconstitutional. Walton *v.* Greenwood, 60 Me. 356.

An act providing for the incorporation of villages was held to be constitutional. St. Paul Gaslight Co. *v.* Sandstone, 73 Minn. 225, 75 N. W. 1050.

In an action to foreclose a lien for the construction of a sewer, the court said upon the contention that the authority given the contractor to collect was in violation of the constitution. "Upon a mere reading, it is perfectly obvious that there is here no delegation of a municipal function. The contractor acts only as the agent or servant of the city. He has no discretion, and can create no liability, nor can he impose any duty or exercise any control or authority over any one. He makes no assessment, levies no tax, and performs no municipal function. The municipal officers who enforce the ordinances of the city do not perform municipal functions, and in the collection of the street assessment the contractor does no more. This precise point was decided in Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771." Banaz *v.* Smith, 133 Cal. 102, 103, 65 Pac. 309.

91. An act providing that cemetery associations may prescribe penalties recoverable by action does not authorize their imposition on non-members, that being a legislative power. Johnstown Cemetery Assoc. *v.* Parker, 45 N. Y. App. Div. 55, 60 N. Y. Suppl. 1015 [*affirming* 28 Misc. (N. Y.) 280, 59 N. Y. Suppl. 821]. The legislature cannot confer on a moneyed corporation power to enact by-laws changing the law. Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595. In Dexheimer *v.* Orange, 60 N. J. L. 111, 36 Atl. 706, an act relative to cities was held unconstitutional as attempting to delegate the power to legislate.

92. *Colorado.*— Williamson *v.* Arapahoe County, 23 Colo. 87, 46 Pac. 117.

Indiana.— Overshiner *v.* State, 156 Ind. 187, 59 N. E. 468, 83 Am. St. Rep. 187, 51 L. R. A. 748 (an act not unconstitutional because conferring upon the state dental association the power to appoint three members of a board of dental examiners); Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192 (delegation to a corporation of authority to appoint members of a board of examiners is not unconstitutional).

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

Louisiana.— Crescent Live Stock Landing, etc., Co. *v.* New Orleans, 33 La. Ann. 934; *In re* New Orleans Drainage Co., 11 La. Ann. 338.

Maine.— Augusta Bank *v.* Augusta, 49 Me. 507.

Minnesota.— State *v.* Sullivan, 67 Minn. 379, 69 N. W. 1094, the fact that the taking effect of act in a city made dependent on a vote of the council is no delegation of legislative power. See State *v.* McMahon, 65 Minn. 453, 68 N. W. 77; State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

Missouri.— Granby Min., etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246; Columbia Bottom Levee Co. *v.* Heier, 39 Mo. 53.

New Hampshire.— Northern R. Co. *v.* Manchester, etc., R. Co., 66 N. H. 560, 31 Atl. 17.

New York.— Fox *v.* Mohawk, etc., Humane Soc., 165 N. Y. 517, 59 N. E. 353, 80 Am. St. Rep. 767, 51 L. R. A. 681, a statute as to harboring dogs in cities is constitutional. A statute requiring the consent of roads already occupying a street before another street railroad can be built thereon was held not to be unconstitutional. *In re* Thirty-Fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172.

United States.— *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

See 10 Cent. Dig. tit. "Constitutional Law," § 92.

to prescribe rules, etc., in certain cases has been held not to be a delegation of legislative authority.[93] Thus the legislature may delegate to various officers the power to determine a fact.[94] So the president of the United States is often

93. *Alabama.*— Ingram *v.* State, 39 Ala. 247, 84 Am. Dec. 782.

Indiana.— Ind. Acts (1899), p. 189, providing that, within ninety days after its passage, the board of health shall prepare regulations fixing minimum standards of foods and drugs, defining specific adulterations, etc., is not unconstitutional, as delegating legislative authority to such board of health. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

Iowa.— Pilkey *v.* Gleason, 1 Iowa 522; Scott *v.* Clark, 1 Iowa 70.

Louisiana.— The legislature was held to have power to authorize the governor to remove incumbents of an office created by it. Evans *v.* Populus, 22 La. Ann. 121.

Massachusetts.— Martin *v.* Witherspoon, 135 Mass. 175.

Montana.— U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851.

New York.— People *v.* Kelly, 76 N. Y. 475, 5 Abb. N. Cas. (N. Y.) 383.

Oregon.— Reed *v.* Dunbar, 41 Oreg. 509, 60 Pac. 451.

South Dakota.— State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

United States.— U. S. *v.* Ormsbee, 74 Fed. 207, a grant by congress to the secretary of war of authority to prescribe rules for the use of government canals. But see U. S. *v.* Rider, 50 Fed. 406 [*following* U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178, an act relative to the powers of the secretary of war as to bridges being an obstruction to navigation was held unconstitutional]. Also *compare* U. S. *v.* Breen, 40 Fed. 402.

See 10 Cent. Dig. tit. "Constitutional Law," § 93 *et seq.*

An act giving the governor power in his discretion, on the application of one hundred voters, to appoint a commission to district or redistrict wards in cities is unconstitutional, as an unlawful delegation of legislative power. Gilhooly *v.* Elizabeth, 66 N. J. L. 484, 49 Atl. 1106.

Oreg. Sess. Laws (1901), p. 328, providing for the regulation of the fish industry and creating a board of fish commissioners, is not unconstitutional, as being a delegation of legislative powers, in authorizing the commissioners to appoint a master fish warden. Reed *v.* Dunbar, 41 Oreg. 509, 69 Pac. 451.

A state board of charities is a constitutional body created by the state constitution of 1894, and is not an inferior board to which the legislature has delegated powers possessed by itself. Matter of New York Juvenile Asylum, 36 Misc. (N. Y.) 633, 74 N. Y. Suppl. 364.

The provision of the sundry civil appropriation act of June 4, 1897 (30 U. S. Stat. at L. p. 11), making it a crime to violate any rule or regulation thereafter to be made by the secretary of the interior for the protection of forest reservations, is void, as in substance and effect a delegation of legislative power to an administrative officer. U. S. *v.* Blasingame, 116 Fed. 654.

94. *California.*— *In re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529.

District of Columbia.— Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

Kentucky.— Winston *v.* Stone, 102 Ky. 423, 19 Ky. L. Rep. 1483, 43 S. W. 397.

Missouri.— "While the Legislature could not delegate to the State Auditor the power to make laws, it does not follow that it could not delegate to him the power to pass upon the character of persons applicant for license to sell auction pools, make books or regulate wagers or bets upon contests to take place upon the race-course where they desire to carry on the business, and to determine what race-course and fair grounds are of good repute, and to grant to persons whom he may find to be of good character a license to sell auction pools thereon. The power delegated to the State Auditor is not the power to make a law, but is a power to determine a fact or things, upon which the action of the law depends, and it can not be said to be legislative in its character." State *v.* Thompson, 160 Mo. 333, 343, 60 S. W. 1077, 83 Am. St. Rep. 468, 54 L. R. A. 950.

New Jersey.— In Iowa L. Ins. Co. *v.* East Mut. L. Ins. Co., 64 N. J. L. 340, 348, 45 Atl. 762, it was held that the duties devolved by an insurance statute on the secretary of state and subsequently transferred by statute to the commissioner of banking and insurance were not legislative.

New York.—People *v.* Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850.

North Carolina.— State *v.* Barringer, 110 N. C. 525, 14 S. E. 781.

Wisconsin.—An act delegating to county boards power to legislate as to officers' fees in certain cases is constitutional. Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551. See also Ryan *v.* Outagamie County, 80 Wis. 336, 50 N. W. 340.

United States.— Leaving under an oleomargarine statute the matter of designating marks, etc., on packages to the commissioner of internal revenue, with the approval of the secretary of the treasury, involves no unconstitutional delegation of power. *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813. See Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

But see Jernigan *v.* Madisonville, 102 Ky. 313, 19 Ky. L. Rep. 1412, 43 S. W. 448, 39 L. R. A. 214 (delegation to courts of the power of assigning towns to different classes is void); Muhlenburg County *v.* Morehead, 20 Ky. L. Rep. 376, 46 S. W. 484 (an act

vested with discretionary authority that cannot be considered a delegation of legislative power.[95]

(II) *Boards and Commissioners*—(A) *In General.* Various powers not delegating legislative authority are often conferred upon boards and commissioners.[96]

imposing the duty of levying and collecting taxes is unconstitutional); Maxwell *v.* State, 40 Md. 273 (an act providing that the rules of the controller shall have the same force "as if they were herein enacted" is void). See 10 Cent. Dig. tit. "Constitutional Law," § 93.

Under the constitution no power of suspending laws can be exercised except by the legislature. Burton *v.* Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272.

95. As for example the authorization to suspend, under certain circumstances, for such time as he shall deem just the provisions of an act of congress allowing the free importation of sugars, etc. Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294 [*affirming* 45 Fed. 175]. See also *In re* Mehlitz, 16 Wis. 443, 84 Am. Dec. 700; *In re* Griner, 16 Wis. 423; The Aurora *v.* U. S., 7 Cranch (U. S.) 382, 3 L. ed. 378.

96. See the following cases as to what are and what are not delegations of legislative power:

California.— Schaezlein *v.* Cabaniss, 135 Cal. 466, 67 Pac. 755, 87 Am. St. Rep. 122, 56 L. R. A. 733 (police power as to sanitation of factories, etc., is not to be delegated); *In re* Werner, 129 Cal. 567, 62 Pac. 97. The legislature may delegate all powers of a municipal nature, including the power to improve streets. Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. See Holley *v.* Orange County, 106 Cal. 420, 39 Pac. 790 (an act creating a board of trustees, with authority to select a site for a public building does not delegate legislative powers); People *v.* Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118. See also an act authorizing a board of medical examiners to revoke a certificate, the holder having been guilty of unprofessional conduct. *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257. But an act conferring power to declare what acts shall constitute a misdemeanor is unconstitutional. *Ex p.* Cox, 63 Cal. 21.

Colorado.— *In re* Senate Bill, 12 Colo. 188, 21 Pac. 481, an act creating a board of public works is valid.

Dakota.— Territory *v.* Scott, 3 Dak. 357, 20 N. W. 401.

Illinois.— Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, a section of the pharmacy act is unconstitutional as delegating legislative power. The authority given railroad and warehouse commissioners to fix charges for the inspection of grain and the compensation of officers was held to be properly delegated. People *v.* Harper, 91 Ill. 357.

Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, pure food law is not unconstitutional as delegating legislative power.

Iowa.— Hildreth *v.* Crawford, 65 Iowa 339, 21 N. W. 667, pharmacy act not unconstitutional.

Maine.— Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69, appointment of commissioners to determine rights, etc., of connecting railroads was held to be constitutional.

Massachusetts.— In the matter of the assessment of the cost of public improvement the legislature may provide for the appointment of disinterested commissioners to determine the proportions to be paid by each locality. *In re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. The legislature having the power to determine the qualifications of officers not otherwise provided for in the constitution, it had authority to delegate such power to civil service commissioners. Opinion of Justices, 138 Mass. 601. And see Com. *v.* Essex County, 13 Gray (Mass.) 239, a lawful delegation of power to commissioners.

Michigan.— Turner *v.* Detroit, 104 Mich. 326, 62 N. W. 405 (an act authorizing a board of commissioners of parks to order the construction of sidewalks, etc., is not unconstitutional); Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484 (an act providing that the state board of health may make rules for the disinfection of baggage coming from a country where contagious diseases exist is constitutional); People *v.* Brooks, 101 Mich. 98, 59 N. W. 444.

Minnesota.— State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 77 Am. St. Rep. 681, 46 L. R. A. 442, legislative powers not delegated to the railroad and warehouse commission. An act attempting to delegate legislative power to the insurance commissioner was held unconstitutional. Anderson *v.* Manchester F. Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 50 Am. St. Rep. 400, 28 L. R. A. 609. See Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65. See also State *v.* McMahon, 65 Minn. 453, 68 N. W. 77; State *v.* Cooley, 65 Minn. 406, 68 N. W. 66.

Missouri.— Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600, no legislative powers conferred on a board of park commissioners.

New Jersey.— Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858, lawful authority conferred on a township committee.

New York.— People *v.* Cram, 164 N. Y. 166, 58 N. E. 112 [*reversing* 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158]; Rumsey *v.*

(B) *Code Commissioners.* The legislature cannot delegate to code commissioners power to amend the laws of the state.[97]

(C) *Insurance Commissioners.* Acts providing for the preparation by the insurance commissioner and the adoption of "a standard policy," delegate legislative power and are unconstitutional.[98]

(D) *Railroad and Warehouse Commissioners.* Statutes authorizing railroad commissioners to regulate the charges of railroads for transportation of passengers and freight, and railroad and warehouse commissioners to fix charges for inspection of grain and compensation of officers, are constitutional.[99]

New York, etc., R. Co., 130 N. Y. 88, 28 N. E. 763, 40 N. Y. St. 583 [*affirming* 15 N. Y. Suppl. 509, 39 N. Y. St. 894, act giving commissioners of land-office power to grant lands under waters of navigable rivers, etc., not invalid]; People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280 (no delegation of legislative function by the railroad act); Polinsky *v.* People, 73 N. Y. 65 (municipal ordinance, constitutional); *In re* New York El. R. Co., 70 N. Y. 327; *In re* Roberts, 17 Hun (N. Y.) 559 (act creating board of revision and correction, not unconstitutional); Matter of New York Juvenile Asylum, 36 Misc. (N. Y.) 633, 74 N. Y. Suppl. 364 (state board of charities a constitutional body). See also People *v.* Justices Ct. Spec. Sess., 7 Hun (N. Y.) 214 (rapid transit act conferring certain powers on commissioners not invalid); Cooper *v.* Schultz, 32 How. Pr. (N. Y.) 107.

North Dakota.— An act delegating to county commissioners the power to fix the salaries of state's attorneys, etc., was held to be void. Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148.

Pennsylvania.— Perkins *v.* Philadelphia, 156 Pa. St. 539, 664, 33 Wkly. Notes Cas. (Pa.) 41, 27 Atl. 356, an act in violation of the constitution prohibiting the delegation to any commission of power to perform any municipal functions.

South Carolina.— State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841, giving the state board of agriculture discretion in issuing licenses for phosphate mining was held to be valid.

Tennessee.—Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167 (no delegation of legislative power in "Uniform Text-Book Act"); State *v.* McEwen, 5 Humphr. (Tenn.) 241.

Texas.— Burton *v.* Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272; Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

Utah.— Gilbert *v.* Board of Police, etc., Co., 11 Utah 378, 40 Pac. 264.

West Virginia.— Arkle *v.* Board of Com'rs, 41 W. Va. 471, 23 S. E. 804.

Wisconsin.— Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551 (power of county boards as to officers' fees in certain cases); Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112 (legislative power delegated in act relative to insurance commissioner); Ryan *v.* Outagamie County, 80 Wis. 336, 50 N. W. 340; State *v.* Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34 (law as to druggists).

United States.— Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014 (Texas railroad commission); Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636 (Mississippi railroad commission).

See 10 Cent. Dig. tit. "Constitutional Law," § 99.

97. State *v.* Grant, 13 Oreg. 115, 9 Pac. 55.

98. Anderson *v.* Manchester F. Assur. Co., 59 Minn. 182, 63 N. W. 241, 50 Am. St. Rep. 400, 28 L. R. A. 609; O'Neil *v.* American F. Ins. Co., 166 Pa. St. 72, 30 Atl. 943, 45 Am. St. Rep. 650, 26 L. R. A. 715; Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112.

99. *Florida.*— Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226; McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504.

Georgia.— Georgia R. Co. *v.* Smith, 70 Ga. 694.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 377, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141. The authority granted to the railroad and warehouse commissioners to fix charges for inspection of grain and compensation of officers is properly delegated. People *v.* Harper, 91 Ill. 357.

Maine.— Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69.

Nebraska.— State *v.* Fremont, etc., R. Co., 23 Nebr. 117, 36 N. W. 305, 22 Nebr. 313, 35 N. W. 118.

New York.— People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280.

North Carolina.— Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

United States.— Minneapolis Eastern R. Co. *v.* State, 134 U. S. 467, 10 S. Ct. 473, 33 L. ed. 985 [*reversing* 40 Minn. 156, 41 N. W. 465]; Chicago, etc., R. Co. *v.* State, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970 [*reversing* 38 Minn. 281, 37 N. W. 782]. And see Chicago, etc., R. Co. *v.* State, 94 U. S. 155, 24 L. ed. 94; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77, warehouse act constitutional.

See 10 Cent. Dig. tit. "Constitutional Law," § 100.

The provisions of the act of the Iowa legislature of 1888 relative to powers of the railroad commissioners, etc., do not delegate

(III) *To Judiciary*—(A) *In General.* While legislative power cannot be delegated to the judiciary,[1] yet courts may be clothed with authority as to prescribing rules, etc., and determining the necessity of certain acts.[2]

legislative power. Chicago R. Co. *v.* Dey, 35 Fed. 866, 1 L. R. A. 744; Tilley *v.* Savannah R. Co., 5 Fed. 641.

The decision of the supreme court of Mississippi to the effect that a statute creating a railroad commission and charging it with the duty of supervising railroads was not in conflict with the constitution of the state was sustained in Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 66.

1. *Kentucky.*— An act conferring on a judge the duty of levying a certain tax in the event of the failure of the county official to act was held to be unconstitutional in Fleming *v.* Dyer, 20 Ky. L. Rep. 689, 47 S. W. 444. So in Muhlenburg County *v.* Morehead, 20 Ky. L. Rep. 376, 46 S. W. 484. So as to authorizing circuit courts to transfer a town or city from one class to another. Jernigan *v.* Madisonville, 102 Ky. 313, 19 Ky. L. Rep. 1412, 43 S. W. 448, 39 L. R. A. 214.

Louisiana.— State *v.* Gaster, 45 La. Ann. 636, 12 So. 739; Carter *v.* State, 42 La. Ann. 927, 8 So. 836, 21 Am. St. Rep. 404.

Maryland.— Beasley *v.* Ridout, 94 Md. 641, 52 Atl. 61.

Minnesota.— State *v.* Young, 29 Minn. 474, 9 N. W. 737.

New Jersey.—State *v.* Bound Brook, (N. J. 1901) 48 Atl. 1022.

North Dakota.— Glaspell *v.* Jamestown, (N. D. 1902) 88 N. W. 1023.

Tennessee.— King *v.* State, 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210; Tillman *v.* Cocke, 9 Baxt. (Tenn.) 429.

West Virginia.— So far as an act attempts to confer on a court the power to revoke an ordinance of a city on the petition of taxpayers it is unconstitutional. Shephard *v.* Wheeling, 30 W. Va. 479, 4 S. E. 635.

Wisconsin.— *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638.

See 10 Cent. Dig. tit. "Constitutional Law," § 103.

"The court of visitation of the state of Kansas cannot lawfully exercise judicial functions, nor is it a court within the meaning of section 720 of the Revised Statutes of the United States." Western Union Tel. Co. *v.* Myatt, 98 Fed. 335, 361.

2. *California.*— Dickey *v.* Hurlburt, 5 Cal. 343.

Connecticut.— New York, etc., R. Co.'s Appeal, 62 Conn. 527, 26 Atl. 122.

District of Columbia.— Reynolds *v.* Smith, 7 Mackey (D. C.) 27. See United States cases cited *infra*, this note.

Florida.— Martinez *v.* Ward, 19 Fla. 175.

Georgia.— Phinizy *v.* Eve, 108 Ga. 360, 33 S. E. 1007.

Indiana.— Water Works Co. *v.* Burkhart, 41 Ind. 364. See Ritter *v.* Ritter, 5 Blackf. (Ind.) 81.

Kansas.— Eskridge *v.* Emporia, 63 Kan. 368, 65 Pac. 694; Callen *v.* Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736. A statute authorizing the district court to exclude unplatted farm lands from corporate limits of a city, when improperly included, does not confer legislative power. Winfield *v.* Lynn, 60 Kan. 859, 57 Pac. 549.

Kentucky.— Lewis *v.* Brandenberg, 105 Ky. 14, 20 Ky. L. Rep. 1011, 47 S. W. 862, 48 S. W. 978; Winston *v.* Stone, 19 Ky. L. Rep. 1483, 43 S. W. 397; Stone *v.* Wilson, 19 Ky. L. Rep. 126, 39 S. W. 49.

Maryland.— McCrea *v.* Roberts, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485; Anderson *v.* Levely, 58 Md. 192.

Massachusetts.— *In re* Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319. See Dow *v.* Wakefield, 103 Mass. 267; Salem Turnpike, etc., Bridge Corp. *v.* Essex County, 100 Mass. 282.

Minnesota.— McGee *v.* Hennepin County, 84 Minn. 472, 88 N. W. 6. And see State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225.

Missouri.— State *v.* Higgins, 125 Mo. 364, 28 S. W. 638. See also State *v.* Field, 17 Mo. 529, 59 Am. Dec. 275.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

New Jersey.— McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830; Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369. The provisions of law that a judge shall determine the circumstances requiring an election and appoint a day therefor are constitutional. Paul *v.* Gloucester County, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

New York.— People *v.* Long Island R. Co., 134 N. Y. 506, 31 N. E. 873, 47 N. Y. St. 648 [*affirming* 58 Hun (N. Y.) 412, 12 N. Y. Suppl. 41, 34 N. Y. St. 715].

Ohio.— Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

Oregon.— O'Kelly *v.* Territory, 1 Oreg. 51.

Pennsylvania.— *In re* Northern Home, 2 Wkly. Notes Cas. (Pa.) 349.

Texas.— *Ex p.* Mato, 19 Tex. App. 112.

Utah.— Young *v.* Salt Lake City, 24 Utah 321, 67 Pac. 1066.

Virginia.— Bolling *v.* Lersner, 26 Gratt. (Va.) 36.

West Virginia.— Haigh *v.* Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.

United States.— *In re* Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154, 164 U. S. 436, 17 S. Ct. 76, 41 L. ed. 504, 156 U. S. 211, 15 S. Ct. 331, 30 L. ed. 401 (a statute as to enforcing attendance of witnesses on the summons of congress); Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 50 C. C. A. 435 (a Ken-

(B) *To Assess Taxes.* While statutes authorizing courts to assess taxes are generally unconstitutional,[3] yet those authorizing the exercise of a certain supervision and also the assessment of certain taxes are often regarded as valid.[4]

(C) *To Fix Compensation of Officers.* Statutes fixing the compensation of officers are held both valid and invalid according to constitutional authority.[5]

(D) *To Form Corporations and Repeal Charters.* Statutes are void so far as they assume to delegate to courts authority to form corporations and repeal charters.[6]

(E) *To Incorporate Municipalities and Change Boundaries.* Statutes conferring on courts the power of incorporating towns and of enlarging or contracting their boundaries are generally constitutional.[7]

tucky statute authorizing court, in certain contingencies, to assess taxpayers, etc., was held to be constitutional). The provision in the Utah enabling act empowering the constitutional convention to provide by ordinance for the transfer of causes in the territorial courts to the proper state and federal courts, respectively, was not an unconstitutional delegation of legislative power by congress. McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. ed. 684. See U. S. Bank *v.* Halstead, 10 Wheat. (U. S.) 51, 6 L. ed. 264.

See 10 Cent. Dig. tit. "Constitutional Law," § 103.

Construction of telephones.— The power of the probate court to direct, pursuant to statute, in what mode telephone lines shall be constructed when the municipal authorities and the company fail to agree is constitutional. Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 32 L. R. A. 150. But in State *v.* Bound Brook, (N. J. 1901) 48 Atl. 1022, the delegation of power to a court to designate the route for a telephone line if not designated by municipal authorities was held to be void. But see Bayonne *v.* Lord, 61 N. J. L. 136, 38 Atl. 752.

3. Hardenburgh *v.* Kidd, 10 Cal. 402 (authorizing a court to assess county taxes); State Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 7 Am. Rep. 575 (an act giving the supreme court jurisdiction to hear appeals from a board of county clerks in the appraisal of property of railroads for taxation); Munday *v.* Rahway, 43 N. J. L. 338 (an act requiring the court before issuing a writ of mandamus to compel the levy of a tax, etc.).

4. *Illinois.*— Huston *v.* Clark, 112 Ill. 344.

Kentucky.— Hoke *v.* Com., 79 Ky. 567; Pennington *v.* Woolfolk, 79 Ky. 13.

Louisiana.— Police Jury *v.* Packard, 28 La. Ann. 199.

Minnesota.— State *v.* Ensign, 55 Minn. 278, 56 N. W. 1006 [*following* State *v.* Hennepin Dist. Ct., 33 Minn. 235, 22 N. W. 625].

Ohio.— State *v.* Gazlay, 5 Ohio 14.

West Virginia.—Wheeling Bridge, etc., Co. *v.* Paull, 39 W. Va. 142, 19 S. E. 551.

See 10 Cent. Dig. tit. "Constitutional Law," § 107.

5. Under a provision in the code the court may fix the compensation of its own reporter. Stevens *v.* Truman, 127 Cal. 155, 59 Pac. 397. So the provision that the compensation of a reporter taking testimony before a magistrate shall be fixed by him and shall not exceed a certain limit is constitutional. McAllister *v.* Hamlin, 83 Cal. 361, 23 Pac. 357. But see Smith *v.* Strother, 68 Cal. 194, 8 Pac. 852. A statute providing that the compensation of deputies of the clerk of the court of appeals shall be fixed by that court is an attempt to delegate legislative authority contrary to the constitution. Com. *v.* Addams, 95 Ky. 588, 16 Ky. L. Rep. 135, 26 S. W. 581. And see Rockwell *v.* Fillmore County, 47 Minn. 219, 49 N. W. 690, holding that the district court in fixing the salary of a county attorney was exercising a proper function.

6. It was held in Kehler *v.* G. W. Jack Mfg. Co., 55 Ga. 639, that under the constitution the courts had no power to incorporate manufacturing companies. But see Franklin Bridge Co. *v.* Wood, 14 Ga. 80. In Blake *v.* People, 109 Ill. 504, it was held that the court was invested with power to find the facts necessary to the creation of corporations. In Heck *v.* McEwen, 12 Lea (Tenn.) 97, an order of court organizing a corporation was held to be valid to the extent of the provisions of the general law. But see Morristown *v.* Shelton, 1 Head (Tenn.) 24; State *v.* Armstrong, 3 Sneed (Tenn.) 634; *Ex p.* Burns, 1 Tenn. Ch. 83. The repeal of a charter was to take effect if a specified event should thereafter take place. It was held that the designation of two judges to determine whether the event had taken place was not a delegation of the power to determine whether the charter should or should not be repealed. Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33. And see, generally, CORPORATIONS.

7. *Colorado.*— People *v.* Fleming, 10 Colo. 553, 16 Pac. 298.

Iowa.—Ford *v.* North Des Moines, 80 Iowa 626, 45 N. W. 103 (an act not unconstitutional, as the only power conferred was the appointment of commissioners of election); Burlington *v.* Leebrick, 43 Iowa 252 (an act as to the annexation of territory by petition to court was held not to be a delegation of legislative power).

Kansas.— Huling *v.* Topeka, 44 Kan. 577,

(IV) *To Local Authorities*—(A) *In General.* The constitutions of few states inhibit legislatures from delegating authority in local affairs to the proper local authorities; hence statutes delegating such authority are generally held to be valid.[8] Thus the legislature may delegate to various commissioners and tri-

24 Pac. 1110 [*following* Callen *v.* Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736]; Kirkpatrick *v.* State, 5 Kan. 673.

Kentucky.— Morton *v.* Woodford, 99 Ky. 367, 18 Ky. L. Rep. 271, 35 S. W. 1112.

Mississippi.— Lum *v.* Vicksburg, 72 Miss. 950, 18 So. 476.

Minnesota.— State *v.* Ueland, 30 Minn. 29, 14 N. W. 58.

Nebraska.— Wahoo *v.* Dickinson, 23 Nebr. 426, 36 N. W. 813.

New Jersey.— Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858.

Tennessee.— Morristown *v.* Shelton, 1 Head (Tenn.) 24.

Washington.—Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625 [*following* Nelson *v.* Troy, 11 Wash. 435, 39 Pac. 974].

West Virginia.— Elder *v.* Central City, 40 W. Va. 222, 21 S. E. 738; *In re* Union Mines, 39 W. Va. 179, 19 S. E. 398.

United States.— The legislature of Indiana may confer upon courts the power to determine whether the conditions exist prescribed by law for the creation, enlargement, or contraction of a city. Forsythe *v.* Hammond, 68 Fed. 774.

See 10 Cent. Dig. tit. "Constitutional Law," § 105.

For statutes held unconstitutional as delegating legislative powers see the following cases:

California.— People *v.* Nevada, 6 Cal. 143.

Illinois.— Galesburg *v.* Hawkinson, 75 Ill. 152.

Minnesota.— State *v.* Simons, 32 Minn. 540, 21 N. W. 750.

Missouri.— State *v.* Weatherby, 45 Mo. 17; Kayser *v.* Bremen, 16 Mo. 88.

New Jersey.— A justice of the supreme court cannot be authorized by statute to decide within what territory the resident voters shall be permitted to assume municipal existence and authority. *In re* Ridgefield Park, 54 N. J. L. 288, 23 Atl. 674.

Washington.—Territory *v.* Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106.

Wisconsin.— *In re* North Milwaukee, 93 Wis. 616, 67 N. W. 1033.

See 10 Cent. Dig. tit. "Constitutional Law," § 105.

8. *California.*—People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660. But see Board of Harbor Com'rs *v.* Excelsior Redwood Co., 88 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321.

Idaho.— Reynolds *v.* Oneida County, (Ida. 1899) 59 Pac. 730.

Illinois.— Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277.

Indiana.— State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698.

Michigan.— Oren *v.* Bolger, (Mich. 1901) 87 N. W. 366.

Mississippi.— The legislature may constitutionally authorize municipalities by ordinance to punish as an offense against the municipality an act which constitutes a crime against the state. Ocean Springs *v.* Green, 77 Miss. 472, 27 So. 743.

New Jersey.— Allison *v.* Corker, 67 N. J. L. 596, 52 Atl. 362 [*modifying* 66 N. J. L. 182, 48 Atl. 1118].

New York.— The legislature may delegate the control of the franchise of a street railroad to those of the locality whose interests are affected. Gilbert El. R. Co. *v.* Kobbe, 70 N. Y. 361. And see New York *v.* Ryan, 2 E. D. Smith (N. Y.) 368. But see Matter of Fallon, 28 Misc. (N. Y.) 748, 59 N. Y. Suppl. 849; Johnstown Cemetery Assoc. *v.* Parker, 28 Misc. (N. Y.) 280, 59 N. Y. Suppl. 821.

Ohio.— State *v.* Messenger, 63 Ohio St. 398, 9 N. E. 105. But see Lawrence *v.* Mitchell, 10 Ohio S. & C. Pl. Dec. 265, 8 Ohio N. P. 8, where an act authorizing the establishment of hamlets under the supervision of township trustees was declared unconstitutional.

Pennsylvania.— Com. *v.* Smith, 9 Pa. Dist. 350, 3 Dauph. Co. Rep. (Pa.) 159, 6 Lack. Leg. N. (Pa.) 151.

Texas.— The legislature may delegate the power to district the state for educational purposes or may employ any agencies or persons to district it. Kinney *v.* Zimpleman, 36 Tex. 554.

Washington.— A statute authorizing city councils to sit as boards of equalization and pass upon the validity of reassessments for local improvements does not confer judicial powers. Heath *v.* McCrea, 20 Wash. 342, 55 Pac. 432; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 54 Pac. 774.

Wisconsin.— State *v.* Nohl, 113 Wis. 15, 20, 88 N. W. 1004; Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551.

See 10 Cent. Dig. tit. "Constitutional Law," § 108.

But statutes have been held to be unconstitutional in Owen *v.* Baer, 154 Mo. 434, 55 S. W. 644 (an act providing that cities of a certain class may issue special tax bills in payment of district sewers, etc.); Dexheimer *v.* Orange, 60 N. J. L. 111, 36 Atl. 706 (an act as to certain cities, permitting the consolidation of offices and relating to the election and duties of officers, etc.); Agua Pura Co. *v.* Las Vegas, 10 N. M. 6, 60 Pac. 208 (an act vesting cities and towns with power to regulate by ordinance the prices charged by individuals or corporations for gas, water, etc., furnished such cities or towns).

bunals authority to pass rules and ordinances relative to streets, levees, etc.[9] And statutes relative to drains and sewers are not void because the determination of certain questions is left to municipal authorities.[10] On the other hand the legislature can delegate its power to levy and collect taxes only when authorized so to do by the constitution.[11]

The legislature has the power in its discretion to provide that the powers of local government in townships be exercised by districts, and to leave to the township committee the fixing of the number and boundaries of such district. Allison *v.* Corker, 67 N. J. L. 596, 52 Atl. 362 [*modifying* 66 N. J. L. 182, 48 Atl. 1118].

The recognition of the local law by the bankruptcy act of July 1, 1898 (30 U. S. Stat. at L. 544, c. 541), in the matter of exemptions, dower, priority of payments, and the like, does not render the act void as an attempt by congress unlawfully to delegate its legislative power. Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 22 S. Ct. 857, 46 L. ed. 1113.

An act relating to the operation of steam-engines and boilers, and providing that any person who desires to act as a steam engineer shall apply to any district examiner for a license to act, is unconstitutional, in that it makes the examiner the conclusive judge as to whether the applicant is trustworthy and competent, in violation of Ohio Const. art. 2, § 1, vesting all legislative power in the general assembly. Harmon *v.* State, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618.

9. *Louisiana.*— Hunsicker *v.* Briscoe, 12 La. Ann. 169.

Maryland.— O'Brian *v.* Baltimore County Com'rs, 51 Md. 15.

Massachusetts.— Salem Turnpike, etc., Corp. *v.* Essex County, 100 Mass. 282.

Michigan.— People *v.* Ingham County, 20 Mich. 95.

New Jersey.— State *v.* Hudson County, 52 N. J. L. 398, 20 Atl. 255 [*affirming* 51 N. J. L. 454, 18 Atl. 117]; State *v.* Hudson County Inferior Ct. C. Pl., 42 N. J. L. 608.

See 10 Cent. Dig. tit. "Constitutional Law," § 114.

In view of N. Y. Const. art. 7, §§ 13, 14, declaring that every law imposing a tax shall state it, the legislature cannot devolve upon commissioners for laying out a street the power to state the tax to be imposed for paying for the improvement. Hanlon *v.* Westchester County, 57 Barh. (N. Y.) 383.

Under the constitution of Kansas the state cannot delegate to road commissioners the power to tax all property of the county for the construction of a highway. Parks *v.* Wyandotte County, 61 Fed. 436.

10. The legislature may authorize corporate authorities of cities and villages to act as drainage commissioners; and the act is not void because it leaves it to the city or village authorities to determine what part of the corporate territory may need draining. Hyde Park *v.* Spencer, 118 Ill. 446, 8 N. E. 846. An act assessing the entire expense of the construction of a sewer upon three towns in proportion to the benefits received was held to be valid. State *v.* Reed, 43 N. J. L. 186. And see State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394, for an act not invalid in delegating to the commission the power of creating and defining districts for drainage purposes.

11. *Alabama.*— Schultes *v.* Eberly, 82 Ala. 242, 2 So. 345, delegation of the power of taxation to a school district. *Compare* Baldwin *v.* Montgomery, 53 Ala. 437.

California.— People *v.* Parks, 58 Cal. 624; Doane *v.* Weil, 58 Cal. 334. But see Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057, where the delegation to city councils of power to determine between certain alternative methods for the payment of assessments for municipal improvements was held to be valid under the constitution. In Kelsey *v.* Nevada, 18 Cal. 629, an act was held constitutional as a mere amendment to a city charter.

Illinois.— Not in the power of the legislature under Const. (1848), art. 9, § 5, authorizing taxation by designated municipalities, to confer upon private persons or corporations the authority to levy and collect taxes or special assessments on real estate. Leveling Wabash River *v.* Houston, 71 Ill. 318; Hessler *v.* Drainage Com'rs, 53 Ill. 105; Harvard *v.* St. Clair, etc., Drainage Co., 51 Ill. 130; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

Maine.— Farnsworth Co. *v.* Lisbon, 62 Me. 451; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395.

Tennessee.— Keesee *v.* Civil Dist. Bd. Education, 6 Coldw. (Tenn.) 127; Hope *v.* Deaderick, 8 Humphr. (Tenn.) 1, 47 Am. Dec. 597. The delegation of power to levy a school tax conferred on a school-board was held unconstitutional in Waterhouse *v.* Cleveland Public Schools, 9 Baxt. (Tenn.) 398. See also Marr *v.* Enloe, 1 Yerg. (Tenn.) 452.

Texas.— Willis *v.* Owen, 43 Tex. 41.

See 10 Cent. Dig. tit. "Constitutional Law," § 111.

For constitutional provisions of this character see the following cases:

Delaware.— Steward *v.* Jefferson, 3 Harr. (Del.) 335.

Georgia.— Powers *v.* Dougherty County, 23 Ga. 65.

Indiana.— Rose *v.* Bath, 10 Ind. 18.

Kentucky.— Justices Clarke County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. (Ky.) 143.

Louisiana.— Bracey *v.* Ray, 26 La. Ann. 710.

Missouri.— The legislature may authorize municipal corporations to make subscriptions

(B) *Cities and Municipalities.* Generally legislatures may delegate to cities and municipalities legislative authority incident to municipal government.[12]

(C) *County Boards and Officers.* Under state constitutions the delegation of authority to county boards and officers has frequently been declared valid.[13]

for public improvements, levy taxes, and issue bonds. State *v.* Linn County Ct., 44 Mo. 504.

Ohio.— Bonebrake *v.* Wall, 11 Ohio Dec. (Reprint) 38, 24 Cinc. L. Bul. 175.

Pennsylvania.— Butler's Appeal, 73 Pa. St. 448.

See 10 Cent. Dig. tit. "Constitutional Law," § 111.

12. *California.*— Kelsey *v.* Nevada, 18 Cal. 629.

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497 (an ordinance enacted in pursuance to a statute, authorizing a city to suppress gambling, etc.); State *v.* Tryon, 39 Conn. 183; English *v.* New Haven, etc., Co., 32 Conn. 240.

Iowa.— Des Moines *v.* Hillis, 55 Iowa 643, 8 N. W. 638.

Kansas.— Emporia *v.* Smith, 42 Kan. 433, 22 Pac. 616 (power conferred on certain cities to extend their boundaries, etc., is not exclusive, but can be conferred on other local agencies); State *v.* Hunter, 38 Kan. 578, 17 Pac. 177 (metropolitan police act of 1887 is not invalid because providing that the executive council shall appoint a board of police commissioners).

Louisiana.— New Orleans *v.* Morgan, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232.

Minnesota.— State *v.* Lee, 29 Minn. 445, 13 N. W. 913.

Missouri.— State *v.* Francis, 95 Mo. 44, 49, 8 S. W. 1; Kelly *v.* Meeks, 87 Mo. 396.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481, delegation of police power.

New Jersey.— Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858.

New York.— Corning *v.* Greene, 23 Barb. (N. Y.) 33.

North Carolina.— Manly *v.* Raleigh, 57 N. C. 370.

Washington.—An act authorizing certain cities to make local laws subject to general laws of the state is valid. Reeves *v.* Anderson, 13 Wash. 17, 42 Pac. 625 [*following* Nelson *v.* Troy, 11 Wash. 435, 39 Pac. 974].

Wisconsin.— Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751.

See 10 Cent. Dig. tit. "Constitutional Law," § 109.

For statutes held unconstitutional see the following cases:

Illinois.— Covington *v.* East St. Louis, 78 Ill. 548.

Michigan.— People *v.* Riordan, 73 Mich. 508, 41 N. W. 482.

Mississippi.— Lum *v.* Vicksburg, 72 Miss. 950, 18 So. 476.

New Hampshire.— Gould *v.* Raymond, 59 N. H. 260; Bowles *v.* Landaff, 59 N. H. 164.

Pennsylvania.— An act authorizing councils of certain cities to create new departments in city governments and define their powers. Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761. An act to have or not to have vitality on the authority of the corporate body subsidiary to that of the legislature. Gill *v.* Scowden, 14 Phila. (Pa.) 626, 36 Leg. Int. (Pa.) 487. See also Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Philadelphia *v.* Lombard, etc., St. Pass. R. Co., 4 Brewst. (Pa.) 14.

Tennessee.— Delegating the power to grant the right to use the streets of a city for railroads. Memphis City R. Co. *v.* Memphis, 4 Coldw. (Tenn.) 406. *Compare* People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844, where it was held to be doubtful whether the legislature of Tennessee might delegate to a city power to grant a street railway franchise for a certain term of years.

Washington.— Delegating the power to create police courts. *In re* Cloherty, 2 Wash. 137, 27 Pac. 1064.

Under Tex. Const. art. 1, § 28, providing that no power of suspending laws in the state shall be exercised except by the legislature, the legislature cannot delegate its authority in a municipal charter to set aside, vacate, suspend, or repeal the general laws of the state; and Dallas City Charter (Tex. Sp. Laws (1899), p. 115), § 106, authorizing the city to regulate the opening and closing of saloons on Sunday, and section 199, prescribing that the charter shall supersede the general laws in case of a conflict, and a city ordinance in conflict with the state law, are void. Arroyo *v.* State, (Tex. Crim. 1902) 69 S. W. 503.

13. *Alabama.*— Dunn *v.* Wilcox County Revenue Ct., 85 Ala. 144, 4 So. 661; Stanfill *v.* Dallas County Revenue Ct., 80 Ala. 287.

California.— People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660 (an act as to the organization of high schools); Kumler *v.* San Bernardino County, 103 Cal. 393, 37 Pac. 383 (an act authorizing supervisors of a county to designate by order the class to which the county has been reduced); Board of Law Library *v.* Trustees Orange County, 99 Cal. 571, 34 Pac. 244 (power conferred on boards of supervisors as to law libraries).

Colorado.— Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465.

Indiana.— Jasper County *v.* Spitler, 13 Ind. 235.

Kansas.— Noffzigger *v.* McAllister, 12 Kan. 315.

On the other hand in many cases such delegation of authority has been declared to be invalid.[14]

(D) *Park Commissioners.* Administrative duties may be conferred upon park commissioners.[15]

f. Conditional and Contingent Legislation — (I) *In General.* A provision that a statute shall take effect upon a subsequent event is constitutional.[16]

(II) *Local Option and Submission to Popular Will* — (A) *In General.* According to some constitutions the question whether or not a law enacted shall be operative may be made to depend upon the popular will.[17] According to

Louisiana.— State *v.* Harper, 42 La. Ann. 312, 7 So. 446, power given police juries to regulate the sale of alcoholic liquors. But see State *v.* Baum, 33 La. Ann. 981.

Michigan.— Feek *v.* Bloomingdale Tp. Bd., 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.

Montana.— Thomas *v.* Smith, 1 Mont. 21.

New York.— *In re* Church, 92 N. Y. 1.

Texas.— Johnson *v.* Martin, 75 Tex. 33, 12 S. W. 321; Staples *v.* Llano Co., 9 Tex. Civ. App. 201, 28 S. W. 569.

Virginia.— *Ex p.* Bassitt, 90 Va. 679, 19 S. E. 453, election of additional justices.

Washington.— Nelson *v.* Troy, 11 Wash. 435, 39 Pac. 974.

West Virginia.— Haigh *v.* Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.

Wisconsin.— Ryan *v.* Outagamie County, 80 Wis. 336, 50 N. W. 340.

United States.— Forsyth *v.* Hammond, 71 Fed. 443, 18 C. C. A. 175.

See 10 Cent. Dig. tit. "Constitutional Law," § 110.

14. *California.*— People *v.* Johnson, 95 Cal. 471, 31 Pac. 611; Burr *v.* Johnson, (Cal. 1892) 29 Pac. 1100; Dougherty *v.* Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161 [*following* State *v.* Field, 17 Mo. 529, 59 Am. Dec. 275].

Kansas.— Wyandotte County *v.* Abbott, 52 Kan. 148, 34 Pac. 416.

Kentucky.—Auditor *v.* Holland, 14 Bush (Ky.) 147.

New York.— Healey *v.* Dudley, 5 Lans. (N. Y.) 115 (an act authorizing boards of county supervisors to fix the salaries of county judges); *In re* Fallon, 28 Misc. (N. Y.) 748, 59 N. Y. Suppl. 849 (an act providing that officials wrongfully removed from office should be allowed expenses, to be determined by reference); Johnstown Cemetery Assoc. *v.* Parker, 28 Misc. (N. Y.) 280, 59 N. Y. Suppl. 821 (an act as to cemetery associations).

North Dakota.—Doherty *v.* Ransom County, 5 N. D. 1, 63 N. W. 148.

Wisconsin.— Slinger *v.* Henneman, 38 Wis. 504.

See 10 Cent. Dig. tit. "Constitutional Law," § 110.

15. Turner *v.* Detroit, 104 Mich. 326, 62 N. W. 405; Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600.

The act of March 1, 1893 (3 N. J. Gen. Stat. p. 2951), entitled "An act concerning public roads and parks and creating boards for the control and management of the same," as amended by Act March 17, 1896, authorizing the township committee to divide the township into road districts, and Act of May 25, 1894, as amended by Act of March 25, 1896, authorizing the division of townships into street lighting districts, are constitutional, as a proper grant of power to the township to establish and create such districts. Allison *v.* Corker, 67 N. J. L. 596, 52 Atl. 362 [*modifying* (N. J. 1901) 48 Atl. 1118].

Kansas city charter, 1889, creating a park board to devise a system of parks, and imposing a limitation on the council, in that it cannot act without a prior recommendation of the board, but conferring no power on the board to legislate, is not repugnant to Mo. Const. art. 9, §§ 16, 17, as creating a third house of legislature in such board, and delegating legislative powers belonging to the council. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

16. The event must be one which shall produce such a change that the law-makers, in their judgment, can declare it wise and expedient that the law shall take effect upon the occurrence of the event. *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425; People *v.* Burr, 13 Cal. 343. A statute changing from one to another town the holding of terms of court for the county is not unconstitutional in that it makes the change depend on the performance of certain acts by the citizens of the latter town, as to providing accommodations, etc. Walton *v.* Greenwood, 60 Me. 356.

Act of Feb. 6, 1889, provides that where any process or work is carried on in any factory in which dust or injurious gases are generated or produced, which are liable to be inhaled by persons employed therein, and it appears to the commissioner that such inhalation could be prevented by the use of some mechanical contrivance, he shall order the same to be provided and used, and making it a misdemeanor to violate the provisions of the act, is unconstitutional, as making the judgment of the commissioner conclusive, and authorizing him, not to enforce the law of the legislature, but to make a law himself. Schaezlein *v.* Cabaniss, 135 Cal. 466, 67 Pac. 755, 87 Am. St. Rep. 122, 56 L. R. A. 733.

17. *California.*— Robinson *v.* Bidwell, 22 Cal. 379; Hobart *v.* Butte County Sup'rs, 17 Cal. 23.

Illinois.— People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801 [*upholding* the constitutionality of the

other constitutions, however, the submission of such question to local option or the popular will is not permissible.[18]

(B) *Adoption of Fence or Stock Law.* The legislature may authorize the electors of a district to vote upon the question of the regulation of live stock.[19]

Torrens Law of 1897, and *following* People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 56 Am. St. Rep. 793]; Andrews *v.* People, 84 Ill. 28 (holding that the legislature might regulate the powers of park commissioners without submitting supplemental act to popular vote); Guild *v.* Chicago, 82 Ill. 472 (special assessment for public improvement); Erlinger *v.* Boneau, 51 Ill. 94; People *v.* Salomon, 51 Ill. 37.

Iowa.— Lytle *v.* May, 49 Iowa 224; Morford *v.* Unger, 8 Iowa 82.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43, acceptance or rejection of city charter.

Louisiana.— New Orleans *v.* De St. Romes, 9 La. Ann. 573; New Orleans *v.* Graihle, 9 La. Ann. 561.

Maryland.— Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648, location of county-seat.

Massachusetts.— Opinion of Justices, 160 Mass. 586, 590, 36 N. E. 488, 23 L. R. A. 113.

Michigan.— People *v.* Collins, 3 Mich. 343.

Minnesota.— State *v.* Hennepin Dist. Ct., 33 Minn. 252, 235, 22 N. W. 632, 625.

Mississippi.— Alcorn *v.* Hamer, 38 Miss. 652.

Missouri.— State *v.* Pond, 93 Mo. 606, 6 S. W. 469 (local option act); Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411; State *v.* Wilcox, 45 Mo. 458.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New Jersey.— Noonan *v.* Hudson County, 52 N. J. L. 398, 20 Atl. 255, submission to freeholders of question whether public road shall be laid out, etc. See Noonan *v.* Hudson County, 51 N. J. L. 454, 18 Atl. 117; Warner *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166; Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99.

New York.— Clarke *v.* Rochester, 28 N. Y. 605; Rome Bank *v.* Rome, 18 N. Y. 38; Johnson *v.* Rich, 10 N. Y. Leg. Obs. 33.

North Carolina.— Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818.

Ohio.— State *v.* Garver, 23 Ohio Cir. Ct. 140; Dexter *v.* Raine, 10 Ohio Dec. (Reprint) 25, 18 Cinc. L. Bul. 61.

Pennsylvania.— Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716 (licenses to sell intoxicating liquor); Smith *v.* McCarthy, 56 Pa. St. 359 (consolidation of city and surrounding territory).

Rhode Island.— State *v.* Copeland, 3 R. I. 33.

Tennessee.— Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Vermont.— State *v.* Parker, 26 Vt. 357.

West Virginia.— Rutter *v.* Sullivan, 25 W. Va. 427.

Wisconsin.— Smith *v.* Janesville, 26 Wis. 291; State *v.* O'Neill, 24 Wis. 149.

See 10 Cent. Dig. tit. "Constitutional Law," § 116.

This subject is treated by Dr. Oberholtzer in the "Referendum in America," published in 1903.

18. *California.*— *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425; Houghton *v.* Austin, 47 Cal. 646.

Delaware.— Rice *v.* Foster, 4 Harr. (Del.) 479.

Indiana.— Meshmeier *v.* State, 11 Ind. 484; Maize *v.* State, 4 Ind. 342.

Iowa.— Weir *v.* Cram, 37 Iowa 649; State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115; State *v.* Beneke, 9 Iowa 203; Geebrick *v.* State, 5 Iowa 491; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Maryland.— Bradshaw *v.* Lankford, 73 Md. 428, 21 Atl. 66, 25 Am. St. Rep. 602, 11 L. R. A. 582.

Massachusetts.— Opinion of Justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113.

Michigan.— An act providing for amendments to the charter of a city by vote of the electors is void as an unauthorized delegation of legislative power. Elliott *v.* Detroit, 121 Mich. 611, 84 N. W. 820.

Missouri.— Owen *v.* Baer, (Mo. 1900) 55 S. W. 644, sewers and drains in cities.

New Hampshire.— State *v.* Hayes, 61 N. H. 264.

New York.— Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Corning *v.* Greene, 23 Barb. (N. Y.) 33; Thorne *v.* Cramer, 15 Barb. (N. Y.) 112.

Ohio.— Weaver *v.* Cherry, 8 Ohio St. 564; Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

Texas.— State *v.* Swisher, 17 Tex. 441.

Utah.— Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

See 10 Cent. Dig. tit. "Constitutional Law," § 116.

Salary law.— An act of the general assembly not coming within the exceptions in the constitution, passed to take effect and be in force when a majority of the voters at an election shall declare in favor of a salary law, and to be void if the majority of the electors do not so declare, is unconstitutional and void, as delegating the legislative power of the state, which, under Ohio Const. art. 2, § 1, is vested in the general assembly. State *v.* Garver, 66 Ohio St. 555, 64 N. E. 573 [*reversing* 23 Ohio Cir. Ct. 140].

19. Such a law was held unconstitutional in Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411, but constitutional in Cain *v.* Davie County, 86 N. C. 8; Armstrong *v.* Traylor, 87 Tex. 598, 30 S. W. 40.

(c) *Creation and Division of Counties.* The question of the creation or division of a county may be submitted to the voters.[20]

(d) *Creation of Municipalities, Amendment of Charters, and Changing Boundaries.* The acceptance of a charter or the adoption of an amendment thereto may be submitted to the voters of a district.[21]

(e) *Establishment and Change of County-Seats.* Legislatures may refer to the voters of a county questions as to the location[22] and removal[23] of county-seats.

(f) *Establishment and Control of Schools.* The legislature may provide that a law as to the establishment and control of schools shall not take effect unless adopted by a vote of the people of the district and that they may vote on the question of taxes.[24]

20. People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; People *v.* Nally, 49 Cal. 478; Erlinger *v.* Boneau, 51 Ill. 94; People *v.* Salomon, 51 Ill. 37; People *v.* Reynolds, 10 Ill. 1; State *v.* Elwood, 11 Wis. 17.

The Alabama act of March 5, 1901, entitled "An act to change the boundary line between B. and C. counties," is not rendered invalid as a delegation of legislative powers by reason of the provision that the change of boundaries should not be operative until approved by a two-thirds vote of the electors in the affected district at an election to be held at a time fixed in the act. Jackson *v.* State, 131 Ala. 21, 31 So. 380.

21. *California.*— *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 284.

Georgia.— Brunswick *v.* Finney, 54 Ga. 317.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43.

Massachusetts.— An act uniting the cities of Boston and Charlestown provided that for certain purposes it should take effect on its passage, and that it should not take full effect until after a certain election in which the inhabitants of the town of Charlestown should take part in the election of officers in the city government of Boston. Stone *v.* Charlestown, 114 Mass. 214.

Missouri.— A general law leaving to a majority vote of each county whether it will organize townships thereunder does not delegate legislative authority. *In re* Opinion of Justices, 55 Mo. 295.

Montana.— People *v.* Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

New Jersey.— Paterson *v.* Useful Manufactures Soc., 24 N. J. L. 385.

New York.— Chenango Bank *v.* Brown, 26 N. Y. 467; Blauvelt *v.* Nyack, 9 Hun (N. Y.) 153. But see People *v.* Stout, 23 Barb. (N. Y.) 349, 4 Abh. Pr. (N. Y.) 22, 13 How. Pr. (N. Y.) 314.

North Carolina.— Manly *v.* Raleigh, 57 N. C. 370.

Pennsylvania.— Smith *v.* McCarthy, 56 Pa. St. 359; Com. *v.* Judges Quarter Sess., 8 Pa. St. 391.

See 10 Cent. Dig. tit. "Constitutional Law," § 120.

22. *Alabama.*— *Ex p.* Hill, 40 Ala. 121.

Arizona.— Territory *v.* Mohave County, (Ariz. 1887) 12 Pac. 730.

California.— Upham *v.* Sutter County, 8 Cal. 378. But see Dickey *v.* Hurlburt, 5 Cal. 343.

Florida.— Lake County *v.* State, 24 Fla. 263, 4 So. 795.

Mississippi.— Barnes *v.* Pike County, 51 Miss. 305.

Pennsylvania.— Com. *v.* Painter, 10 Pa. St. 214.

Texas.— Walker *v.* Tarrant County, 20 Tex. 16.

23. Clarke *v.* Jack, 60 Ala. 271; Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804; Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648; Peck *v.* Weddell, 17 Ohio St. 271.

Erection of court-house.—The act of March 11, 1901, authorizing a certain county to erect a court-house, requires that it be ratified by the people of the county. It was held that such ratification is merely a condition precedent, and that the act is not invalid as a delegation of legislative authority. Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818.

24. *Kentucky.*— Marshall *v.* Donovan, 10 Bush (Ky.) 681.

Massachusetts.— A statute providing that, if three or more towns require, county commissioners shall establish truant schools is constitutional. "It is not unconstitutional as a delegation of legislative power. It is complete in itself. It is as if the Legislature had said, 'The county commissioners shall establish and maintain a county truant school in every county where there is a public exigency for one; and the requirement of three or more towns in a county shall be conclusive proof of the existence of such an exigency.' This method of determining whether the law shall be set in motion in a given case is merely a detail of administration for which the Legislature may provide in this way, without delegating the power to make laws. Opinion of Justices, 138 Mass. 601; Stone *v.* Charlestown, 114 Mass. 214." Lynn *v.* Essex County, 148 Mass. 148, 151, 19 N. E. 171.

Minnesota.— State *v.* Cooley, 65 Minn. 406, 68 N. W. 66.

Missouri.— State *v.* Wilcox, 45 Mo. 458.

New York.— Various old decisions are Thorn *v.* Cramer, 15 Barb. (N. Y.) 112;

(G) *Issue of Bonds by Municipalities and Subscription to Corporate Stock.* Enabling acts, authorizing the issue and donation of bonds or the subscription to corporate stock by counties, cities, etc., approved by a popular vote, are constitutional.[25]

B. Judicial Powers and Functions — 1. In General. It is the duty of the judiciary to construe the constitution and laws, and determine the rights of parties conformably thereto.[26]

Johnson *v.* Rich, 9 Barb. (N. Y.) 680 [*overruled* in Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506]; Bradley *v.* Baxter, 8 How. Pr. (N. Y.) 18; Holly *v.* Bengen, 3 Code Rep. (N. Y.) 193.

Texas.— An act authorizing municipalities to control their public schools by the vote of electors is not a delegation of legislative functions. Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159.

Virginia.— An act to establish a school, providing that it should not take effect unless adopted by a vote of the people of the district, and delegating the power of levying taxes to defray expenses to a board of commissioners. Bull *v.* Read, 13 Gratt. (Va.) 78.

25. *California.*— Hobart *v.* Butte County, 17 Cal. 23 (a county authorized to engage in the construction of a railroad with the assent of majority of voters); People *v.* Burr, 13 Cal. 343.

Indiana.— Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185.

Iowa.— Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene (Iowa) 1.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

New York.— Clarke *v.* Rochester, 28 N. Y. 605 [*affirming* 24 Barb. (N. Y.) 446, 5 Abb. Pr. (N. Y.) 107]; Starin *v.* Genoa, 23 N. Y. 439.

Ohio.— Loomis *v.* Spencer, 1 Ohio St. 153; Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

Pennsylvania.— Moers *v.* Reading, 21 Pa. St. 188.

Texas.— San Antonio *v.* Jones, 28 Tex. 19.

United States.— Queensbury *v.* Culver, 19 Wall. (U. S.) 83, 22 L. ed. 100; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382; Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375.

See 10 Cent. Dig. tit. "Constitutional Law," § 121.

26. *Arkansas.*— *Ex p.* Allis, 12 Ark. 101.

California.— The judiciary determines by construing the constitution the functions of each branch, and its own function is to annul their unlawful acts when properly before it. Nougues *v.* Douglass, 7 Cal. 65.

Colorado.— Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369.

Indiana.— Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

Kansas.— State Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 7 Am. Rep. 575.

Louisiana.— Judges must exercise powers strictly judicial and therefore cannot perform the duties of a commissioner. State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532. Courts cannot give vitality to laws which have become by paramount authority void. Austin *v.* Sandel, 19 La. Ann. 309; First Municipality *v.* Pease, 2 La. Ann. 538, treating of the separation of the three branches. The judiciary decides on the rights of parties in controversies which have assumed a judicial form. Nicholson *v.* Thompson, 5 Rob. (La.) 367.

Maryland.— Beasley *v.* Ridout, 94 Md. 641, 52 Atl. 61.

Nebraska.— The determination of judicial questions is given by the constitution to the courts. State *v.* Savage, (Nebr. 1902) 90 N. W. 898.

New Hampshire.— Edes *v.* Boardman, 58 N. H. 580 (holding that the power of appraising property for purposes of taxation is a judicial one); Merrill *v.* Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

New Jersey.—The judicial department has the right to consider whether the legislature and its agencies have observed constitutional injunctions in attempting to amend the constitution, and to annul their acts in case they have not done so. Bott *v.* State Secretary, 63 N. J. L. 289, 43 Atl. 744, 881, 45 L. R. A. 251.

New York.— People *v.* Nussbaum, 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492 [*reversing* 32 Misc. (N. Y.) 1, 66 N. Y. Suppl. 129], upholding an act empowering a justice to grant an application for an order requiring persons to appear and submit to an examination. So in *In re* Leich, 31 Misc. (N. Y.) 671, 65 N. Y. Suppl. 3. The question of a municipal board while exercising powers conferred by law, encroaching on private rights, is a judicial one. Ellison *v.* Allen, 30 N. Y. Suppl. 441, 62 N. Y. St. 274. Judicial power, within the constitution of the United States, may be defined to be that power by which judicial tribunals construe the constitution, laws, and treaties, and determine the rights of parties conformably thereto. Gilbert *v.* Priest, 14 Abb. Pr. N. S. (N. Y.) 165.

Tennessee.— McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

Virginia.— Woodall *v.* Lynchburg, 100 Va. 318, 4 Va. Supreme Ct. 166, 40 S. E. 915.

Wisconsin.— The question whether a statute was designed to further some governmental function or private gain is a judicial

2. Statutes Conferring on Courts or Judges Non-Judicial or Ministerial and Administrative Powers. Generally the legislature cannot confer on the judiciary powers not judicial;[27] but it has been held that a construction of the United States constitution forbidding the union of executive and judicial functions so strict as to deny to the legislature the power to clothe judicial tribunals with minor executive functions would embarrass the workings of the state system.[28]

one. Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

United States.— The judiciary can only control the other departments when they attempt to exercise a function unconstitutionally. Avery *v.* Fox, 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674. Under a statute providing that the laws of the United States shall be in force in a territory so far as applicable, it is for the court, when the question arises, to determine what laws are applicable. Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578, 1 Oreg. 381.

See 10 Cent. Dig. tit. "Constitutional Law," § 123.

27. *California.*—A statute conferring other than judicial functions is void. Phelan *v.* San Francisco, 20 Cal. 39, 6 Cal. 531; Burgoyne *v.* San Francisco, 5 Cal. 9.

Indiana.— The legislature cannot confer on the courts powers vested in the governor. Butler *v.* State, 97 Ind. 373.

Maryland.— A judge cannot be compelled to perform duties of a non-judicial nature imposed upon him by statute after his appointment. State *v.* Chase, 5 Harr. & J. (Md.) 297.

Michigan.— Such administrative duties cannot be imposed upon the courts as the appointment of surveyors to examine premises for the purpose of enabling the court to relevy a void drain tax. Houseman *v.* Kent Cir. Judge, 58 Mich. 364, 25 N. W. 369.

Minnesota.— The legislature cannot assign to the judiciary duties other than judicial in relation to a judge of probate committing inebriates. Foreman *v.* Hennepin County, 64 Minn. 371, 67 N. W. 207.

Nebraska.— State *v.* Sioux City, etc., R. Co., 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47.

United States.—U. S. *v.* Ferreira, 13 How. (U. S.) 40, 14 L. ed. 42; Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. ed. 436; San Diego Land, etc., Co. *v.* National City, 74 Fed. 79; *Ex p.* Riebeling, 70 Fed. 310; *Ex p.* Gans, 5 McCrary (U. S.) 393, 17 Fed. 471.

See 10 Cent. Dig. tit. "Constitutional Law," § 124.

28. Speed *v.* Crawford, 3 Metc. (Ky.) 207. See also the following cases:

Arkansas.— An act imposing on county judges the duty of causing the accounts of certain county officers, etc., to be annually stated, etc., is constitutional. State *v.* Collins, 19 Ark. 587. Under the constitution the legislature could give a justice of the peace power to issue writs of attachment, etc. Jones *v.* Buzzard, 2 Ark. 415.

Indiana.— White County *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

Kentucky.— The statute conferring upon certain courts the right to establish towns under certain conditions is constitutional. Morton *v.* Woodford, 99 Ky. 367, 18 Ky. L. Rep. 271, 35 S. W. 1112.

Massachusetts.— Dow *v.* Wakefield, 103 Mass. 267; Salem Turnpike, etc., Corp. *v.* Essex County, 100 Mass. 282.

Michigan.— The duty may be imposed upon the circuit judge of indorsing his approval of the claim of a coroner against the state for services. Locke *v.* Speed, 62 Mich. 408, 28 N. W. 917.

New Jersey.— The duty imposed upon a court to determine the location of a bridge, the freeholders of one county having certified that they cannot agree with the freeholders of the other as to the location, is a judicial function. Somerset County *v.* Hunterdon County, 52 N. J. L. 512, 19 Atl. 972. A law providing that the circuit judge shall determine the circumstances requiring an election and appointing a day therefor does not violate the provision of the constitution as to the division of powers. Paul *v.* Gloucester County, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

New York.— A statute providing that whenever towns are liable to maintain a bridge over a stream, freeholders may, on the refusal of the commissioners to act, apply to the court for an order requiring them so to do, and such order shall be made as justice shall require, is constitutional. Matter of Mt. Morris, 41 Hun (N. Y.) 29.

Oregon.— A statute empowering certain judges to appoint a bridge committee does not violate the provision of the constitution which prohibits the judicial department from exercising the functions of the executive. State *v.* George, 22 Oreg. 142, 29 Pac. 356, 29 Am. St. Rep. 586, 16 L. R. A. 737.

Texas.— The provision of the constitution authorizing the legislature to change the jurisdiction of county courts is broad enough to empower it to confer jurisdiction on such courts to establish county boundaries. Kaufman County *v.* McGaughey, 11 Tex. Civ. App. 551, 33 S. W. 1020.

Washington.— Seanor *v.* Whatcom County, 13 Wash. 48, 42 Pac. 552.

United States.— The legislature of a state denied by the constitution the power of creating, etc., municipalities by special act, and authorized to create, etc., only by general law, may confer on courts the power to determine whether the conditions exist prescribed by law for creating, etc., a municipal body. Reagan *v.* Farmers' L. & T. Co., 154

3. Political Questions — a. In General. Political questions are not within the province of the judiciary.[29]

U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Forsythe *v.* Hammond, 68 Fed. 774. Section 12 of the Interstate Commerce Act, in authorizing circuit courts to make orders enforcing subpœnas issued by the commission, does not impose judicial functions. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 1047 [*reversing* 53 Fed. 476]. See also Northern Canada R. Co. *v.* International Bridge Co., 7 Fed. 653 (which related to the determination by a court of the terms upon which a railway company should be entitled to the use of a bridge, etc., and it was held to be no less the exercise of a judicial function to prescribe a rule of conduct or protect the existence of a right during a future period than it is to determine whether the right has been invaded in the past); U. S. *v.* Todd, 13 How. (U. S.) 52 note, 14 L. ed. 47 (holding that an old statute did not confer judicial power).

See 10 Cent. Dig. tit. "Constitutional Law," § 124.

29. *Arkansas.*— Latham *v.* Clark, 25 Ark. 574.

California.— Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788; People *v.* Riverside, 70 Cal. 461, 9 Pac. 662, 11 Pac. 759; People *v.* Pacheco, 27 Cal. 175; Franklin *v.* State Bd. of Examiners, 23 Cal. 173.

Illinois.— A court of equity cannot enjoin holding an election and certifying candidates, as the matter is a political one. Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143 [*distinguishing* State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 35 L. R. A. 145].

Louisiana.— Stoner *v.* Flournoy, 28 La. Ann. 850.

Maine.— See State *v.* Wagner, 61 Me. 178, acquiescence by courts in claim to, and exercise of, jurisdiction over a locality by the political authorities.

Nebraska.— Miller *v.* Wheeler, 33 Nebr. 765, 51 N. W. 137.

New Hampshire.— See Bedel *v.* Loomis, 11 N. H. 9, assertion by the legislature of a right of jurisdiction within certain limits.

Ohio.— *In re* Board of Review, 11 Ohio Dec. (Reprint) 571, 27 Cinc. L. Bul. 334.

Texas.— Harrold *v.* Arrington, 64 Tex. 233, settlement of boundary line.

United States.— Neely *v.* Henkel, 180 U. S. 126, 21 S. Ct. 308, 45 L. ed. 457 [*affirming* 103 Fed. 626]; Neely *v.* Henkel, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448 [*affirming* 103 Fed. 631], on the question as to occupation of Cuba by the United States. Congress is to determine whether claims upon the treasury are founded upon just obligations, and having decided in the affirmative and appropriated money therefor, its decision can rarely, if ever, be reviewed by the judiciary. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215. The action of the political departments of the government in reserving a tract comprising a military reservation for military purposes was held conclusive upon the courts as to the character of occupation. Benson *v.* U. S., 146 U. S. 325, 13 S. Ct. 60, 36 L. ed. 991.

But see Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369 (holding certain powers of the governor relative to the issuance of patents not to be exclusive political functions); State *v.* Gleason, 12 Fla. 190 (holding that the eligibility of the person elected lieutenant-governor is not such a political question that it is not within the jurisdiction of the court); Bouldin *v.* Lockhart, 1 Lea (Tenn.) 195 (holding that where a statute under which an election was held removing a county-seat is constitutional, the removal afterward will not deprive the courts of control over it on the ground that it is a political act).

See 10 Cent. Dig. tit. "Constitutional Law," § 125.

A controversy between the United States and a state as to the boundary between the state and a territory does not fall within the principle that the courts have no jurisdiction over "political questions." That principle only applies to controversies with independent nations, the determination of which is committed to the executive department. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285.

In ascertaining the tribal and other relations of Indians, courts generally follow the executive and legislative departments to which the determination of these relations has been specially intrusted. Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183.

In determining the political status of a state, the decision of the proper political department of the federal government will control the decision of the judicial department. Kelley *v.* State, 25 Ark. 392.

Congress may make treasury notes legal tender in payment of debts in time both of peace and of war; and the exigency requiring the exercise of such power is a political one. *In re* Legal Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204. And see Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448.

Questions relating to treaties were held to be international and political in *In re* Clinton Bridge, 1 Woodw. (U. S.) 150, 5 Fed. Cas. No. 2,900, 7 Am. L. Reg. N. S. 149 [*affirmed* in 10 Wall. (U. S.) 454, 19 L. ed. 969]. See also Jones *v.* Walker, 2 Paine (U. S.) 688, 13 Fed. Cas. No. 7,507.

Rights to be protected, such as rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state,

b. Adoption of Constitution and Amendments. The question as to the adoption of a constitution or amendments thereto is a political one.[30]

c. Apportionment and Election of Members of Legislative Bodies. Questions

with its constitutional powers and privileges, present political questions. Georgia *v.* Stanton, 6 Wall. (U. S.) 50, 18 L. ed. 721. In U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182, it was held that the question whether a particular class of Indians are to be regarded as a tribe or have ceased to hold the tribal relation is a political one. And see Kennett *v.* Chambers, 14 How. (U. S.) 38, 14 L. ed. 316; Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581 (recognition of a foreign government by the executive); U. S. *v.* Baker, 5 Blatchf. (U. S.) 6, 24 Fed. Cas. No. 14,501; Taylor *v.* Morton, 2 Curt. (U. S.) 454, 23 Fed. Cas. No. 13,799 (question as to duty on merchandise arising under a treaty); *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83 (political questions arising under a treaty). The supreme court is bound by the claim of the government that certain islands do not belong to another nation. Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226.

The judiciary, in the absence of legislation, may determine how far the policy of the state will justify the giving a temporary effect within its limits to the laws of a sister state. *Ex p.* Archy, 9 Cal. 147. See also Nougues *v.* Douglass, 7 Cal. 65.

The legislature are to determine the exigency as to the exercise of the police power, but the subjects of the exercise belong to the judiciary. Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

The power to hold an election is political and cannot be enjoined. Harris *v.* Schryock, 82 Ill. 119; Dickey *v.* Reed, 78 Ill. 261; Darst *v.* People, 62 Ill. 306; Walton *v.* Develing, 61 Ill. 201; People *v.* Galesburg, 48 Ill. 485.

The question as to the validity of an organization claiming to be the lawful government of a foreign county is a political one. The Hornet, 2 Abb. (U. S.) 35, 12 Fed. Cas. No. 6,705, 11 Int. Rev. Rec. 6.

The time when the Rebellion closed was held to be a fact for the determination of the political branches of the government. Grossmeyer *v.* U. S., 4 Ct. Cl. 1.

The United States supreme court cannot enforce a treaty which the government disregards. Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926.

Whether a statute providing for the election of presidential electors by congressional districts instead of by the people at large is repugnant to the constitution of the United States was held to be a judicial question in McPherson *v.* Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869.

Who is the sovereign *de jure* or *de facto* of a territory is a political question. Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691.

30. *Kentucky.*— Miller *v.* Johnson, 92 Ky. 589, 19 Ky. L. Rep. 933, 18 S. W. 522, 15 L. R. A. 524.

Maryland.— Norman *v.* Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716.

Nebraska.— Brittle *v.* People, 2 Nebr. 198.

Rhode Island.— Hanley *v.* Wetmore, 15 R. I. 386, 6 Atl. 777.

United States.— Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Smith *v.* Good, 34 Fed. 204; Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112. 10 Am. L. Reg. N. S. 718.

See 10 Cent. Dig. tit. "Constitutional Law," § 126.

As a matter of judicial investigation it is immaterial whether the adoption was by the states or people. Hawkins *v.* Filkins, 24 Ark. 286.

Courts cannot prevent the submission to the people, as directed by the legislature, of an amendment. State *v.* Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582.

As to the power of supreme court to determine the validity of an amendment see State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636.

The constitution must be amended as therein prescribed, and the courts may, when the amendment does not relate to their own powers, inquire whether in its adoption the provisions of the existing constitution have been observed. Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

The court can compel, by mandamus, the reconvening of the board and a recanvass. Rich *v.* Board of State Canvassers, 100 Mich. 453, 59 N. W. 181.

The decision by congress upon claims and the appropriation of money therefor can rarely if ever be the subject of review by the judiciary. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

The proclamation by the government of the adoption of a constitution is not subject to review by the courts. Worman *v.* Hagan, 18 Md. 152, 27 Atl. 616, 21 L. R. A. 716.

The recognition by the national government of the government established at Wheeling after the secession of Virginia is binding on the judiciary. Griffin's Case, Chase (U. S.) 364, 11 Fed. Cas. No. 5,815, 1 Am. L. Reg. N. S. 358, 3 Am. L. Rev. 784, 2 Am. L. T. Rep. (U. S. Cts.) 93, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623.

The political power of the state having recognized a defective constitution, and important rights having accrued thereunder, it is the duty of the court to regard it as valid. Miller *v.* Johnson, 92 Ky. 589, 13 Ky. L. Rep. 933, 18 S. W. 522, 15 L. R. A. 524.

as to apportionment and election of members of legislative bodies are generally for the courts.[31]

4. Advisory Opinions. The constitutions of some states provide that the court of appeal shall give its opinion upon important questions, when requested by the governor or either branch of the legislature.[32]

31. *Illinois.*— People *v.* Thompson, 155 Ill. 451, 40 N. E. 307.

Indiana.— Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Michigan.—Giddings *v.* State Secretary, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402.

Nebraska.— State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113.

New Jersey.— Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

New York.— People *v.* Monroe County, 19 N. Y. Suppl. 978.

Rhode Island.— State *v.* South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65.

Wisconsin.— State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See 10 Cent. Dig. tit. "Constitutional Law," § 127.

In New Hampshire, under the constitution, the action of the senate as final judges of elections is conclusive. Opinion of Justices, 56 N. H. 570.

The question of apportionment under an act of congress was held to be political and not judicial. State *v.* Boyd, 36 Nebr. 181, 54 N. W. 252, 19 L. R. A. 227.

Senate alone is the judge as to whether certain persons are constitutionally entitled to retain their seats. *In re* Justices Supreme Judicial Ct., 7 Me. 483.

The supreme court cannot upon quo warranto oust one declared by the legislative body to be a member. State *v.* Tomlinson, 20 Kan. 692.

While the court cannot determine the right of a party to a seat in the legislature it can determine the right to a certificate of election thereto and compel by mandamus the issuance of such certificate to the party entitled. O'Ferrall *v.* Colby, 2 Minn. 180.

32. *Colorado.*— *In re* Denver Fire, etc., Com'rs, 21 Colo. 14, 39 Pac. 329; *In re* Penitentiary Com'rs, 19 Colo. 409, 35 Pac. 915; *In re* Priority, etc., 19 Colo. 58, 34 Pac. 277, holding that the court would make no answer in an *ex parte* proceeding. The court will determine whether the questions justify an opinion. *In re* Penitentiary Com'rs, 19 Colo. 409, 35 Pac. 915. The constitution does not authorize the court to determine the right to office of one appointed fire commissioner as against the former incumbent. *In re* Penitentiary Com'rs, 19 Colo. 409, 35 Pac. 915 [*distinguishing In re* Speakership, etc., 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241]. The courts cannot pass upon the constitutionality of a statute already enacted. *In re* University Fund, 18 Colo. 398, 33 Pac. 415. Where the promoters of a bill concede that in some respects it is unconstitutional, it is not for the court to determine whether a constitutional measure might be prepared to embody the leading purpose of such bill. *In re* House Bill No. 10, 15 Colo. 600, 26 Pac. 824. And see *In re* Speakership, etc., 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241, question as to the power of the house of representatives to remove its speaker. The executive questions submitted must be exclusively *publici juris*, and legislative questions must be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right. *In re* Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478. It is not the duty of the court to construe, at the request of the legislature, the constitution as it relates to water rights, if it does not appear that such rights are the subject of any pending act. *In re* Senate Resolution, 9 Colo. 620, 21 Pac. 470.

Connecticut.— The court declined to comply with a request of the legislature for an opinion as to the validity of contemplated legislation. *In re* Judges' Reply, 33 Conn. 586.

Florida.— Opinion of Court, 23 Fla. 297, 6 So. 925, holding that the judges were not authorized to give an opinion as to what character of acts it would be unconstitutional for the legislature to pass.

Massachusetts.— Mass. Const. c. 3, art. 2, provides that "each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions." The history of the subject is given in Opinion of Justices, 126 Mass. 557. The opinions can be required only "upon important questions of law," not of fact. Opinion of Justices, 120 Mass. 600. "And upon solemn occasions," that is, when necessary to be determined by the body making the inquiry, in the exercise of its legislative or executive power under the constitution. The opinion cannot be required upon a question which may arise in the course of judicial administration, and which cannot be affected by legislative or executive action. Justices' Answer, 122 Mass. 600. "The Justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity." Opinion of Justices, 126 Mass. 557, 566. Opinions were given in Opinion of Justices, 9 Cush. (Mass.) 604, and Opinion of Justices, 5 Metc. (Mass.) 596, although doubt was expressed, as the ques-

5. Encroachment on Legislature — a. In General. The legislature may pass

tion in each case was as to the legal effect of a contract, created by statute, between the commonwealth and a private corporation. "Opinions have been frequently required by the House of Representatives, and given by the Justices, upon questions of law concerning the election and qualifications of members, of which the House is made by the Constitution the final judge." Justices' Answer, 148 Mass. 623, 21 N. E. 439; Opinion of Justices, 126 Mass. 557, 566; Peabody *v.* Boston, 115 Mass. 383, 384. See further as to questions, Opinion of Justices, 150 Mass. 592, 598, 24 N. E. 1084, 8 L. R. A. 487; 145 Mass. 587, 13 N. E. 15. The justices, in 1781, in obedience to the first legislature under the constitution, delivered opinions as to whether, notwithstanding the provision of the constitution that all money bills shall originate in the house, "the Senate have an equal right and concern with the House of Representatives in originating and completing the settlement of a valuation." Opinion of Justices, 126 Mass. 547. "Opinions have been given, when required by the Governor and Council, upon questions of law affecting the constitution of the Council; or involved in the exercise of the power of the Governor to veto bills or resolves; of the power vested in him as commander-in-chief of the militia; of his power, with the advice of the Council, to appoint or remove public officers, to pardon offences, or to issue warrants for the execution of capital sentences; or in the discharge of duties imposed upon the Governor and Council by statute, such as issuing warrants for the payment of claims against the Commonwealth, or canvassing returns of votes for public officers." Justices' Answer, 122 Mass. 600, 602. Opinions given to the governor and council will be found in Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Opinion of Justices, 154 Mass. 603, 31 N. E. 634; Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842; Opinion of Justices, 145 Mass. 587, 13 N. E. 15; Opinion of Justices, 136 Mass. 578, 583; Opinion of Justices, 126 Mass. 603; Opinion of Justices, 120 Mass. 600; Opinion of Justices, 117 Mass. 599; Opinion of Justices, 107 Mass. 604; Opinion of Justices, 13 Allen (Mass.) 593; Opinion of Justices, 9 Allen (Mass.) 585; Opinion of Justices, 1 Allen (Mass.) 197, note; Opinion of Justices, 14 Gray (Mass.) 614; Opinion of Justices, 13 Gray (Mass.) 618; Opinion of Justices, 3 Gray (Mass.) 601; Opinion of Justices, 11 Cush. (Mass.) 604; Opinion of Justices, 3 Cush. (Mass.) 584, 586; Opinion of Justices, 22 Pick. (Mass.) 571; Opinion of Justices, 8 Mass. 548; Opinion of Justices, 3 Mass. 568. "Opinions have been given to the Senate, or to the House of Representatives, upon the construction and effect of the Constitution, and of existing statutes, with a view to further legislation; upon questions whether a bill has been so laid before the Governor as to become a law by lapse of time without his approval; upon questions relating to the votes for Governor and Lieutenant Governor, which are directed by the Constitution to be counted by the Senate and House of Representatives; or to the election of Councillors, while such election was required by the Constitution to be made by the two Houses; or to the election, returns, or qualifications of Senators or Representatives, of which the Senate and the House respectively are the final judges." Justices' Answers, 122 Mass. 600, 602. Opinions given or refused to the senate or house of representatives are found in: Opinion of Justices, 178 Mass. 605, 60 N. E. 129; Opinion of Justices, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564; Opinion of Justices, 167 Mass. 599, 46 N. E. 118; Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350; Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; Opinion of Justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113; Opinion of Justices, 157 Mass. 595, 35 N. E. 111; Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; Opinion of Justices, 150 Mass. 592, 598, 24 N. E. 1084, 8 L. R. A. 487; Justices' Answer, 148 Mass. 623, 21 N. E. 439; Opinion of Justices, 142 Mass. 601, 7 N. E. 35; Opinion of Justices, 138 Mass. 601; Opinion of Justices, 135 Mass. 594; Opinion of Justices, 126 Mass. 547, 557; Opinion of Justices, 124 Mass. 596; Opinion of Justices, 122 Mass. 594, 600; Opinion of Justices, 117 Mass. 603; Opinion of Justices, 115 Mass. 602; Opinion of Justices, 99 Mass. 636; Opinion of Justices, 10 Gray (Mass.) 613; Opinion of Justices, 8 Gray (Mass.) 20; Opinion of Justices, 9 Cush. (Mass.) 604; Opinion of Justices, 6 Cush. (Mass.) 373, 375, 377; Opinions of Justices, 5 Metc. (Mass.) 587, 591, 596; Opinion of Justices, 1 Metc. (Mass.) 572, 580; Opinion of Justices, 23 Pick. (Mass.) 547; Opinion of Justices, 18 Pick. (Mass.) 575; Opinion of Justices, 11 Pick. (Mass.) 538; Opinion of Justices, 7 Pick. (Mass.) 125 note; Opinion of Justices, 3 Pick. (Mass.) 517; Opinion of Justices, 15 Mass. 537; Opinion of Justices, 14 Mass. 470, 472; Opinion of Justices, 7 Mass. 523; Opinion of Justices, 3 Mass. 567.

Minnesota.— The supreme court will not at the request of the governor, or in any case where an act of the legislature is not involved in matters properly before it, give its opinion as to the construction of the act. Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330. As to the unconstitutionality of a statute requiring opinions see Matter of Application of Senate, 10 Minn. 78.

Missouri.— The court will not give its opinion upon a law which may subsequently come before it in a contested case. Opinion of Justices, 55 Mo. 497. It was held in *In re* North Missouri R. Co., 51 Mo. 586, that the matters inquired of must be those of public concern, that the judges were to decide for

any act it pleases without interference from the courts;[33] but when the legisla-

themselves whether the questions authorize the rendition of opinions, and that the question as to the constitutionality of the sale of one railroad to another could not be passed upon.

New Hampshire.—A statute making certain rules prepared by a commissioner valid when approved by the court was held not to require the advice of the justices; and a decision as to their sufficiency was held not authorized before the question arose in actual cases. *In re* School Law Manual, 63 N. H. 574, 4 Atl. 878. Mayors and aldermen cannot require opinions. Opinion of Justices, 62 N. H. 706. Advice to the governor and council is not authorized on questions affecting private rights. Opinion of Court, 62 N. H. 704. Under N. H. Laws (1901), c. 45, entitled, "An act to provide for uniform blanks and rules of practice and procedure in probate courts," the supreme court has no power, in proceedings instituted for that purpose, to approve or disapprove the forms and rules adopted by the statutory committee. *In re* Probate Blanks, 71 N. H. 621, 52 Atl. 861.

Ohio.— Opinions cannot be given on hypothetical questions or questions not necessary to the decision. State *v.* Baughman, 38 Ohio St. 455.

South Dakota.— *In re* Chapter 6, 8 S. D. 274, 66 N. W. 310, refusal to give an opinion because the rights of persons not given an opportunity to be heard were involved.

See 10 Cent. Dig. tit. "Constitutional Law," § 128.

33. *Alabama.*— *Ex p.* Echols, 39 Ala. 698, 88 Am. Dec. 749.

California.— Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788; *In re* La Société Francaise, etc., 123 Cal. 525, 56 Pac. 458; De Witt *v.* Duncan, 46 Cal. 342; *Ex p.* McCarthy, 29 Cal. 395; People *v.* Todd, 23 Cal. 181.

Connecticut.— State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925.

Georgia.— Clayton *v.* Calhoun, 76 Ga. 270.

Illinois.— Price *v.* People, 193 Ill. 114, 61 N. E. 884, 86 Am. St. Rep. 306, 55 L. R. A. 588; Whiteside County *v.* Burchell, 31 Ill. 68.

Indiana.— Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Smith *v.* Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375. See also Stilz *v.* Indianapolis, 55 Ind. 515; State *v.* Elff, 49 Ind. 282, relating to liquor law.

Iowa.— Bankhead *v.* Brown, 25 Iowa 540.

Kentucky.— Morton *v.* Woodford, 99 Ky. 367, 18 Ky. L. Rep. 271, 35 S. W. 1112.

Louisiana.— Hill *v.* Fontenot, 46 La. Ann. 1563, 16 So. 475. A court cannot find elsewhere than in the constitution itself the right to control the exercise of a legislative power expressly granted. *In re* New Orleans Drainage Co., 11 La. Ann. 338; State *v.* Hufty, 11 La. Ann. 303. In Bassett *v.* School Directors, 9 La. Ann. 513, it was held that a power to levy a tax was under legislative control.

Maine.— *In re* Opinion of Judges, 7 Me. 483.

Maryland.— Baltimore *v.* Bonaparte, 93 Md. 156, 48 Atl. 735; State *v.* Jarrett, 17 Md. 309.

Massachusetts.— Miller *v.* Fitchburg, 180 Mass. 32, 61 N. E. 277. The supreme court may inquire into the legality of an order of the house imprisoning a witness for refusing to testify before it. Burnham *v.* Morrissey, 14 Gray (Mass.) 226 74 Am. Dec. 676. In Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768, it was held that the court could not inquire into the question whether a member of the house was duly heard before being expelled.

Michigan.— Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; Chippewa County *v.* Auditor-Gen., 65 Mich. 408, 32 N. W. 651.

Minnesota.— Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652; Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450.

Mississippi.— Cameron *v.* Louisville, etc., R. Co., 69 Miss. 78, 10 So. 554.

Missouri.—Albright *v.* Fisher, 164 Mo. 56, 64 S. W. 106; Young *v.* Kansas City, 152 Mo. 661, 54 S. W. 535. See also St. Joseph Bd. Public Schools *v.* Patten, 62 Mo. 444 (holding that the legislature could not be compelled to make laws); State *v.* Hays, 50 Mo. 34, 11 Am. Rep. 402 (holding that the court had no jurisdiction to compel payment in any other manner than the legislature had directed).

Nebraska.— Nebraska Telephone Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; Bradshaw *v.* Omaha, 1 Nebr. 16.

Nevada.— State *v.* Blasdel, 4 Nev. 241.

New York.— The rule that courts cannot inquire into the motives inducing legislation extends to legislative acts by a common council as well as those by a legislature. Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081 [*affirming* 25 N. Y. App. Div. 329, 49 N. Y. Suppl. 713]. The legislative power to discharge state obligations is not reviewable by the courts. People *v.* Dayton, 55 N. Y. 367. See also People *v.* Shepard, 36 N. Y. 285. Determination by legislation of the population of a territory proposed to be organized as a new county is not reviewable by the courts. Rumsey *v.* People, 19 N. Y. 41. The discretion of a municipal corporation as to the exercise of legislative functions is not reviewable by the courts. New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562. See also People *v.* Toynbee, 2 Park. Crim. (N. Y.) 490, legislative power not subject to judicial control.

North Carolina.— Wilson *v.* Jenkins, 72 N. C. 5; Galloway *v.* Jenkins, 63 N. C. 147.

Ohio.— Zanesville *v.* Zanesville Tel., etc.,

ture transcends its power the courts may declare its acts void;[34] and in case of doubt or ambiguity construe them.[35]

Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

Oklahoma.—Addington *v.* Canfield, 11 Okla. 204, 66 Pac. 355; Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578.

Oregon.— King *v.* Portland, 2 Oreg. 146.

Pennsylvania.— Oil City *v.* Oil City Trust Co., 151 Pa. St. 454, 31 Wkly. Notes Cas. (Pa.) 129, 25 Atl. 124 (imposing of license on banks for legislative determination); Strine *v.* Northumberland Co., 2 Walk. (Pa.) 198 (an order of court superseding an act as to boarding prisoners is invalid). Courts cannot set aside a sale of state canals for inadequacy of price or set aside a legislative act for any undue favor to local interests. Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278. Limitations are legislative acts. Reist *v.* Heilbrenner, 11 Serg. & R. (Pa.) 131.

Rhode Island.— Burdick *v.* Coates, 22 R. I. 410, 48 Atl. 389.

South Dakota.— State *v.* Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582.

Tennessee.— Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706, 59 S. W. 1041; State *v.* Lindsay, 103 Tenn. 625, 53 S. W. 950.

Texas.— Walker *v.* Tarrant County, 20 Tex. 16.

Utah.— Ellison *v.* Barnes, 23 Utah 183, 63 Pac. 899; Kimball *v.* Grantsville City, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628.

Virginia.— Woodall *v.* Lynchburg, 100 Va. 318, 4 Va. Supreme Ct. 166, 40 S. E. 915.

Wisconsin.— *In re* Falvey, 7 Wis. 630.

Wyoming.—Barkwell *v.* Chatterton, 4 Wyo. 307; *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

United States.— Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 1009, 44 L. ed. 1187 [*affirming* 108 Ky. 278, 21 Ky. L. Rep. 1735, 56 S. W. 177, 49 L. R. A. 258]; U. S. *v.* Sandoval, 167 U. S. 278, 17 S. Ct. 868, 42 L. ed. 168; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Wisconsin *v.* Duluth, 96 U. S. 379, 24 L. ed. 668; New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233; Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353.

See 10 Cent. Dig. tit. "Constitutional Law," § 129. But see Cropley *v.* Vogeler, 2 App. Cas. (D. C.) 28.

Determination by the legislature.— As to what is a proper exercise of police power is subject to review by courts. *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636 [*affirming* 33 Hun (N. Y.) 374].

In case of the legislature taking private property for public use the courts may determine what constitutes public use. Longhbridge *v.* Harris, 42 Ga. 500. And see Concord R. Co. *v.* Greely, 17 N. H. 47.

The court may determine whether any particular regulation reasonably restricts a citizen as to engaging in certain business. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727.

The power of deciding between conflicting interests of river navigation and of transportation across navigable rivers by structures is a legislative one. Milnor *v.* New Jersey R. Co., 3 Wall. (U. S.) Appendix 782, 16 L. ed. Appendix 1, 17 Fed. Cas. No. 9,620, 6 Am. L. Reg. 6; Silliman *v.* Troy, etc., Bridge Co., 11 Blatchf. (U. S.) 274, 22 Fed. Cas. No. 12,853; Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 395, 22 Fed. Cas. No. 12,852. But see Silliman *v.* Hudson River Bridge Co., 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851. In The Sam Slick, 2 Curt. (U. S.) 480, 21 Fed. Cas. No. 12,282, it was held that even if the court might think that the Massachusetts legislature would have excepted a certain case out of a statute if it had been foreseen the court could not except it. And see U. S. *v.* Williams, 5 McLean (U. S.) 133, 28 Fed. Cas. No. 16,721.

When a charter or a general statute provides that such charter may be repealed by the legislature at will, within restrictions, the legislature may exercise its powers summarily, and its action, unless palpably in violation of the principles of national justice, cannot be reviewed by the courts. Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33.

34. Myers *v.* English, 9 Cal. 341; Nougues *v.* Douglas, 7 Cal. 65; Bradley *v.* New Haven, 73 Conn. 946, 48 Atl. 960; Norwalk St. R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Margolies *v.* Atlantic City, 67 N. J. L. 82, 50 Atl. 367. And see McCracken *v.* Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Western Union Tel. Co. *v.* Myatt, 98 Fed. 335 (holding that an act creating a court of visitation of Kansas with general power to regulate the business of railroad and telegraph lines, etc., is unconstitutional); Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106 (holding that a county funding act of Kentucky imposed a legislative function on a judicial tribunal).

35. *Arkansas.*— The courts may correct a mistake in a statute by substituting the word intended for the one used. Haney *v.* State, 34 Ark. 263.

Idaho.—The courts may interpolate punctuation or words intended to be used in a statute; otherwise when the matter comprises the real substance of the act. Holmberg *v.* Jones, (Ida. 1901) 65 Pac. 563.

Indiana.— Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391.

Washington.— Point Roberts Fishing Co. *v.* George, etc., Co., 28 Wash. 200, 68 Pac. 438.

b. Determination as to Whether General Law Is Applicable or Whether Special Act Can Be Passed. The determination under a state constitution of whether an object can be accomplished by general instead of special legislation is generally for the legislature,[36] but sometimes it is for the court.[37]

c. Inquiry into Policy or Motive and Wisdom or Justice of Legislation. The justice, wisdom, policy, or expediency of a law are matters for the legislature;[38]

United States.— Pereles *v.* Watertown, 6 Biss. (U. S.) 79, 19 Fed. Cas. No. 10,980.

See 10 Cent. Dig. tit. "Constitutional Law," § 129.

36. *Arkansas.*—Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

California.— People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

Colorado.— Darrow *v.* People, 8 Colo. 426, 8 Pac. 924; Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828. See also Brown *v.* Denver, 7 Colo. 305, 3 Pac. 455.

Florida.— Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

Illinois.—Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 27 N. E. 203. See also Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Indiana.— Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727. See also State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 14 L. R. A. 566; Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; Ellingham *v.* Wells County, 107 Ind. 600, 8 N. E. 9; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1.

Kansas.— Wichita *v.* Burleigh, 36 Kan. 34, 12 Pac. 332; Hines *v.* Leavenworth, 3 Kan. 186.

Louisiana.— Whited *v.* Lewis, 25 La. Ann. 568.

Missouri.— Hall *v.* Bray, 51 Mo. 288; State *v.* New Madrid County Ct., 51 Mo. 82; State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

New York.— People *v.* Bowen, 21 N. Y. 517; Mosier *v.* Hilton, 15 Barb. (N. Y.) 657.

North Dakota.— Edmonds *v.* Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725.

See 10 Cent. Dig. tit. "Constitutional Law," § 130.

Public debt.— The constitution having provided that no law shall authorize any state debt to be contracted except to meet certain contingencies, the action of the legislature relative to such contingencies cannot be reviewed by the judiciary unless it is apparent that the contingency did not exist. Hovey *v.* Foster, 118 Ind. 502, 21 N. E. 39.

37. Thomas *v.* Clay County, 5 Ind. 4, in which the court said, the legislature having decided a general law to be applicable, that the matter was a proper subject of judicial inquiry. "In other states, a more stringent construction of limitations upon special legislation has been adopted, and the courts have held that general laws must be framed to effect a change in ward, township and county lines, by resorting to the delegation of power to the people of those several sub-divisions of the state; but the language in those constitutions is not in all respects similar to our own, and cannot furnish a safe guide to us." Pell *v.* Newark, 40 N. J. L. 71, 83, 29 Am. Rep. 266. See also People *v.* Allen, 42 N. Y. 378.

The court may decide that a general law on certain matters might be passed by the legislature, although such never has been. *Ex p.* Pritz, 9 Iowa 30.

38. *California.*— *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755 (issue and sale of bonds); Houghton's Appeal, 42 Cal. 35 (modifying grades of streets); Napa Valley R. Co. *v.* Napa County, 30 Cal. 435 (compelling county to subscribe to stock of railroad); People *v.* Bigler, 5 Cal. 23.

Colorado.— Larimer County *v.* National State Bank, 11 Colo. 564, 19 Pac. 537.

Delaware.— State *v.* Allmond, 2 Houst. (Del.) 612, sale of intoxicating liquor.

Georgia.— Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

Illinois.— Marion County *v.* Lear, 108 Ill. 343; Pittsfield, etc., Plank Road Co. *v.* Harrison, 16 Ill. 81. As to statute to be observed by judiciary, even if unwise, see Wadleigh *v.* Develling, 1 Ill. App. 596.

Indiana.— "With the justice, the propriety, the policy, the advisability or desirability or undesirability of a statute, the courts can have nothing whatever to do, so long as the act does not infringe some provision of the constitution, State or Federal, or some valid treaty or law of Congress." State *v.* McClelland, 138 Ind. 395, 37 N. E. 799; Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Johnston *v.* State, 128 Ind. 16, 27 N. E. 422, 25 Am. St. Rep. 412, 12 L. R. A. 235; Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; Hovey *v.* State, 119 Ind. 395, 21 N. E. 21; Maxwell *v.* Fulton County, 119 Ind. 20, 23, 21 N. E. 453, 19 N. E. 617; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; Wilkins *v.* State, 113 Ind. 514, 16 N. E. 162; Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. 411; Eastman *v.* State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

Iowa.— Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 344, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436 (joint rates of charges for transportation); Jordan *v.* Wapello County, 69 Iowa 177, 28 N. W. 548 (imposi-

and the judiciary cannot inquire into the motives of legislators in determining the validity of an enactment.[39]

d. Organization of Legislature and Conflicting Legislatures. Where there is a question as to the legal organization of the legislature, the question whether the legislature has been legally organized and as to which of two conflicting legislatures has the lawful authority is for the courts.[40]

6. Encroachment on Executive — a. In General. The judiciary cannot inter-

tion of a large fine for contempt in violating an injunction restraining the sale of liquor); Merchants' U. B. W. Co. *v.* Brown, 64 Iowa 275, 20 N. W. 434 (appropriation of state funds to corporation for public benefit).

Kentucky.— Com. *v.* Fowler, 96 Ky. 166, 16 Ky. L. Rep. 360, 28 S. W. 786, 33 L. R. A. 839 (a statute as to liquor license); Johnson *v.* Higgins, 3 Metc. (Ky.) 566 (a statute suspending courts).

Louisiana.— State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452 (authorization of glove contests at athletic clubs); State *v.* Flanders, 24 La. Ann. 57 (an act as to funding the floating debt of a city). See First Municipality *v.* Pease, 2 La. Ann. 538; Le Breton *v.* Morgan, 4 Mart. N. S. (La.) 138.

Maine.— The question whether, under the constitution, an act is reasonable and for the benefit of the people is not for the court. Moor *v.* Veazie, 32 Me. 343, 52 Am. Dec. 655.

Maryland.— Leonard *v.* Wiseman, 31 Md. 201, a question as to bounty.

Massachusetts.— In Opinion of Justices, 166 Mass. 589, 595, 44 N. E. 625, 34 L. R. A. 58, relative to an act authorizing veterans to apply for examination for any position in the public service, etc., the court says: "Of the wisdom of such legislation we are not made the judges." In Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161, 166, relative to a tax upon life-insurance companies, the court says: "We have nothing to do with the policy or expediency of the law." And see Dow *v.* Wakefield, 103 Mass. 267, assessment upon the towns for the maintenance of bridges.

Missouri.— Hannibal *v.* Marion County, 69 Mo. 571; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

Nevada.— Gibson *v.* Mason, 5 Nev. 283.

New Hampshire.— State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; Cummings *v.* White Mountains R. Co., 43 N. H. 114.

New York.— Settle *v.* Van Evrea, 49 N. Y. 280. See also People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; People *v.* Lawrence, 36 Barb. (N. Y.) 177; Lindenmuller *v.* People, 21 How. Pr. (N. Y.) 156; People *v.* Quant, 12 How. Pr. (N. Y.) 83; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417.

North Carolina.— State *v.* Manuel, 20 N. C. 144.

Pennsylvania.— Butler's Appeal, 73 Pa. St. 448. See also Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237. The courts cannot set aside a public law on the ground that it was passed in fraud of the people. Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278.

Tennessee.— Ballentine *v.* Pulaski, 15 Lea (Tenn.) 633. That an enactment was secured by bribery does not authorize the court to declare it invalid. Lynn *v.* Polk, 8 Lea (Tenn.) 121.

West Virginia.— Slack *v.* Jacob, 8 W. Va. 612.

Wyoming.— *In re* Johnson County, 4 Wyo. 133, 32 Pac. 850.

United States.— Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Tilley *v.* Savannah F., etc., R. Co., 4 Woods (U. S.) 427, 5 Fed. 641. The remedy for burdensome laws is with congress. *In re* Meador, 1 Abb. (U. S.) 317, 16 Fed. Cas. No. 9,375, 5 Am. L. Rev. 166, 2 Am. L. T. Rep. (U. S. Cts.) 140, 10 Int. Rev. Rec. 74, 2 Leg. Gaz. (Pa.) 193, 3 West. Jur. 209.

See 10 Cent. Dig. tit. "Constitutional Law," § 131.

39. *California.*— People *v.* Beatty, 14 Cal. 566; *Ex p.* Newman, 9 Cal. 502.

Indiana.— McCulloch *v.* State, 11 Ind. 424. See also Wright *v.* Defrees, 8 Ind. 298.

Iowa.— Miners' Bank *v.* U. S., 1 Greene (Iowa) 553.

Minnesota.— Jewell *v.* Weed, 18 Minn. 272.

Missouri.— Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; State *v.* Hays, 49 Mo. 604.

Nebraska.— Bradshaw *v.* Omaha, 1 Nebr. 16.

Ohio.— State *v.* Dudley, 1 Ohio St. 437.

Pennsylvania.— Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278.

Tennessee.— Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364.

United States.— Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148. See also *Ex p.* McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264; Bank of Commerce *v.* New York, 2 Black (U. S.) 620, 17 L. ed. 451; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

See 10 Cent. Dig. tit. "Constitutional Law," § 131; and Cooley Const. Lim. (6th ed.) 220–222.

40. Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Werts *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 23 L. R. A. 354.

fere with the duties of executive officers unless they are of a character purely ministerial.[41]

41. *Arkansas.*— Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346.

Connecticut.— Bradley *v.* New Haven, 73 Conn. 646, 48 Atl. 960.

Georgia.— Johnson *v.* Jackson, 99 Ga. 389, 27 S. E. 734; Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677.

Illinois.— People *v.* Yates, 40 Ill. 126; People *v.* Bissell, 19 Ill. 229, 68 Am. Dec. 591.

Indiana.—Wilkinson *v.* Board of Children's Guardians, 158 Ind. 1, 62 N. E. 481; Terre Haute *v.* Evansville R. Co., 149 Ind. 174, 46 N. E. 77; Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

Iowa.— State *v.* Barker, (Iowa 1902) 89 N. W. 204.

Louisiana.— State *v.* Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; State *v.* Deslonde, 27 La. Ann. 71; Claiborne *v.* Police Jury, 7 Mart. (La.) 5.

Maryland.— Baltimore City *v.* Bonaparte, 93 Md. 156, 48 Atl. 735.

Michigan.— People *v.* Auditor-Gen., 38 Mich. 746.

Minnesota.— State *v.* Westfall, 85 Minn. 437, 89 N. W. 175; Hayne *v.* Metropolitan Trust Co., 67 Minn. 245, 69 N. W. 916; State *v.* Whitcomb, 28 Minn. 56, 8 N. W. 902. See also St. Paul, etc., R. Co. *v.* Brown, 24 Minn. 517; State *v.* Dike, 20 Minn. 363.

Missouri.— State *v.* Towns, 153 Mo. 91, 54 S. W. 552. See also Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

New Jersey.— Moore *v.* Haddonfield St. Com'rs, 62 N. J. L. 386, 792, 41 Atl. 946. Courts cannot compel a governor to produce a paper which his official duty in his opinion requires him to withhold. Thompson *v.* German Valley R. Co., 22 N. J. Eq. 111.

Pennsylvania.— Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667; Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23.

Texas.— Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317.

United States.— U. S. *v.* Queen, 105 Fed. 269; Taylor *v.* Kercheval, 82 Fed. 497.

See 10 Cent. Dig. tit. "Constitutional Law," § 133.

But see Cahill *v.* Perrine, 105 Ky. 531, 20 Ky. L. Rep. 1454, 1656, 49 S. W. 344, 50 S. W. 19 (where it is said that the circuit judge, by the constitution, is a conservator of the peace throughout the commonwealth; and may properly discharge the duties imposed upon him by statute of appointing guards to protect property against mobs, "without infringing section 28 of the Constitution"); State *v.* North Dakota Children's Home Soc., 10 N. D. 493, 88 N. W. 273 (holding that an act relating to societies for securing homes for orphans, etc., did not impose non-judicial duties upon judges).

It is the settled doctrine that the courts cannot control or interfere with the judgment or discretion of an executive officer, except where the duties to be performed are purely ministerial. See U. S. *v.* Windom, 137 U. S. 636, 11 S. Ct. 197, 34 L. ed. 811; U. S. *v.* Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. ed. 354; Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 19 L. ed. 62; Patent Commissioner *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335; Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 10 L. ed. 559, 609; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; McIntire *v.* Wood, 7 Cranch (U. S.) 504, 3 L. ed. 420; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60. "Or, as we think, where the statute under which he acts is unconstitutional." But the circuit court may restrain a postmaster from withholding mail matter from a citizen to whom it is directed, under an order of the postmaster-general, which was beyond the scope of his constitutional authority. Hoover *v.* McChesney, 81 Fed. 472. Where a marshal's claim for fees is presented for allowance, and the department in its discretion suspends action until vouchers are furnished, etc., the courts should not assume jurisdiction until final action is taken or is deferred for an unreasonable time. U. S. *v.* Fletcher, 147 U. S. 664, 13 S. Ct. 343, 37 L. ed. 322 [*following* New Orleans *v.* Paine, 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162]. The question as to the assertion of one that he is the owner of a tract of land, which the land officers regard as public land, is treated in Litchfield *v.* Register, 9 Wall. (U. S.) 575, 19 L. ed. 681. See Astrom *v.* Hammond, 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596. As to a *subpœna duces tecum* issuing to the president of the United States see U. S. *v.* Burr, 4 Cranch C. C. (U. S.) 455, 25 Fed. Cas. No. 14,692*a*.

Authority to hold court.— Under the act of March 23, 1900, providing that the judge of the court of common pleas, on the request of the justice of the supreme court, should hold the circuit court, and the act of 1891, declaring that the law judge of the court of common pleas should *ipso facto* be appointed to hold the circuit court, the judge of the court of common pleas derives his authority to hold the circuit court from the appointment as judge of the court of common pleas, and not from the request of the justice of the supreme court. Commonwealth Roofing Co. *v.* Palmer Leather Co., 67 N. J. L. 566, 52 Atl. 389.

Laws (1901), c. 237, providing for the Torrens system of registering land titles, is not unconstitutional, in that it violates article 3 of the constitution, vesting the powers of government in three distinct departments. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

The Anti-Monopoly Act does not impose non-judicial duties upon judicial officers. *In re* Davies, 168 N. Y. 89, 61 N. E. 118, 32 N. Y. Civ. Proc. 163, 56 L. R. A. 855 [*reversing* 67 N. Y. Suppl. 492]. The justices of the supreme court may order certain per-

b. Granting Reprieves and Pardons.[42] The judicial power cannot exercise a revisory authority over executive acts such as the granting of reprieves and pardons.[43]

c. Injunction.[44] Generally the head of an executive department cannot be enjoined from the performance of his duties.[45]

d. Mandamus.[46] While an executive officer is not subject to mandamus in matters involving the exercise of discretion,[47] the writ generally may be issued

sons to give testimony to enable the attorney-general to determine the propriety of a suit to enforce the anti-monopoly law. Matter of Atty.-Gen., 22 N. Y. App. Div. 285, 47 N. Y. Suppl. 883 [*affirming* 21 Misc. (N. Y.) 101, 47 N. Y. Suppl. 20].

"The executive, in the proper discharge of his duties under the Constitution, is independent of the courts as he is of the legislature." Cooley Const. Lim. (6th ed.) 136.

"The issuing of the executions by the Comptroller General to collect the public revenue due to the State, was the act of the Executive department of the State government, and the Courts have no power or authority to compel that department, by mandamus or other judicial process, to issue executions for the collection of the public revenue of the State, or to restrain that department of the government from doing so, or to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize it to issue such executions against the defaulting officers and agents of the government — that is a matter which belongs to the Executive department of the government, exclusively." Scofield *v.* Perkerson, 46 Ga. 350, 359.

The legal action of executive officers may be determined by the court and brought in question in causes requiring judicial action. State *v.* Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

The military authority of the governor was stated to be supreme in State *v.* Harrison, 34 Minn. 526, 26 N. W. 729.

42. See, generally, PARDONS.

43. The power of staying the execution of a death sentence pending an appeal, conferred on the supreme court, is treated in Parker *v.* State, 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859 [*modifying* Butler *v.* State, 97 Ind. 373]. And see Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481 (authority conferred on magistrates in liquor cases was held not to confer a pardoning power); Astrom *v.* Hammond, 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

44. As to injunctions generally see INJUNCTIONS.

45. *District of Columbia.*—The head of the executive department cannot be enjoined from enforcing the execution of a general law affecting only public rights. Grant *v.* Cooke, 7 D. C. 165.

Indiana.— In Smith *v.* Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375, it was held that certified copies of the returns of certain votes could not be stopped by injunction in the hands of the secretary of state.

Massachusetts.— A court of equity cannot restrain the secretary of state from issuing a city charter on the ground that the statute authorizing such charter is unconstitutional. Larcom *v.* Olin, 160 Mass. 102, 35 N. E. 113.

Minnesota.— The governor cannot be restrained from doing an act in his official capacity. Western R. Co. *v.* De Graff, 27 Minn. 1, 6 N. W. 341.

New York.— The officers of the state cannot be enjoined, even though the judge deems the statute in question unconstitutional. Thompson *v.* Canal Fund Com'rs, 2 Abb. Pr. (N. Y.) 248.

Oklahoma.— The execution of orders given by the president for the removal of intruders from government land will not be enjoined. Guthrie *v.* Hall, 1 Okla. 454, 34 Pac. 380.

United States.—Green *v.* Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; New Orleans *v.* Paine, 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162 [*affirming* 51 Fed. 833, 2 C. C. A. 516].

See 10 Cent. Dig. tit. "Constitutional Law," § 135.

Mandamus or injunction will lie against the secretary of the interior, where he attempts illegally to annul the action of his predecessor, approving the location of a railroad's right of way over public lands. Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 27 L. ed. 123.

The president cannot be restrained from carrying into effect an unconstitutional act of congress. Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 18 L. ed. 437.

46. As to mandamus generally see MANDAMUS.

47. *Arizona.*— Board of Directors *v.* Wolfley, (Ariz. 1889) 22 Pac. 383.

Arkansas.— Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346.

California.— Hatch *v.* Stoneman, 66 Cal. 632, 5 Pac. 734. See, however, Benjamin *v.* Perkins, 55 Cal. 483; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Middleton *v.* Low, 30 Cal. 596; People *v.* Brooks, 16 Cal. 11; People *v.* Whitman, 6 Cal. 659.

Colorado.— Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 285, 15 L. R. A. 369.

Connecticut.— Malmo's Appeal, 72 Conn. 1, 43 Atl. 485.

District of Columbia.— U. S. *v.* Boutwell, 7 D. C. 64; Mississippi *v.* Durham, 4 Mackey (D. C.) 235.

Florida.— State *v.* Drew, 17 Fla. 67; Towle *v.* State, 3 Fla. 202.

Georgia.— Low *v.* Towns, 8 Ga. 360; Bonner *v.* State, 7 Ga. 473.

against him in matters wherein he performs a mere ministerial duty or is without power to act at all.[48]

Illinois.— People *v.* Cullom, 100 Ill. 472; Marshall *v.* Moses, 40 Ill. 126; People *v.* Hatch, 33 Ill. 9; People *v.* Bissell, 19 Ill. 229, 68 Am. Dec. 591.

Indiana.— Hovey *v.* State, 127 Ind. 588, 27 N. E. 175, 22 Am. St. Rep. 663, 11 L. R. A. 763.

Louisiana.— State *v.* Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; State *v.* Cavanac, 30 La. Ann. 237. See also State *v.* Lewis, 28 La. Ann. 84; State *v.* Deslonde, 27 La. Ann. 71; State *v.* Warmoth, 24 La. Ann. 351, 13 Am. Rep. 126; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712.

Maine.— Dennett, Petitioner, 32 Me. 508, 85 Am. Dec. 643.

Maryland.—Miles *v.* Bradford, 22 Md. 170, 85 Am. Dec. 643; Green *v.* Purnell, 12 Md. 829.

Michigan.—People *v.* Auditor-Gen., 38 Mich. 746. See also People *v.* Board of State Auditors, 32 Mich. 191; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89.

Minnesota.— In Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519, it was held that an executive officer was not subject to the judiciary even in ministerial matters. See also State *v.* Braden, 40 Minn. 174, 41 N. W. 817; State *v.* Whitcomb, 28 Minn. 50, 8 N. W. 902; Western R. Co. *v.* De Graff, 27 Minn. 1, 6 N. W. 341; State *v.* Dike, 20 Minn. 363; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; Chamberlain *v.* Sibley, 4 Minn. 309; Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13.

Mississippi.— The governor cannot be compelled by mandamus to perform any act. Vicksburg, etc., R. Co. *v.* Lowry, 61 Miss. 102, 48 Am. Rep. 76.

Missouri.— That mandamus will not lie to compel the governor to perform any duty ministerial or political see Robb *v.* Stone, 120 Mo. 428, 25 S. W. 376, 41 Am. St. Rep. 705, 23 L. R. A. 194; State *v.* Fletcher, 39 Mo. 388.

Nebraska.— State *v.* Savage, (Nebr. 1902) 90 N. W. 898.

New Jersey.— McCullough *v.* Essex County Cir. Ct., 59 N. J. L. 103, 34 Atl. 1072; State *v.* Governor, 25 N. J. L. 331, no power to award a mandamus against the governor.

Pennsylvania.— Com. *v.* Wickinsham, 66 Pa. St. 134. See also Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667, where it was held that the governor was not subject to the subpœna of the grand jury.

Rhode Island.— Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564.

Tennessee.— Bates *v.* Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; Joneshoro Fall Branch, etc., Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713.

Texas.— Chalk *v.* Darden, 47 Tex. 438; Galveston, etc., R. Co. *v.* Gross, 47 Tex. 428. And see Kuechler *v.* Wright, 40 Tex. 600; Bledsoe *v.* International R. Co., 40 Tex. 537.

United States.— "It has been settled from the adoption of the Constitution of the United States, dividing the powers of government into three departments, that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; that it is only in cases where the executive officer has to perform a purely ministerial act that the courts, either by a proceeding in mandamus or injunction, can direct or control the performance of such (ministerial) act." Dudley *v.* James, 83 Fed. 345, 349. See also Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555]. In U. S. *v.* Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183, it was held that the judicial department had no power to grant a mandamus in the case of award under a treaty. See also U. S. *v.* Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. ed. 354, a case of a pension certificate.

See 10 Cent. Dig. tit. "Constitutional Law," § 134.

A public officer cannot be compelled to do a particular thing which his superior has lawfully ordered him not to do. Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656. See also U. S. *v.* Guthrie, 17 How. (U. S.) 284, 15 L. ed. 102; U. S. *v.* Seaman, 17 How. (U. S.) 225, 15 L. ed. 226; Reeside *v.* Walker, 11 How. (U. S.) 272, 13 L. ed. 693 [*affirming* Brunn. Col. Cas. (U. S.) 571, 1 Hayw. & H. (U. S.) 363, 20 Fed. Cas. No. 11,656, 11 Law Rep. 448]; Brashear *v.* Mason, 6 How. (U. S.) 92, 12 L. ed. 357; Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 599, 10 L. ed. 559, 609.

48. *Alabama.*— Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371.

District of Columbia.— U. S. *v.* Bayard, 5 Mackey (D. C.) 428. But see U. S. *v.* Bayard, 4 Mackey (D. C.) 310.

Illinois.— People *v.* State Secretary, 58 Ill. 90.

Indiana.— Baker *v.* Kirk, 33 Ind. 517. See Governor *v.* Nelson, 6 Ind. 496.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Kansas.— Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162.

Louisiana.— State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532. See State *v.* Johnson, 28 La. Ann. 932.

Maryland.— Magruder *v.* Swann, 25 Md. 173.

Michigan.— People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

Missouri.— State *v.* Garesche, 3 Mo. App. 526. See Pacific R. Co. *v.* Price, 23 Mo. 353, 66 Am. Dec. 673.

Montana.— Chumasero *v.* Potts, 2 Mont. 242.

Nebraska.— State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704.

Nevada.— State *v.* Blasdel, 4 Nev. 241.

North Carolina.— Raleigh, etc., Air-Line R.

7. Election, Appointment, and Removal of Officers. While the election, appointment, and removal of officers are matters not within the function of the judiciary, yet the courts have power to determine certain questions as to the title to office.[49]

Co. *v.* Jenkins, 68 N. C. 499, 502. See also Cotten *v.* Ellis, 52 N. C. 545.

Ohio.— Citizens' Bank *v.* Wright, 6 Ohio St. 318; State *v.* Chase, 5 Ohio St. 528.

Texas.— General Land Office Commissioner *v.* Smith, 5 Tex. 471.

Wisconsin.— State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692; State *v.* Hastings, 15 Wis. 75. See Atty.-Gen. *v.* Barstow, 4 Wis. 567.

United States.— "If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be *prima facie* ground for at least calling upon him to show cause why a mandamus should not issue." U. S. *v.* Black, 128 U. S. 40, 51, 9 S. Ct. 12, 32 L. ed. 354. After a patent has been duly signed, etc., the title passes, and the ministerial duty of delivering the instrument can be enforced by mandamus. U. S. *v.* Schurz, 102 U. S. 378, 28 L. ed. 167. But see Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579; Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 19 L. ed. 62; U. S. *v.* Edmunds, 5 Wall. (U. S.) 563, 18 L. ed. 692; Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335.

See 10 Cent. Dig. tit. "Constitutional Law," § 134.

As to the issuance of a mandamus to control the action of the postmaster-general in respect to a ministerial act see Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181. See also Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

When a law enjoins upon the governor or other executive officer a mere ministerial duty, leaving him no discretion, the writ of mandamus may issue as an appropriate exercise of judicial power. State *v.* Savage, (Nebr. 1902) 90 N. W. 898.

49. *Alabama.*— Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529 (holding that the power to appoint to office and fill vacancies is not inherently an executive function, and that an act to establish a board of commissioners of police by appointment by a probate judge is not unconstitutional); State *v.* Porter, 1 Ala. 688 [*overruling* State *v.* Paul, 5 Stew. & P. (Ala.) 40], holding that the court had power to determine the constitutional qualifications of one elected by the two houses of the general assembly to a judgeship. See also State *v.* Adams, 2 Stew. (Ala.) 231.

Arkansas.— Baxter *v.* Brooks, 29 Ark. 173, the general assembly intrusted with exclusive jurisdiction over contested elections. See also State *v.* Baxter, 28 Ark. 129. Executive officers, under the constitution, cannot be constituted a court; hence there is no appeal. *Ex p.* Allen, 26 Ark. 9.

California.— The constitutional provision as to division of powers refers wholly to the state government; hence it is not violated by an act empowering district judges to appoint members of a city police board. Staude *v.* Board of Election Com'rs, 61 Cal. 313. And see Tuolumne County *v.* Stanislaus County, 6 Cal. 440, law authorizing county judges to appoint certain commissioners.

Colorado.—*In re* Fire, etc., Com'rs, 19 Colo. 482, 36 Pac. 234 [*distinguishing* Trimble *v.* People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236, power with the courts to determine whether the former incumbent or the new appointee is entitled to the office of fire and police commissioner].

Florida.— State *v.* Johnson, 30 Fla. 499, 11 So. 855.

Georgia.— An act authorizing judges to appoint a board of registration and election managers does not contravene the constitutional requirement as to the division of powers. Russell *v.* Cooley, 69 Ga. 215. But see State *v.* Towns, 8 Ga. 360.

Illinois.— The law giving the county court power to appoint election commissioners does not violate the provisions of the constitution as to the division of powers. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793. And see People *v.* Morgan, 90 Ill. 558 (original board appointed by governor and vacancies filled legally by judge); Wilcox *v.* People, 90 Ill. 186 (full power as to removal given to governor).

Indiana.— An act providing that a judge may, upon a change of venue from him, appoint a judge *pro tempore* is constitutional. State *v.* Dufour, 63 Ind. 567; Starry *v.* Winning, 7 Ind. 311.

Kentucky.— Because the official authorized by law to appoint a collector of taxes fails to find one the court may not appoint one. McLean County *v.* Owensboro Deposit Bank, 81 Ky. 254. The right of approval and implied right of disapproval of the appointment of a deputy by the sheriff, conferred on the county court, belongs to its executive, and not to its judicial power. Applegate *v.* Applegate, 4 Metc. (Ky.) 236. And see Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401.

Louisiana.— State *v.* Rost, 47 La. Ann. 53, 16 So. 776, an act of the governor in removing a public officer not reviewable by the courts. See also to same effect State *v.* Lamantia, 33 La. Ann. 446; State *v.* Cahen, 28 La. Ann. 645; State *v.* Fisher, 26 La. Ann. 537. The law which empowers judges to suspend sheriffs for the neglect of duty is not constitutional. State *v.* Richmond, 29 La. Ann. 705. See also State *v.* Ramos, 10 La. Ann. 420.

Maryland.—Watkins *v.* Watkins, 2 Md. 341.

Massachusetts.— An act directing the justices to appoint supervisors of election is unconstitutional, as such officers are execu-

8. Delegation of Powers by Judiciary. The judiciary cannot delegate its powers.[50]

C. Executive Powers and Functions — 1. In General. "It is the province of the executive to enforce."[51]

2. Appointment, Election, and Removal of Officers. The power to appoint to and remove from office belongs generally to the executive only when conferred by law.[52]

tive officers. Matter of Election Case Sup'rs, 114 Mass. 247, 19 Am. Rep. 341. See also Wales *v.* Belcher, 3 Pick. (Mass.) 508.

Missouri.— Courts cannot interfere with the governor in issuing a commission. Matter of Opinion of Court, 58 Mo. 369. See also Lewis *v.* State, 12 Mo. 128.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

New Jersey.— If the power were executive, the attempt to confer it on the chief justice would violate the provision of the constitution as to the division of powers. *In re* Cleveland, 51 N. J. L. 311, 17 Atl. 772.

New York.— Tappan *v.* Gray, 9 Paige (N. Y.) 507 [*reversing* 3 Edw. (N. Y.) 450]; Willoughby *v.* Comstock, 3 Edw. (N. Y.) 424, jurisdiction to oust an officer in no way connected with the administration of justice in the court.

Ohio.— State *v.* Kendle, 52 Ohio St. 346, 39 N. E. 947 (an act authorizing judges to appoint jury commissioners is valid); State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228 (power of the governor to remove officials for misconduct).

Oklahoma.— The action of the governor in removing an officer, if within his statutory power, will not be reviewed by the courts. Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14.

Tennessee.— The official action of the governor in issuing a certificate of election to those elected to congress can neither be restrained nor coerced by the courts. Bates *v.* Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316.

West Virginia.—State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

Wisconsin.— Atty.-Gen. *v.* Barstow, 4 Wis. 567; Atty.-Gen. *v.* Brown, 1 Wis. 513.

United States.— *In re* Election Sup'rs, 2 Flipp. (U. S.) 228, 23 Fed. Cas. No. 13,628, 2 Cinc. L. Bul. 714.

See 10 Cent. Dig. tit. "Constitutional Law," § 137.

50. *Delaware.*— The chancellor cannot appoint a person as master to state an account. Reybold *v.* Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401.

Illinois.— A judge cannot authorize ministerial court officers to exercise judicial powers in his absence. Wight *v.* Wallbaum, 39 Ill. 554.

Indiana.— The provision of the constitution requiring the supreme court to give a statement in writing of its decisions, etc., cannot be delegated. State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101.

Mississippi.— A court cannot delegate authority to a sheriff to take bail and approve sureties. Jacquemine *v.* State, 48 Miss. 280.

North Carolina.— An order directing the sheriff to commit a defendant until he should answer questions before a commissioner appointed to take his examination before trial was held void as delegating judicial power. Bradley Fertilizer Co. *v.* Taylor, 112 N. C. 141, 17 S. E. 69. A court cannot delegate its judicial functions to its clerk. Strickland *v.* Cox, 102 N. C. 411, 9 S. E. 414.

Texas.— Southern Oil Co. *v.* Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429.

Vermont.— Weeks *v.* Boynton, 37 Vt. 297.

See 10 Cent. Dig. tit. "Constitutional Law," § 138.

51. Grecnough *v.* Greenough, 11 Pa. St. 489, 494, 51 Am. Dec. 567; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253. The right of the executive officers named in the constitution to exercise all the powers properly belonging to the executive department is given indisputably by the constitution. State *v.* Savage, (Nebr. 1902) 90 N. W. 898, 91 N. W. 557.

A provision in the constitution as to distribution of powers, as to no person in one department exercising the powers of the others, and as to the executive power of the state being vested in the governor is declaratory and does not confer any specific powers. Field *v.* People, 3 Ill. 79.

The enforcement of the rights of government as to depredations upon property belongs to the executive. Stephenson *v.* Little, 10 Mich. 433.

The fact that the legislature might have conferred on others than the governor and council certain duties, as provided in a certain act, does not take away from that act its executive character, and the duty is imposed upon them as an executive department and not as individuals. *In re* Dennett, 32 Me. 508, 54 Am. Dec. 602.

52. *Alabama.*— Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529, holding that the power to appoint to office or to fill vacancies is not inherently an executive function. See also State *v.* Foster, 130 Ala. 154, 30 So. 477.

Colorado.— *In re* Fire, etc., Com'rs, 19 Colo. 482, 36 Pac. 234 (holding that while the governor may remove certain officials and fill the vacancies, he cannot install the new appointees by use of the militia before an adjudication); Lamb *v.* People, 3 Colo. App. 106, 32 Pac. 618 (holding that the power of ap-

3. Encroachment on Legislature. The executive cannot assume legislative functions.[53]

4. Encroachment on Judiciary — a. In General. Statutes delegating judicial power to executive and administrative officers are unconstitutional.[54]

pointing and removing a state veterinary surgeon was in the governor alone).

Illinois.— A charter providing that the city council shall judge of the qualification and election of its members does not conflict with the constitutional provision vesting the judicial power in the courts. Keating *v.* Stack, 116 Ill. 191, 5 N. E. 541. It was not intended that the division of powers should be absolutely independent; and the governor is not clothed with the sole power of removing from office the secretary of state whom he has appointed. Field *v.* People, 3 Ill. 79.

Indiana.— The constitutional grant of executive power to the governor does not invest him with the exclusive right to exercise the power of appointment to office. Hovey *v.* State, 119 Ind. 395, 21 N. E. 21.

Kansas.—McMaster *v.* Herald, 56 Kan. 231, 42 Pac. 697.

Kentucky.— The statute as to the duties of the contesting board in elections for a clerk of the court of appeals does not authorize an inquiry as to the violation by the person elected of the constitutional provision as to dueling, etc., and the judgment that he is not entitled to the office, etc. Com. *v.* Jones, 10 Bush (Ky.) 725.

Louisiana.— The power to remove for cause implies authority to judge of the existence of the cause, and being vested in the executive cannot be controlled by any other branch of the government. State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131.

Maryland.— Cantwell *v.* Owens, 14 Md. 215.

Michigan.— Power to remove may be vested in a superior officer or board, although the act is judicial. Fuller *v.* Ellis, 98 Mich. 96, 57 N. W. 33. The constitution commits to the legislature the whole subject of removal, and the determination of cause may be vested by it in other departments, although the exercise of judicial powers is involved. People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644.

Nebraska.— The provision of the constitution as to the removal of county officers by the board of county commissioners does not authorize the exercise of judicial powers. State *v.* Olcson, 15 Nebr. 247, 18 N. W. 45.

New Jersey.— The executive department is not charged with the duty of removing a state officer for misbehavior. Board of Police Com'rs *v.* Pritchard, 36 N. J. L. 101.

Ohio.— The power conferred on the governor to remove members of the board of police commissioners is administrative and not judicial. State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

Oklahoma.— Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14.

Utah.— Gilbert *v.* Board of Police, etc., Com'rs, 11 Utah, 378, 40 Pac. 264.

Washington.—A law placing the settlement of the statement of facts on appeal practically in the hands of parties to the suit is not unconstitutional. State *v.* Arthur, 7 Wash. 358, 35 Pac. 120.

Wisconsin.—State *v.* Superior, 90 Wis. 612, 64 N. W. 304, holding that the power to remove city officers conferred on the council is administrative. An order of the superintendent of public property removing a janitor appointed by the court was held void. *In re* Janitor Supreme Ct., 35 Wis. 410.

See 10 Cent. Dig. tit. "Constitutional Law," § 140.

53. Madison County Ct. *v.* Richmond, etc., R. Co., 80 Ky. 16, holding that a court having been authorized to submit the question to the people could not revoke its action and order a second vote.

A suspension of legal proceedings by any other than legislative authority is void. Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675.

Ida. Sess. Laws (1899), p. 345, providing for a state board of medical examiners, and authorizing the governor to appoint such board without the concurrence of the senate, is not a violation of Ida. Const. art. 2, § 1, providing that no person or collection of persons charged with the exercise of powers properly belonging to either one of three departments, viz., the legislative, executive, or judicial, shall exercise any powers belonging to the others. *In re* Inman, (Ida. 1902) 69 Pac. 120.

The making by the president of rules for calling forth and drafting the militia is not the exercise of a legislative power. *In re* Griner, 16 Wis. 423.

Where acts of congress creating districts of the surveyor-general have received a uniform construction by the executive, acted upon for years under the sanction of the law-making power, it is conclusive on the judiciary. U. S. *v.* Lytle, 5 McLean (U. S.) 9, 26 Fed. Cas. No. 15,652.

54. Evans *v.* State, 63 Ala. 195 (question under the code as to sheriff admitting to bail); Hinsdale County *v.* Mineral County, 9 Colo. App. 368, 48 Pac. 675 (holding that an act was not repugnant to the constitution as an attempt to vest judicial power in the state engineer and assisting surveyors).

A statute does not violate a constitutional provision vesting judicial powers in the courts, because it provides that charges of violation of its provisions shall be heard by an executive officer, there being a right to appeal to the courts. Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816.

30 U. S. Stat. at L. 1153, § 30, giving certain powers to the secretary of war over bridges constructed over navigable water does

b. Conferring Judicial Power on Executive and Administrative Officers — (I) *In General.* Many statutes apparently of this kind, however, are constitutional, as the power conferred is in reality ministerial.[55]

(II) *Boards and Commissioners.* Authority conferred on boards and commissioners is generally of a ministerial nature.[56]

not confer upon him legislative or judicial power. E. A. Chatfield Co. *v.* New Haven, 110 Fed. 788; U. S. *v.* Moline, 82 Fed. 592.

In determining what federal laws were applicable to Oregon in 1848, providing that those applicable should be in force there, the court was held not to be bound by any construction made by the administrative department of the general government. Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578, 1 Oreg. 381.

The legislature cannot vest in an officer other than the courts any judicial powers to be finally and exclusively exercised by him. Gough *v.* Dorsey, 27 Wis. 119.

The provisions of the constitution of California giving railroad commissioners power as to fixing rates, etc., was held constitutional in Southern Pac. Co. *v.* Board of Railroad Com'rs, 78 Fed. 236.

55. *Arkansas.*— Hempstead *v.* Underhill, 20 Ark. 337.

California.— People *v.* Boggs, 56 Cal. 648. See also Holley *v.* Orange County, 106 Cal. 420, 39 Pac. 790.

Connecticut.— *In re* Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242.

District of Columbia.— U. S. *v.* Cooper, 20 D. C. 104.

Florida.— *Ex p.* Wells, 21 Fla. 280.

Georgia.— Carey *v.* Giles, 9 Ga. 253.

Illinois.— Andrew *v.* People, 75 Ill. 605.

Indiana.— Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; State *v.* Johnson, 105 Ind. 463, 5 N. E. 553.

Iowa.— O'Brien *v.* Barr, 83 Iowa 51, 49 N. W. 68.

Michigan.—Northrup *v.* Maneka, 126 Mich. 550, 85 N. W. 1128.

Minnesota.— Home Ins. Co. *v.* Flint, 13 Minn. 244.

Wisconsin.— State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Hoff *v.* Jasper County, 110 U. S. 53, 3 S. Ct. 476, 28 L. ed. 68; North German Lloyd Steamship Co. *v.* Hedden, 43 Fed. 17; *In re* Meador, 1 Abb. (U. S.) 317, 7 Fed. Cas. No. 9,375, 5 Am. L. Rev. 168, 2 Am. L. T. Rep. (U. S. Cts.) 140, 153, 10 Int. Rev. Rec. 74, 2 Leg. Gaz. (Pa.) 193, 3 West. Jur. 209; Doll *v.* Evans, 7 Fed. Cas. No. 3,969, 11 Am. L. Reg. N. S. 315, 15 Int. Rev. Rec. 143, 4 Leg. Gaz. (Pa.) 113, 9 Phila. (Pa.) 364, 29 Leg. Int. (Pa.) 116. The act of 1820 as to auditing the account of a collector of customs was held constitutional in Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; but the act of 1820 authorizing a treasury agent to issue a distress warrant against a defaulting officer, etc., was held unconstitutional as conferring judicial powers in U. S. *v.* Taylor, 3 McLean (U. S.) 539, 28 Fed. Cas. No. 16,440.

See 10 Cent. Dig. tit. "Constitutional Law," § 143 *et seq.*

A provision in an ordinance giving authority to a poundmaster to sell animals for their keeping, etc., was held void in Willis *v.* Lagris, 45 Ill. 289.

Collector's return of taxes due and unpaid. — Such return is not open to the objection that it gives the collector judicial power to determine the question of delinquency, as it is only made *prima facie* evidence. Andrews *v.* People, 75 Ill. 605, 613.

A statute conferring power on a county attorney to punish for contempt was held to be unconstitutional. *In re* Sims, 54 Kan. 1, 37 Pac. 135, 45 Am. St. Rep. 261, 25 L. R. A. 110.

The question as to disqualification to hold office under U. S. Const. Amendm. 14 is a judicial one. Where the constitution of the state vests judicial powers in courts, the legislature cannot authorize the governor to ascertain the disqualification and declare the office vacant. State *v.* Towne, 21 La. Ann. 490.

56. *Illinois.*— The civil service act is not unconstitutional as delegating judicial powers to the civil service commissioners. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775. An act was held not unconstitutional, as conferring judicial powers on the executive department, as the discharge of the prisoner in question was granted on recommendation of the board under a judicial order of the court approved by the governor. George *v.* People, 167 Ill. 447, 47 N. E. 741.

Indiana.— An act authorizing the managers of a reformatory to terminate the imprisonment of a convict according to certain rules does not confer upon them judicial powers. Skelton *v.* State, 149 Ind. 684, 49 N. E. 901; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. In Langenberg *v.* Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108, it was held that the powers conferred on a board of tax commissioners was constitutional. So also as to a board of examiners in dentistry. Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192. The act authorizing supervisors of highways to remove fences along highways, etc., when deemed to be unsafe does not confer judicial powers. Hymes *v.* Aydelott, 26 Ind. 431.

Louisiana.— State *v.* Police Jury, 32 La. Ann. 1022.

(III) *Clerks, Notaries, and Recorders.* The delegation of powers to such officers as clerks of courts, notaries, and recorders is common, and in most cases the duties so delegated are ministerial.[57]

Michigan.— Andrews *v.* Carney, 74 Mich. 278, 41 N. W. 923 (holding that an act providing for election contests by petition to the probate judge and appointment of a board of examiners to recount ballots, etc., does not confer judicial powers); Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474 (holding that an act providing for the revocation of licenses of foreign insurance companies under certain circumstances does not confer judicial powers upon the commissioner of insurance).

Missouri.— State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

Nebraska.— Drew *v.* Kirkham, 8 Nebr. 477, 1 N. W. 451.

New York.— People *v.* Ulster, etc., R. Co., 128 N. Y. 240, 28 N. E. 635, 40 N. Y. St. 280 [*affirming* 58 Hun (N. Y.) 266, 12 N. Y. Suppl. 303, 34 N. Y. St. 983], holding that an act providing for the reorganization of railroads sold under mortgage does not confer judicial powers on the railroad commissioners.

Ohio.— France *v.* State, 57 Ohio St. 1, 47 N. E. 1041.

Rhode Island.— State Bd. Health *v.* Roy, 22 R. I. 538, 48 Atl. 802.

Wisconsin.— A statute authorizing transfers from a reformatory to a state prison was held constitutional in *In re* Linden, 112 Wis. 523, 88 N. W. 645. The commissioners of public lands in refusing to issue a patent were held not to confer judicial powers. State *v.* Timme, 60 Wis. 344, 18 N. W. 837. In State *v.* Dodge County, 56 Wis. 79, 13 N. W. 680, it was held that an act authorizing the board of trustees of state hospitals for the insane to correct mistakes as to insane persons being charged to the wrong county, etc., is valid.

See 10 Cent. Dig. tit. "Constitutional Law," § 144.

An act vesting the power to assess the property of telegraph, etc., companies in tax commissioners was held valid in Western Union Tel. Co. *v.* Henderson, 68 Fed. 588.

A statute giving the master commissioner authority to grant writs of habeas corpus is unconstitutional as conferring judicial authority. Shoults *v.* McPheeters, 79 Ind. 373.

Commissioners to refund the bonded indebtedness of a township at a percentage, and invest the sinking fund to be raised to pay the same, are not charged with judicial functions. Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669.

Powers conferred upon commissioners to apportion water in irrigation are judicial. Thorp *v.* Woolman, 1 Mont. 168.

The Income Tax Law of 1864 authorizing commissioners to issue attachments, etc., for contempt against citizens refusing to produce their books, etc., was held to be an attempt to confer judicial power. *Ex p.* Doll, 7 Fed. Cas. No. 3,968, 7 Phila. (Pa.) 595, 27 Leg. Int. (Pa.) 20, 11 Int. Rev. Rec. 36.

The question as to the forfeiture of the right to vote is a judicial one and cannot be adjudged by the officers of the election. Burkett *v.* McCarthy, 10 Bush (Ky.) 758.

The state reformatory act, which authorizes the managers to transfer, temporarily, to the penitentiary persons shown to their satisfaction to have been over twenty-one when sentenced, or to have been previously convicted of crime, and those deemed incorrigible, is unconstitutional. People *v.* Mallary, 195 Ill. 582, 63 N. E. 508, 88 Am. St. Rep. 212. And see Henderson *v.* People, 165 Ill. 607, 46 N. E. 711; *In re* Dumford, 7 Kan. App. 89, 53 Pac. 92, holding that the act conferring power upon the board of managers of the reformatory to transfer inmates is unconstitutional.

The tariff law.— The provision of this law, excluding inferior teas, the final determination being left to the customs officers, is valid. "The legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter. In view of the decisions of the United States supreme court in Lem Moon Sing *v.* U. S., 158 U. S. 538, 15 S. Ct. 967, 39 L. ed. 1082, and a line of similar cases, such legislation seems not to be obnoxious to the objection that it is unconstitutional." Cruikshank *v.* Bidwell, 86 Fed. 7.

57. *Colorado.*— An act authorizing the clerk to enter judgment upon a referee's report is not a violation of the constitution relative to judicial power. Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189.

Connecticut.— Dickinson *v.* Kingsbury, 2 Day (Conn.) 1.

Illinois.— A law which requires a recorder of deeds or a clerk of court to appraise bonds does not confer judicial powers. Hawthorne *v.* People, 109 Ill. 302, 50 Am. Rep. 610. In Donahue *v.* Will County, 100 Ill. 94, it was held that the removal of a county treasurer by a county board is not a judicial act.

Indiana.— The statute authorizing clerks of circuit courts to fix the amount of bail does not confer judicial power. Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162.

Kansas.— A provision authorizing a ministerial act of a clerk of court, in granting an attachment, does not conflict with a section of the organic act granting judicial power. Reyburn *v.* Brackett, 2 Kan. 227, 83 Am. Dec. 457.

Kentucky.— A judgment directing no execution to issue until the filing of a receipt showing payment of a note does not confer judicial powers on the clerk. Mutual L.

(IV) *COUNTIES, MUNICIPALITIES, AND BOARDS AND OFFICERS THEREOF.* The delegation of ministerial authority to such agents greatly facilitates the transaction of business; but courts are quick to check the conferring of judicial functions.[58]

Ins. Co. *v.* Gorman, 19 Ky. L. Rep. 295, 40 S. W. 571.

Louisiana.— The power of the secretary of state as to receiving certain corporate bonds and issuing certificates thereon is a ministerial and not a judicial function. Helmes *v.* Tennessee Coal, etc., R. Co., 49 La. Ann. 1465, 22 So. 403. The duty of homologating an unopposed family meeting imposed upon clerks of district courts was held to be ministerial in Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939. An act requiring the district judge, when the probate judge is disqualified, to appoint a notary or justice of the peace to perform certain ministerial duties in relation to successions does not delegate judicial power. State *v.* Buchanan, 12 La. 409.

Maine.— An act authorizing the clerk of a municipal court to hear complaints in all criminal matters, and issue warrants of commitment does not violate the constitution vesting all judicial power in the courts. State *v.* Le Clair, 86 Me. 522, 30 Atl. 7.

Minnesota.— Power given to the clerk of the municipal court to receive complaints and issue warrants in criminal cases is constitutional. St. Paul *v.* Umstetter, 37 Minn. 15, 33 N. W. 115. An act authorizing the clerk, in an action on contract for the payment of money only upon proof of personal service, and no answer being filed with him, to enter judgment, is valid. Skillman *v.* Greenwood, 15 Minn. 102.

Mississippi.—An act directing the mode of procedure against banks for a violation of their charter does not confer judicial powers on the clerk of the circuit court. Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439.

Missouri.— A provision authorizing the clerks of the circuit courts to enter judgments on the confession of a party was held to be constitutional. Hull *v.* Dowdall, 20 Mo. 359.

Ohio.— The power conferred on a notary, etc., in taking depositions, to commit a witness for refusing to answer a question is not judicial. De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

Oklahoma.— Guthrie *v.* New Vienna Bank, 4 Okla. 194, 38 Pac. 4, referee.

Oregon.— A statute authorizing the clerk to enter default and judgment was held not to confer judicial power in Talbot *v.* Garretson, 31 Oreg. 256, 49 Pac. 978; Crawford *v.* Beard, 12 Oreg. 447, 8 Pac. 537; Graydon *v.* Thomas, 3 Oreg. 250.

Wisconsin.— State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956. The following cases held that powers conferred upon the clerks of courts to enter judgment, etc., were not judicial: Lathrop *v.* Snyder, 17 Wis. 110; Wells *v.* Morton, 10 Wis. 468; Hempstead *v.* Drummond, 1 Pinn. (Wis.) 534.

Wyoming.— The statute conferring power upon the clerk of court to admit a defendant to bail is constitutional. State *v.* Krohne, 4 Wyo. 347, 34 Pac. 1.

See 10 Cent. Dig. tit. "Constitutional Law," § 146.

An act giving a notary public all the powers in certain cases conferred on the circuit court commissioners where such commissioners are disqualified, etc., is invalid. Chandler *v.* Nash, 5 Mich. 409.

An act permitting a justice to accept from one charged with drunkenness a recognizance as to his behavior and providing that on his appearance after having complied with the recognizance he shall be discharged is invalid, as permitting unofficial persons to prescribe rules for the acquittal of those charged with crime. Happy Home Clubs *v.* Alpena County, 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144.

An act providing for the registration of land titles was held unconstitutional as conferring judicial power upon the county recorder. State *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

An act providing that on default the clerk may enter up judgment in vacation violates that part of the constitution relating to judicial officers. Hall *v.* Marks, 34 Ill. 358.

The statute conferring on county attorneys power to commit witnesses for contempt on refusal to be sworn, etc., violates the constitution as to judicial power. *In re* Sims, 54 Kan. 1, 37 Pac. 135, 45 Am. St. Rep. 261, 25 L. R. A. 110.

The statute granting to the clerks of courts authority to issue writs of certiorari is unconstitutional. Thomas *v.* State, 9 Tex. 324.

58. *California.*— A provision that a contest relating to an election should be tried by supervisors was held unconstitutional in Stone *v.* Elkins, 24 Cal. 125. But an act vesting power to grant ferry licenses to county supervisors was held constitutional in Chard *v.* Harrison, 7 Cal. 113.

Florida.— Jacksonville *v.* L'Engle, 20 Fla. 344 (holding that the prohibition against conferring judicial functions on county commissioners was not violated by an act authorizing them to prescribe new boundaries of an incorporated town, etc.); State *v.* Brown, 19 Fla. 563 (holding that an act seeking to invest county commissioners with judicial powers to hear complaints against holders of licenses and to impose penalties, etc., was unconstitutional).

Illinois.— An act assigning to county commissioners the duties of drainage commissioners, giving an appeal from their orders to an appeal board, and giving the commissioners an appeal to the county board, where none is given to the land holder, is not unconstitutional. Land Owners *v.* People, 113 Ill. 296.

(v) *Receivers and Registers.* Certain officers who are not elected, commissioned, and qualified, as judges are required to be by the constitution, such as registers in chancery, receivers, etc., may be vested with certain quasi-judicial powers.[59]

Indiana.— The legislature has power to confer upon the boards of county commissioners authority to adjudicate claims against the county. Maxwell *v.* Fulton County, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; State *v.* Washington County, 101 Ind. 69. The remedy for the collection of dues for street improvements by precept from the council, mayor, and clerk of the city is not unconstitutional. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. The constitution does not prohibit a mayor from being charged with judicial duties as an officer of the state, since the constitution only applies to the departments of the state government. Waldo *v.* Wallace, 12 Ind. 569.

Kentucky.— The provisions of the constitution do not invalidate a statute providing that executive and ministerial officers in cities shall be removable by the board of aldermen "sitting as a court" since the power conferred is not judicial. Gibbs *v.* Louisville, 99 Ky. 490, 18 Ky. L. Rep. 341, 36 S. W. 524. Under the constitution judicial officers cannot be created by legislative act, and no judicial power can be conferred on town trustees. Jarman *v.* Patterson, 7 T. B. Mon. (Ky.) 646.

Louisiana.— A statute conferring judicial functions on a mayor was held unconstitutional in Baton Rouge *v.* Dearing, 15 La. Ann. 208; Lafon *v.* Dufracq, 9 La. Ann. 350.

Maine.— The legislature was held competent to authorize selectmen to act as exclusive judges in certain controversies. Bassett *v.* Carleton, 32 Me. 553, 54 Am. Dec. 605.

Maryland.— A mayor may be authorized to arrest disorderly women in the exercise of the police power. Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 656.

Massachusetts.— So much of an act as undertakes to confer authority upon the common council of a city to commit and punish for contempt is unconstitutional. *In re* Whitcomb, 120 Mass. 118, 21 Am. Rep. 502.

Michigan.—An act which authorizes supervisors, if returns from any district are withheld, to proceed with the canvass of the votes returned, if they are satisfied that the failure is to prevent a full expression of the electors, confers administrative powers only. Feek *v.* Bloomingdale Tp. Bd., 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.

Minnesota.— An act legalizing and providing for the payment of an advertisement by an individual of the financial statement of a county, the commissioners having neglected to publish the same as required by law, does not confer judicial powers. Fuller *v.* Morrison, 36 Minn. 309, 30 N. W. 824. An act authorizing the submission by county commissioners of the question of a removal of the county-seat to a vote of the people was held constitutional in State *v.* Ostrom, 35 Minn. 480, 29 N. W. 585; State *v.* Wiswell, 35 Minn. 480, 29 N. W. 586. An act requiring commissioners of a county to audit claims against a school district and to vote a tax for the amount thereof attempts to confer judicial powers and is void. Sanborn *v.* Rice County Com'rs, 9 Minn. 273.

Missouri.— The legislature was held not prohibited from authorizing a mayor to take recognizances in criminal cases. Cunningham *v.* State, 14 Mo. 402.

Nevada.— It was held that under the constitution there was no objection to members of the executive branch assessing property or acting on the board of equalization. Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437. An act giving county commissioners power as to application to discharge a supplemental assessment was held constitutional in State *v.* Ormsby County, 7 Nev. 392.

New Jersey.— An ordinance conferring on city officers jurisdiction of an action is void. Weeks *v.* Fotman, 16 N. J. L. 237.

New York.— An act investing the board of a metropolitan sanitary district with powers to make regulations for the protection of health, etc., was held constitutional in Metropolitan Bd. Health *v.* Heister, 37 N. Y. 661. An act authorizing a municipal board to order the arrest of persons violating its ordinances was held not unconstitutional in Cooper *v.* Schultz, 32 How. Pr. (N. Y.) 107.

North Carolina.— Flat Swamp, etc., Canal Co. *v.* McAlister, 74 N. C. 159.

South Carolina.—An act authorizing a municipality to grant liquor licenses does not delegate judicial power. State *v.* Columbia, 17 S. C. 80.

Utah.— The powers of medical examiners as to the qualifications of applicants to practice were held not to confer judicial authority. People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

West Virginia.— A statute empowering county courts to hear charges against and remove from office a justice of the peace was held to confer judicial authority. Arkle *v.* Board of Com'rs, 41 W. Va. 471, 23 S. E. 804.

Wisconsin.— In so far as an act confers on mayors authority to cause pauper children to be committed to the state industrial school, it confers judicial powers. Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

See 10 Cent. Dig. tit. "Constitutional Law," § 145.

59. Gaines *v.* Harvin, 19 Ala. 491 (powers of registers of chancery to appoint trustees in certain cases); People *v.* Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105 (holding that an act relating to registering titles con-

VI. POLICE POWER.

A. Definition.[60] Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires.[61]

fers judicial powers on the registrar contrary to the constitution providing that they be vested in certain courts); Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585 (powers of receiver of an insolvent bank).

60. **An attempt to define the term "police power"** either accurately or satisfactorily is sometimes attended with no little difficulty, and it has been said by a learned jurist that "it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." Shaw, C. J., in Com. *v.* Alger, 7 Cush. (Mass.) 53, 85 [*quoted* in Rochester *v.* West, 29 N. Y. App. Div. 125, 127, 51 N. Y. Suppl. 482].

"**The police power of the State, so far, has not received a full and complete definition.** It may be said, however, to be the right of the State, or State functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law." Champer *v.* Greencastle, 138 Ind. 339, 351, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768.

61. **Other definitions** are: "A power which inheres in the State and in each political division thereof to protect by such restraints and regulations as are reasonable and proper the lives, health, comfort and property of its citizens." Rochester *v.* West, 29 N. Y. App. Div. 125, 128, 51 N. Y. Suppl. 482.

"As understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all." State *v.* Wagener, 77 Minn. 483, 494, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442.

"Nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." *In re* License Cases, 5 How. (U. S.) 504, 583, 12 L. ed. 256 [*quoted* in Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77].

"That inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 194, 22 Am. Rep. 71.

"The due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations." 4 Bl. Comm. 162 [*quoted* in Carthage *v.* Frederick, 122 N. Y. 268, 273, 25 N. E. 480, 33 N. Y. St. 383, 19 Am. St. Rep. 490, 10 L. R. A. 178].

"The power of the state, . . . to prescribe regulations to promote the health, peace, morals, education and good order of the people." Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

"The power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." Per Shaw, C. J., in Com. *v.* Alger, 7 Cush. (Mass.) 53, 85 [*quoted* in Com. *v.* Bearse, 132 Mass. 542, 546, 42 Am. Rep. 450 note, where it is said: "No exposition has been given of this power more thorough and satisfactory, or more often quoted with approval than that of Chief Justice Shaw"].

"Those powers by which the health, good order, peace and general welfare of the community are promoted." Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565.

Police is, in general, a system of precaution, either for the prevention of crime or of calamities. Its business may be distributed into eight distinct branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of epidemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence; (8) police for registration. Commissioners of Canals & Locks Co. *v.* Willamette Transp., etc., Co., 6 Oreg. 222.

"**The police of a State, in a comprehensive sense,** embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others." Cooley Const.

B. Nature and Scope. This power extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the state,[62] and the mere fact that a law, necessary for the welfare of society, regulates trade or business, or to some degree operates as a restraint thereon, does not make it unconstitutional.[63] So too it may substantially interfere with the enjoyment of private property;[64] but there must be some obvious and real connection between the actual provisions of police measures and their assumed purpose; the legislature cannot, under the guise of such regulations, arbitrarily invade personal rights or private property;[65] and cannot at will impose upon property burdens so excessive as to work a confiscation thereof.[66]

Lim. (6th ed.) 704 [*quoted* in Meadowcroft *v.* People, 163 Ill. 56, 65, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176].

62. *Arkansas.*— Dabbs *v.* State, 39 Ark. 353, 43 Am. Rep. 275.

Connecticut.— Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Delaware.— Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506.

Illinois.— Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625, an often quoted leading case.

See 10 Cent. Dig. tit. "Constitutional Law," § 149 *et seq.*

The police power aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one's property and pursuing one's occupation so as not to trespass on the property or rights of others. Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573; Pool *v.* Trexler, 76 N. C. 297; Com. *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

Application to patented property.— Where, by the application of the invention or discovery for which letters patent have been granted by the United States, tangible property comes into existence, its use is to the same extent as that of any other species of property subject within the several states to the control which they may respectively impose in the legitimate exercise of their police powers over their purely domestic affairs. So the state might properly enforce a statute regulating the use of oils considered by the state inspector as unsafe for illuminating purposes; and this, although patent-rights for the manufacture of oil had been granted by the United States. Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115.

The law-making power is the sole judge of when if at all it will enact police laws, but what regulations are reasonable is a judicial question. Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Miller *v.* Fitchburg, 180 Mass. 32, 61 N. E. 277.

63. Hawthorn *v.* People, 109 Ill. 302, 50 Am. Rep. 610; Sarrls *v.* Com., 7 Ky. L. Rep. 473; State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L. R. A. 135 (holding valid a city ordinance, the object of which was the prevention of the use of unwholesome well-water in the making of bread for public distribution and consumption, which required the filling up of wells on premises where such bread was made); New Orleans Water-Works Co. *v.* St. Tammany Water-Works Co., 4 Woods (U. S.) 134, 14 Fed. 194.

64. Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 33 N. Y. St. 383, 19 Am. St. Rep. 490, 10 L. R. A. 178, sustaining a village ordinance forbidding, under penalty, property-owners to permit snow or ice to collect or remain on the sidewalks in front of their premises, so as to impede public travel later than ten o'clock in the forenoon of the day after the same shall have fallen thereon, or for more than two hours after being notified to remove the same.

Police regulations are not a taking under the right of eminent domain, or a deprivation of property without due process of law. Thus a prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit, as such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it. It is only a declaration by the state that its use by any one for certain forbidden purposes is prejudicial to the public interests, the exercise of the police power by the destruction of the property, which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct 273, 31 L. ed. 205. And see Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118. See also, generally, EMINENT DOMAIN.

65. Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391; Iler *v.* Ross, (Nebr. 1902) 90 N. W. 869, 57 L. R. A. 895; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; Smiley *v.* MacDonald, 42 Nebr. 5, 60 N. W. 355, 47 Am. St. Rep. 684, 27 L. R. A. 540.

66. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41

C. Authority to Exercise. The government of the United States being one of enumerated powers, the non-enumerated powers being reserved to the states,[67] it follows that this power not having been delegated to the federal government, was left with the individual states and belongs to them by virtue of their general sovereignty[68] and has no limitations or restrictions except such as are found in the constitution;[69] but the states must recognize this limitation, the federal power being paramount within the scope of its enumerated powers.[70] And while federal police powers cannot be exercised within the states by congressional legislation,[71] it may be said that the federal government doubtless has a power over its own property analogous to the police power of the several states.[72] A legislature cannot, by any contract, divest itself of its police power, the maxim

L. R. A. 481; New York Sanitary Utilization Co. *v.* Health Dept., 61 N. Y. App. Div. 106, 70 N. Y. Suppl. 510 [*affirming* 32 Misc. (N. Y.) 577, 67 N. Y. Suppl. 324, where N. Y. Laws (1900), c. 663, forbidding the continuation within the borough of Brooklyn of the business of boiling garbage, in so far as it applied to a corporation located therein at the choice of the municipal authorities, which had for years reduced garbage under city contracts, when it did not appear that the plant was a nuisance or detrimental to the public health and that the processes used were the best devised, was held unconstitutional].

To be valid as police regulations, laws must be necessary to the preservation of the health, comfort, morals, order, or safety of the community; and no law prohibiting that which is harmless in itself, or commanding that to be done which does not tend to promote the health, safety, or welfare of society will be sustained. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727 (where an ordinance of a board of county supervisors regulating the business of keeping asylums for the care of persons afflicted with insanity, inebriety, or other nervous diseases, provided that no license should be granted to any person to conduct such business unless the walls of the asylum designated in his application were rendered fireproof by being constructed of brick and iron, or stone and iron, the grounds accessible to patients surrounded by a brick wall at least eighteen inches thick and twelve feet high, and the premises distant more than four hundred yards from any dwelling-house or school-house; and that the male and female patients should not be cared for in the same building was held unconstitutional and void, being an arbitrary exercise of the police power); Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611 (where an ordinance of a city which required a railroad company to keep a flagman by day and a red lantern by night at a certain street crossing, when the company had only a single track, over which only its usual trains passed, and where it did not appear that such crossing was unusually dangerous, or more so than ordinary crossings, was held not to be a reasonable requirement, and so within the constitutional limitation on the police power); People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285.

67. "The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 326, 4 L. ed. 97. And see Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

68. Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; *In re* License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

69. Hawthorn *v.* People, 109 Ill. 302, 50 Am. Rep. 610.

The fourteenth amendment does not take from the states police powers reserved to them at the time of the adoption of the constitution. Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394.

70. Hence a state cannot, under guise of an exercise of police power, impair the authority of the United States relating to the regulation of commerce. Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. ed. 550; Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543; *In re* Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702; *In re* License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678.

71. U. S. *v.* Dewitt, 9 Wall. (U. S.) 41, 19 L. ed. 593, holding that a portion of the Internal Revenue Act of 1867, making it a misdemeanor to mix for sale naphtha and illuminating oils or to sell oil of petroleum inflammable at a lower temperature than 110° Fahrenheit, was a mere police regulation, and as such void within the states.

72. Camfield *v.* U. S., 167 U. S. 518, 525, 17 S. Ct. 864, 42 L. ed. 260, holding that the federal government might, when found necessary for the protection of the public or of intending settlers, forbid all inclosures of public lands, although the alternate sections of private lands were thereby rendered less available for pasturage.

Salus populi suprema lex necessarily applying;[73] but it may delegate its power and jurisdiction to courts, municipalities, or committees to adopt police measures.[74]

D. Who Subject to. All natural persons within the state, and all corporations doing business within the state or created thereby, hold their property and engage in their business subject to the police power of the state.[75]

E. Particular Applications — 1. In General. Generally speaking it may be said that the proper authorities may control practices in the operation of all business which endanger the public welfare and safety;[76] but only such regulations will be sustained as in fact are necessary for the safety and comfort of the public, and the courts will declare arbitrary provisions invalid.[77]

2. Articles of Personal Consumption or Use. The legislature or its delegated agents may regulate the conditions of production and distribution of articles of food and take steps to control adulteration;[78] may determine in what

73. Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33, 24 L. ed. 989, where the court said: "The plaintiff in error boldly takes the ground that, being a Corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd *v.* Alabama, 94 U. S. 645, 24 L. ed. 302."

74. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17 (commission empowered to enforce change of grade crossings); Harmon *v.* Chicago, 110 Ill. 400, 51 Am. Rep. 698.

A city, town, or village can only exercise such police power as is fairly included in the grants of power by its charter. And where certain acts are made criminal by the state law and are fully covered thereby, a city can punish only such acts as would be attended with circumstances of aggravation not included in the state law. So the carrying of deadly weapons, being an offense fully provided for and punished by law, and being an act not in itself amounting to a breach of the peace, cannot be made an offense and punished by municipal ordinance, unless expressly authorized by the municipal charter. Judy *v.* Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

75. *Alabama.*— American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Illinois.— Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634, 642.

Maryland.— Singer *v.* State, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551.

Ohio.— State *v.* Gardner, 58 Ohio St. 599, 606, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 32 L. ed. 253; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and generally *infra*, VI, E, 7, b.

Acceptance of ordinances under the police power by corporations is immaterial, since they are enacted for the public good by virtue of sovereign right; and corporations in all cases are held to have notice of such regulations, and to be liable for violation of them. McAndrew *v.* St. Louis, etc., R. Co., 88 Mo. App. 97. But a complaint for violation of a city ordinance must directly allege that the ordinance was adopted, as the court cannot take judicial notice of that fact. State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423. And where a city charter prescribes the particular manner in which ordinances are to be enforced that method is exclusive. Blanchard *v.* Bristol, (Va. 1902) 41 S. E. 948.

76. Charleston *v.* Elford, 1 McMull. (S. C.) 234 (an ordinance forbidding the throwing of merchandise from upper windows into a street); Electric Imp. Co. *v.* San Francisco, 45 Fed. 593, 13 L. R. A. 131 (an ordinance controlling the position of highly charged electric wires).

77. Cotter *v.* Doty, 5 Ohio 393.

78. *Louisiana.*— State *v.* Labatut, 39 La. Ann. 516, 2 So. 550.

Massachusetts.— Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839 (butter); Com. *v.* Carter, 132 Mass. 12

places[79] and at what time[80] food may be sold; may prohibit the sale of substances imitative of food articles, although not positively injurious to health,[81] and in general regulate the conditions of production and distribution of food so far as necessary for the health and comfort of the community.[82] So too it may regulate the manufacture, distribution, and sale of intoxicating liquors[83] by enacting local

(holding that milk inspectors may enter carts to take samples for analysis).

Missouri.— Kansas City *v.* Cook, 38 Mo. App. 660.

New Hampshire.— Slayton *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51.

New York.— People *v.* Girard, 145 N. Y. 105, 39 N. E. 823, 64 N. Y. St. 554, 45 Am. St. Rep. 595 [*affirming* 73 Hun (N. Y.) 457, 26 N. Y. Suppl. 272, 56 N. Y. St. 47, sustaining N. Y. Laws (1889), c. 515, § 4, forbidding the manufacture or sale of vinegar which contains any artificial coloring matter obnoxious to health and not calculated to make the product resemble another kind of vinegar]; Polinsky *v.* People, 73 N. Y. 65 [*affirming* 11 Hun (N. Y.) 390]; People *v.* West, 44 Hun (N. Y.) 162 [*affirmed* in 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452, allowing the legislature to prohibit the delivery of diluted milk to butter or cheese manufactories, as permitted by N. Y. Laws (1884), c. 202, and N. Y. Laws (1885), c. 183]; People *v.* Cipperly, 37 Hun (N. Y.) 319 (holding that while the legislature may prohibit the sale of unwholesome milk, it may not establish a standard by which its adulteration is conclusively established. But see Com. *v.* Evans, 132 Mass. 11; Shivers *v.* Newton, 45 N. J. L. 469; State *v.* Smith, 14 R. I. 100, 51 Am. Rep. 344, which hold that a statute prohibiting the sale of adulterated milk, and providing that in all prosecutions thereunder, if the milk shall be shown on analysis to contain more than a certain per cent of watery fluids, or less than a certain per cent of milk solids or of milk fats, it shall be deemed for the purpose of the act adulterated, is within the constitutional power of the legislature as an exercise of the police power).

Ohio.— Weller *v.* State, 53 Ohio St. 77, 40 N. E. 1001 (forbidding the adulteration and coloring of vinegar); Rose *v.* State, 11 Ohio Cir. Ct. 87, 5 Ohio Cir. Dec. 72.

Tennessee.— Levi *v.* State, 4 Baxt. (Tenn.) 289, relating to liquors.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, ADULTERATION; FOOD; INTOXICATING LIQUORS.

79. Crowley *v.* Rucker, 107 La. 213, 31 So. 629, holding that where its charter gave it a right to establish public markets, a town might require all articles of food to be sold only in the public market place, and that it might prescribe reasonable penalties in the enforcement of ordinances.

The sale upon sidewalks or gutters of provisions, fruit, and other commodities may be forbidden. State *v.* Summerfield, 107 N. C. 895, 12 S. E. 114.

80. People *v.* Hagan, 36 Misc. (N. Y.) 349, 73 N. Y. Suppl. 564, holding constitutional the New York law forbidding the Sunday sale of uncooked meats.

81. State *v.* Rogers, 95 Me. 94, 99, 49 Atl. 564, 85 Am. St. Rep. 395 (where the court said: "Where the resemblance between the external appearance of yellow butter and the counterfeit article is so close that it is not practicable by any ordinary inspection for the purchaser to distinguish the one from the other, and the only effective means of protecting the public against the deception are to be found in the absolute suppression of the business and the entire exclusion of such imitations from the market, the enactment of such a prohibitory statute as the one in question, for the prevention of fraud, the protection of public morals, and the promotion of a sound public policy, may well be deemed a reasonable exercise by the legislature of the police powers of the state"); State *v.* Addington, 77 Mo. 110 [*affirming* 12 Mo. App. 214]; Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429.

82. St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872 (holding a city ordinance valid which provided that no dairy or cow-stable should thereafter be established within the city limits without first obtaining permission from the municipal assembly by proper ordinance); State *v.* Layton, 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487 (holding that the act of May 11, 1899, prohibiting the sale of alum baking powders as unhealthful was a valid exercise of the police power, such articles not being so universally conceded to be wholesome and innoxious that judicial notice may be taken thereof). See also, generally, FOOD.

83. *Alabama.*— Feibelman *v.* State, 130 Ala. 122, 30 So. 384.

Illinois.— Laugel *v.* Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 [*affirming* 96 Ill. App. 618].

Maine.— State *v.* Intoxicating Liquors, 95 Me. 140, 49 Atl. 670 [*distinguishing* State *v.* Intoxicating Liquors, 94 Me. 335, 47 Atl. 531; Rhodes *v.* Iowa, 170 U. S. 412, 18 S. Ct. 664, 42 L. ed. 1008].

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828 (holding that a law providing that beer or malt liquors can be sold in that state only on condition that they shall be made from specified cereals; that they shall be inspected and a certain amount paid to the state on each gallon inspected, was a valid exercise of police power); State *v.* Searcy, 20 Mo. 489.

Texas.— Peacock *v.* Limburger, (Tex. 1902) 67 S. W. 518 (where a statute which pro-

option laws[84] or providing a right of action, on behalf of a person injured, against the seller.[85] It may also exercise certain police powers over tobacco and cigarettes,[86] control the sale or gift of drugs,[87] and prescribe proper rules as to the handling and use of inflammable and explosive substances.[88]

3. In Interest of Public Health. The legislature has broad powers to take measures necessary for preventing sickness and epidemics;[89] hence it may pro-

hibited the sale of liquor to students of institutions of learning was sustained); *Ex p.* Brown, (Tex. 1901) 61 S. W. 396 (holding to be valid a regulation that liquor-dealers shall not keep their places open on Sunday).

United States.— Rhodes *v.* Iowa, 170 U. S. 412, 18 S. Ct. 664, 42 L. ed. 1088; Gray *v.* Connecticut, 159 U. S. 74, 15 S. Ct. 985, 40 L. ed. 80; *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572; Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128; Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 33, 24 L. ed. 989.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, Intoxicating Liquors.

84. Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6; Com. *v.* Weller, 14 Bush (Ky.) 61, 29 Am. Rep. 407; Com. *v.* Dean, 110 Mass. 357; Weil *v.* Calhoun, 25 Fed. 865.

85. The statutes commonly provide that whosoever is injured by the wrongful acts of a drunken person, or suffers loss from the fact that liquor was furnished to another, may maintain an action for damages against the dealer who sold the liquor causing intoxication, when the intoxicated person was either a confirmed drunkard, a minor, a lunatic, or under the influence of liquor when he purchased the liquor; and the courts generally sustain such legislation.

Illinois.— Roth *v.* Eppy, 80 Ill. 283.

Iowa.— Goodenough *v.* McGrew, 44 Iowa 670.

Massachusetts.— Mass. Rev. Laws, c. 100, §§ 58, 63, allowing an action to husband, wife, child, parent, guardian, employer, or other person who is injured in person, property, or means of support by an intoxicated person, or in consequence of the intoxication habitual or otherwise of any person, against any person who by selling or giving intoxicating liquor has caused in whole or in part such intoxication. Colburn *v.* Spencer, 177 Mass. 473, 59 N. E. 78.

New Hampshire.— Bedore *v.* Newton, 54 N. H. 117.

New York.— Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, Intoxicating Liquors.

86. Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478], holding that a product such as tobacco, which has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must be recognized as a legitimate article of commerce, although it may to a certain extent be subject to the police power of the states.

Cigarettes.— A legislative restriction on or prohibition of the sale of cigarettes, the use of which is somewhat generally believed to be deleterious, particularly to young people, is within the police power of the legislature, provided it does not apply to original packages or make any discrimination against cigarettes imported from other states, and if there is no doubt that the statute is designated for the protection of the public health. Austin *v.* Tennessee, 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224 [*affirming* 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478].

87. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; *Ex p.* Yung Jon, 28 Fed. 308 (an act prohibiting the sale or gift of opium to one not a druggist or a physician, except on the prescription of a physician); *Ex p.* Ah Lit, 26 Fed. 512; *In re* Lee Tong, 9 Sawy. (U. S.) 253, 18 Fed. 253.

88. Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 28 Am. St. Rep. 180, 13 L. R. A. 587; McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508 (nitro-glycerine and gunpowder); Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. And see, generally, Explosives.

89. *Alabama.*— Ferguson *v.* Selma, 43 Ala. 398.

Indiana.— Anderson *v.* O'Conner, 98 Ind. 168.

Maine.— Barbour *v.* Ellsworth, 67 Me. 294.

Massachusetts.— Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

Michigan.— Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484.

New York.— New York *v.* Herdje, 68 N. Y. App. Div. 370, 74 N. Y. Suppl. 104, sustaining the tenement-house construction law of 1901, as a valid exercise of police power. See also People *v.* D'Oench, 111 N. Y. 359, 18 N. E. 862, 20 N. Y. St. 599; *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *In re* Paul, 94 N. Y. 497.

See 10 Cent. Dig. tit. "Constitutional Law," § 148.

One arrested and detained in good faith by the authorities on account of exposure to smallpox has no right of action against the city. Levin *v.* Burlington, 129 N. C. 184, 39

vide hospitals and take other steps necessary for the prevention and control of epidemic and other diseases among men and animals,[90] and may within certain limits establish quarantines.[91] It may provide for drains and proper systems of drainage;[92] for a water supply and protection of the same from pollution,[93] the rates of which may be regulated by a city, although it itself is a consumer.[94] It may also provide for the regulation of cemeteries;[95] for the care, removal, and general disposal of dead bodies,[96] and for the collection and removal of all garbage, filth, and other noxious and unwholesome substances, and ashes, stable manure, rubbish, and other waste and refuse matter accumulating in centers of population, which without such regulations would become nuisances, menacing the comfort and health of the inhabitants.[97] So too under its power to take measures

S. E. 822, 55 L. R. A. 396. See also Barbour *v.* Ellsworth, 67 Me. 294.

90. Chicago *v.* Peck, 98 Ill. App. 434 [*affirmed* in 196 Ill. 260, 63 N. E. 711, holding that the city of Chicago might lease property and locate smallpox hospital thereon]; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 21 S. Ct. 603, 45 L. ed. 847 [*affirming* 20 Tex. Civ. App. 451, 49 S. W. 627, holding constitutional a law excluding cattle liable to be affected with anthrax]. And see, generally, ANIMALS; HEALTH; HOSPITALS.

91. *Florida.*— Forbes *v.* Escambia County, 28 Fla. 26, 9 So. 862, 13 L. R. A. 549.

Michigan.— Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484.

Missouri.— St. Louis *v.* Boffinger, 19 Mo. 13; St. Louis *v.* McCoy, 18 Mo. 238.

West Virginia.— Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

United States.— Morgan's Louisiana, etc., R., etc., Co. *v.* Louisiana Bd. Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237; New York *v.* Miln, 9 Pet. (U. S.) 102, 9 L. ed. 648.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, HEALTH.

92. *California.*— Hagar *v.* Yolo County, 47 Cal. 222.

Illinois.— Kilgour *v.* Drainage Com'rs, 111 Ill. 242.

Michigan.—Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551.

North Carolina.— Brown *v.* Keener, 74 N. C. 714.

Wisconsin.— Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, DRAINS.

93. Wells *v.* Atlanta, 43 Ga. 67; Wayland *v.* Middlesex County Com'rs, 4 Gray (Mass.) 500; Dayton *v.* Quigley, 29 N. J. Eq. 77; New York City Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833, 64 N. Y. St. 507, 45 Am. St. Rep. 579 [*reversing* 17 N. Y. Suppl. 510], holding that a water-supply on each floor of tenement-houses might be required.

94. Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075; Spring Valley Water-Works *v.* Bartlett, 8 Sawy. (U. S.) 555, 16 Fed. 615. And see, generally, WATERS.

95. *Illinois.*— Graves *v.* Bloomington, 17 Ill. App. 476.

Massachusetts.— Jenkins *v.* Andover, 103 Mass. 94; Austin *v.* Murray, 16 Pick. (Mass.) 121.

New York.— Coates *v.* New York, 7 Cow. (N. Y.) 585.

North Carolina.— Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793.

South Carolina.— Charleston *v.* Wentworth St. Baptist Church, 4 Strobh. (S. C.) 306.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, CEMETERIES.

96. Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417. And see, generally, DEAD BODIES.

97. Iler *v.* Ross, (Nebr. 1902) 90 N. W. 869; State *v.* Griffin, (N. H. 1897) 39 Atl. 260 (holding that depositing of sawdust in a city water-supply could be prevented, although formerly the owners of sawmills had deposited sawdust in such waters); Balch *v.* Utica, 168 N. Y. 651, 61 N. E. 1127 [*affirming* 42 N. Y. App. Div. 562, 59 N. Y. Suppl. 513, holding that a city may contract for the removal of garbage dumped on grounds near a river flowing through the city]; Harrington *v.* Board of Aldermen, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305 (holding that aldermen may properly abate a privy vault, regardless of the manner in which it is kept, where it is situated upon premises abutting on a street in which there is a sewer).

As incident to the power of regulation, legislatures may grant an exclusive privilege by contract to one person to collect and remove under their own immediate control and direction, and in pursuance of rules enacted for that purpose, those noxious and unwholesome substances which are nuisances *per se* and a menace to the public health. Iler *v.* Ross, (Nebr. 1902) 90 N. W. 869.

But it is not competent as a police regulation to grant a monopoly to one individual, by contract, to enter upon the private premises of the inhabitants of a city, and at their expense collect and remove those innoxious substances such as ashes, cinders, stable ma-

in the interest of the public health hours of labor within certain limits may be controlled by the legislature.[98]

4. In Interest of Public Morals. It is also a proper exercise of police power to regulate and prohibit gambling;[99] to regulate lotteries, either by stringent measures against those having lottery tickets in their possession, or other steps necessary to stamp out the traffic;[1] to control the owning, letting, keeping, or frequenting of buildings or other places used for bawdy-houses or for other lewd or indecent purposes;[2] to regulate the display, sale, or distribution of immoral literature;[3] and to regulate entertainments given in places of amusement, by

nure, or other substances not in themselves nuisances, but which if allowed to accumulate in unreasonable quantities would become such, or which may be utilized for some beneficial purpose. Such an attempted exercise of power is an invasion of the personal and property rights of citizens, in restraint of trade, and unnecessarily creates a monopoly. Iler *v.* Ross, (Nebr. 1902) 90 N. W. 869.

98. Com. *v.* Hamilton Mfg. Co., 120 Mass. 383; Com. *v.* Beatty, 15 Pa. Super. Ct. 5 (holding constitutional the state law forbidding the employment of a minor, male or female, or any adult woman over sixty hours per week or over twelve hours in any day); Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780 (sustaining the Utah eight-hour law relating to mine and smelting workers).

99. *Arkansas.*—"In the exercise of its police power, the State may, and does, regulate and control many professions, pursuits, trades and employments. And such as are of no real benefit to society, or are hazardous or injurious, it may prohibit under penalties. In this category may be mentioned gaming, the keeping of bawdy-houses, lotteries and the sale of lottery tickets, the sale of spirituous liquors, of obscene literature and of illuminating oils that are inflammable below a certain temperature." Dabbs *v.* State, 39 Ark. 353, 357, 43 Am. Rep. 275.

Indiana.— Green *v.* State, 109 Ind. 175, 9 N. E. 781.

Maine.— State *v.* Soucie's Hotel, 95 Me. 518, 50 Atl. 709.

Massachusetts.— Com. *v.* Hogarty, 141 Mass. 106, 4 N. E. 831.

Missouri.— Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189.

New Hampshire.— Cutler *v.* Welsh, 43 N. H. 497.

New York.— People *v.* Noelke, 94 N. Y. 137, 46 Am. Rep. 128; Oppenheimer *v.* Lalor, 36 Misc. (N. Y.) 546, 73 N. Y. Suppl. 948.

Pennsylvania.— Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, Gaming.

1. *Alabama.*— Boyd *v.* State, 53 Ala. 601; Broadbent *v.* Tuskaloosa Scientific, etc., Assoc., 45 Ala. 170.

California.—*Ex p.* McClain, 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243, 54 L. R. A. 779, making the possession of a lottery ticket unlawful. See *In re* Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138, holding unconstitutional an ordinance making it "unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket."

Louisiana.— State *v.* Dobard, 45 La. Ann. 1412, 14 So. 253.

Maryland.— See Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425, holding a statute unconstitutional in so far as it forbade "gift enterprises" in which no element of chance entered, such being an unreasonable restraint on trade.

Missouri.— State *v.* Hawthorn, 9 Mo. 389.

New York.— Reilly *v.* Gray, 77 Hun (N. Y.) 402, 28 N. Y. Suppl. 811, 60 N. Y. St. 45 (selling pools on horse-races is not a lottery within the constitutional prohibition. *Contra*, Irving *v.* Britton, 8 Misc. (N. Y.) 201, 28 N. Y. Suppl. 529, 58 N. Y. St. 836); Hart *v.* People, 26 Hun (N. Y.) 396 (holding that lottery advertisements may be prohibited without contravening N. Y. Const. art. 1, § 8, that one may freely publish his sentiments on all subjects).

Virginia.— Dismal Swamp Co. *v.* Com., 81 Va. 220; Justice *v.* Com., 81 Va. 209; Com. *v.* Chubb, 5 Rand. (Va.) 715.

United States.— New Orleans *v.* Houston, 119 U. S. 265, 7 S. Ct. 198, 30 L. ed. 411; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, Lotteries.

2. Com. *v.* Goodall, 165 Mass. 588, 43 N. E. 520; Com. *v.* Cobb, 120 Mass. 356; St. Ignace *v.* Snyder, 75 Mich. 649, 42 N. W. 1130; People *v.* Sadler, 97 N. Y. 146; King *v.* People, 83 N. Y. 587; *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845. And see, generally, Disorderly Houses.

Bastardy laws are a valid exercise of the police power; and although the action provided by statute is often civil in form, it is really an exercise of the police power of the state. *In re* Walker, 61 Nebr. 803, 86 N. W. 510. And see, generally, Bastards.

3. Com. *v.* McCance, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61; Com. *v.* Holmes, 17 Mass. 336, holding it an indictable offense at common law to maliciously publish a libel expressing or signifying any obscene, lewd,

requiring licenses, forbidding immoral pieces, and if injurious to public morals by prohibiting the employment of women either upon a stage or elsewhere.[4] So too cruelty to animals may be restrained and punished under the police power.[5]

5. IN INTEREST OF PUBLIC ORDER. It is the duty of the police power to adopt all measures necessary for the preservation of the rights of person and property from unlawful violence and disorder, and for the maintenance of peace and quiet.[6]

6. IN INTEREST OF PUBLIC SAFETY. The legislature may make such police regulations of railroads as are necessary for the safety of the persons and property of the public; it may compel them to construct and maintain cattle-guards, warning-posts, crossing-signs, crossing-gates, planking of tracks, and kindred appliances;[7] make all necessary and reasonable provisions for the maintenance, alteration, or removal of grade crossings;[8] require railroads to fence their rights of way, and

or immoral matter or meaning, tending to deprave or corrupt the public morals; as an obscene book or print.

Obscene literature.— In general upon this subject see Cooley Const. Lim. (4th ed.) 596; U. S. Rev. Stat. (1878), § 2491 (forbidding the importation of obscene matter); U. S. Rev. Stat. (1878), § 3893 (forbidding the use of mails for obscene matter). Such a statute is constitutional. *In re* Jackson, 96 U. S. 727, 24 L. ed. 877.

4. *In re* Considine, 83 Fed. 157, holding a state statute constitutional forbidding the employment of women in any saloon, beer-hall, bar-room, theater, or other place of amusement where intoxicating liquors were sold.

5. *Georgia.*— McKinne *v.* State, 81 Ga. 164, 9 S. E. 1091, construing Ga. Code, § 4612*a*.

Indiana.— State *v.* Giles, 125 Ind. 124, 25 N. E. 159.

Maryland.— State *v.* Falkenham, 73 Md. 463, 21 Atl. 370, construing Md. Acts (1890), c. 198.

Massachusetts.— Com. *v.* McClellan, 101 Mass. 34.

Missouri.— St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791.

Texas.— Turman *v.* State, 4 Tex. App. 586.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, ANIMALS.

6. *Alabama.*— The disturbance of a religious assembly may be punished. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252.

Arkansas.— Dabbs *v.* State, 39 Ark. 353, 43 Am. Rep. 275.

Michigan.—An ordinance is legal which forbids making any public address in any public place within a half-mile circle of the city hall, without first obtaining permission from the mayor. Love *v.* Judge Recorder's Ct., 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618.

Pennsylvania.— Northumberland County *v.* Zimmerman, 75 Pa. St. 26.

Texas.— *Ex p.* Brown, (Tex. Crim. 1901) 61 S. W. 396.

See 10 Cent. Dig. tit. "Constitutional Law," § 148.

7. *Alabama.*— Birmingham Mineral R. Co. *v.* Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92, 27 L. R. A. 263.

Georgia.— Bearden *v.* Madison, 73 Ga. 184, an ordinance sustained which forbade all persons except passengers or railroad employees getting on or off trains within city limits.

Idaho.— Johnson *v.* Oregon Short-Line R. Co., (Ida. 1900) 63 Pac. 112, 53 L. R. A. 744.

Illinois.— See Wice *v.* Chicago, etc., R. Co., 193 Ill. 351, 61 N. E. 1084, 56 L. R. A. 268 [*reversing* 93 Ill. App. 266], holding that a city council with power to pass all necessary police ordinances has no power to provide that no person shall get on or off a train while it is in motion without permission to do so from the person in charge.

New York.— Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209, regulation of trains within city limits.

Wisconsin.— Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, RAILROADS.

8. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17 (where the legislature, to remove a dangerous grade crossing of the tracks of two railroads by a street in the city of Hartford, appointed, by resolution of April 4, 1884, a commission and empowered it to order the carrying of the tracks over the street and to order the railroad companies or either of them to lay out and maintain a new line or lines of railway for a distance not exceeding half a mile on each side of the street and within three hundred feet of the center line of the existing tracks, and to require all surface tracks within those limits to be removed, to direct by whom, when, and how the work should be done, to apportion the expense among the parties, but not exceeding one half to the city, and to apply to any court of competent jurisdiction for aid in the enforcement of its orders. It was held that (1) This action was a valid exercise of the police power of the state, since the states are intrusted with the duty of enacting and maintaining all the internal regulations necessary for the protection of the lives, health, and comfort of their people and for the security of their rights; (2) The legislature may validly delegate power and jurisdiction to courts and committees to adopt measures to prevent all things hurtful

make them responsible for losses caused by neglect so to do;[9] enact ordinances for the prevention of and protection from fires, as by the establishment of fire limits;[10] and prescribe reasonable and *bona fide* building regulations.[11]

7. To Trades, Professions, and Business — a. On Ground of Nuisance — (1) *Rule Stated.* The limitations upon the police power are frequently to be determined by the answer to the query whether a nuisance as generally understood upon the legal principles of the law of nuisance exists, as the police power clearly extends to the prevention and abatement of nuisances;[12] but the legislature or its agents cannot, by the mere declaration that a certain business is a nuisance, exercise police power over it, if in fact it is not injurious or offensive to the community,[13] and in case of such an act it is the duty of the courts to declare the same unconstitutional.[14] The power to regulate many kinds of business does not, however, as appears from a leading case, rest upon the existence of a nuisance,[15] as many

to the comfort and welfare of society; (3) The fact that a railroad was put to great expense was no ground for illegality; and (4) The act was not a taking of property for a public use); Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 18 S. Ct. 513, 42 L. ed. 948; Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87.

In view of the paramount duty of the state legislature to secure the safety of the community at an important railroad crossing in a populous city, it is within its power to supervise, control, and change agreements from time to time entered into between a city and a railroad company as to a viaduct over such crossing, saving any rights previously vested. Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 18 S. Ct. 513, 42 L. ed. 948. And see Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87.

9. Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Cairo, etc., R. Co. *v.* People, 92 Ill. 97, 34 Am. Rep. 112; Tredway *v.* Sioux City, etc., R. Co., 43 Iowa 527; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773.

10. Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969 (passing on the Massachusetts act for the prevention of fires); Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684 (holding that a municipality may establish fire limits, prohibit the erection of wooden structures therein, declare the erection of such structures within such limits nuisances, and destroy a structure within the designated class without showing that it was in fact a nuisance).

11. Rosedale *v.* Hanner, 157 Ind. 390, 61 N. E. 792; Winthrop *v.* New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; Signell *v.* Wallace, 35 Misc. (N. Y.) 656, 72 N. Y. Suppl. 348, construing "New Tenement House Act," N. Y. Laws (1901), c. 334, § 4, amended by N. Y. Laws (1901), c. 555.

12. Waggoner *v.* South Gorin, 88 Mo. App. 25. In Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 667, 24 L. ed. 1036, where it is said of the police power "To regulate and abate nuisances is one of its ordinary functions."

13. Laugel *v.* Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 [*affirming* 96 Ill. App. 618, holding that a city, under the general grant of power over nuisances, may not adopt an ordinance declaring a thing to be a nuisance which is in fact not clearly so]; Griffin *v.* Gloversville, 67 N. Y. App. Div. 403, 73 N. Y. Suppl. 684 (holding that a declaration of a city ordinance that a particular thing is a common nuisance does not make it so, but the question of its being a common nuisance is for judicial determination); *In re* Hong Wah, 82 Fed. 623.

14. *In re* Wilshire, 103 Fed. 620; *In re* Hong Wah, 82 Fed. 623.

15. Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77 [*affirming* 69 Ill. 80], where the following principles controlling business "clothed with a public interest" were laid down:

(1) When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in its use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use;

(2) In the exercise of this control it has been customary in the United States from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and other similar employments, and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold;

(3) The case more particularly decided that an act of the general assembly of Illinois, entitled "An Act to regulate public warehouses, and the warehousing and inspecting of grain, and to give effect to article 13 of the constitution of this state" was not repugnant to the constitution of the United States; and that where warehouses are situated and business is carried on exclusively within the state, it may as a matter of domestic concern prescribe regulations for them, notwithstanding that they are used as instruments by those engaged in interstate, as well as state commerce; and that until

kinds of business so peculiarly and intimately affect the public interest that whoever engages in any one of them in effect grants to the public an interest in the methods and instrumentalities employed therein.[16] Aside from these considerations, however, the right to use property in the prosecution of any business which is not injurious or offensive to the community at large or to persons within its vicinity is one of the legal attributes of ownership of property of which the owner cannot be deprived by any state law or municipal ordinance.[17]

(II) *Applications of Rule.* The state may regulate or prohibit the transaction of business in such ways and places that noise,[18] smoke, dust,[19] odors,[20] and

congress acts in reference to their interstate relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction.

16. Mr. Cooley justly pointed out that it was not very clear what circumstances affect property with a public interest. "In the following cases we should say that property in business was affected with a public interest. 1. Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, etc. 2. Where the state on public grounds renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business some special use is allowed to be made of public property or of a private easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases." Cooley Const. Lim. (5th ed.) 737, 739.

17. People *v.* Berrien Cir. Judge, 124 Mich. 664, 83 N. W. 594, 83 Am. St. Rep. 352, 50 L. R. A. 493 (holding that an act aimed solely at commission merchants who engage in the business of selling farm produce for producers upon commission, which requires them to execute a bond in the penal sum of five thousand dollars, conditioned for the faithful performance of their contracts, and to pay a license-fee is unconstitutional, since it is class legislation, and an unjustifiable interference with the right of citizens to carry on legitimate business); *In re* Hong Wah, 82 Fed. 623 (holding unconstitutional a city ordinance providing that it should be unlawful for any person to maintain a public laundry within the city, except in designated localities, and declaring that any such laundry established or carried on in violation of this provision was a public nuisance and a violation of the ordinance a misdemeanor).

Impairment of franchise.—"The police power of the State comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society," but the proper limit in its bearing upon chartered rights and privileges of private corporations for public uses would seem to be this: That the legislature may at all times regulate the exercise of the corporate franchise, by general laws passed in good faith for the legitimate ends contemplated by the state police power, that is, for the peace, good order, health, comfort, and welfare of society, but it cannot, under the color of such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to the beneficial exercise of it. Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst (Del.) 506, 536.

18. *Ex p.* Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63, holding that a town may enact an ordinance prohibiting the keeping of a jackass within its limits in hearing distance of its populace.

19. Moses *v.* U. S., 16 App. Cas. (D. C.) 428, 50 L. R. A. 532 (where the act of congress of Feb. 2, 1899, declaring the emission of dense or thick black or gray smoke or cinders from any smoke-stack or chimney used in connection with any stationary engine, etc., within the District of Columbia, to be a public nuisance, and providing a punishment therefor, is upon its face said to be a valid exercise of the police power of congress over the district); Harmon *v.* Chicago, 110 Ill. 400, 405, 51 Am. Rep. 698 (holding valid the following smoke ordinance of the city of Chicago: "The owner or owners of any boat or locomotive engine, and the person or persons employed, as engineer or otherwise, in the working of the engine or engines in said boat, or in operating such locomotive, and the proprietor, lessee and occupant of any building, who shall permit or allow dense smoke to issue or to be emitted from the smoke-stack of any such boat or locomotive, or the chimney of any building, within the corporate limits, shall be deemed and held guilty of creating a nuisance, and shall, for every such offense, be fined in a sum of not less than five nor more than fifty dollars"); State *v.* Mott, 61 Md. 297, 48 Am. Rep. 105 (kilns).

20. *Delaware.*— State *v.* Luce, 9 Houst. (Del.) 396, 32 Atl. 1076, fertilizers.

Kansas.— Burlington *v.* Stockwell, 5 Kan. App. 569, 47 Pac. 988, stock-yards.

Maryland.— Woodyear *v.* Schaefer, 57 Md. 1, 40 Am. Rep. 419, fertilizing works.

Michigan.— Grand Rapids *v.* Weiden, 97 Mich. 82, 56 N. W. 233, rendering establishment.

Missouri.— St. Louis *v.* Fischer, 167 Mo.

other similar discomforts or dangers[21] result so as to amount to an injury to the community.

b. For Public Convenience, Safety, and Expediency. Common carriers have from the earliest time been controlled by police power; accordingly, railroad companies being allowed to charge only reasonable rates, the legislature may make a valid enactment that certain maximum rates shall not be exceeded;[22] likewise railroad companies may be compelled to make connections with other railroads suitable to the convenience and safety of the public,[23] and to obey many other kindred regulations.[24] So too ferries and ferrymen are under the general control of the police power;[25] and may be required under bond to do certain specific

654, 67 S. W. 872 (holding an ordinance valid by which the erection of cow stables and dairies within prescribed limits was forbidden; and sustaining an action of a city in making the prohibited territory coextensive with the city itself); St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 (stables); State *v.* Beattie, 16 Mo. App. 131 (stables).

New Jersey.— Weil *v.* Ricord, 24 N. J. Eq. 169; Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251, fertilizers.

New York.—Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564; Metropolitan Bd. Health *v.* Heister, 37 N. Y. 661, slaughter-houses.

Oregon.— Portland *v.* Meyer, 32 Oreg. 368, 52 Pac. 21, 67 Am. St. Rep. 538, a city may lawfully exclude even existing slaughter-houses from being operated and maintained within the city limits.

Rhode Island.— Aldrich *v.* Howard, 7 R. I. 87, 80 Am. Dec. 636, stables.

Wisconsin.— Milwaukee *v.* Gross, 21 Wis. 241, 91 Am. Dec. 472, slaughter-houses.

United States.— Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036 (the manufacture of fertilizers regulated); *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, NUISANCES.

21. *Idaho.*— A statute making it unlawful to herd or graze sheep within two miles of an inhabited dwelling and making the owner of sheep so grazed liable for dangers to the injured party is a valid exercise of the police power of the state. Sifers *v.* Johnson, (Ida. 1901) 65 Pac. 709.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, holding that electric companies may be compelled to place their wires in subsurface conduits, when public safety and welfare demand.

New York.— People *v.* Lichtman, 65 N. Y. App. Div. 76, 72 N. Y. Suppl. 511, holding that N. Y. Penal Code, § 389, as amended by N. Y. Laws (1900), c. 494, prohibiting the manufacture of compressed gas in a tenement or dwelling-house, or any other article of which such gas forms a component part, is within the police power of the state. And this covers the manufacture of soda-water.

Pennsylvania.— Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220 [*citing* Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253, and *distinguishing* People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721], holding constitutional an ordinance prohibiting the casting of advertisements in dwellings, etc., although newspapers and addressed envelopes are excepted.

United States.— Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, NUISANCES.

Laundries, as seen in Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923, although not nuisances *per se*, may be subject to regulations. But such ordinances must not be arbitrary. See *In re* Wo Lee, 26 Fed. 471, holding an ordinance invalid by which the board of health had arbitrary power to grant or refuse permits to do laundry business.

22. Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. ed. 94; Chicago, etc., R. Co. *v.* Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710.

23. Atlantic, etc., R. Co. *v.* State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233, where it is said that the legislature, under the police power, may in proper cases require railroad companies whose roads cross to meet each other, to construct such switches, sidetracks, and connections as will enable them to transport cars to and from each other's lines. Such regulations do not amount to a taking of the companies' property for which compensation must be provided.

A law compelling street railroads to transport free of charge policemen while traveling in the performance of their duty is invalid. Wilson *v.* United Traction Co., 72 N. Y. App. Div. 233, 76 N. Y. Suppl. 203.

24. See *supra*, VI, E, 6; and, generally, CARRIERS; RAILROADS.

25. *Arkansas.*— Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053; Jabine *v.* Midgett, 25 Ark. 474.

Indiana.— Madison *v.* Abbott, 118 Ind. 337, 21 N. E. 28.

Massachusetts.— Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169; Charles River

things;[26] for example, to keep safe and convenient boats, with a sufficient number of ferrymen, and to pay a statutory penalty to one unreasonably detained.[27] So also hackmen, cab, and stage-drivers, may be required to obtain licenses;[28] and a city may validly fine cab-drivers who do not wait at specified cab-stands.[29] It is also well established that warehousemen, wharfingers, and others in similar pursuits are subject to regulation.[30] Hawkers, peddlers, and canvassers are subject to regulation under the police power and may be required to take out licenses to sell their goods and wares.[31] Keepers of junk-shops, second-hand

Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344.

New Jersey.— Hudson County *v.* New Jersey R., etc., Co., 24 N. J. L. 718.

New York.— Hoffman *v.* Union Ferry Co., 68 N. Y. 385.

Texas.— Johnson *v.* Erskine, 9 Tex. 1.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, FERRIES.

26. Botts *v.* Bridges, 4 Port. (Ala.) 274; Johnson *v.* Erskine, 9 Tex. 1.

27. Koretke *v.* Irwin, 100 Ala. 323, 13 So. 943, 21 L. R. A. 787, construing Ala. Code (1886), §§ 1444, 1452.

28. One ground commonly given in the cases for the regulation of hack-drivers is the need of guarding the public from the extortion and fraud to which it is here so peculiarly subject. Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157.

29. District of Columbia *v.* Sargeant, 17 App. Cas. (D. C.) 264; New York *v.* Reesing, 38 Misc. (N. Y.) 129, 77 N. Y. Suppl. 82, holding that a city ordinance imposing a fine on the owner or driver of any hack or cab which shall stand waiting for employment at any other place than at public hack-stands or in front of private premises with the consent of the owner is valid.

The question of the reasonableness of a cab-stand act is for the courts; and if the result of an act is an unfair monopoly for a railroad company or others the court may declare the act invalid. District of Columbia *v.* Sargeant, 17 App. Cas. (D. C.) 164.

30. W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. ed. 618 [*affirming* 77 Minn. 223, 79 N. W. 962, in which case the plaintiff operated a grain warehouse in a village in Minnesota in which no grain was stored but his own, which was purchased of the farmers at the warehouse, where the grain was delivered, and weighed and graded by him on his own scales and with his own appliances. It was held that the business so carried on was of such a public character and so affected with public interest that the legislature might require persons operating such a warehouse to take out a license therefor, as provided in Minn. Gen. Laws (1895), c. 148. And as the statute applied to all of the class defined by its first section (namely, "all elevators and warehouses in which grain is received, stored, shipped or handled, and which are situated on the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railway company in this state to be used in connection with its line of railway at any station or siding in this state, other than at terminal points) it was not invalid by reason of its non-application to those who own or operate warehouses not situated on the right of way of a railroad. Such a classification was not so unreasonable as to amount to denial of equal protection of the laws, nor was the requirement of a license a regulation of commerce among the states]; Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 469, 36 L. ed. 247 [*following* Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77, and *distinguishing* Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970]. The latter is a leading case which held constitutional N. Y. Laws (1888), c. 581, fixing a maximum charge of five eighths of a cent per bushel for elevating, receiving, weighing, and discharging by means of floating or stationary elevators, in any city of the state containing a population of one hundred and thirty thousand or over, as well in its application to elevators owned by private individuals as to those owned by corporations having chartered privileges from the state, since the business carried on was affected with a public interest and a practical monopoly. And the further provision was sustained that in transferring grain to and from vessels and canal-boats, the charge for shoveling to the leg of the elevator when unloading, and for trimming cargo when loading, should be limited to the actual cost of the outside labor employed therein. And the fact that the elevators were largely employed in the transfer of grain which was in course of transportation from the western states to the seaboard did not render the act obnoxious as a regulation of interstate commerce. And see Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77. See also 24 Am. L. Rev. 908; and, generally, WAREHOUSEMEN.

31. *Kentucky.*— West *v.* Mt. Sterling, 23 Ky. L. Rep. 1670, 65 S. W. 120.

Minnesota.— St. Paul *v.* Briggs, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554.

Missouri.— Moberly *v.* Hoover, 93 Mo. 663, 67 S. W. 721.

Nebraska.— Rosenbloom *v.* State, (Nebr. 1902) 89 N. W. 1053.

New Hampshire.—State *v.* Angelo, 71 N. H. 224, 51 Atl. 905.

North Carolina.— Collier *v.* Burgin, 130 N. C. 632, 41 S. E. 874.

Pennsylvania.— Mechanicburg *v.* Koons, 18 Pa. Super. Ct. 131, canvasser.

dealers, and pawnbrokers are subject to the police power.[32] Again, as a condition of engaging in certain businesses or professions, licenses, or registration and certificate thereof may be imposed under penalty;[33] thus regulations providing for the license or registration of physicians, surgeons, and dentists have been generally sustained.[34] It is essential, however, to the validity of such acts that they shall operate in their requirements with substantial equality, the most frequent source of unconstitutionality being not in the subject-matter sought to be controlled but in the existence of arbitrary distinctions.[35]

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, HAWKERS AND PEDDLERS.

32. *Illinois.*— Launder *v.* Chicago, 111 Ill. 291, 53 Am. Rep. 625; Kuhn *v.* Chicago, 30 Ill. App. 203.

Massachusetts.—Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485, junk-dealer.

Michigan.— Van Baalen *v.* People, 40 Mich. 258, pawnbroker. See Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116.

North Carolina.— See State *v.* Taft, 118 N. C. 1190, 23 S. E. 970, 54 Am. St. Rep. 768, 32 L. R. A. 122; Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123.

Ohio.— Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463, second-hand dealer.

Pennsylvania.— Com. *v.* Mintz, 19 Pa. Super. Ct. 283.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, PAWNBROKERS.

33. *Alabama.*— Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

Michigan.— Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

New Jersey.— Margolies *v.* Atlantic City, 67 N. J. L. 82, 50 Atl. 367.

Ohio.— State *v.* Gardner, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689, holding that plumbers may be required to take out licenses.

Wisconsin.— Tenney *v.* Lenz, 16 Wis. 566; Carter *v.* Dow, 16 Wis. 298.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and Cooley Const. Lim. (4th ed.) 245, 246; Cooley Tax. 396, 397; 1 Dillon Mun. Corp. § 357.

Limit on amount of license charge.—Where police regulation alone is the object of a license, there is a conflict among the authorities, as to the rule governing the amount which may be charged for such license. The nature of the occupation, trade, or profession has of necessity much to do with it. In the case of such as are useful and beneficial to the community, the license charged should not ordinarily be so great as in the case of those not so, especially when immoral in their nature or tendency. The weight of authority is that the amount exacted for a license, although designed for regulation and not for revenue, is not to be confined to the expense of issuing it, but that a reasonable compensation may be charged for the additional expense of supervision over the particular business or vocation, at the place where it is licensed. For this purpose, the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence. Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; *Ex p.* Marshall, 64 Ala. 266.

34. *California.*— *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Kentucky.— Matthews *v.* Murphy, 23 Ky. L. Rep. 750, 63 S. W. 785, 54 L. R. A. 415.

Maine.— Bibber *v.* Simpson, 59 Me. 181.

Michigan.— People *v.* Reetz, 127 Mich. 87, 86 N. W. 396.

Missouri.— State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565.

New York.— Finch *v.* Gridley, 25 Wend. (N. Y.) 469.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623, a leading case.

See 10 Cent. Dig. tit. "Constitutional Law," § 148; and, generally, PHYSICIANS AND SURGEONS.

35. Noel *v.* People, 187 Ill. 587, 79 Am. St. Rep. 238, 52 L. R. A. 287, 58 N. E. 616 (holding unconstitutional section 2 of the Pharmacy Act (Hurd's Rev. Stat. Ill. (1897), pp. 1075, 1076), imposing a penalty on any person not a registered pharmacist who conducts a pharmacy unless he places in active charge a registered pharmacist; and section 8, which vested in the pharmacy board an arbitrary discretion in granting the privilege of dealing in certain kinds of medicine); State *v.* Pennoyer, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709 (holding unconstitutional, on the ground of undue discrimination, an act of the legislature requiring that all doctors, except those who had practised for five years at the same place, should obtain a license and make payment therefor); State *v.* Gardner, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689 (where after saying that the business of plumbing is one which is so nearly related to the public health that it may with propriety be regulated by law, and that reasonable regulations, tending to protect the public against the dangers of careless and inefficient work and appropriate to that end, do not infringe any constitutional right of the citizen pursuing such calling, the court held that part of the act of April 21, 1896, entitled "An act to promote the public health and regulate the sanitary construction of house drainage and plumb-

VII. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

A. In General. The term "right" in civil society is defined to mean that which a person is entitled to have, to do, or to receive from others, within the limits prescribed by law.[36] The rights which are declared to be natural and inalienable, whose protection is guaranteed by the several constitutions, are such rights as are personal to the individual as a citizen of a free community, civil as distinguished from political, and belonging alike to every man, woman, and child;[37] they include the right of personal liberty, the right of personal security, and the right to acquire and enjoy property;[38] and are to be construed in every jurisdiction, with reference to what were considered the natural rights of men under the common law which existed at the adoption of the constitution.[39] Such rights, however, are not absolutely indefeasible, but are so unless or until the government, acting in pursuance of the constitution or some law passed pursuant thereto, requires their surrender in consideration of the public welfare or safety.[40] Constitutional provisions for the security of person or property should be liberally construed.[41] The first ten amendments to the federal constitution commonly known as the "Bill of Rights," guaranteeing protection to certain rights of the people, are limited in their application to the federal government,[42] and were not intended to lay down any novel principles of government, but simply embodied certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to well-recognized exceptions, arising from the necessities of the case. The exceptions have continued to be recognized as if formally expressed.[43]

ing" which requires any plumber, whether master or employing plumber or journeyman, before engaging in the business, to undergo an examination as to fitness, and obtain a license, but permits all members of a firm to pursue the business where one only has procured such license, and all members of a corporation to pursue it where the manager only has procured such license, does not operate equally upon all of a class pursuing the calling under like circumstances, and is invalid).

36. Atchison, etc., R. Co. *v.* Baty, 6 Nebr. 37, 29 Am. Rep. 356.

37. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82, holding that while the right of holding state office is a civil or political right it is not of the class of natural rights which are held to be inalienable, like the rights of conscience. See also, generally, CIVIL RIGHTS.

38. Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391.

It seems that the attempt of the legislature to confer the power of contest on the election commissioners is in violation of Ky. Const. § 2, subs. 2, providing that "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority;" one of the arbitrary features of the law being the fact that there is no provision by which the parties can escape a trial before the commissioners, although they may have made up and expressed their opinions, or may be bitterly prejudiced. Pratt *v.* Breckinridge, 23 Ky. L. Rep. 1356, 65 S. W. 136.

Vt. Stat. c. 175, § 4133, requiring corporations, companies, or firms, "organized under the laws of another state," before selling choses in action owned or guaranteed by them, to file a bond with the inspector of finance to secure the payment of taxes, and to make report as required of "like corporations in this state," and directing that the inspector of finance shall be made the attorney of such corporations, on whom process may be served, is in contravention of the bill of rights (Vt. Const. c. 1, art. 1), declaring that all men have the right to enjoy life and liberty, and to acquire, possess, and protect property. State *v.* Cadigan, 73 Vt. 245, 50 Atl. 1079, 87 Am. St. Rep. 714, 57 L. R. A. 666.

39. Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391; Mayo *v.* Wilson, 1 N. H. 53; Henley *v.* State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126.

40. *Ex p.* Smith, 38 Cal. 702; Mayo *v.* Wilson, 1 N. H. 53; People *v.* Ewer, 19 N. Y. Suppl. 933, 8 N. Y. Crim. 383; Mink *v.* Mink, 16 Pa. Co. Ct. 189.

41. Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746. See also *supra*, IV, C.

42. Starr *v.* Comer, 157 Ind. 611, 62 N. E. 452; *In re* Fitzpatrick, 16 R. I. 60, 11 Atl. 773.

The fifth amendment of the federal constitution, that no person shall be compelled in any criminal case to be a witness against himself, operates exclusively in restriction of federal power, and has no application to the states. State *v.* Comer, 157 Ind. 611, 62 N. E. 452. And see, generally, WITNESSES.

43. Robertson *v.* Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. ed. 715.

B. Personal Liberty — 1. In General. The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person, to whatsoever place one's inclination may direct without any restraint except by due process of law.[44] But the law may impose limitations and restrictions upon personal liberty in order to enforce the duty citizens owe in defense of the state,[45] in order to provide proper care for individuals who are helpless or dependent,[46] and also in any proper exercise of the police power.[47]

2. Involuntary Servitude. The constitutional provision that there shall be neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, does not prevent the enactment of a law providing for imprisonment for contempt of court;[48] providing that persons committed to jail may be employed at labor;[49] requiring the performance of labor in lieu of taxes;[50] providing that if a laborer without just cause fails to perform the labor according to contract he shall be liable to fine or imprisonment;[51] granting exclusive rights to carry on certain kinds of business, when they are necessary and proper to effectuate a purpose which has in view the public good;[52] or preventing the immigration of negroes.[53] Nor does it invalidate a covenant in a deed of land in fee by which a grantee covenants for himself, his heirs and assigns, to pay a perpetual yearly rent.[54] The provisions against involuntary servitude do not apply to such services as have from time immemorial been treated as exceptional.[55] This exception to the general rule

44. Robertson *v.* Com., 101 Ky. 285, 19 Ky. L. Rep. 442, 40 S. W. 920; *Ex p.* Smith, 135 Mo. 223, 36 S. W. 628, 58 Am. St. Rep. 576, 33 L. R. A. 606; St. Louis *v.* Roche, 128 Mo. 541, 31 S. W. 915; Memphis *v.* Winfield, 8 Humphr. (Tenn.) 707; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, 745 [*reversing* 1 Nev. 294, and holding that a "capitation tax of one dollar upon every person leaving the State by any railroad, stage coach or other vehicle engaged or employed in the business of transporting passengers for hire," to be paid by the proprietors or corporations so engaged, was unconstitutional, being repugnant to the right of every citizen of the United States to pass and repass through every part of it without interruption, as freely as in his own state; to repair to the seat of government, to the seaports, to the subtreasuries, the land-offices, the revenue offices, and the courts of justice in the several states; a right which in its nature is independent of the will of any state over whose soil he must pass in the exercise of it]; Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353; Elkison *v.* Deliesseline, Brunn. Col. Cas. (U. S.) 431, 8 Fed. Cas. No. 4,366, Wheel. Crim. (N. Y.) 56.

As to due process of law generally see *infra*, XIII.

45. Parker *v.* Kaughman, 34 Ga. 136; Kneedler *v.* Lane, 45 Pa. St. 238, 3 Grant (Pa.) 523.

46. *Ex p.* Ferrier, 103 Ill. 367, 43 Am. Rep. 10; Nott's Case, 11 Me. 208; Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197.

47. *Ex p.* Smith, 38 Cal. 702; Com. *v.* Morrisey, 157 Mass. 471, 32 N. E. 664 (holding that in the exercise of the police power the legislature may provide a punishment for drunkenness); Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533. But in Gastenau *v.* Com., 108 Ky. 473, 22 Ky. L. Rep. 157, 56 S. W. 705, 49 L. R. A. 111, a city ordinance declaring that it shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor, or "to frequent, loaf, or stand around said building within fifty feet thereof," and providing for the punishment of any saloon-keeper who shall permit a violation of that provision of the ordinance, was held void as being an unreasonable interference with individual liberty.

48. Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244.

49. Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819; Myers *v.* Stafford, 114 N. C. 234, 19 S. E. 764. But in *Re* Thompson, 117 Mo. 83, 22 S. W. 863, 38 Am. St. Rep. 639, 20 L. R. A. 462, a statute providing for the hiring out of vagrants to the highest bidder after a verdict of vagrancy found by a jury on an examination before a justice of the peace was held to be unconstitutional.

50. *In re* Dassler, 35 Kan. 678, 12 Pac. 130; Dennis *v.* Simon, 51 Ohio St. 233, 36 N. E. 832.

51. State *v.* Easterlin, 61 S. C. 71, 39 S. E. 250; *Ex p.* Williams, 32 S. C. 583, 10 S. E. 551.

52. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

53. Nelson *v.* People, 33 Ill. 390. But see Choisser *v.* Hargrave, 2 Ill. 317, an act providing for the indenturing and registering of negroes.

54. Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439.

55. For example, those of a seaman. Robertson *v.* Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. ed. 715.

s subject, however, to the proviso that a contract was entered into voluntarily or such services.[56]

3. Imprisonment For Debt[57] — **a. In General.** Whether or not a particular commitment is an imprisonment for debt depends entirely upon the construction o be placed upon the articles in the several state constitutions prohibiting imprisonment for debt, and the statutes passed for the purpose of carrying out such constitutional inhibition. Congress, by the act of March 2, 1867, adopted the modifications, conditions, and restrictions upon imprisonment for debt then existng by the laws of the several states, and the course of proceedings which might hereafter be adopted therein.[58] As a general rule it may be stated that this prohibition applies only to obligations growing out of contracts, and does not apply o cases of tort or cases of a criminal nature.[59]

b. Obligations Ex Contractu — (1) *In General.* Any liability to pay money growing out of any contract, either express or implied, constitutes a debt, within the meaning of the prohibition.[60] The contract, however, must be free from fraud, fraud being generally expressly excepted by the state constitution.[61] If,

56. See *In re* Chung Fat, 96 Fed. 202.

57. Arrest and imprisonment on civil process generally see Arrest; Executions.

58. U. S. *v.* Tetlow, 2 Lowell (U. S.) 159, 28 Fed. Cas. No. 16,456, 6 Am. L. Rev. 159, 14 Int. Rev. Rec. 205.

59. Lower *v.* Wallick, 25 Ind. 68; U. S. *v.* Walsh, 1 Abb. (U. S.) 66, 1 Deady (U. S.) 281, 28 Fed. Cas. No. 16,635, 1 Am. L. T. Rep. (U. S. Cts.) 45, 6 Int. Rev. Rec. 212. And see *infra*, VII, B, 3, c, d, e, f.

60. *California.*— Knutte *v.* San Francisco, 134 Cal. 660, 66 Pac. 875; *In re* Holdforth, 1 Cal. 438.

Illinois.— Parker *v.* Follensbee, 45 Ill. 473.

Minnesota.— Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

Missouri.— Roberts *v.* Stoner, 18 Mo. 481.

Ohio.— Sandusky Second Nat. Bank *v.* Becker, 62 Ohio St. 289, 56 N. E. 1025, 51 L. R. A. 860.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½.

61. *Arkansas.*— Ruddell *v.* Childress, 31 Ark. 511; Hatheway *v.* Jones, 20 Ark. 109; Sutton *v.* Hays, 17 Ark. 462.

California.— *In re* Vinich, 86 Cal. 70, 26 Pac. 528 (holding that fraud must be shown to exist before the defendant can be subjected to imprisonment); Stewart *v.* Levy, 36 Cal. 159.

Connecticut.— Cowles *v.* Day, 30 Conn. 406, 412 (holding that Conn. Const. art. 1, § 10, providing that "no person shall be arrested, detained or punished except in cases clearly warranted in law," and the statutes abolishing imprisonment in all actions for debt arising upon contract express or implied, except in cases of fraud and fraudulent dealings as therein specified, were not intended to abolish such imprisonment in respect to that dishonest class of debtors who were guilty of fraud in contracting their debts, or who concealed or conveyed away their property so that it could not be reached by the ordinary process of attachment); Armstrong *v.* Ayres, 19 Conn. 540.

Georgia.— Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495.

Illinois.— Huntington *v.* Metzger, 158 Ill. 272, 41 N. E. 881; Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; Malcolm *v.* Andrews, 68 Ill. 100 (where the court held that the provisions of the state constitution are to be regarded as having effectually abolished imprisonment for debt, as practised under the common law; and therefore where a debt is the basis of the action, in order to justify imprisonment, the foundation must be laid under one or both of the exceptions contained in Ill. Const. art. 2, § 12, that is, a refusal to deliver up his estate for the benefit of creditors, or fraud either in contracting or evading payment of the debt, such provisions extending to a writ of ne exeat); Strode *v.* Broadwell, 36 Ill. 419; Tuttle *v.* Wilson, 24 Ill. 553; Gorton *v.* Frizzell, 20 Ill. 291; Burnap *v.* Marsh, 13 Ill. 535; Maher *v.* Huette, 10 Ill. App. 56 (holding that as imprisonment of the debtor under the state constitution is for his wrongful act in endeavoring to evade payment, it should appear that all the elements required by the statute to render the act complete actually exist before the debtor forfeits the right to invoke in his behalf the general guaranty of personal liberty, and before he can be said to be brought within the exceptions).

Indiana.— Baker *v.* State, 109 Ind. 47, 9 N. E. 711 (holding that the leading, if not the only, purpose of the state constitutions in excepting cases of fraud from the prohibition of imprisonment for debt, was to authorize imprisonment for fraud practised in avoiding the payment of debts); Swift *v.* State, 63 Ind. 81; Ramsey *v.* Foy, 10 Ind. 493 (holding that every statute in restraint of personal liberty ought to be strictly construed).

Iowa.— *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Kansas.— *In re* Heath, 40 Kan. 333, 19 Pac. 926; Heath *v.* Brown, 40 Kan. 33 (holding that if the facts show fraud in the contracting of the obligation, the courts will deny the motion for the discharge of the

however, the contract is not free from fraud, the imprisonment permitted is not for or on account of the debt, but because of the fraud committed.[62]

debtor); Hauss *v.* Kohlar, 25 Kan. 640; Howe Mach. Co. *v.* Lincoln, 25 Kan. 312 [*affirming* 24 Kan. 123]; Tennent *v.* Weymouth, 25 Kan. 21 (holding that the proof of fraud must be clear and strong, fraud never being presumed, but always requiring proof, the law neither favoring nor encouraging arrest and imprisonment, such a remedy being the *dernier resort*, the end of the law, quasi-criminal); Gillett *v.* Thiebold, 9 Kan. 427; *In re* Roberts, 4 Kan. App. 292, 45 Pac. 942.

Louisiana.— State *v.* Judge Fourth City Ct., 37 La. Ann. 385 (holding that proof of intention to depart permanently from the state without leaving sufficient property to satisfy his creditor's demand was sufficient proof of fraud to bring the case within the statute authorizing the arrest of a debtor in cases of fraud); State *v.* Orleans Parish Civil Sheriff, 31 La. Ann. 799; Levi *v.* Levy, 20 La. Ann. 552 (holding that the act of 1855 authorizing the arrest of debtors under certain circumstances must be regarded as an exception to the general rule, although there does not seem to be any express declaration against imprisonment; and viewed as an exception, it must be construed strictly); Anderson *v.* Brinkley, 1 La. Ann. 126.

Massachusetts.— Noyes *v.* Manning, 162 Mass. 14, 37 N. E. 768; Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318; Way *v.* Brigham, 138 Mass. 384; *In re* Frost, 127 Mass. 550; Dooley *v.* Cotton, 3 Gray (Mass.) 496.

Michigan.— Dummer *v.* Nungesser, 107 Mich. 481, 65 N. W. 564; Badger *v.* Reade, 39 Mich. 771; *In re* Teachout, 15 Mich. 346 (holding that an affidavit showing a *prima facie* case of fraud is sufficient to warrant arrest and imprisonment under the Michigan statutes); Bromley *v.* People, 7 Mich. 472.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

New Jersey.— McKernan *v.* McDonald, 27 N. J. L. 541 (holding that under a constitutional provision that no person shall be imprisoned for debt except in cases of fraud, the fraud must be clearly proved by such testimony as would be required in a court of justice, and that the affidavit might be taken by any person competent to take it, and the order might be made by any judge or commissioner to whom the affidavit might be exhibited); Van Wagenen *v.* Coe, 22 N. J. L. 531; *Ex p.* Clark, 20 N. J. L. 648, 45 Am. Dec. 394 (where it was contended that there was nothing fraudulent in a debtor's refusing to apply money in his possession to payment of the debt and therefore the constitution, in prohibiting imprisonment for debt except in cases of fraud, nullified an earlier statute allowing imprisonment in cases where the debtor "unjustly and unlawfully" declines to surrender property in his control to the payment of his debts. The court held, however, that the act was not incompatible with the clause in the constitution); Hunt *v.* Hill, 20 N. J. L. 476 (holding that the fraud is not to be presumed, but must be proved).

North Carolina.— State *v.* Torrence, 127 N. C. 550, 37 S. E. 268; State *v.* Norman, 110 N. C. 484, 14 S. E. 968; McNeely *v.* Haynes, 76 N. C. 122 (holding, where a firm debt was incurred by one partner acting fraudulently, that the other partner, who was not a party to the fraud and did not connive at it, was entitled to the constitutional exemption); Melvin *v.* Melvin, 72 N. C. 384 (holding that the words "except in cases of fraud" as used in the constitution were broad and comprehended not only fraud in attempting to hinder, delay, and defeat the collection of a debt by concealing property and other fraudulent devices, but embraced also fraud in making the contract, false pretenses and fraud in incurring the liability).

Ohio.— Spice *v.* Steinruck, 14 Ohio St. 213 (holding that under the constitutional provision that "no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud," the courts have no power to authorize arrests in cases of fraud unless such power is conferred by express legislation); *In re* Concklin, 5 Ohio Cir. Ct. 78.

Oregon.— Norman *v.* Zieber, 3 Oreg. 197.

Pennsylvania.— Howard *v.* McKee, 82 Pa. St. 409; Gosline *v.* Place, 32 Pa. St. 520 (holding that the remedy of imprisonment might be applied whether the fraud was committed in or out of the state); Duff *v.* McDonough, 2 Pa. Super. Ct. 373; Blanco *v.* Bosch, 3 Wkly. Notes Cas. (Pa.) 171.

Vermont.— Rutland Bank *v.* Barker, 27 Vt. 293; Vergennes Bank *v.* Barker, 27 Vt. 243; Aiken *v.* Richardson, 15 Vt. 500.

Washington.— Burrichter *v.* Cline, 3 Wash. 135, 28 Pac. 367.

Wisconsin.— *In re* Mowry, 12 Wis. 52.

United States.— Norman *v.* Manciette, 1 Sawy. (U. S.) 484, 18 Fed. Cas. No. 10,300, 4 Am. L. T. Rep. (U. S. Cts.) 60, 3 Leg. Gaz. (Pa.) 132. See also The Bremena *v.* Card, 38 Fed. 144, construing the law in South Carolina.

Alabama seems to be the only state in which fraud is not excepted and in which imprisonment for debt is entirely abolished. *Ex p.* Hardy, 68 Ala. 303.

New York has no provision in its constitution prohibiting imprisonment for debt, but there are statutes prohibiting such imprisonment except in cases of fraud. People *v.* O'Brien, 3 Abb. Dec. (N. Y.) 552, 6 Abb. Pr. N. S. (N. Y.) 63; Commonwealth Nat. Bank *v.* Temple, 2 Sweeny (N. Y.) 344, 39 How. Pr. (N. Y.) 432; Moak *v.* De Forrest, 5 Hill (N. Y.) 605.

62. Sawyer *v.* Nelson, 44 Ill. App. 184.

A statute providing that where any person

(II) *Breach of Promise to Marry.* It has generally been held that an action for breach of a promise to marry is based upon contract, and therefore within the constitutional prohibition of imprisonment for debt, the defendant being exempt from punishment in the absence of proof of fraud.[63]

(III) *Costs.* The costs recovered by the plaintiff in an action of contract are considered as part of the debt and therefore within the constitutional prohibition.[64] It has been held, however, that costs recovered by the defendant of the unsuccessful plaintiff were not a debt.[65]

c. Obligations Ex Delicto. The constitutional prohibition does not apply to cases founded on torts committed by the defendant, and therefore in such cases the defendant is liable to be imprisoned for the wrong he has done.[66]

d. Criminal, Quasi-Criminal, and Statutory Cases. The statutory prohibition does not apply to fines, penalties, or other impositions imposed by the courts in criminal proceedings as punishments for crimes committed against the common or state law.[67] Neither does the prohibition apply to the costs of such criminal

shall sell any personal property, on which a lien exists, without the consent of the lienee, he shall be deemed guilty of a misdemeanor and imprisoned, is not unconstitutional, as in violation of S. C. Const. art. 1, § 24, providing that no person shall be imprisoned for debt except in case of fraud. State *v.* Barden, 64 S. C. 206, 41 S. E. 959.

63. *In re* Tyson, 32 Mich. 262; Perry *v.* Orr, 35 N. J. L. 295; Moore *v.* Mullen, 77 N. C. 327. But see *In re* Sheahan, 25 Mich. 145, in which it was held that an allegation of seduction in an action for breach of promise of marriage takes the case out of the constitutional exemption. And see, generally, Arrest.

64. State *v.* Second Judicial Dist. Ct., 16 Nev. 76; Granholm *v.* Sweigle, 3 N. D. 476, 57 N. W. 509. See also, generally, Costs.

65. Parker *v.* Spear, 62 How. Pr. (N. Y.) 394. See also, generally, Costs.

66. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

Georgia.— Southern Express Co. *v.* Lynch, 65 Ga. 240; Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495.

Illinois.— Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; McKindley *v.* Rising, 28 Ill. 337; People *v.* Cotton, 14 Ill. 414.

Indiana.— Turner *v.* Wilson, 49 Ind. 581; Lower *v.* Wallick, 25 Ind. 68; McCool *v.* State, 23 Ind. 127.

Maine.— Gooch *v.* Stephenson, 15 Me. 129.

Michigan.—Fuller *v.* Bowker, 11 Mich. 204, replevin.

Missouri.— Blewett *v.* Smith, 74 Mo. 404.

New York.— McDuffie *v.* Beddoe, 7 Hill (N. Y.) 578.

North Carolina.— Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43 (seduction); Moore *v.* Green, 73 N. C. 394, 21 Am. Rep. 470.

Pennsylvania.— Dungan *v.* Read, 167 Pa. St. 393, 31 Atl. 639 (trespass); Romberger *v.* Henry, 167 Pa. St. 314, 31 Atl. 634; Kalbfus *v.* Rundell, 134 Pa. St. 102, 19 Atl. 492 (conspiracy); Tryon *v.* Hassinger, 1 Pa. L. J. Rep. 184 (false and fraudulent representation).

Wisconsin.— *In re* Kindling, 39 Wis. 35; *In re* Mowry, 12 Wis. 52 (conversion); Howland *v.* Needham, 10 Wis. 495 (ejectment).

Contra, Ex p. Prader, 6 Cal. 239; Holmes *v.* State, 2 Greene (Iowa) 501 (decided under a constitutional provision prohibiting imprisonment in any civil action).

See 10 Cent. Dig. tit. "Constitutional Law," § 151½.

67. *Alabama.*— Chauncey *v.* State, 130 Ala. 71, 30 So. 403, 89 Am. St. Rep. 17; Crosby *v.* Montgomery, 108 Ala. 498, 18 So. 723; *Ex p.* King, 102 Ala. 182, 15 So. 524 (holding that imprisonment of one who fraudulently obtains accommodation from a hotel or boarding-house or removes his baggage is not imprisonment for debt); Bailey *v.* State, 87 Ala. 44, 6 So. 398; Tarpley *v.* State, 79 Ala. 271; State *v.* Leach, 75 Ala. 36; Lee *v.* State, 75 Ala. 29; Caldwell *v.* State, 55 Ala. 133; Morgan *v.* State, 47 Ala. 34. *Contra,* Carr *v.* State, 106 Ala. 35, 17 So. 350, 54 Am. St. Rep. 17, 34 L. R. A. 634.

Colorado.— Robertson *v.* People, 20 Colo. 279, 38 Pac. 326.

Illinois.— Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; *In re* Bollig, 31 Ill. 88; Hutchinson *v.* Davis, 58 Ill. App. 358.

Indiana.— Hardenbrook *v.* Ligonier, 95 Ind. 70.

Iowa.— Boyer *v.* Kinnick, 90 Iowa 74, 57 N. W. 691.

Kansas.— *In re* Mitchell, 39 Kan. 762, 19 Pac. 1; *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

Maryland.— State *v.* Nicholson, 67 Md. 1, 8 Atl. 817; State *v.* Mace, 5 Md. 337.

Mississippi.— *Ex p.* Meyer, 57 Miss. 85.

North Carolina.— State *v.* Wallin, 89 N. C. 578; State *v.* Manuel, 20 N. C. 144.

Ohio.— *In re* Beall, 26 Ohio St. 195.

South Carolina.— *Ex p.* Williams, 32 S. C. 583, 10 S. E. 551.

Tennessee.— State *v.* Hoskins, 106 Tenn. 430, 61 S. W. 781; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; Mosley *v.* Gallatin, 10 Lea (Tenn.) 494. But in State *v.* Paint Rock Coal, etc., Co., 92 Tenn. 81, 82,

proceedings.[68] It has also been held that imprisonment for non-payment of costs of one instituting a criminal prosecution without probable cause is not imprisonment for debt.[69]

e. Obligations in the Nature of Taxes. Taxes, not being founded on contract, do not establish the relation of debtor and creditor between the taxpayer and the state, and therefore are not debts within the constitutional prohibition.[70]

f. Enforcing Orders and Decrees of Court — (I) *In General.* The constitutional prohibition of imprisonment for debt does not take away the power of the judge to commit to jail for contempt,[71] or for failure to pay a fine imposed for contempt;[72] but some cases hold that there must first be a conviction for contempt.[73]

(II) *Refusal to Apply Non-Exempt Property to Satisfy Execution.* Imprisonment for disobedience to an order, made in supplementary proceedings, requiring the debtor to apply his non-exempt property to the payment of the execution, is not imprisonment for debt.[74]

20 S. W. 499, 36 Am. St. Rep. 68, the court held that a statute providing that "it would be unlawful for any person or persons, firms or corporations or companies, to refuse to cash any checks or scrip of their own that may be presented it within thirty days of its date of issuance, and that any such person who should refuse to redeem, in lawful currency, any such checks or scrip shall be guilty of a misdemeanor, and, upon conviction, shall be fined," violates the spirit if not the letter of the constitutional provision that "the legislature shall pass no law authorizing imprisonment for debt in civil cases."

Texas.— Dixon *v.* State, 2 Tex. 481.

Wisconsin.— Baker *v.* State, 54 Wis. 368, 12 N. W. 12.

Wyoming.— *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

68. *Alabama.*— Bailey *v.* State, 87 Ala. 44, 6 So. 398; Caldwell *v.* State, 55 Ala. 133; Morgan *v.* State, 47 Ala. 34. But in *Ex p.* Russellville, 95 Ala. 19, 11 So. 18, the court held that indefinite inprisonment until a fine and costs are paid is in violation of the prohibition of imprisonment for debt, and in Nelson *v.* State, 46 Ala. 186, the opinion was expressed by the court that a party could not be imprisoned to enforce the payment of costs, for the reason that costs were not strictly a part of the punishment, but only a debt, the collection of which might be enforced by execution as any other debt, but if the costs were not paid or secured as allowed by law, it knew of no restraint on the legislature which forbade the state to impose a certain amount of work for the county on the defendant as a mode of securing the payment of the costs in a criminal case.

Illinois.— Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213.

Indiana.— McCool *v.* State, 23 Ind. 127 [*overruling* Porter *v.* State, 17 Ind. 415; Thompson *v.* State, 16 Ind. 516], holding that the costs are an incident of the fine rather than a debt.

Iowa.— Boyer *v.* Kinnick, 90 Iowa 74, 57 N. W. 691; Albertson *v.* Kriechbaum, 65 Iowa 11, 21 N. W. 178.

Kansas.— *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

North Carolina.— State *v.* Wallin, 89 N. C. 578; State *v.* Cannady, 78 N. C. 539; State *v.* Manuel, 20 N. C. 144.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½.

69. *In re* Ebenhack, 17 Kan. 618; State *v.* Hamilton, 106 N. C. 660, 10 S. E. 854; State *v.* Dunn, 95 N. C. 697; State *v.* Wallin, 89 N. C. 578; State *v.* Cannady, 78 N. C. 539.

70. *California.*— Perry *v.* Washburn, 20 Cal. 318.

Kansas.— *In re* Dassler, 35 Kan. 678, 12 Pac. 130.

Massachusetts.— Appleton *v.* Hopkins, 5 Gray (Mass.) 530.

Nebraska.— Rosenbloom *v.* State, (Nebr. 1902) 89 N. W. 1053, 57 L. R. A. 922.

New Jersey.— Linn *v.* O'Neil, 55 N. J. L. 58, 25 Atl. 273; Camden *v.* Allen, 26 N. J. L. 398.

Rhode Island.— *In re* Collection of Poll Tax, 21 R. I. 582, 44 Atl. 805.

South Carolina.— Charleston *v.* Oliver, 16 S. C. 47.

Vermont.— Webster *v.* Seymour, 8 Vt. 135.

Virginia.— Com. *v.* Byrne, 20 Gratt. (Va.) 165.

Contra, Cooper *v.* Savannah, 4 Ga. 68.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½; and, generally, TAXATION.

71. Carlton *v.* Carlton, 44 Ga. 216. But see *Ex p.* Crenshaw, 80 Mo. 447, which holds that while the court may order one into imprisonment until he shall have returned certain property, it cannot fine and imprison him by way of punishment, nor imprison him until he shall have paid the costs of the contempt proceedings, as this would be imprisonment for debt. And see, generally, CONTEMPT.

72. *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207, holding such fine not to be a debt, although it was imposed on a constable for failing to execute process, with the object of securing the payment of the plaintiff's claim.

73. *In re* Blair, 4 Wis. 522.

74. *Iowa.*— Eikenberry *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360; *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Kansas.— *In re* Burrows, 33 Kan. 675, 7

(III) *Refusal to Pay Alimony.* The commitment of a defendant for contempt in refusing to pay alimony or counsel fees in a suit for divorce is not an imprisonment for debt.[75]

(IV) *Refusal to Turn Over Money or Property in Possession.* An order of court requiring one to pay over a specific sum of money or to deliver specific property found to be in his possession or under his control is not an infringement on the constitutional inhibition against imprisonment for debt.[76]

g. Ne Exeat. Arrest under a writ of ne exeat and requirement of bail not to leave the state is not imprisonment for debt.[77]

C. Personal Security. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation;[78] and requires that no person except on impeachment and in cases arising in the military and naval service shall be held to answer for a capital or otherwise infamous crime, or for any offense above the common-law decree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a grand jury; that no person shall be subject for the same offense to be twice put in jeopardy of life or limb; that no person shall be compelled, in any criminal case, to be a witness against himself; that in all criminal prosecutions, the accused is entitled to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the

Pac. 148; State *v.* Burrows, 33 Kan. 10, 5 Pac. 449.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Missouri.— State *v.* Barclay, 86 Mo. 55.

Ohio.— *In re* Concklin, 5 Ohio Cir. Ct. 78.

Wisconsin.— *In re* Milburn, 59 Wis. 24, 17 N. W. 965.

Contra, Ex p. Hardy, 68 Ala. 303, which holds an act unconstitutional which provides that a person may be imprisoned for contempt where, upon a bill for discovery, it appears that he has property liable to the payment of the debt, and he refuses to comply with a decree ordering him to make application thereof to the debt, upon the ground that the legislature has no power to do indirectly that which was directly prohibited by law.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½; and, generally, Executions.

75. *California.*— *Ex p.* Perkins, 18 Cal. 60.

Colorado.— *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222; People *v.* Barton, 16 Colo. 75, 26 Pac. 149.

Florida.— Bronk *v.* State, (Fla. 1901) 31 So. 248.

Georgia.— Lewis *v.* Lewis, 80 Ga. 706, 6 S. E. 918, 12 Am. St. Rep. 281.

Illinois.— Wightman *v.* Wightman, 45 Ill. 167; Barclay *v.* Barclay, 83 Ill. App. 366.

Michigan.— Steller *v.* Steller, 25 Mich. 159.

Minnesota.— Hurd *v.* Hurd, 63 Minn. 443, 65 N. W. 728.

North Carolina.— Pain *v.* Pain, 80 N. C. 322.

Ohio.— Kaderabek *v.* Kaderabek, 3 Ohio Cir. Ct. 419; Stewart *v.* Stewart, 10 Ohio Dec. (Reprint) 662, 23 Cinc. L. Bul. 38.

Contra, Coughlin *v.* Ehlert, 39 Mo. 285; *Ex p.* Gerrish, (Tex. Crim. 1900) 57 S. W. 1123, where it was held that a provision inserted by agreement in a decree for divorce that defendant pay to plaintiff twenty dollars a month for the maintenance of their minor child cannot be enforced by contempt proceedings.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½; and, generally, Divorce.

A money decree for alimony is not a debt, within the constitutional prohibition against imprisonment for debt, but is such an order as will, under Rev. Stat. § 5640, authorizing the punishment as for contempt or disobedience to a lawful order, rule, or command of court, justify punishment for contempt on a wilful failure to comply with the decree. State *v.* Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625.

76. *Georgia.*— Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596; Robinson *v.* Woodmansee, 76 Ga. 830; Smith *v.* McLendon, 59 Ga. 523 (holding that the imprisonment of an attorney at law for contempt in failing to pay over money to his client when ordered is not imprisonment for debt); Remley *v.* De Wall, 41 Ga. 466.

Louisiana.— State *v.* Mauberret, 47 La. Ann. 334, 16 So. 814.

Minnesota.— *In re* Burt, 56 Minn. 397, 57 N. W. 940.

Wisconsin.— Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

United States.— Mueller *v.* Nugent, 184 U. S. 1, 22 S. Ct. 269, 46 L. ed. 405; *In re* Schlesinger, 102 Fed. 117, 42 C. C. A. 207; *In re* Rosser, 101 Fed. 562, 41 C. C. A. 497; Jeffries *v.* Laurie, 27 Fed. 198.

See 10 Cent. Dig. tit. "Constitutional Law," § 151½.

77. Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 193. And see, generally, Ne Exeat.

78. McCarthy *v.* Hinman, 35 Conn. 538, holding constitutional a statute providing that where a minor child is abandoned by the

assistance of counsel for his defense. And as a further guard against abuse and oppression in criminal proceedings, it is declared that excessive bail cannot be required, excessive fines imposed, or cruel and unusual punishment inflicted; nor can any bill of attainder or *ex post facto* law be passed.[79]

D. Religious Liberty and Freedom of Conscience — 1. In General. The federal constitution, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[80] makes no provisions for protecting citizens of the respective states in their religious liberties. That is left to the state to regulate, no inhibition being imposed by the federal constitution on the states in this respect.[81] Accordingly most of the state constitutions guarantee to the individual, irrespective of sect or denomination, protection of the rights of conscience and liberty to worship God according to the dictates of his own conscience.[82]

2. Religious Exercises in Public Schools. This guaranty, however, does not prohibit the use of the bible in public schools or devotional exercises, provided the pupil is not required to join in any ceremony contrary to his or her religious opinions, or those of a parent or guardian;[83] but denominational religious exercises and instruction in sectarian doctrine in the public schools are prohibited.[84]

3. Competency of Atheist as Witness and Qualifications as Guardian. So too the provision of the constitution is not violated by the rejection of a witness as incompetent by reason of his want of religious belief.[85] But under an article providing that no person shall be molested for his opinions, be subject to any civil or political incapacity, or acquire any civil or political advantage in consequence of such opinions, it was held that a person cannot be removed from guardianship of minor children merely because he is an infidel.[86]

4. Police Power.[87] Laws enacted for the purpose of restraining and punishing acts which have a tendency to disturb the public peace or corrupt the public morals, even though such acts may have been done pursuant to, and in conformity with, what was believed at the time to be a religious duty, are not repugnant to the constitutional guaranty of religious freedom. For example, laws against

parent, to be supported by the town, such parent shall be deemed a pauper, and be subject to the same rules and regulations as a pauper.

79. See provisions in United States Constitution and amendments thereto; and the constitutions of the several states and the amendments thereto.

80. U. S. Const. Amendm. 1.

81. Permoli *v.* New Orleans Municipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739. *Contra*, St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

82. See constitutions of the several states.

83. *Illinois.*— North *v.* State University, 137 Ill. 296, 27 N. E. 54.

Iowa.— Moore *v.* Monroe, 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444.

Maine.— Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256, a regulation requiring the reading from the protestant version of the bible.

Massachusetts.— Spiller *v.* Woburn, 12 Allen (Mass.) 127.

Michigan.— Pfeiffer *v.* Board of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536.

Pennsylvania.— Stevenson *v.* Hanyon, 7 Pa. Dist. 585, 9 Kulp (Pa.) 256.

Contra, State *v.* Board School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330, which case, however, was decided under a provision of the constitution which prohibited "sectarian instruction."

See 10 Cent. Dig. tit. "Constitutional Law," § 152; and, generally, Schools and School Districts.

84. Stevenson *v.* Hanyon, 4 Pa. Dist. 395, 16 Pa. Co. Ct. 186, 25 Pittsb. Leg. J. N. S. 381, 1 Lack. Leg. N. (Pa.) 99.

85. Thurston *v.* Whitney, 2 Cush. (Mass.) 104, 110. In this case the court (Wilde, J.) says: "This article has no reference to atheists, and to their competency as witnesses. It was intended to prevent persecution by punishing any one for his religious opinions, however erroneous they might be. But an atheist is without any religion, true or false. The disbelief in the existence of any God is not a religious, but an anti-religious, sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment, as incompetent, would be no violation of this article of the constitution. It is not within its words or meaning." See, generally, Witnesses.

86. Maxey *v.* Bell, 41 Ga. 183. See also, generally, Guardian and Ward.

87. As to police power generally see *supra*, VI.

blasphemy,[88] bigamy,[89] and the playing upon drums and musical instruments in the streets.[90]

5. Legislation in Aid of Religion. The doctrine of religious freedom does not forbid legislation tending to promote religion, or even to advance the interests of a sect or class of religionists;[91] nor is it violated by a statute incorporating a church which had been an "established church" before the Revolution and confirming to it its rights to lands acquired by it as such.[92]

6. Disposition of Property. Nor does the doctrine of religious freedom limit a testator's right to prescribe the purposes for which his property shall be used, as a condition to a legacy.[93]

7. Sunday Laws. Laws against the desecration of the christian Sabbath by labor or sports have been enacted in practically all the states. The constitutionality of such laws has been long established[94] and is not affected by the fact that they may work hardship upon persons whose conscience requires them to observe another day as their Sabbath, or upon persons whose religious sentiments lead them to believe it their duty to labor on the Sabbath.

88. State *v.* Chandler, 2 Harr. (Del.) 553; Com. *v.* Kneeland, 20 Pick. (Mass.) 206; Thatcher Crim. Cas. (Mass.) 346; Muzzy *v.* Wilkins, Smith (N. H.) 1. And see, generally, Blasphemy.

89. Wooley *v.* Watkins, 2 Ida. 555, 22 Pac. 102; Davis *v.* Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. ed. 637; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244. And see, generally, Bigamy.

90. Washburn *v.* Bloomington, 32 Ill. App. 245; Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142; State *v.* White, 64 N. H. 48, 5 Atl. 828. And see, generally, Disorderly Conduct.

91. *Ex p.* Andrews, 18 Cal. 678; Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82. The latter case was decided under an article in the constitution (part 1, art. 6) which permits the legislature to authorize the several towns, parishes, bodies corporate, or religious societies within this State to make adequate provisions, at their own expense, for the support and maintenance of public protestant teachers of piety, religion, and morality; but not to tax those of other sects or denominations for their support. The court held that this constitutional provision did not forbid the legislature to authorize such towns, parishes, etc., to make provision for the support of any other religious teachers besides protestants.

In Illinois it has been held that a statute granting the temporary use of school-houses for religious meetings and Sunday-schools does not violate a constitutional provision to the effect that no one shall be compelled to support a place of worship, and that no preference shall be given by law to any religious denomination or mode of worship. Nichols *v.* School Directors, 93 Ill. 61, 34 Am. Rep. 160.

92. Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

93. Magee *v.* O'Neill, 19 S. C. 170, 45 Am. Rep. 765.

94. *Alabama.*— Frolickstein *v.* Mobile, 40 Ala. 725.

Arkansas.— Scales *v.* State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768.

California.— *Ex p.* Burke, 59 Cal. 6, 43 Am. Rep. 231; *Ex p.* Bird, 19 Cal. 130; *Ex p.* Andrews, 18 Cal. 678. In *Ex p.* Newman, 9 Cal. 502, however, an earlier statute "for the better observance of the Sabbath" was held unconstitutional, and void as discriminating in favor of one religion.

Louisiana.— State *v.* Fernandez, 39 La. Ann. 538, 2 So. 233; State *v.* Judge, 39 La. Ann. 132, 1 So. 437. In these cases the court held that an act requiring the closing of places of business on Sunday does not compel the observance of Sunday as a religious institution and therefore is not in violation of the constitution. And see Minden *v.* Silverstein, 36 La. Ann. 912 (holding that an ordinance regulating the conduct of citizens on Sunday is only sustainable under the constitution as a police regulation); State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224.

Massachusetts.— Com. *v.* Has, 122 Mass. 40.

Minnesota.— State *v.* Ludwig, 21 Minn. 202.

Missouri.— State *v.* Ambs, 20 Mo. 214.

New York.—Neuendorff *v.* Duryea, 69 N. Y. 557, 25 Am. Rep. 235 (holding that the legislature has authority to protect the christian Sabbath from desecration by such laws as it may deem necessary, and is the sole judge of the acts proper to be prohibited with a view to the public peace on that day, and therefore has power to prohibit dramatic performances on Sunday); Lindenmuller *v.* People, 21 How. Pr. (N. Y.) 156.

Pennsylvania.— Specht *v.* Com., 8 Pa. St. 312, 325, 49 Am. Dec. 518; Waldo *v.* Com., 9 Wkly. Notes Cas. (Pa.) 200, 12 Lanc. Bar (Pa.) 60.

South Carolina.— Charleston *v.* Benjamin, 2 Strobh. (S. C.) 508, 49 Am. Dec. 606.

Texas.— Gabel *v.* Houston, 29 Tex. 335.

United States.— Swann *v.* Swann, 21 Fed. 299.

See 10 Cent. Dig. tit. "Constitutional Law," § 154; and, generally, Sunday.

E. Pursuit of Happiness. The right to the pursuit of happiness is guaranteed by the state constitutions and declared to be one of the inalienable rights of individuals. Under these provisions the individual right of self-control can be limited only to that extent which is necessary to promote the general welfare;[95] but if the general welfare requires the prohibition of an act, it may be prohibited even though it does not involve direct and immediate injury to any other than the person who commits it.[96] Included in this right is the right to liberty in the choice of occupation,[97] and to conduct and advertise it in any legitimate manner, subject only to the restraints necessary to secure the common welfare.[98]

F. Right to Acquire, Hold, and Dispose of Property — 1. In General. The right to acquire, hold, and dispose of property is declared by the constitution to be inherent in the individual and inalienable. Any attempt, by statute or ordinance, to interfere with this right is unconstitutional,[99] unless the public

95. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294; Herman *v.* State, 8 Ind. 545 (holding unconstitutional an act forbidding the use of certain liquors as a beverage); Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422; Com. *v.* Isenberg, 4 Pa. Dist. 579, 8 Kulp (Pa.) 116 (in this case an act requiring employers to pay wages twice a month between fixed days was held to be unconstitutional); State *v.* Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600 (holding constitutional an act prohibiting the carrying of deadly weapons and providing that on a prosecution therefor the jury shall acquit if the defendant shall prove "that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives," and that he was carrying the weapon in good faith for self-defense only, believing with good cause that he was in danger of death or great bodily harm at the hands of another person).

96. Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Topeka *v.* Raynor, 60 Kan. 860, 58 Pac. 557; Ah Lim *v.* Territory, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395 (holding constitutional an act prohibiting the smoking of opium); U. S. *v.* Curtis, 12 Fed. 824.

97. *Illinois.*— Bessette *v.* People, 193 Ill. 334, 62 N. E. 215; Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181.

Maine.— Dexter *v.* Blackden, 93 Me. 473, 45 Atl. 525.

New Jersey.—State *v.* Hickman, 63 N. J. L. 666, 44 Atl. 1099 [*affirming* 62 N. J. L. 499, 41 Atl. 942].

New York.— People *v.* Caldwell, 168 N. Y. 671, 61 N. E. 1132 [*affirming* 64 N. Y. App. Div. 46, 71 N. Y. Suppl. 654]; People *v.* Hagan, 35 Misc. (N. Y.) 155, 71 N. Y. Suppl. 461.

United States.—Allgeyer *v.* Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253.

Contra, Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472.

See 10 Cent. Dig. tit. "Constitutional Law," § 155.

98. Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181; Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220 [*affirming* 17 Pa. Super. Ct. 331].

99. *California.*— *Ex p.* Knapp, 127 Cal. 101, 59 Pac. 315.

Indiana.— Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391.

Maine.— Opinion of Justices, 58 Me. 590, holding that the legislature cannot authorize towns to establish manufactories on their own account.

New Jersey.— Bloom *v.* Koch, 63 N. J. Eq. 10, 50 Atl. 621 (the court restraining an obstruction of the right to the influx of light and air by a private person, although compensation could be made in damages); Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.— People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 16 N. Y. St. 185, 4 Am. St. Rep. 465; People *v.* Biesecker, 58 N. Y. App. Div. 391, 68 N. Y. Suppl. 1067, an act making it a misdemeanor for any person who sells food to give away therewith, as a part of the transaction or sale, any other thing as a premium, gift, etc., was held to be unconstitutional.

Ohio.— State *v.* Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409; French *v.* Shirley, 9 Ohio S. & C. Pl. Dec. 181, 7 Ohio N. P. 26.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234.

South Carolina.— Lumb *v.* Pinckney, 21 S. C. 471, in which, however, the court held constitutional an act providing that after final judgment in an action to recover lands, in favor of plaintiff, if defendant has purchased the lands so recovered, supposing that his title was good, he shall be entitled to recover of the plaintiff the full value of all improvements made upon such land.

South Dakota.— Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621.

Texas.— Milliken *v.* Weatherford, 54 Tex. 388, 38 Am. Rep. 629. See, however, Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064.

Vermont.— State *v.* Cadigan, 73 Vt. 245, 50

health, morals, or safety, or the general welfare require such otherwise unwarranted interference.[1]

2. LIBERTY TO CONTRACT. The right to acquire, hold, and dispose of property includes the right to make reasonable and proper contracts;[2] but does not enable a citizen to contract either by himself or his agent in violation of the laws of the state.[3] It does not on the other hand prevent the legislature placing restrictions on the right to contract, when demanded by a sound public policy.[4] It does not interfere with the right of the legislature to pass laws for the protection of individuals or classes of individuals against fraud or unfair dealing,[5] or for the proper

Atl. 1079, 87 Am. St. Rep. 714, 57 L. R. A. 616.

Washington.— State *v.* Moore, 7 Wash. 173, 34 Pac. 461, holding unconstitutional an act prohibiting the recording of a deed unless accompanied by a certificate of the treasurer that all taxes levied on the property according to the books of his office have been paid.

United States.— Mason *v.* Rollins, 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

See 10 Cent. Dig. tit. "Constitutional Law," § 156.

1. *California.*— *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55; Los Angeles County *v.* Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 211.

Illinois.— Hawthorn *v.* People, 109 Ill. 302, 50 Am. Rep. 610; Somerville *v.* Marks, 58 Ill. 371; Stevens *v.* Brown, 58 Ill. 289; Yeazel *v.* Alexander, 58 Ill. 254.

Indiana.— Devin *v.* Scott, 34 Ind. 67 (holding constitutional an act providing for the care and custody of the person and estate of habitual drunkards); Doe *v.* Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732.

Iowa.— Yonngerman *v.* Murphy, 107 Iowa 686, 76 N. W. 648.

Kansas.— Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854.

Maine.— Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639 (holding that the legislature may declare that articles which are injurious to the public health or morals shall not constitute property); Cottrill *v.* Myrick, 12 Me. 222.

Massachusetts.—Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439.

New York.— People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 43 N. Y. St. 654, 27 Am. St. Rep. 612 [*affirming* 61 Hun (N. Y.) 272, 16 N. Y. Suppl. 753, 40 N. Y. St. 861, holding constitutional an act making it a criminal offense for an agent of a life-insurance company to pay a rebate as an inducement to insure in his company]; People *v.* King, 110 N. Y. 418, 18 N. E. 245, 18 N. Y. St. 353, 6 Am. St. Rep 389, 1 L. R. A. 293 (holding constitutional an act providing that no citizen of the state can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of privileges furnished by places of public resort).

Oregon.— Luch *v.* Sears, 29 Oreg. 421, 44 Pac. 693.

Pennsylvania.— McCann *v.* Com., 198 Pa. St. 509, 48 Atl. 470; Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472; Com. *v.* Beatty, 15 Pa. Super. Ct. 5.

United States.— Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 5 McCrary (U. S.) 382, 17 Fed. 419.

See 10 Cent. Dig. tit. "Constitutional Law," § 156.

Cal. Pen. Code, § 626k, enacting that every one who buys, sells, or offers for sale, barter, or trade any quail, is guilty of a misdemeanor, is not violative of the fourteenth amendment of the federal constitution, on the ground that it interferes with the inalienable rights of acquiring, holding, and protecting property. *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177.

2. *Arkansas.*— Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

New York.— People *v.* Coler, 166 N. Y. 144, 59 N. E. 716, 52 L. R. A. 814; Powers *v.* Shepard, 45 Barb. (N. Y.) 524, 1 Abb. Pr. N. S. (N. Y.) 129.

Ohio.— Cox *v.* Pittsburgh, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 594, 1 Ohio N. P. 213.

Pennsylvania.— Com. *v.* Brown, 8 Pa. Super Ct. 339, 43 Wkly. Notes Cas. (Pa.) 69.

Rhode Island.— Andrews *v.* Beane, 15 R. I. 451, 8 Atl. 540.

United States.— Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816; Shaver *v.* Pennsylvania Co., 71 Fed. 931.

See 10 Cent. Dig. tit. "Constitutional Law," § 157.

3. Hooper *v.* People, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297.

4. McFadden *v.* Blocker, 3 Indian Terr. 224, 54 S. W. 873; Adler, etc., Clothing Co. *v.* Corl, 155 Mo. 149, 55 S. W. 1017; Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782; Karnes *v.* American F. Ins. Co., 144 Mo. 413, 16 S. W. 166, holding valid a statute prohibiting limitation of actions within the statutory period by contract.

The prohibition against options to buy or sell grain or other commodities at a future time, which is made by Ill. Crim. Code, § 130, does not invade the liberty granted to every citizen by U. S. Const. Amendm. art. 14. Booth *v.* Illinois, 184 U. S. 425, 22 S. Ct. 425, 46 L. ed. 623 [*affirming* 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 763, 78 Am. St. Rep. 229].

5. Considine *v.* Metropolitan L. Ins. Co.,

regulation and control of common carriers[6] or public service corporations,[7] or of matters which depend upon the bounty of the state.[8] But a statute is void which attempts to regulate the payment of wages or sale of goods to employees,[9]

165 Mass. 462, 43 N. E. 201 (upholding Mass. Stat. (1887), c. 214, § 73, as amended by Mass. Stat. (1892), c. 372, and Mass. Stat. (1893), c. 434, § 1, providing in effect, that in an action on a life policy, where the application is not attached to the policy, and therefore not a part of it, the application is not admissible in evidence, and that oral evidence is not admissible to prove that statements referred to in the policy and material to the risk were untrue); Kriebohns *v.* Yancey, 154 Mo. 67, 55 S. W. 260; Davis *v.* State, 11 Ohio Dec. (Reprint) 894, 30 Cinc. L. Bul. 342 (upholding an act making it unlawful for an employer to attempt, by coercion, to prevent his employee from being a member of a lawful labor organization). See, however, State *v.* Bateman, 10 Ohio S. & C. Pl. Dec. 68, 7 Ohio N. P. 487.

Kan. Laws (1897), c. 265, prohibiting any agreements not to sell or dispose of any articles of commerce or consumption below a common standard figure, to establish the price of any article so as to preclude a free competition in regard thereto, or to pool any interests unlawfully, is not in conflict with a guaranty of right to acquire property by lawful contract, secured by the federal constitution, and is a valid exercise of the legislative power. State *v.* Smiley, 65 Kan. 240, 69 Pac. 199.

Ky. Stat. § 656, providing that no life-insurance company doing business in Kentucky shall make or permit any distinction or discrimination in rates "in favor of individuals between insurants of the same class and equal expectation in life," make any contract of insurance other than is plainly expressed in the policy issued thereon, or allow any rebate of premium, is not unconstitutional, as being in restraint of trade or as preventing competition. Equitable L. Assur. Soc. *v.* Com., 23 Ky. L. Rep. 2359, 67 S. W. 388.

6. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55; Burlington R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436 (in which case, however, it was held that the provision of the Iowa Act (23d Gen. Assemb. c. 17, § 2), that all railway companies in the state shall, upon the demand of any person interested, establish "reasonable joint through rates" between points on their respective lines within the state, and (section 3) that in case of their failure to do so the commissioners shall establish the rate, does not compel the railway companies to enter involuntarily into contractual relations with each other, but merely imposes a duty for the non-performance of which they become liable to have the rates fixed by the commissioners, and to the consequent penalties if they refuse to give effect to the rates thus fixed); Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389.

As to carriers generally see CARRIERS.

7. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201, where the statute fixed maximum charges for the instruments and service of a telephone company. And see State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

8. McGannon *v.* Michigan Millers' Mut. F. Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116 (holding that a foreign corporation cannot by contract avoid the laws of the state); Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657; U. S. *v.* Marks, 2 Abb. (U. S.) 531, 26 Fed. Cas. No. 15,721, 2 Am. L. T. Rep. (U. S. Cts.) 124.

9. *Arkansas.*— Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

Illinois.— Harding *v.* People, 160 Ill. 459, 43 N. E. 624, 52 Am. St. Rep. 344, 32 L. R. A. 445; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492.

Massachusetts.— Com. *v.* Potomska Mills Corp., 155 Mass. 122, 28 N. E. 1128; Com. *v.* Perry, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. Rep. 533, 14 L. R. A. 325.

New York.— People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

Ohio.— *In re* Preston, 63 Ohio St. 428, 59 N. E. 101, 81 Am. St. Rep. 642, 52 L. R. A. 506; State *v.* Norton, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 183.

Pennsylvania.— Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; Com. *v.* Brown, 8 Pa. Super. Ct. 339, 43 Wkly. Notes Cas. (Pa.) 69; Com. *v.* Isenberg, 4 Pa. Dist. 579, 8 Kulp (Pa.) 116.

West Virginia.— State *v.* Fire Creek Coal, etc., Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359. See also State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

See 10 Cent. Dig. tit. "Constitutional Law," § 169.

Contra.— *Arkansas.*— Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

Illinois.— In Jones *v.* People, 110 Ill. 590, a statute providing for a "track" scale to be furnished by the operators of coal mines, and that all coal should be weighed on the scales and the weight so determined should be considered the basis upon which the wages of persons mining coal should be computed, was held to be constitutional. See also

So too statutes have been held void which attempted to regulate the hours of labor for employees.[10]

3. Regulating Occupations and Employment of Labor. The legislature has power to make such reasonable regulations for the conduct of places of business and the employment of labor as the general welfare requires, even though such regulations may interfere with a man's control over his own property.[11]

Whitebreast Fuel Co. *v.* People, 175 Ill. 51, 51 N. E. 853.

Indiana.— In Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576, a statute was held to be constitutional which provided that the wages of miners and certain others should be paid at least once in every two weeks in lawful money of the United States, and also another statute declaring unlawful every contract waiving the benefit of the statute, the court basing its decision, however, on the ground that the acts in question were a proper exercise of the right of the government to devise and establish such rules as in its judgment will best protect the standard of value which its laws have fixed.

Missouri.— See State *v.* Loomis, (Mo. 1892) 20 S. W. 332.

United States.— Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 S. Ct. 1, 46 L. ed. 55 [*affirming* 103 Tenn. 421, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316].

10. *California.*— *Ex p.* Kubach, 85 Cal. 274, 24 Pac. 737, 20 Am. St. Rep. 226, 9 L. R. A. 482.

Colorado.— *In re* Morgan, 26 Colo. 415, 58 Pac. 1071, 77 Am. St. Rep. 269, 47 L. R. A. 52; *In re* Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328.

Illinois.— Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291.

Nebraska.— Low *v.* Rees Printing Co., 41 Nebr. 127, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702.

Ohio.— Wheeling Bridge, etc., R. Co. *v.* Gilmore, 8 Ohio Cir. Ct. 658; State *v.* Norton, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 183.

Washington.— Seattle *v.* Smyth, 22 Wash. 327, 60 Pac. 1120.

See 10 Cent. Dig. tit. "Constitutional Law," § 170.

In New York, however, the court has held that a statute providing that contractors for city work in a certain city shall not accept more than eight hours for a day's work, or employ any man for more than eight hours in twenty-four consecutive hours, except in cases of necessity, is constitutional. People *v.* Beck, 144 N. Y. 225, 39 N. E. 80 [*reversing* 10 Misc. (N. Y.) 77, 30 N. Y. Suppl. 473, 62 N. Y. St. 396]; People *v.* Warren, 77 Hun (N. Y.) 120, 28 N. Y. Suppl. 303, 59 N. Y. St. 857. See also People *v.* Orange County Road Constr. Co., 73 N. Y. App. Div. 580, 77 N. Y. Suppl. 16 [*reversing* 37 Misc. (N. Y.) 341, 75 N. Y. Suppl. 510, 16 N. Y. Crim. 317], holding that N. Y. Pen. Code, § 384*h*, providing that any person or corporation who, contracting with the city or a municipal corporation shall require more than eight hours' work for a day's labor is guilty of a misdemeanor is constitutional.

In Pennsylvania in Com. *v.* Beatty, 15 Pa. Super. Ct. 5, an act was sustained making it criminal to employ an adult female in manufacturing establishments, etc., for more than twelve hours a day or sixty hours a week.

11. Bergman *v.* Cleveland, 39 Ohio St. 651 (holding constitutional an ordinance making it an offense for a liquor-seller to employ female servants in his place of business); State *v.* Considine, 16 Wash. 358, 47 Pac. 755; Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145 (holding constitutional an ordinance prohibiting the doing of work in public laundries in a city between the hours of ten o'clock at night and six o'clock in the morning).

Advertising by circulars is not prohibited by an ordinance forbidding the casting thereof in vestibules of dwellings; addressed envelopes being expressly excepted, and delivery to individuals not being forbidden. Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220 [*affirming* 17 Pa. Super. Ct. 331].

Ticket brokerage.—The fact that some dishonest persons have been engaged in the ticket-brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, does not justify the legislature in depriving every citizen of the liberty to further engage in such business, as attempted by N. Y. Laws (1901), c. 639. People *v.* Caldwell, 168 N. Y. 671, 62 N. E. 1132 [*affirming* 64 N. Y. App. Div. 46, 71 N. Y. Suppl. 654].

For acts held unconstitutional see Wallace *v.* Georgia, etc., R. Co., 94 Ga. 732, 22 S. E. 579 (an act requiring corporations to give their discharged employees the cause of their removal); People *v.* Warren, 13 Misc. (N. Y.) 615, 34 N. Y. Suppl. 942, 69 N. Y. St. 167 (an act making it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer on such works); State *v.* Bateman, 10 Ohio S. & C. Pl. Dec. 68, 7 Ohio N. P. 487 (holding unconstitutional a statute making it unlawful to coerce or attempt to coerce employees by discharging or threatening to discharge them because of their connection with any lawful labor organization); *In re* Sam Kee, 12 Sawy. (U. S.) 379, 31 Fed. 680.

Wis. Rev. Stat. (1898), § 4466b, as amended by Wis. Laws (1899), c. 332, providing that

4. Regulating Trades and Professions. In like manner the state, city, or town has power to make such reasonable provisions for the regulation or control of trades and professions as the health, safety, comfort, or general welfare of the people demands.[12]

5. Regulating Traffic in Intoxicants. The legislature has power to enact such laws as may be necessary and proper to regulate the sale of intoxicating liquors,[13]

no person or corporation shall discharge an employee because he is a member of any labor organization, is void for imposing a restraint on individual freedom, guaranteed by the state and federal constitutions. State *v.* Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748.

12. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328 (where an ordinance prohibiting the sale of meats at retail outside of certain markets was held constitutional); Goldthwaite *v.* Montgomery, 50 Ala. 486 (upholding an act by which all lawyers were required to take out a revenue license); Cousins *v.* State, 50 Ala. 113, 20 Am. Rep. 290.

California.— *Ex p.* Moynier, 65 Cal. 33, 2 Pac. 728.

Connecticut.— State *v.* Wordin, 56 Conn. 216, 14 Atl. 801.

Iowa.— State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

Louisiana.—Allopathic State Bd. Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809.

Missouri.—State *v.* Addington, 12 Mo. App. 214.

New Hampshire.— State *v.* Freeman, 38 N. H. 426.

New Jersey.—Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942.

New York.— People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 54 N. Y. St. 431, 36 Am. St. Rep. 668 [*affirming* 63 Hun (N. Y.) 306, 18 N. Y. Suppl. 25, 43 N. Y. St. 427]; Niagara Falls *v.* Salt, 45 Hun (N. Y.) 41.

Pennsylvania.— Com. *v.* Vrooman, 164 Pa. St. 306, 35 Wkly. Notes Cas. (Pa.) 97, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250 [*reversing* 3 Pa. Dist. 340]; Kussel *v.* Erie, 8 Pa. Dist. 105.

South Carolina.— Byrne *v.* Stewart, 3 Desauss. (S. C.) 135.

Texas.— Newson *v.* Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; Petterson *v.* Board of Pilot Com'rs, 24 Tex. Civ. App. 33, 57 S. W. 1002; Davidson *v.* Sadler, 23 Tex. Civ. App. 600, 57 S. W. 54.

See 10 Cent. Dig. tit. "Constitutional Law," § 166.

Horseshoeing.— Ill. Laws (1897), p. 233, requiring all persons practising horseshoeing in the state, with the exception of persons specified in section 4, to work four years at the business, to be examined by a board of examiners, and to obtain a license from such board as a condition precedent to the right to practise such business, being a regulation of such business, and not imposed for revenue, is repugnant to Ill. Const. (1870), art. 2, § 1, guaranteeing the preservation of the inalienable rights of liberty and pursuit of happiness. Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

Medicine.—Kan. Laws (1901), c. 254, establishing a state board of medical registration and examination, is not unconstitutional as operating to exclude some persons from following their chosen avocations. State *v.* Wilcox, 64 Kan. 789, 68 Pac. 634.

For ordinances and statutes held unconstitutional because unreasonable restraints upon business see Thomas *v.* Hot Springs, 34 Ark. 553, 36 Am. Rep. 24; *Ex p.* Sing Lee, 96 Cal. 354, 31 Pac. 245, 31 Am. St. Rep. 218, 24 L. R. A. 195; Bessette *v.* People, 193 Ill. 334, 62 N. E. 215.

13. *Connecticut.*— State *v.* Wheeler, 25 Conn. 290.

Dakota.— Minnehaha County *v.* Champion, (Dak. 1888) 37 N. W. 766; Territory *v.* O'Connor, (Dak. 1888) 37 N. W. 765, where a local option law was sustained.

Indiana.— Haggart *v.* Stehlin, (Ind. 1892) 29 N. E. 1073 [*overruling* Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391], holding that the liquor business, being a pursuit which is hurtful to the community, the right to conduct such a business is not an inherent attribute of personal liberty.

Iowa.— Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606; *In re* Ruth, 32 Iowa 250.

Kentucky.— Powers *v.* Com., 90 Ky. 167, 11 Ky. L. Rep. 964, 13 S. W. 450, where a law prohibiting the giving of intoxicating liquor by one person to another is held to be with the police power.

Maine.— Dexter *v.* Blackden, 93 Me. 473, 45 Atl. 525; Lunt's Case, 6 Me. 412.

Massachusetts.— Com. *v.* Clapp, 5 Gray (Mass.) 97; Com. *v.* Blackington, 24 Pick. (Mass.) 352.

Ohio.—Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683, where a statute creating a lien on the realty upon which a saloon is established for the amount of the license is upheld.

Pennsylvania.—Altenburg *v.* Com., 126 Pa. St. 602, 24 Wkly. Notes Cas. (Pa.) 145, 17 Atl. 799, 4 L. R. A. 543.

South Carolina.— State *v.* Chester, 18 S. C. 464.

See 10 Cent. Dig. tit. "Constitutional Law," § 167; and, generally, Intoxicating Liquors.

and may even totally prohibit individuals from engaging in either the manufacture or sale of intoxicating liquors.[14]

6. REGISTRATION ACTS. The property rights guaranteed by the constitutions are not infringed by provisions made for the reasonable protection of purchasers of property, such as is afforded by registration acts.[15]

7. LICENSE-TAXES. Neither are such rights infringed by an act authorizing cities to impose license-taxes on business occupations.[16]

8. PROHIBITING PEDDLING. Nor are they violated by laws making reasonable regulations for the use of streets of cities or of towns, although they indirectly interfere with the purchase and sale of goods.[17]

9. REGULATING DISPOSITION OF PROPERTY BY WILL. The right to dispose of property by will is a legislative, not a natural, right. Hence the legislature has power to prescribe the formalities to be observed in the execution of a will, and the condition to which it shall be subject.[18]

10. CREATION OF LIENS AND OTHER INVOLUNTARY LIABILITIES. Statutes giving mechanics' liens upon real or personal property, for work done or materials furnished to the owner or his agent, are not in violation of the property rights guaranteed by the constitutions.[19] But statutes which have given such liens to subcontractors and laborers have been held to be void.[20]

11. AUTHORIZING MUNICIPAL AID TO RAILROADS. It has generally been held that

14. State *v.* Allmond, 2 Houst. (Del.) 612; People *v.* Gallagher, 4 Mich. 244; State *v.* Clark, 28 N. H. 176, 61 Am. Dec. 611; State *v.* Aiken, 42 S. C. 222, 231, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410], where the court laid down the following principles: "(1) That liquor, in its nature, is dangerous to the morals, good order, health and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. (2) That the State, under its police power, can itself assume entire control and management of those subjects, such as liquor, that are dangerous to the peace, good order, health, morals and welfare of the people, even when trade is one of the incidents of such entire control and management on the part of the State." But in Clinton *v.* Phillips, 58 Ill. 102, 11 Am. Rep. 52, however, a city ordinance prohibiting the sale of intoxicating liquors, and permitting druggists to sell the same for sacramental, chemical, mechanical, or medical purposes, but requiring them under a heavy penalty to furnish to the city clerk a statement in writing of the kind and quantity thereof, and when and to whom sold, verified by the oath of every servant in the druggist's employ, was held to be an invasion of the sanctity of private business.

15. Van Husan *v.* Heames, 96 Mich. 504, 56 N. W. 22 (holding constitutional an act prohibiting the recording of a deed until a certificate from the auditor-general or from the county treasurer is presented as to any tax liens or tax-titles held against the land conveyed, and showing that all taxes have been paid for the five preceding years, etc. *Contra*, Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643 (upholding an act regulating conditional sales of personal property, and providing for filing instruments pertaining to the same, and making a violation thereof a misdemeanor); State *v.* Moore, 7 Wash. 173, 34 Pac. 461). And see, generally, CHATTEL MORTGAGES; DEEDS; MORTGAGES; RECORDS.

16. St. Louis *v.* McCann, 157 Mo. 301, 57 S. W. 1016; Knisely *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86; *In re* Oliver, 21 S. C. 318, 53 Am. Dec. 681. And see, generally, LICENSES.

17. Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Com. *v.* Gardner, 133 Pa. St. 284, 25 Wkly. Notes Cas. (Pa.) 462, 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666. And see, generally, HAWKERS AND PEDDLERS.

18. *In re* McCabe, 68 Cal. 519, 9 Pac. 554; Patton *v.* Patton, 39 Ohio St. 590, holding constitutional an act providing that a bequest by a testator, leaving issue living, to any religious or charitable purpose, shall be void if made within twelve months of the testator's death. See also Brettun *v.* Fox, 100 Mass. 234; and, generally, WILLS.

19. Hicks *v.* Murray, 43 Cal. 515; Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621. And see, generally, LIENS; MECHANICS' LIENS; and like titles.

20. Palmer *v.* Tingle, 55 Ohio St. 423, 45 N. E. 313, 9 Ohio Cir. Ct. 708; McMaster *v.* West Chester State Normal School, 162 Pa. St. 260, 29 Atl. 734; Waters *v.* Wolf, 162 Pa. St. 153, 34 Wkly. Notes Cas. (Pa.) 409, 29 Atl. 646, 42 Am. St. Rep. 815; Lee *v.* Lewis, 13 Pa. Co. Ct. 567, 7 Kulp (Pa.) 164; McMasters *v.* West Chester Normal School, 2 Pa. Dist. 753, 13 Pa. Co. Ct. 481; Jones *v.* Great Southern Fireproof Hotel Co., 79 Fed. 477. *Contra*, Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Henry, etc., Co. *v.* Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332. See also Gibbs *v.* Tally, 133 Cal. 373, 65 Pac. 970.

statutes allowing municipalities to aid (by subscribing for stock) in the construction of railroads and similar improvements, which, by terminating in or running through the municipality, or by being links in lines or routes of transportation that do thus terminate or run, will, as it is supposed, benefit the municipality, and to tax private property for this purpose, are constitutional and valid.[21]

12. CIVIL DAMAGE ACTS. The fundamental rights of private property guaranteed by the constitution are not violated by statutes which provide for the recovery of damages for the death of a person in certain cases by any person dependent on the deceased for support.[22]

13. RESTRAINTS OF MARRIED WOMEN. The legislature may, however, it is held, impose limitations upon the rights of married women in connection with property.[23]

G. Freedom of Speech and of the Press — 1. IN GENERAL. The constitution of the United States and the state constitutions guarantee the right of freedom of speech and liberty of the press, and congress has power, under the fourteenth amendment, to protect this right by appropriate legislation.[24] Most of the constitutions, however, provide expressly that persons exercising this freedom shall be responsible for its abuse; and even where there is no such provision in the constitution, it is universally conceded that there is some limitation of the right of free speech and free press. Such limitation is fixed by common-law principles and statutory declarations of the police power.[25]

2. LIBEL AND SLANDER. Accordingly libel laws and the punishment of libel and slander do not infringe this constitutional right.[26]

3. STATUTORY PROHIBITIONS. Nor do statutes required to protect the public morals or general welfare of the people infringe this constitutional right.[27]

21. Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759. *Contra*, Griffith *v.* Crawford County, 20 Ohio Appendix 1. And see, generally, RAILROADS.

22. Bedore *v.* Newton, 54 N. H. 117. And see, generally, DEATH; INTOXICATING LIQUORS.

23. Todd *v.* Clapp, 118 Mass. 495. In this case, however, the point in dispute was whether a statute enacting that the provisions of the general statutes "authorizing a married woman to carry on any trade or business on her sole and separate account, shall be so construed as not to allow her to enter into copartnership in business with any person," was an attempted exercise by the legislature of the judicial power in determining the construction of a statute. And the court interpreting it as wholly prospective in its operation, and intended to change the existing law, held it to be constitutional. And see, generally, HUSBAND AND WIFE.

24. U. S. *v.* Hall, 26 Fed. Cas. No. 15,282, 3 Chic. Leg. N. 260, 13 Int. Rev. Rec. 181.

25. See the provisions of the constitutions of the several states; and, generally, NEWSPAPERS.

The publisher of an article instigating revolution and murder, suggesting the persons to be murdered, through the positions they occupy, and which denounces those who spare the ministers of public justice as guilty of a crime, is not protected by Const. § 8, art. 1, providing that every citizen may freely speak, write, and publish his views on all subjects, being responsible for the abuse of that right, and that no law shall be passed to abridge the liberty of speech or of the press. People *v.* Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 [*affirming* 71 N. Y. App. Div. 160, 75 N. Y. Suppl. 591 (*affirming* 36 Misc. (N. Y.) 139, 73 N. Y. Suppl. 220)].

26. Morton *v.* State, 3 Tex. App. 510; Arnold *v.* Clifford, 2 Sumn. (U. S.) 238, 1 Fed. Cas. No. 555. And see, generally, LIBEL AND SLANDER.

27. *Connecticut.*— State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; State *v.* Sykes, 28 Conn. 225, a statute making it a criminal offense to publish any proposal to sell or procure lottery tickets.

Kansas.— *In re* Banks, 56 Kan. 242, 42 Pac. 693.

Louisiana.— State *v.* Goodwin, 37 La. Ann. 713.

Missouri.— State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127.

Montana.— State *v.* Faulds, 17 Mont. 140, 42 Pac. 285, a statute making the publication of a false and grossly inaccurate report of the proceedings of any court a contempt and criminal offense.

North Carolina.— State *v.* Warren, 113 N. C. 683, 18 S. E. 498, a statute making it unlawful to use profane language to the disturbance of the peace.

New York.— Hart *v.* People, 26 Hun (N. Y.) 396, a statute prohibiting the publication "of an account of any such illegal lottery, game or device, stating when and where the same is to be drawn or the prizes

4. Contempt. The constitutional guaranty presents no barrier to the exercise by courts of power to punish as for contempt one who publishes improper articles concerning a case in litigation.[28]

5. Injunctions to Prevent Abuse of the Right. It is still, however, uncertain whether the attempt to prevent rather than to punish abuses of speech or publication is constitutional.[29]

6. Private Contracts. The constitutional guaranty does not prohibit individuals voluntarily contracting among themselves for a limitation of their constitutional right.[30]

7. Regulating Use of Public Places. Nor does this constitutional guaranty prevent the government regulating the use of places wholly within its control.[31]

8. Taxing and Licensing. Nor does this constitutional guaranty prevent taxing newspapers or licensing any occupation which the general welfare requires to be under the control of the government.[32]

therein, . . . or where any ticket may be obtained therein, or in any way aiding the same."

United States.— U. S. *v.* Harmon, 45 Fed. 414, holding constitutional a statute prohibiting the use of the mails for obscene matter.

See 10 Cent. Dig. tit. "Constitutional Law," § 172.

Limits of rule.— In Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158, it was held that the right to criticize judicial conduct is included in the right of free speech and free press. And a statute making certain provisions for the confinement of the insane, and their detention until discharged in one of certain modes, none of which could be resorted to by the person confined directly, as of right, in his own behalf, was held to be unconstitutional in *In re* Doyle, 16 R. I. 537, 18 Atl. 159, 27 Am. St. Rep. 759, 5 L. R. A. 359. So in *Ex p.* Neill, 32 Tex. Crim. 275, 22 S. W. 923, 40 Am. St. Rep. 776, a city ordinance declaring a certain newspaper a public nuisance and forbidding its sale in the city was held to be unconstitutional. In *Re* Jackson, 96 U. S. 727, 24 L. ed. 877, it was held that regulations against transporting in the mail printed matter which is open to examination cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When therefore printed matter is excluded from the mail, its transportation in any other way cannot be forbidden by congress.

28. Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; State *v.* Rosewater, 60 Nebr. 438, 83 N. W. 353; State *v.* Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717. But in State *v.* Eau Claire County Cir. Ct., 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554, the publication of articles reflecting on the impartiality and honesty of a judge in the trial of cases already disposed of was held not to be a contempt. And see, generally, Contempt.

29. The following cases sustain attempts to prevent such abuses: Shoemaker *v.* South Band Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332; Flint *v.* Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243 (holding, however, that the fact of libel or slander must first be found by a jury, and then an injunction would be granted to restrain any further publication); Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803. The following cases hold the opposite view: Dailey *v.* San Francisco, 112 Cal. 94, 44 Pac. 458, 53 Am. St. Rep. 160, 32 L. R. A. 273; Life Assoc. of America *v.* Boogher, 3 Mo. App. 173; New York Juvenile Guardian Soc. *v.* Roosevelt, 7 Daly (N. Y.) 188; Doff *v.* Doll, 9 Ohio Dec. (Reprint) 428, 13 Cinc. L. Bul. 335. And see, generally, Injunctions.

Under Mo. Bill of Rights, § 14, guaranteeing to every person freedom to say, write, or publish whatever he will on any subject, being responsible for the abuse of that liberty, the right to speak, write, and publish is privileged against interference therewith by injunction, and its exercise for the purpose of boycotting the business of individuals cannot be restrained, although the privilege is abused, and plaintiffs, owing to the insolvency of defendants, are without an adequate remedy at law. Marx & Haas Jeans Clothing Co. *v.* Watson, 168 Mo. 133, 67 S. W. 391, 90 Am. St. Rep. 440, 56 L. R. A. 951.

30. Matthews *v.* New York Associated Press, 136 N. Y. 333, 662, 32 N. E. 981, 50 N. Y. St. 9, 49, 32 Am. St. Rep. 741 [*affirming* 61 Hun (N. Y.) 199, 15 N. Y. Suppl. 887, 40 N. Y. St. 593, holding that a by-law of the Associated Press providing that no member "shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose" is not in violation of the constitutional guaranty of free press]; Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

31. U. S. *v.* Newton, 20 D. C. 226; Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712, sustaining a city ordinance prohibiting the making of addresses in a public park.

32. *Iowa.*— State *v.* Bair, 92 Iowa 28, 60 N. W. 486, sustaining a statute providing that an itinerant vendor of any drug, who

H. Right of Assembly and Petition — 1. IN GENERAL. The right of assembly and petition is guaranteed by the constitutions, which secure to every person, natural or artificial, the right to apply to any department of the government for the redress of grievances, or the bestowal of a right, and also guarantee the enjoyment of such redress or right, when obtained, free from all penalty for having sought or obtained it.[33] This right does not relieve the persons joining in a petition from responsibility for charges made therein.[34] It is not violated by ordinances or rules making reasonable regulations for the use of places within the control of the government.[35]

2. SCOPE OF CONSTITUTIONAL GUARANTY. The first amendment to the national constitution, prohibiting congress from abridging the right to assemble and petition, was not intended to limit the action of the state governments in respect to their own citizens, but to operate upon the national government alone, guaranteeing the continuance of the right only against congressional interference.[36]

VIII. VESTED RIGHTS.

A. Definition. Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.[37]

B. Power to Divest. A state has no right to divest vested rights,[38] whether such attempt be made by legislative enactment[39] or by a change in the constitu-

shall by writing, printing, or any other method publicly profess to treat disease, shall pay a license.

Louisiana.— New Orleans *v.* Crescent Newspaper, 14 La. Ann. 804, sustaining a tax on capital invested in a newspaper.

South Carolina.— *In re* Jager, 29 S. C. 438, 7 S. E. 605.

Texas.— Thompson *v.* State, 17 Tex. App. 253.

Virginia.— Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

United States.— Preston *v.* Finley, 72 Fed. 850.

See 10 Cent. Dig. tit. "Constitutional Law," § 172.

33. Britton *v.* Board of Election, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; Louisiana Citizens' Bank *v.* Orleans Parish Bd. Assessors, 54 Fed. 73.

34. Vanarsdale *v.* Laverty, 69 Pa. St. 103.

35. Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79.

36. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

37. Cooley Const. Lim. 332 [*cited* in People *v.* Adirondack R. Co., 39 N. Y. App. Div. 34, 56, 56 N. Y. Suppl. 869; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 673, 16 S. Ct. 705, 40 L. ed. 838].

Other definitions are: "An immediate fixed right of present or future enjoyment." Fearne Cont. Rem. 1 [*cited* in Marshall *v.* King, 24 Miss. 85, 90; Clarke *v.* McCreary, 12 Sm. & M. (Miss.) 347, 353; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 673, 16 S. Ct. 705, 40 L. ed. 838].

"An immediate right of present enjoyment or a present fixed right of future enjoyment." 4 Kent Comm. 202 [*cited* in Marshall *v.* King, 24 Miss. 85, 90; Clarke *v.* McCreary, 12 Sm. & M. (Miss.) 347, 353; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 673, 16 S. Ct. 705, 40 L. ed. 838].

"Rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality." Grinder *v.* Nelson, 9 Gill (Md.) 299, 309, 52 Am. Dec. 694.

"Rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them." Moore *v.* State, 43 N. J. L. 203, 243, 39 Am. Rep. 558.

"Where a man has power to do certain actions, or to possess certain things, according to the laws of the land." Eakin *v.* Raub, 12 Serg. & R. (Pa.) 330, 360.

"The privilege to enjoy property legally vested, to enforce contracts, and enjoy the rights of property conferred by the existing law." Fisher's Negroes *v.* Dabbs, 6 Yerg. (Tenn.) 119, 154.

"A title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment of a demand or a legal exemption from a demand made by another." Cooley Const. Lim. 359 [*cited* in Richardson *v.* Akin, 87 Ill. 138, 140; Toronto *v.* Salt Lake County, 10 Utah 410, 417, 37 Pac. 587].

"The right the person has, in whom it vests, to do certain acts, or to possess, occupy, own, or enjoy, certain things, or to ask, demand, recover, and receive, certain things, according to the law of the land at the time." Martindale *v.* Moore, 3 Blackf. (Ind.) 275, 282.

38. Story Comm. on Const. § 1957.

39. *Alabama.*— Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

tion of the state.[40] If an act is within the legislative power, however, it is not a valid objection to it that it divests vested rights. Retrospective laws[41] divesting vested rights, unless *ex post facto*[42] or impairing the obligations of contracts,[43] are not within the prohibition of the United States constitution, however repugnant to the principles of sound legislation.[44]

C. How Divested — 1. Destruction of Property. Vested rights may be divested not only by a change of the title to the property, but also by the destruction of the property itself.[45]

2. Forfeiture and Transfer by State. Vested rights may be divested by forfeiture[46] and transfer of private property by the state.[47]

D. Application to Particular Rights — 1. In General. The term "vested rights" relates to property rights only,[48] and does not apply to personal rights. There is therefore no vested right in requirements for admission to the bar,[49] in a certificate of identification,[50] or in the right of a parent to the custody of children.[51] So there is no vested right in exemptions from public service,[52] such as

California.— Billings *v.* Hall, 7 Cal. 1.

Illinois.— Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553; Naught *v.* Oneal, 1 Ill. 36.

Iowa.—Davis *v.* O'Ferrall, 4 Greene (Iowa) 168; Wright *v.* Marsh, 2 Greene (Iowa) 94; Webster *v.* Reid, Morr. (Iowa) 467.

Louisiana.— State *v.* New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168.

Maine.— Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

Maryland.— McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41.

Mississippi.— Clarke *v.* McCreary, 12 Sm. & M. (Miss.) 347; Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9; Davis *v.* Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.

New Hampshire.— Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131.

New Jersey.— James *v.* Dubois, 16 N. J. L. 285; Den *v.* Robinson, 5 N. J. L. 807.

New York.— Benson *v.* New York, 10 Barb. (N. Y.) 223; People *v.* Westchester County, 4 Barb. (N. Y.) 64; Varick *v.* Briggs, 6 Paige (N. Y.) 323.

North Carolina.— Houston *v.* Bogle, 32 N. C. 496.

Pennsylvania.— Lane *v.* Nelson, 79 Pa. St. 407; Lambertson *v.* Hogan, 2 Pa. St. 22; Dillon *v.* Dougherty, 2 Grant (Pa.) 99.

South Carolina.— Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

Tennessee.— Anderson *v.* Weakley, Cooke (Tenn.) 410.

Texas.— Morris *v.* State, 62 Tex. 728; De Cordova *v.* Galveston, 4 Tex. 470. But see McMullen *v.* Hodge, 5 Tex. 34.

West Virginia.— Johnson *v.* Sanger, 49 W. Va. 405, 38 S. E. 645.

Wisconsin.— State *v.* Atwood, 11 Wis. 422.

See 10 Cent. Dig. tit. "Constitutional Law," § 175.

40. Berry *v.* Bellows, 30 Ark. 198.

A state constitution cannot divest rights which have already vested under the statute of limitations. Grigsby *v.* Peak, 57 Tex. 142.

41. See *infra*, X.

42. See *infra*, X, C.

43. See *infra*, IX.

44. Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Bonaparte *v.* Camden, etc., R. Co., Baldw. (U. S.) 205, 3 Fed. Cas. No. 1,617; Bennett *v.* Boggs, Baldw. (U. S.) 60, 3 Fed. Cas. No. 1,319; Albee *v.* May, 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134.

45. Cash *v.* Whitworth, 13 La. Ann. 401, 71 Am. Dec. 515.

46. State *v.* Rum, 51 N. H. 373, holding, however, that a statute is not void for omitting to designate the mode of disposal after forfeiture.

47. Society for Propagation of Gospel *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

48. Wood *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105.

Inchoate rights which have not been acted on are under legislative control. People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513.

49. *In re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519, holding that a law student has neither a vested nor an inchoate right to be admitted to the bar, by meeting the requirements in force when he began his studies. But see *In re* Applications, etc., 14 S. D. 429, 85 N. W. 992, where it was held that persons already admitted to practice have a vested right of which they cannot be deprived by statute. See, generally, Attorney and Client, 4 Cyc. 898.

50. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068.

51. Bennet *v.* Bennet, 13 N. J. Eq. 114. See also Parent and Child.

52. Exemption from public service in accordance with the provisions of a statute is not a right vested by contract which the legislature may not violate or impair, but such exemption is a gratuitious privilege revokable at the will of the legislature that granted it. Daly *v.* Harris, 33 Ga. Suppl. 38.

jury duty,[53] military service,[54] or working on public roads.[55] Moreover there can be no vested right to do wrong, none to violate a moral duty, or to resist the performance of a moral obligation.[56] So too there can be no vested right in an existing law, which precludes its change or repeal, nor in any omission to legislate which will exempt a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority.[57]

2. Rights of Property — a. Accounting by Trustee. An act granting a right to an accounting from a trustee is not unconstitutional as impairing vested rights.[58]

b. Administration Proceedings.[59] Neither the personal representatives of a decedent nor his creditors obtain such an interest in his real estate on his death as precludes the legislature from repealing statutes authorizing sales to be made by executors or administrators for the payment of debts.[60] So a statute as to priority of payment out of the assets of a decedent is merely a direction to the administrator, and may be changed by the legislature at any time.[61]

c. Betterment Laws. A statute allowing the value of his improvements to one ejected from land occupied by him under color of title is constitutional, even as to its provision giving compensation for improvements made before its enactment,[62] and one who has acquired a right to the payment of the value of his

53. Dunlap *v.* State, 76 Ala. 460; Scranton's Appeal, 74 Ill. 161; *In re* Powell, 5 Mo. App. 220. But see *Ex p.* Goodin, 67 Mo. 637. See, generally, Juries.

54. *Alabama.*— *Ex p.* Tate, 39 Ala. 254.

Georgia.— Swindle *v.* Brooks, 34 Ga. 67; Daly *v.* Harris, 33 Ga. Suppl. 38.

Massachusetts.— Com. *v.* Bird, 12 Mass. 443.

North Carolina.—Gatlin *v.* Walton, 60 N. C. 325.

South Carolina.— *Ex p.* Graham, 13 Rich. (S. C.) 277.

Texas.— *Ex p.* Mayer, 27 Tex. 715.

Virginia.— Burroughs *v.* Peyton, 16 Gratt. (Va.) 470.

See 10 Cent. Dig. tit. "Constitutional Law," § 178.

55. *Ex p.* Thompson, 20 Fla. 887.

56. Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694.

57. Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70. See also Wood *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105.

License to sell liquor.—No one has a vested right to have issued to him a license to sell intoxicating liquors. Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

Public improvements.— Complainants, lot-owners, were served with certain notice to rebuild their walk within thirty days. They let a contract for a new tar walk and proceeded to provide a foundation therefor. Before anything further was done, and only a few days later, the common council passed an ordinance which had been pending, extending the stone-walk district so as to cover complainants' lots. Complainants were immediately notified that they must build a stone walk in accordance with the ordinance. The work done on the foundation of the tar walk could have been utilized for the stone walk. It was held that complainants acquired no vested rights to construct a tar walk. Scribner *v.* Grand Rapids, 119 Mich. 188, 77 N. W. 699.

58. Knight *v.* Lasseter, 16 Ga. 151 (holding an act extending to a trustee the right which the *cestui* has to an accounting from a prior trustee is not unconstitutional as depriving the *cestui* of any vested rights); Keene's Appeal, 64 Pa. St. 268.

59. See, generally, Executors and Administrators.

60. Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609; Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496.

Time of sale.— An act limiting the time within which real estate of a decedent may be sold to pay debts or claims against him, not liens before his death, is not unconstitutional merely because a case might occur in which a creditor would lose his right of recourse to the real estate, as this could hardly occur without dilatoriness on the part of the creditor. *In re* Ackerman, 33 Minn. 54, 21 N. W. 852.

Insolvent estates.— A statute providing, in reference to insolvent estates of decedents, that when the amount of the estate shall be used up in the payment of funeral expenses and the allowance to the widow, the administrator shall be wholly discharged from all claims which the creditors of the deceased may otherwise have against such estate is constitutional. Longfellow *v.* Patrick, 25 Me. 18.

61. McLure *v.* Melton, 24 S. C. 559, 58 Am. Rep. 272.

62. *Arkansas.*— Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

Indiana.—Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374.

Iowa.— Childs *v.* Shower, 18 Iowa 261.

Kansas.— Claypoole *v.* King, 21 Kan. 602.

Minnesota.— Madland *v.* Benland, 24 Minn. 372.

Ohio.— McCoy *v.* Grandy, 3 Ohio St. 463.

improvements cannot be divested of that right by a repeal of the act.[63] The legislature may also prospectively determine that a tenant for life shall have the right to make permanent improvements upon the estate and receive compensation for the value of them, although a retroactive law to that effect would be unconstitutional as an impairment of vested rights.[64]

d. Exemption Laws. The exemption privileges of a debtor are not vested rights.[65] Thus a homestead exemption is not such a vested right as cannot be impaired by subsequent legislation.[66] Again an exemption from taxation does not confer a vested right. It may therefore be modified by the legislature.[67]

e. Insolvency Laws. An insolvent has no vested right to a discharge on filing a petition, and therefore acts passed after the petition is filed providing a discharge in insolvency shall be refused on certain conditions are constitutional;[68]

Tennessee.— Bristoe *v.* Evans, 2 Overt. (Tenn.) 341.

Texas.— Saunders *v.* Wilson, 19 Tex. 194, 201; Scott *v.* Mather, 14 Tex. 235. But see Hearn *v.* Camp, 18 Tex. 545.

Contra, Billings *v.* Hall, 7 Cal. 1; Newton *v.* Thornton, 3 N. M. 189, 5 Pac. 257; Society for Propagation of Gospel *v.* Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156.

See 10 Cent. Dig. tit. "Constitutional Law," § 202.

An act which gives the occupying claimant the option either to take the land and pay the amount of its valuation, without the improvement, or to take pay for his improvements, is unconstitutional as impairing vested rights. McCoy *v.* Grandy, 3 Ohio St. 463. But see Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266, holding that a statute providing that a successful plaintiff in ejectment shall at his election either pay the occupant the present value of his improvements or convey title to him and receive in return the value of the land as of the date at which the occupant entered thereon is a valid exercise of legislative power. See also Madland *v.* Benland, 24 Minn. 372.

Where a party brought ejectment before the passage of an act providing for the payment for *bona fide* improvements made by occupying tenants, plaintiff's right to have the suit determined according to the existing rules of law and equity is a vested one, and the act does not apply. Johnson *v.* Rowland, Ky. Dec. 77.

63. Worthen *v.* Ratcliffe, 42 Ark. 330; Fisher *v.* Cockerill, 5 T. B. Mon. (Ky.) 129. See also Craig *v.* Dunn, 47 Minn. 59, 49 N. W. 396; Flynn *v.* Lemieux, 46 Minn. 458, 49 N. W. 238, holding that under the occupying claimant's law the failure of the claimant to pay into court the assessed value of the occupant's improvements within one year from the rendition of the verdict or finding in favor of such claimant not only barred his remedy, but extinguished his right of property, the title to which thereafter vested in the adverse occupant, although no judgment had been entered in the action. Hence a law, amendatory of this law, and providing for payment within one year from the entry of the judgment, in so far as it is made to apply retroactively to such cases, is invalid.

64. Austin *v.* Stevens, 24 Me. 520.

65. Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312; Bull *v.* Conroe, 13 Wis. 233; and, generally, EXEMPTIONS.

66. *California.*— Noble *v.* Hook, 24 Cal. 638.

Georgia.— Harris *v.* Glenn, 56 Ga. 94.

Illinois.— Mooney *v.* Moriarty, 36 Ill. App. 175.

Massachusetts.— Wildes *v.* Vanvoorhis, 15 Gray (Mass.) 139.

Mississippi.— Massey *v.* Womble, 69 Miss. 347, 11 So. 188.

North Carolina.— Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312.

Tennessee.—Parker *v.* Savage, 6 Lea (Tenn.) 406.

Wisconsin.— Bull *v.* Conroe, 13 Wis. 233.

See 10 Cent. Dig. tit. "Constitutional Law," § 205; and, generally, HOMESTEADS.

67. *Iowa.*— Shiner *v.* Jacobs, 62 Iowa 392, 17 N. W. 613.

Kentucky.— Owensboro Deposit Bank *v.* Daviess, 102 Ky. 174, 19 Ky. L. Rep. 248, 39 S. W. 1030, 1041.

Maryland.— State *v.* Northern Cent. R. Co., 90 Md. 447, 45 Atl. 465.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 22 So. 824, 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

New York.— People *v.* Board of Assessors, 84 N. Y. 610.

West Virginia.— Prohasco *v.* Moundsville, 11 W. Va. 501.

United States.— Citizens' Sav. Bank *v.* Owensboro, 173 U. S. 636, 19 S. Ct. 530, 43 L. ed. 840.

See 10 Cent. Dig. tit. "Constitutional Law," § 206; and, generally, TAXATION.

Inheritance tax.— An act subjecting property to a collateral inheritance tax, although applicable by its terms to property of a decedent who died before its passage, is not unconstitutional. Short's Estate, 16 Pa. St. 63. See also Matter of Vanderbilt, 50 N. Y. App. Div. 246, 63 N. Y. Suppl. 1079, holding that an act imposing a tax on the right to succession derived from the exercise of a power of appointment, created before such act was passed, did not deprive the appointees of any vested right.

68. *In re* Lane, 3 Metc. (Mass.) 213, holding that acts refusing a discharge in insol-

and statutes providing that every sale or conveyance made by a debtor within a certain period before an assignment for the benefit of creditors shall be void if such debtor was insolvent at the time are not unconstitutional as impairing vested rights.[69]

f. Laws Authorizing Sale of Land. The legislature may pass acts authorizing the sale of land and interests therein, in cases where it is necessary for the quieting of titles and for the benefit of those concerned if no vested rights are impaired.[70] Thus an act authorizing the sale of the real estate of a minor, where the interest of such minor will be promoted by the sale, does not impair or lessen the property of the minor, but merely authorizes a change in the character of the estate.[71] So the legislature has the power to authorize a sale of property in which there is an estate in expectancy contingent on the happening of certain events.[72]

g. Laws Changing Nature and Tenure of Estates. The legislature has no power to alter or destroy by statute the nature or tenure of estates.[73] So where a

vency where a debtor has given a preference within a certain time before petition filed are constitutional. See, generally, INSOLVENCY.

Preferences to employees.— An act providing that when the business of any person shall be suspended by the action of creditors, debts owing to employees not exceeding fifty dollars each, for work done within the six months next preceding the seizure of the property, shall be treated as preferred debts is not unconstitutional. Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342.

69. *In re* Summers, 10 Ohio S. & C. Pl. Dec. 301.

70. Kneass' Appeal, 31 Pa. St. 87.

An act validating previous sales of land by executors under powers in wills probated in other states is a proper exercise of legislative power. De Zbranikov *v.* Burnett, 10 Tex. Civ. App. 442, 31 S. W. 71.

As against an heir or devisee who is sui juris an act authorizing the sale of an estate by an administrator or executor is invalid, as the estate is vested and subject to the owner's control (Brenham *v.* Story, 39 Cal. 179; Kneass' Appeal, 31 Pa. St. 87), unless such statute was in force at the time the intestate or testator died, in which case the property of the heir or devisee vests subject to this power (*In re* Porter, 129 Cal. 86, 61 Pac. 659).

Defunct corporation.— A law authorizing the sale of lands of a corporation which had dissolved is not unconstitutional as depriving a person of possible reverter. Bass *v.* Roanoke Nav., etc., Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247.

Insolvent estates.— A special act of the legislature authorizing administrators of an insolvent estate to convey lands in payment of debts is not unconstitutional. Langdon *v.* Strong, 2 Vt. 234.

Joint tenancy, tenancy in common, or coparcenary.— An act authorizing the superior court as a court of equity, to order a sale of any real estate and of any rights therein, held in joint tenancy, tenancy in common, or coparcenary, whenever partition cannot be conveniently made in any other way, and to distribute the proceeds, is not unconstitutional, as destroying any vested rights in such real estate, since it merely affords a reasonable remedy for its enjoyment by partition. Richardson *v.* Monson, 23 Conn. 94; Biddle *v.* Starr, 9 Pa. St. 461.

71. Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87; Kneass' Appeal, 31 Pa. St. 87; Estep *v.* Hutchman, 14 Serg. & R. (Pa.) 435; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; and, generally, INFANTS.

72. Varble *v.* Phillips, 14 Ky. L. Rep. 363, 20 S. W. 306; Sohier *v.* Massachusetts Gen. Hospital, 3 Cush. (Mass.) 483; Brevoort *v.* Grace, 53 N. Y. 245; Norris *v.* Clymer, 2 Pa. St. 277; Blagge *v.* Miles, 1 Story (U. S.) 426, 3 Fed. Cas. No. 1,479, 4 Law Rep. 256. But see Saxton *v.* Mitchell, 78 Pa. St. 479, holding that where under the provisions of the law the testator's property passed to the heirs subject to an easement in a religious corporation, under which it was entitled to use a part of the property for a certain religious purpose, an act authorizing the courts to direct the sale of land, and with the proceeds purchase a more suitable place for religious meetings, was unconstitutional, as destroying vested rights of heirs. See, generally, ESTATES.

Estate tail.— A special act authorizing the sale of certain lands in which an estate tail was limited is constitutional. Comstock *v.* Gay, 51 Conn. 45; Carroll *v.* Olmsted, 16 Ohio 251; De Mill *v.* Lockwood, 3 Blatchf. (U. S.) 56, 7 Fed. Cas. No. 3,782.

Life-estate and remainder.— Provisions for a proceeding by the owner of a life-estate in possession to have the same sold with the estate in remainder, in so far as they apply to estates created subsequent to their passage, are not unconstitutional as invading the rights of private property. Nimmons *v.* Westfall, 33 Ohio St. 213. See also Gillespie *v.* Allison, 115 N. C. 542, 20 S. E. 627, holding that an act providing that the existence of a life-estate in land shall not bar a sale for partition does not impair the rights of a remainderman whose interest in the land was acquired before the passage of the act.

73. Dewey *v.* Lambier, 7 Cal. 347; and, generally, ESTATES.

right[74] or title has once been acquired by adverse possession it cannot be taken away, either by the repeal of the statute limiting the time within which a suit for the recovery of the premises is barred,[75] or by a change in the requirements necessary to constitute adverse possession.[76] Again while an act of the legislature curing a prior defective conveyance is valid as against the owner, his heirs or assigns,[77] it cannot affect the title of a subsequent *bona fide* purchaser, since it would operate to divest vested rights.[78] The legislature, however, has the power to change a joint tenancy into a tenancy in common as the value of an estate is thereby increased.[79]

h. Laws Regulating Medium of Payment. Where the medium of payment

By statutes of interpretation.—A legislative interpretation changing titles, founded on existing statutes, is subject to every objection which lies to an *ex post facto* law, since it would destroy the rights already acquired under the former statutes by one made subsequent to the time when they become vested. Turner *v.* Turner, 4 Call (Va.) 234.

74. Woolever *v.* Stewart, 36 Ohio St. 146, 38 Am. Rep. 569, holding that where a right to maintain a dam became vested by adverse possession an act requiring the owner to put in a chute or passageway for fish is unconstitutional.

75. Morford *v.* Cook, 24 Pa. St. 92; Parish *v.* Eager, 15 Wis. 532; Knox *v.* Cleveland, 13 Wis. 245; Webster *v.* Cooper, 14 How. (U. S.) 488, 14 L. ed. 510.

Where no private rights are impaired, an act authorizing a court to vacate ways existing by prescription or lapse of time is not unconstitutional. *In re* Stuber, 28 Pa. St. 199.

76. Kennebec *v.* Laboree, 2 Me. 275, 11 Am. Dec. 79; Thistle *v.* Frostburg Coal Co., 10 Md. 129. But see McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. 744, holding that adverse possession for ten years after passage of Wash. Code (1881) is sufficient to bar recovery, although the right of action accrued prior thereto, when the statute required adverse possession for twenty years.

Right to set-off.— An act giving a *bona fide* occupant of land under an adverse claim of title the right to set off the value of all permanent improvements made by him on good faith is not unconstitutional as interfering with vested rights. Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934.

77. Assignee with notice.— Where a mortgage trust deed was given to a foreign corporation which had no legal capacity to take it the mortgagor's assignee of the equitable interest under the deed, thus having notice of the equities of the parties, acquires no such vested right as will defeat the application of an act which retrospectively validated the mortgage by endowing the mortgagee with legal capacity to take it. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

Rights of persons applying for passage of act.— An act curing an invalid deed is not unconstitutional if it affects the vested rights of no person except those who applied for its passage. Caverow *v.* Mutual Ben. L. Ins. Co., 52 Pa. St. 287.

A law making deeds evidence, although defectively acknowledged, is not unconstitutional as destroying vested rights. Reid *v.* Hart, 45 Ark. 41; Williams *v.* Robson, 6 Ohio St. 510; Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387.

78. Newman *v.* Samuels, 17 Iowa 528; Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76; Wright v. Rogers, 9 Gill & J. (Md.) 181; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

In construing acts intended to validate existing mortgages, the courts may properly consider the equities of the parties affected, and where the act is clearly in the interests of justice they should construe the legislative powers liberally to uphold them. Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900.

Rights acquired after passing of validating act.— An act validating defective acknowledgments of deeds does not impair the rights of a person acquiring a lien on the premises conveyed after the taking effect of the act. Ferguson *v.* Williams, 58 Iowa 717, 13 N. W. 49. Nor does an attachment made after the recording of a mortgage but prior to the passage of the curative act give a vested right which will prevent such act taking effect. Steers *v.* Kinsey, 68 Ark. 360, 58 S. W. 1050. See also Murphy *v.* Farmers', etc., Bank, 131 Cal. 115, 63 Pac. 368.

79. Miller *v.* Miller, 16 Mass. 59; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243. See also Miller *v.* Dennett, 6 N. H. 1090. But see *contra,* Dewey *v.* Lambier, 7 Cal. 347. See, generally, JOINT TENANCY; TENANCY IN COMMON.

Destruction of right of survivorship.— The legislature may destroy the right of survivorship in joint tenants, as it is a mere contingency destructible by either joint tenant. Bambaugh *v.* Bambaugh, 11 Serg. & R. (Pa.) 191. But see *contra,* Greer *v.* Blanchar, 40 Cal. 194.

Making owners in severalty owners in common.— Since owners of land on a meandered, non-navigable stream or dried-up lake own the bed thereof in severalty, a statute declaring them to be owners thereof in common is unconstitutional as impairing vested rights. Shell *v.* Matteson, 81 Minn. 38, 83 N. W. 491; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825.

is designated by statute the right to receive it is a vested right, and an act providing for payment in another medium is unconstitutional.[80]

i. Laws Regulating and Taxing Trades and Professions. There is no infringement of vested rights by acts regulating and taxing trades and professions,[81] where such acts are a valid exercise of the police power of a sovereignty.[82] Therefore acts regulating the practice of medicine,[83] the sale of liquor,[84] and the business of plumbing,[85] as well as laws imposing a license-tax on attorneys[86] and theaters[87] are constitutional. Such acts, however, must be confined to police power and not deprive individuals or corporations of any of their essential rights and privileges.[88]

j. Lien Laws. Acts creating a lien cannot be construed retroactively because they would defeat vested rights.[89] But in the case of purely remedial statutes, where no alteration in the right is proposed further than to give an additional remedy there is no objection on the ground of divesting vested rights.[90] A lien

80. People *v.* Riggs, 56 Ill. 483. But see State *v.* Clinton, 26 La. Ann. 561, holding that a statute authorizing the payment by the state in the form of bonds for work on the levees of the state is not unconstitutional as divesting vested rights. See, generally, PAYMENT.

81. Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

82. As to police power see *supra*, VI.

83. People *v.* Moorman, 86 Mich. 433, 49 N. W. 263; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623; and, generally, PHYSICIANS AND SURGEONS.

84. State *v.* Allmond, 2 Houst. (Del.) 612; Stickrod *v.* Com., 86 Ky. 285, 9 Ky. L. Rep. 563, 5 S. W. 580; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224; State *v.* Stovall, 103 N. C. 416, 8 S. E. 900; and, generally, INTOXICATING LIQUORS.

Sale on Sunday may be prohibited. People *v.* Griffin, 1 Ida. 476; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224.

Liquors acquired before passage of act.— In Wynehamer *v.* People, 13 N. Y. 378, it was held that an act imposing a punishment on persons selling liquors in small quantities is unconstitutional as to liquors which were owned by a party prior to the passage of the act, in that it interferes with the right to dispose of and sell property which was lawfully acquired.

85. People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 64 N. Y. St. 51, 27 L. R. A. 718.

86. *Ex p.* Williams, 31 Tex. Crim. 262, 20 S. W. 580, 21 L. R. A. 783; and ATTORNEY AND CLIENT, 4 Cyc. 898.

87. Charity Hospital *v.* De Bar, 11 La. Ann. 385; Charity Hospital *v.* Stickney, 2 La. Ann. 550; and, generally, THEATERS AND SHOWS.

Opening on Sunday.— An act forbidding theaters from being open on Sunday is not unconstitutional as an interference with vested rights. Lindenmuller *v.* People, 33 Barb. (N. Y.) 548.

88. *Ex p.* Koehler, 23 Fed. 529, holding that while the legislature may prescribe rates of transportation its power to do so is qualified so that it cannot impair or destroy any vested or corporate rights by providing for inadequate rates. See also Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679, holding that an act establishing a railroad commission with power to regulate the rates, the method of running the road, and to inform the corporation as to what improvements and changes it deems proper is void as disturbing vested right in the railroads to manage their own business affairs

89. Albertson *v.* Landon, 42 Conn. 209; Young *v.* Jones, 180 Ill. 216, 54 N. E. 235 (a statute giving a mechanic's lien); Schell *v.* Michener, 2 Wkly. Notes Cas. (Pa.) 379; Day *v.* Pickett, 4 Munf. (Va.) 104; and, generally, LIENS.

90. Bolton *v.* Johns, 5 Pa. St. 145, 47 Am. Dec. 404.

Illustrations.— An act empowering a court of chancery to order the property of an insolvent corporation, encumbered by liens, to be sold clear of encumbrances does not take away a vested right but merely provides a remedy. Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395. And if taxes are unpaid and there is no change of ownership, it is competent for the legislature to revive a lien which has lapsed or create a new lien, no right of third persons having intervened. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363. So if a surety's right to relief is a subsisting one, an act authorizing a judgment debtor, who is surety only, to revive the judgment after it has become dormant does not impair or divest any vested right of the principal debtor. Peters *v.* McWilliams, 36 Ohio St. 155.

Order of sale under liens.— An act providing the order in which several tracts subject to a lien shall be sold is constitutional as to all proceedings after its passage, although the lien accrued before. Phelps' Appeal, 98 Pa. St. 546.

Priority of liens.— An act giving a mechanic's lien for improvements a preference over an existing mortgage, unless the mortgagee shall within a given time give notice that he will not be responsible for such improvements is not unconstitutional, as disturbing a vested interest by compelling the

once given by law is, however, a vested right which cannot be affected by subsequent legislation.[91]

k. Property or Rights of Corporations and of Stock-Holders Therein — (i) *In General.* Under the reserved power to amend corporate charters, the legislature cannot divest property or rights which have become vested.[92] So the lien of a corporation on the shares of its stock-holders for debts due it, being a vested right, is not divested by the repeal of the act creating it.[93] The rights of corporations and the interest of stock-holders are, however, like the rights of individuals, subject to police power,[94] and statutes regulating the sale and disposition of

mortgagee to enforce his lien before he is required to do so by law. Hicks *v.* Murray, 43 Cal. 515.

91. *Illinois.*— Hughes *v.* Russell, 43 Ill. App. 430.

Iowa.— Hannahs *v.* Felt, 15 Iowa 141.

Louisiana.— Sabatier *v.* His Creditors, 6 Mart. N. S. (La.) 585.

Mississippi.— Leak *v.* Cook, 52 Miss. 799.

New Jersey.— Coddington *v.* Beebe, 29 N. J. L. 550.

South Carolina.— King *v.* Belcher, 30 S. C. 381, 9 S. E. 359.

Texas.— Handel *v.* Elliott, 60 Tex. 145.

Washington.—Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

Wisconsin.— Streubel *v.* Milwaukee, etc., R. Co., 12 Wis. 67.

United States.— State Trust Co. *v.* Kansas City, etc., R. Co., 115 Fed. 367; Harris *v.* The Henrietta, 11 Newb. Adm. 284, 11 Fed. Cas. No. 6,121.

Contra, Frost *v.* Ilsley, 54 Me. 345; Bangor *v.* Goding, 35 Me. 73, 56 Am. Dec. 688; Hanes *v.* Wadly, 73 Mich. 178, 41 N. W. 222, 2 L. R. A. 498; Bailey *v.* Mason, 4 Minn. 546. See also Capron *v.* Strout, 11 Nev. 304, holding that the repeal of a mechanic's lien law by a substitute containing all the essential provisions of it should not be construed as impairing existing rights created under the old law.

See 10 Cent. Dig. tit. "Constitutional Law," § 236; and, generally, LIENS.

92. Savannah *v.* Georgia Steam Boat Co., R. M. Charlt. (Ga.) 342; Plymouth *v.* Jackson, 15 Pa. St. 44; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; Chicago, etc., R. Co. *v.* Minnesota Cent. R. Co., 4 McCrary (U. S.) 606, 14 Fed. 525; San Mateo County *v.* Southern Pac. R. Co., 13 Fed. 722. And see Yale College *v.* Sanger, 62 Fed. 177, holding that the title which Yale College has under the contract with the state of Connecticut securing to said corporation the income of the fund derived from the avails of land script donated under the act of congress of July 2, 1862, which were invested in bonds and constituted a separate fund, is a vested right in such securities, and the state treasurer may be enjoined from a threatened diversion of the income under the authority of an unconstitutional statute. See, generally, CORPORATIONS.

Forfeiture without notice.— A statute providing for the licensing of foreign corporations to do business in the state on certain conditions, and for forfeiting and revoking such a license for condition broken, is not unconstitutional as disturbing vested rights, in that it does not provide for notice to the company to be affected by the revocation or allow it a hearing. The company accepts the license *cum onere*, and runs the risk of a summary revocation *ex parte*. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

A statute directing that the proceeds arising from the lease or sale of a railroad shall, after paying corporate debts, be applied in payment of municipal bonds given for corporate stock issued to the municipality is unconstitutional, as interfering with the vested right of stock-holders. Hill *v.* Glasgow R. Co., 41 Fed. 610.

Where right to repeal is reserved.— The general assembly having reserved the right to alter or repeal the charters of banks, an act requiring banks of the commonwealth to go into liquidation does not impair any vested right of such banks. Robinson *v.* Gardiner, 18 Gratt. (Va.) 509.

93. H. W. Wright Lumber Co. *v.* Hixon, 105 Wis. 153, 80 N. W. 1110, 1135. See also Deal *v.* Singletary, 105 Ga. 466, 30 S. E. 765; Scribner *v.* Grand Rapids, 119 Mich. 188, 77 N. W. 699; State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; State *v.* King County Super. Ct., 21 Wash. 186, 57 Pac. 337.

Where stock-holders are individually liable for corporate debts.— Under a statute providing that stock-holders shall be individually liable for debts, the right of a creditor against any of the individual stock-holders is not vested until he recovers a judgment against them. Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

94. Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 114. See also Wilson *v.* Com., 7 Bush (Ky.) 536, holding that an act imposing a penalty upon officers of a company who shall pass cattle or teams through any of the toll-gates without payment of tolls did not impair any of the vested rights of such officers to the free use of the road.

Making corporations guilty of conspiracy. —An act providing that any corporation or individual who shall enter into any pool or trust with any other corporation or individual to fix the price or premium to be paid for insuring property or to maintain prices when so fixed shall be deemed guilty of conspiracy and shall forfeit their rights to do business in the state does not deprive an in-

the franchises and privileges of insolvent corporations,[95] as well as statutes requiring railroads to fence their tracks[96] and to construct crossings,[97] or regulating the rate of speed of railroad trains,[98] are constitutional.

(II) *Franchises and Privileges.* Where a grant of a franchise or privilege has been accepted and acted on by a corporation it becomes a vested right and cannot be subsequently impaired,[99] except by a valid exercise of the police power.[1] But where such a grant has not been acted on[2] or where acts remain to be performed before certain corporate powers granted to individuals can be exercised, the grant of the powers does not become a vested right till the acts are performed, and the franchise remains in abeyance.[3]

l. Property or Rights of States or Municipal Corporations and Vested Interests of Individuals Therein — (I) *Of States.* A retroactive law passed by a state legislature operating on property belonging to the state is not unconstitutional so long as private rights are not infringed.[4]

(II) *Of Municipal Corporations* — (A) *In General.* The rights and fran-

surance company which had complied with the laws of the state as they existed before its enactment of any vested right. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

95. Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. (Ky.) 165; Mudge *v.* New Orleans Exchange, etc., Co., 10 Rob. (La.) 460.

Reorganization.— A statute withdrawing right of bondholders to reorganize, in case of foreclosure of a railroad under a mortgage, except on condition of submission to rates of transportation fixed by the statute, is not an impairment of property rights, even in case of a mortgage already given; reorganization being only part of the remedy of the bondholder, and not being essential to enable the purchaser at foreclosure sale to operate the road in accordance with the franchise of the original company. Railroad Com'rs *v.* Grand Rapids, etc., R. Co., (Mich. 1902) 89 N. W. 967.

96. New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195.

97. Pittsburg, etc., R. Co. *v.* South West Pennsylvania R. Co., 77 Pa. St. 173.

98. Erb *v.* Morasch, 8 Kan. App. 61, 54 Pac. 323.

99. Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 21 N. J. Eq. 550; Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127.

Power given in charter.— A general power given a railroad, by its charter, to consolidate with, purchase, lease, or acquire the stock of other roads may, while it remains unexecuted, be limited by the legislature, without impairing any vested right, to cases where the other roads are not parallel or competing. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838 [*reversing* 73 Fed. 933].

Right granted by charter indefinite.— The ordinance of a city that no car, engine, or carriage of any kind belonging to, or used by, a certain railroad shall be drawn or propelled upon that part of their railroad on a certain street does not impair any vested right of the company under its charter, which authorized it to construct a railroad "over some point within the corporation to be approved by the common council," since such power to approve implies the power to reject one location and accept another, and this carries with it the further power to reserve control in respect to the road when built. Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

1. New Orleans *v.* Faber, 105 La. 208, 29 So. 507, 83 Am. St. Rep. 232, 53 L. R. A. 165 (prohibiting private markets within a certain distance of the public market); Northwestern Telephone Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 176.

2. Muskogee Nat. Telephone Co. *v.* Hall, (Indian Terr. 1901) 64 S. W. 600.

3. Williams *v.* State, 23 Tex. 264.

The fact that money has been spent vests no right in the applicant for corporate powers previous to its having secured the consent of the legal authorities. *In re* New York Cable R. Co., 40 Hun (N. Y.) 1.

Grant of immunity.— Where there is a general law prohibiting lotteries, and the legislature passes a special act authorizing one, it is a grant of an immunity which may be taken away where rights have not vested thereunder. Bass *v.* Nashville, Meigs (Tenn.) 421, 33 Am. Dec. 154.

4. Lewis *v.* Turner, 40 Ga. 416; Union Parish Soc. *v.* Upton, 74 Me. 545, holding that legislation which diverts the proceeds of sales of lands reserved for public uses from the ministerial fund to the fund for public schools, in cases where the fee of the land has not vested in any beneficiary, is constitutional.

Allowing appeal against state.— A resolution of the general assembly, allowing an appeal to be taken against the state after expiration of the statutory time therefor, is constitutional, no private rights being impaired thereby. People *v.* Frisbee, 26 Cal. 135; State *v.* Dexter, 10 R. I. 341.

A grant of the right of the state to personal property is not unconstitutional, al-

chises of a municipality are not vested rights such as cannot be interfered with by the legislature,[5] unless rights of property have become vested thereunder.[6] Thus a general law which in its operation may change existing settlements of paupers, and thereby impose a new duty and charge on towns, is regarded as valid, since it does not impair private interests, and relates to a subject of public concern.[7]

(B) *Disposition of Public Funds.* The right of a municipality in the disposition of public funds is subject to legislative control.[8] The legislature may therefore divert funds payable to a county or municipality before they have been appropriated or any right acquired thereunder.[9]

though individuals are in possession, claiming it as their own. Kershaw *v.* Boykin, 1 Brev. (S. C.) 301.

5. Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748. See also East Hartford *v.* Hartford Bridge Co., 17 Conn. 79. But see Guilford *v.* Cornell, 18 Barb. (N. Y.) 615.

Dissolution of village.— Under a constitutional provision that corporations may be formed under general laws, and that all general laws passed pursuant to that section may be altered from time to time or repealed, the legislature may authorize the dissolution of a village, even though rights acquired under acts incorporating it are thereby injuriously affected. Blauvelt *v.* Nyack, 9 Hun (N. Y.) 153.

Right to change boundaries of school district.— A school district has no such vested rights as to prevent a change of its boundaries without notice and a hearing before some tribunal. Board of School Com'rs *v.* Centre Tp., 143 Ind. 391, 42 N. E. 808; School Dist. No. 57 *v.* Board of Education, 16 Kan. 536.

Right to grant liquor licenses.— A municipal corporation has no vested right either to grant licenses for the sale of liquor or to the money received from them, by virtue of its charter of incorporation, which the legislature may not take away. State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

6. Grogan *v.* San Francisco, 18 Cal. 590; St. Louis *v.* Russell, 9 Mo. 507; Benson *v.* New York, 10 Barb. (N. Y.) 223; Bass *v.* Fontleroy, 11 Tex. 698.

Rights in ferries.— A charter granting a municipal corporation the right and power to establish ferries and to hold them with the revenues and tolls forever, when acted on, gives such municipality and its citizens vested rights which cannot be taken away by the legislature. Benson *v.* New York, 10 Barb. (N. Y.) 223. But see East Hartford *v.* Hartford Bridge Co., 17 Conn. 79.

Rights in school lands.— A statute attempting to take from a county land acquired for educational purposes and to vest it in settlers on the land is unconstitutional, as impairing the vested rights of the county. Milam County *v.* Bateman, 54 Tex. 153. But see Baker *v.* Dunning, 77 Tex. 28, 13 S. W. 617, holding that a constitutional provision giving to actual settlers on school lands the right of preëmption is not repugnant to the constitution of the United States, as being an infringement of the vested right of the counties.

Right to collect taxes.— Where a tax has become due, the right to collect it is a vested right, which cannot be affected by subsequent legislation. Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; *In re* Wolfe, 66 Hun (N. Y.) 389, 21 N. Y. Suppl. 515, 522, 50 N. Y. St. 115, 122, 29 Abb. N. Cas. (N. Y.) 340; Galbraith *v.* Com., 14 Pa. St. 258. See also Favrot *v.* East Baton Rouge, 34 La. Ann. 491, holding that the right of a judgment creditor of a parish to have a tax levied for the payment of his judgment is a vested one, which cannot be destroyed by subsequent legislation. But see Mobile, etc., R. Co. *v.* Peebles, 47 Ala. 317.

7. Appleton *v.* Belfast, 67 Me. 579; Endicott *v.* Hopkinton, 125 Mass. 521; Exeter *v.* Stratham, 2 N. H. 102. See also Pembroke *v.* Epsom, 44 N. H. 113, holding that where the cause of action for supplies for a pauper has accrued, an act abolishing the settlement cannot be construed as an implied intention to impair the vested right in the cause of action. But see Brunswick *v.* Litchfield, 2 Me. 28, which holds that where the marriage of a pauper was made valid by a resolve of the legislature, the derivative settlement which she thus acquired could not operate to oblige the town, thus newly charged with her maintenance, to pay for her support, before the passing of the resolve, without disturbing vested rights.

8. Marion County *v.* Lear, 108 Ill. 343.

9. Sanilac County *v.* Alpin, 68 Mich. 659, 36 N. W. 794; Hannibal *v.* Marion County, 69 Mo. 571; State *v.* Graham, 16 Nebr. 74, 19 N. W. 470; Cage *v.* Hogg, 1 Humphr. (Tenn.) 48.

Moneys collected.— Where a law authorizes taxes to be levied and collected and directs the purposes thereof the money is not so vested as to be beyond legislative control. The legislature may authorize a different disposition and such legislation may apply to moneys already collected but not paid over. Farwell *v.* Benevolent Assoc. of Paid Fire Dept., 4 Ill. App. 36; Taggart *v.* State, 142 Ind. 668, 40 N. E. 260, 42 N. E. 352; State *v.* St. Louis County Ct., 34 Mo. 546; Conner *v.* Bent, 1 Mo. 235; State *v.* Swift, 11 Nev. 128; Richland County *v.* Richland Center, 59 Wis. 591, 18 N. W. 497. But see Fisher *v.* New Orleans Bd. of School Directors, 48 La. Ann. 1077, 20 So. 163; Mobile, etc., R. Co.

(III) *Bounties and Pensions.* No person has a vested right to have a pension.[10] It is therefore competent for congress to provide that a person receiving a pension under a special act shall not receive in addition a pension under a general law,[11] and when a pension has been once granted the legislature may reduce or take it away entirely.[12] Nor has any person a vested right to a bounty [13] until it has been earned.[14]

(IV) *Claimants and Creditors*—(A) *In General.* Where rights have become vested in a claim against a municipality subsequent acts disallowing such claim are unconstitutional.[15] So where a state or municipality has collected [16] or been authorized to collect taxes to pay creditors whose rights have become fixed, such creditors have a vested right in the funds which cannot be affected by legislative act.[17] Again if bonds have been issued under authority given by statute, the subsequent repeal of such statute cannot affect the vested rights which a *bona fide* purchaser has acquired.[18]

(B) *Corporations Granted Municipal Aid.* When a statute authorizes the levy of taxes in aid of a corporation, a subsequent statute taking away such authority, is not unconstitutional as impairing a vested right in the corporation to have the benefit of the tax,[19] even though mandamus proceedings to compel payment have been begun.[20] But where rights of property have vested under such an act its repeal is inoperative.[21]

v. State, 51 Miss. 137; Yazoo *v.* State, 48 Miss. 440; Aberdeen Female Academy *v.* Aberdeen, 13 Sm. & M. (Miss.) 545.

Sum to be forfeited.— Where by statute a certain sum was to be forfeited to a county if a railroad company did not locate its road in a certain manner, a subsequent act remitting and releasing the penalty is constitutional, as well after a forfeiture as before, and after commencement of suit to recover the penal sum, as neither the county nor its citizens acquired a vested right to it. Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534, 11 L. ed. 714.

10. Chalk *v.* Darden, 47 Tex. 438; U. S. *v.* Teller, 107 U. S. 64, 2 S. Ct. 39, 27 L. ed. 352; and, generally, Pensions.

11. U. S. *v.* Teller, 107 U. S. 64, 2 S. Ct. 39, 27 L. ed. 352.

12. State *v.* Farley, 12 Ohio Cir. Dec. 273. See also Kavanagh *v.* Board of Police Pension Fund Com'rs, 134 Cal. 50, 66 Pac. 36, holding that an act providing that on the death of a police officer the city and county treasurer shall pay a certain sum to his legal representatives out of a fund created by such act does not create a vested right in such sum during the life of such officers.

13. Pennie *v.* Reis, 80 Cal. 266, 22 Pac. 176; Jefferson County *v.* Hudson, 20 Kan. 71.

14. *In re* Canfield, 98 Mich. 644, 57 N. W. 807; East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82; People *v.* Board of State Auditors, 9 Mich. 327; *In re* Opinion of Justices, 45 N. H. 590; Calder *v.* Henderson, 54 Fed. 802, 4 C. C. A. 584.

An act providing for the payment of local bounties pledged to volunteers under calls of the president does not impair any vested rights. State *v.* Harris, 17 Ohio St. 608.

15. State *v.* Cathers, 25 Nebr. 250, 41 N. W. 182. But see Parker *v.* Buckner, 67 Tex. 20, 2 S. W. 746, where it was held that an act providing that if certain claims are not presented to the several commissioners' courts within six months after the act goes into effect they shall be barred is not unconstitutional, as taking away vested rights.

16. Laforge *v.* Magee, 6 Cal. 650; Shields *v.* Chase, 32 La. Ann. 409.

17. State *v.* Kispert, 21 Wis. 387.

Acts authorizing taxpayers to secure obligations of municipality and use them as a set-off.— A state law which authorizes a person owing taxes to a municipal corporation to procure obligations of the municipality and use them as a set-off against his own debt is not unconstitutional, as divesting creditors of the municipality of vested rights. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 5 S. Ct. 895, 29 L. ed. 172.

18. Marsh *v.* Little Valley, 1 Hun (N. Y.) 554.

Right to have warrant received for taxes.— The holder of a territorial warrant which under the statute may be received for taxes has no such vested rights as to prevent the repeal of the statute. Langford *v.* King, 1 Mont. 33. See also Paulsen *v.* Rogers, 32 Gratt. (Va.) 654.

19. Aspinwall *v.* Daviess County, 22 How. (U. S.) 364, 16 L. ed. 296. See also Phalen *v.* Com., 1 Rob. (Va.) 713.

20. Covington, etc., R. Co. *v.* Kenton County Ct., 12 B. Mon. (Ky.) 144; Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

21. Gibbes *v.* Greenville, etc., R. Co., 13 S. C. 228.

Rights of taxpayers under acts authorizing a levy in aid of corporations.— Where a statute authorizes a municipality to purchase bonds in aid of a corporation, upon proof of consent of a majority of taxpayers, a subsequent act validating such purchase without reference to the sufficiency of proofs made is not invalid as interfering with vested rights

(v) *Contracts For Public Works.* Where a statute requires that the notice inviting proposals for the execution of the work of a street improvement should be posted for a certain period of time, and such notice is posted for a less time, it is a violation of the statute affecting the substantial rights of the persons interested, and rendering all subsequent proceedings void.[22]

(vi) *Escheated Property.* Statutes fixing the times within which claimants to property may assert their rights are not constitutional when vested rights are impaired.[23] Where therefore the beneficial interest in an escheated estate has vested such interest cannot be recalled.[24]

(vii) *Fish and Game Laws.* Acts for the preservation of fish or game are not unconstitutional, as depriving persons of vested rights, so far as they relate to fish caught or game killed after they are passed.[25]

(viii) *Highways and Bridges.*[26] The regulation of highways and bridges is entirely within legislative control.[27] The legislature may therefore vacate streets without interfering with any vested rights of the public.[28] No regulations, however, are constitutional which impair vested rights.[29]

of the taxpayers. Duanesburgh *v.* Jenkins, 57 N. Y. 177; People *v.* Mitchell, 45 Barb. (N. Y.) 208. And an act directing an assignment to a railroad company of the assessments made under a previous act for the benefit of such company is valid, as in no way affecting the rights of the owners of the lands assessed, since it was immaterial whether the money was first paid into the treasury and then to the company or paid to the company directly. Litchfield *v.* Vernon, 41 N. Y. 123.

22. Hewes *v.* Reis, 40 Cal. 255.

23. Louisville Bank *v.* Board of Trustees Public Schools, 83 Ky. 219, holding that an act providing that money on deposit, the last owner of which had not been heard from in eight years, should vest in the commonwealth, and that the receipt of the auditor or the judgment of the court should be a full acquittance to the person surrendering the property is unconstitutional, as depriving the depositor and depositary of vested rights.

24. Atty.-Gen. *v.* Providence, 8 R. I. 8; Harvey *v.* Harvey, 25 S. C. 283; and, generally, Escheat.

Escheated property vested in state.—Where by the constitution escheated property vests in the state for the benefit of the school fund, subsequent legislation cannot divest it. State *v.* Mayer, 63 Ind. 33; State *v.* Reeder, 5 Nebr. 203. But see *In re* Sticknoth, 7 Nev. 223.

Statutes passed during pendency of escheat proceedings.— The legislature has the power to regulate the disposition of property while proceedings by an escheator are pending, as the property has not then vested. Gresham *v.* Rickenbacher, 28 Ga. 227; State *v.* Tilghman, 14 Iowa 474.

25. Gentile *v.* State, 29 Ind. 409; Phelps *v.* Racey, 5 Daly (N. Y.) 235; and, generally, Fish and Game.

An act forbidding the taking of certain fish at their spawning season is constitutional, although it affects riparian proprietors of unnavigable streams. Com. *v.* Look, 108 Mass. 452. See also Gentile *v.* State, 29 Ind. 409.

26. See, generally, Bridges; Streets and Highways.

27. *In re* Northampton, 158 Mass. 299, 33 N. E. 568 (regulating grade crossings); Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661 (providing that cattle shall not be driven upon certain streets except at certain hours of the day); Greensburg *v.* Laird, 8 Pa. Co. Ct. 608; Underhill *v.* Essex, 64 Vt. 28, 23 Atl. 617 (holding a judgment that a town shall be assessed for part of the expenses of a bridge gives no vested rights which cannot be taken away by a repeal of the law under which the judgment was given).

28. Endora *v.* Darling, 54 Kan. 654, 39 Pac. 184; People *v.* Ingham County, 20 Mich. 95; Bartow *v.* Draper, 5 Duer (N. Y.) 130. But see *In re* Penny Pot Landing, 16 Pa. St. 79.

29. Helm *v.* Webster, 85 Ill. 116 (an act depriving an individual of his right of reverter was held to be unconstitutional); Hudson County Land Imp. Co. *v.* Seymour, 35 N. J. L. 47 (an act providing for the alteration of streets); *In re* Beekman St., 20 Johns. (N. Y.) 269 (holding where persons have purchased lots on the faith of plans of street commissioners, an act authorizing new plans for laying out streets whereby the value of said lots was materially depreciated is unconstitutional).

Assessment of benefits upon adjacent landowners.— An act which authorizes the mayor and city council to open any street, and provides that the owners of the lots adjacent to and fronting on part of the street so opened shall be assessed for their respective portions of the benefit derived from the improvement, is in violation of a constitution which declares that no vested right shall be divested, unless for purposes of public utility, and for adequate compensation previously made. Municipality No. 2 *v.* White, 9 La. Ann. 446.

Widening streets.— An act providing for the widening of streets without a provision for compensation proceeding in the usual way on notice is unconstitutional as impairing

(IX) *LAND TAKEN FOR PUBLIC USE.*[30] The right of a landowner for damages for land taken for public use becomes absolute, when the property is actually taken,[31] the improvement has been finally determined on,[32] or damages have been ascertained according to the modes pointed out by law.[33] It then becomes a vested right and cannot be affected by subsequent legislation.[34]

(X) *LOCATION OF SEAT OF GOVERNMENT.* Property-owners in a city in which the state seat of government is located have no vested rights in such location which will prevent its change.[35]

(XI) *NAVIGABLE WATERS.* Statutes providing for the removal of obstructions on navigable streams are unconstitutional where they interfere with the vested rights of riparian owners.[36]

(XII) *OFFICERS*[37]—(A) *Right to Office.* A person in the possession of a public office has no such vested interest therein as precludes a repeal of the law creating it,[38]

vested rights. Hudson County Land Imp. Co. *v.* Seymour, 35 N. J. L. 47.

30. See, generally, EMINENT DOMAIN.

31. Stephens *v.* Marshall, 3 Pinn. (Wis.) 203, 3 Chandl. (Wis.) 222.

32. Harrington *v.* Berkshire County, 22 Pick. (Mass.) 263, 33 Am. Dec. 741. But see People *v.* Van Nort, 15 Abb. Pr. N. S. (N. Y.) 242; *In re* Anthony St., 20 Wend. (N. Y.) 618, 32 Am. Dec. 608, holding that until the final confirmation of a report of commissioners for laying out streets, individuals whose property was contemplated to be taken do not acquire any vested rights in respect of the damages assessed.

33. People *v.* Westchester County, 4 Barb. (N. Y.) 64; Hawkins *v.* Rochester, 1 Wend. (N. Y.) 53, 19 Am. Dec. 462.

34. Elgin *v.* Eaton, 83 Ill. 535, 25 Am. Rep. 412; Harrington *v.* Berkshire County, 22 Pick. (Mass.) 263, 33 Am. Dec. 741; People *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; Ganson *v.* Buffalo, 2 Abb. Dec. (N. Y.) 236, 1 Keyes (N. Y.) 454; People *v.* Westchester County, 4 Barb. (N. Y.) 64; Hawkins *v.* Rochester, 1 Wend. (N. Y.) 53, 19 Am. Dec. 462.

An act extending the time for taking an appeal from an award of road damages is not void as taking away vested rights, for there can be no vested right to recover a judgment for the amount awarded. Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148.

Reversion to original owner on abandonment.— An act provided that when work in the construction of a railway has ceased, and has not been in good faith resumed for a period of eight years, the land on which the road is being built shall revert to the owner of the tract from which it was taken. It was held that the statute does not interfere with vested rights, as the property right of the holder of a right of way does not attach to the land independent of its use for public purposes, and when the public use becomes impossible or is abandoned the right to hold the land ceases. Skillman *v.* Chicago, etc., R. Co., 78 Iowa 404, 43 N. W. 275, 16 Am. St. Rep. 452.

35. Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815; Walker *v.* Tarrant County, 20 Tex. 16; Alley *v.* Denson, 8 Tex. 297.

Acts to compensate landowners for removal of county site.— An act authorizing the levy and collection of a tax to compensate the owners of lots in a town for damages sustained by the removal of the county site therefrom is constitutional and valid. Wilkinson *v.* Cheatham, 43 Ga. 258.

Statute confirming illegal acts of commissioners in choice of seat of government.— Where by a statute county commissioners are appointed to fix a county-seat, etc., on a lot of ground not less than fifty nor more than two hundred acres, and they are not able to procure more than forty acres, and they cause public buildings to be erected thereon, a subsequent statute confirming the commissioners' acts impairs no private rights of the commissioners, although they are thereby deprived of pleading, in an action by the building contractor, that they acted outside their authority, and hence cannot be held liable for the cost of building. Ruggles *v.* Washington County, 3 Mo. 496.

36. Middleton *v.* Flat River Booming Co., 27 Mich. 533; Glover *v.* Powell, 10 N. J. Eq. 211; Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736 (a wharf built out to navigable waters); Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245; and, generally, NAVIGABLE WATERS.

The right of preëmption given to a riparian owner by N. J. Riparian Act (1860), § 8, was not a vested right. American Dock, etc., Co. *v.* Public Schools Trustees, 39 N. J. Eq. 409.

37. See, generally, OFFICERS.

38. Lovejoy *v.* Beeson, 121 Ala. 605, 25 So. 599; State *v.* Evans, 166 Mo. 347, 66 S. W. 355; Sinclair *v.* Young, 100 Va. 284, 4 Va. Supreme Ct. 176, 40 S. E. 907. But see State *v.* Griffin, 125 N. C. 332, 34 S. E. 429; McCall *v.* Webb, 125 N. C. 243, 34 S. E. 430.

Change in qualifications for appointment.— A rule of a board of education prescribing additional qualifications necessary for appointment as principal of a high school does not violate any vested right of one who holds a position of principal of a school, other than a high school, under a certificate which would entitle him to appointment as principal of a

or a change in the emoluments thereof,[39] unless regulated by constitutional provisions.[40]

(B) *Fees.* The right to fees due officers of the court as compensation for services rendered,[41] and the right of such officers to costs and the means for their collection[42] are vested rights.

(XIII) *PUBLIC LANDS*—(A) *In General.* Where titles to public lands have once vested they cannot be taken away by subsequent legislative acts.[43] Imperfect and inchoate titles to land which were part of the public domain are, however, subject to legislative control.[44]

(B) *Public Parks.* The owners of land around a public park, the fee of which is in the city, have no such right as will entitle them to compensation when it is discontinued by legislative sanction.[45]

(XIV) *SCHOOLS*—(A) *In General.* The inhabitants of school districts have no vested rights in lands reserved for the maintenance of public schools[46] or in the location of school-houses.[47]

(B) *Instruction in Public Schools.* The opportunity of instruction in public schools given by statute is a legal right as well as a vested right in property and cannot be taken away or impaired by legislation.[48]

high school. Matter of Stebbins, 41 N. Y. App. Div. 269, 58 N. Y. Suppl. 468.

39. State *v.* Evans, 166 Mo. 347, 66 S. W. 355; Matter of New York, 33 N. Y. App. Div. 365, 53 N. Y. Suppl. 875.

40. White *v.* State, 123 Ala. 557, 26 So. 343; Harwood *v.* Perrin, (Ariz. 1900) 60 Pac. 891.

41. State *v.* Mooney, 74 N. C. 98, 21 Am. Rep. 487; *Ex p.* McDonald, 2 Whart. (Pa.) 440. But see People *v.* Bircham, 12 Cal. 50, holding that an act releasing sureties on a forfeited recognizance is a grant of public property and does not interfere with a vested right, in that the district attorney is entitled to a fee of ten per cent on the amount collected on such obligations.

Vested right in salary.— A public officer has a vested right to his salary, when once earned, which the legislature cannot impair. Young *v.* Rochester, 73 N. Y. App. Div. 81, 76 N. Y. Suppl. 224.

42. *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

Right to render service.— The clerk of the court has no vested right to render the service imposed on him so as to secure the commission therefor, if the service has not been performed before his successor comes into office. Bradford *v.* Jones, 1 Md. 351.

43. *Kansas.*— Winfield Town Co. *v.* Maris, 11 Kan. 128.

Kentucky.— Marshall *v.* Clark, Hughes (Ky.) 77.

New Jersey.— Southard *v.* Central R. Co., 26 N. J. L. 13.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

Tennessee.— Vanzant *v.* Waddel, 2 Yerg. (Tenn.) 260; Williams *v.* West Tennessee Register, Cooke (Tenn.) 214.

Texas.— Quinlan *v.* Houston, etc., R. Co., (Tex. Civ. App. 1893) 24 S. W. 693.

United States.— Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147.

See 10 Cent. Dig. tit. "Constitutional Law," § 183; and, generally, PUBLIC LANDS.

Bona fide purchasers of lands which were acquired by means of a fraudulent grant from the state have a vested equitable right, not being participators in the fraud, which the state cannot take away by a subsequent act declaring the grant absolutely void. Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

44. Kemper *v.* Victoria, 3 Tex. 135; State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503; State *v.* Gray, 4 Wis. 380; *In re* Yosemite Valley Case, 15 Wall. (U. S.) 77, 21 L. ed. 82.

Application to purchase.— In Baty *v.* Sale, 43 Ill. 351, 92 Am. Dec. 128, it was held that an application to purchase land by a preëmptor under the federal laws created in him a vested right which was not taken away by the subsequent removal of the land-office from that district and the withdrawal of such lands from entry.

Requirements for title not fulfilled.— Under an act requiring land certificates to be located, surveyed, or patented only on vacant and unappropriated public domain, the holder of a certificate has no vested right to lands withdrawn from location and survey after the issue of his certificate, and before its location and survey. Looney *v.* Bagley, (Tex. 1887) 7 S. W. 360. See also State *v.* School, etc., Land Com'rs, 6 Wis. 334.

45. Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725. But see Franklin County *v.* Lathrop, 9 Kan. 453, where it was held that abutting landowners have a vested right to have land designated for public uses continued for such uses.

46. Bradley *v.* Case, 4 Ill. 585; and, generally, SCHOOLS AND SCHOOL DISTRICTS.

47. *In re* Farnum, 51 N. H. 376.

48. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; and, generally, SCHOOLS AND SCHOOL DISTRICTS.

Separate schools for colored children.— In State *v.* Board of Education, 2 Ohio Cir. Ct. 557, a statute provided that when in the judgment of a board of education it would

(xv) *Support of Pauper.* A pauper has no vested right to be supported in any particular place.[49]

m. Redemption Laws. A statute giving a debtor a right to redeem his property within a certain time after it has been taken on execution is a valid exercise of the legislative power to change remedies and process, when applied to contracts made after the adoption of the statute,[50] but when applied retrospectively is unconstitutional.[51] Where a person's right to redeem property sold has once vested a subsequent statute taking away such right or impairing it is unconstitutional.[52]

n. Registration Laws. Registration acts requiring the recording of deeds[53] or mortgages[54] within a reasonable time after their passage are not unconstitutional as impairing vested rights.

o. Rights Acquired by Marriage — (1) *In General.* Vested rights acquired by virtue of the law existing at the time of marriage cannot be disturbed by subsequent legislation.[55] So where rights acquired in the property of a wife under the law existing at the time of the marriage have become vested in her husband they cannot be impaired by legislative enactment.[56] A marriage does

be for the advantage of the district to do so it might organize separate schools for colored children. The section was expressly repealed. It was held that the repealing act was not one affecting vested rights or in any way impairing the obligation of contracts.

49. Craftsbury *v.* Greensboro, 66 Vt. 585, 29 Atl. 1024, holding that an act placing the burden of supporting a pauper on a town other than the one in which he was residing at the time of its passage is not unconstitutional. See, generally, Poor Persons.

50. Oliver *v.* McClure, 28 Ark. 555; International L. Ins. Co. *v.* Scales, 27 Wis. 640; and, generally, Executions.

51. Sheldon *v.* Pruessner, 52 Kan. 593, 35 Pac. 204; Moore *v.* Barstow, 52 Kan. 431, 34 Pac. 969; Greenwood *v.* Butler, 52 Kan. 424, 34 Pac. 967, 22 L. R. A. 465; Cargill *v.* Power, 1 Mich. 369; Dingey *v.* Paxton, 60 Miss. 1038; Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367. But see Butler *v.* Palmer, 1 Hill (N. Y.) 324, holding that an act shortening the time for redemption from foreclosure sales is constitutional, since it related merely to a remedy, not a right.

52. Russell *v.* Pacific Can Co., 116 Cal. 527, 48 Pac. 616; Terelta Land, etc., Co. *v.* Shaffer, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458; Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373; Ashuelot R. Co. *v.* Elliot, 52 N. H. 387. *Compare* Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 515, holding that an act taking away the debtor's right of redemption and making the sale absolute would be unobjectionable.

Imposing a penalty on the right of redemption.— An act requiring the owner of land sold for taxes, to be entitled to redeem, to pay the taxes that have been meanwhile paid by the purchaser and twenty-five per cent interest is void as to the excess of interest over seven per cent so far as it operates retrospectively. Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367.

Where infants have the right to redeem lands belonging to them, which have been sold for taxes and purchased by the state, the legislature has no power by a subsequent act to take away and destroy such right. Moore *v.* Irby, 69 Ark. 102, 61 S. W. 371; Moody *v.* Hoskins, 64 Miss. 468, 1 So. 622.

53. Salmon *v.* Huff, 9 Tex. Civ. App. 164, 28 S. W. 1044; and, generally, Deeds.

54. Citizens' State Bank *v.* Julian, 153 Ind. 655, 55 N. E. 1007; and, generally, Chattel Mortgages; Mortgages.

55. Mitchell *v.* Violett, 104 Ky. 77, 20 Ky. L. Rep. 378, 47 S. W. 195, 42 L. R. A. 738; Fisher *v.* Allen, 2 How. (Miss.) 611; Kelly *v.* McCarthy, 3 Bradf. Surr. (N. Y.) 7.

Acts validating marriages.— An act declaring valid all marriages previously celebrated by an ordained minister does not impair vested rights. Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Community property.— An act providing that a husband cannot convey community property without the written consent of his wife is unconstitutional as to community property acquired before its passage, in that it deprives the husband of a vested right. Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497.

Making property of a wife liable for family expenses.— An act making the property of a wife liable for family expenses does not deprive her of her vested rights, although it permits the seizure of property acquired before the passage of the act, as the exemption of the wife's property prior to the passage of the act was a mere privilege and not a property right. Myers *v.* Field, 146 Ill. 50, 34 N. E. 424.

56. *District of Columbia.*— National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111.

Georgia.— Sperry *v.* Haslam, 57 Ga. 412.

Massachusetts.—Dunn *v.* Sargent, 101 Mass. 336.

New York.— Norris *v.* Beyea, 13 N. Y. 273; White *v.* White, 5 Barb. (N. Y.) 474, 4 How. Pr. (N. Y.) 102; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295; Kelly *v.* McCarthy, 3 Bradf. Surr. (N. Y.) 7.

not, however, create in the husband a vested right in the property which his wife may afterward acquire so that an act securing to the wife's separate use all the property which she should acquire is not unconstitutional as to property conveyed to her after such act was passed.[57] And an act divesting a husband of all rights in his wife's chattels is not unconstitutional, as his right to the property is conditional until he has reduced it to possession.[58]

(II) *Dower and Curtesy.* The right of dower or curtesy is inchoate and contingent until the death of the husband or wife, and before that event is under the absolute control of the legislature,[59] unless rights of third parties have intervened.[60] Acts therefore confirming titles, where rights of dower have not been released, are constitutional.[61] Where, however, the right of dower or curtesy has once accrued it becomes a vested right which cannot be taken away by statute.[62]

North Carolina.— O'Connor *v.* Harris, 81 N. C. 279.

Ohio.— Quigley *v.* Graham, 18 Ohio St. 42.

Pennsylvania.—Burson's Appeal, 22 Pa. St. 164.

South Carolina.— Shuler *v.* Bull, 15 S. C. 421; Bouknight *v.* Epting, 11 S. C. 71.

See 10 Cent. Dig. tit. "Constitutional Law," § 200; and, generally, Husband and Wife.

Giving a deserted wife the rights of a feme sole trader.— An act giving a deserted wife the rights of a *feme sole* trader was held no unconstitutional interference with the husband's interest in his wife's property by marriage prior to the passage of the act. Moninger *v.* Ritner, 104 Pa. St. 298.

Laws regulating mode of conveying wife's property.— A law that no conveyance of the realty of any married woman shall be valid unless joined in by the wife does not deprive the husband of any rights which are not clearly subject to the control of the legislature, as the legislature may at all times prescribe the mode of conveying property. Peck *v.* Walton, 26 Vt. 82.

57. Blood *v.* Humphrey, 17 Barb. (N. Y.) 660; Holliday *v.* McMillan, 79 N. C. 315; Taft *v.* Cannon, (R. I. 1896) 34 Atl. 148; Witte *v.* Clarke, 17 S. C. 313.

58. Marshall *v.* King, 24 Miss. 85; Clarke *v.* McCreary, 12 Sm. & M. (Miss.) 347; Dilley *v.* Henry, 25 N. J. L. 302; Percy *v.* Cockrill, 53 Fed. 872, 4 C. C. A. 73.

A husband's right to reduce his wife's choses in action is not vested and may be interrupted by legislation. Hart *v.* Leete, 104 Mo. 315, 13 S. W. 976; Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125. But see O'Connor *v.* Harris, 81 N. C. 279. See also Leete *v.* St. Louis State Bank, 115 Mo. 184, 21 S. W. 788.

59. *Alabama.*— Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672; Boyd *v.* Harrison, 36 Ala. 533.

Illinois.— Jackson *v.* Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Henson *v.* Moore, 104 Ill. 403. But see Russell *v.* Rumsey, 35 Ill. 362.

Indiana.— Frantz *v.* Harrow, 13 Ind. 507.

Iowa.— Lucas *v.* Sawyer, 17 Iowa 517.

Kansas.— Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071.

Maine.— Barbour *v.* Barbour, 46 Me. 9.

Michigan.— Hill *v.* Chambers, 30 Mich. 422.

Minnesota.— Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

Mississippi.— Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

Missouri.— Bartlett *v.* Ball, 142 Mo. 28, 43 S. W. 783. But see Williams *v.* Courtney, 77 Mo. 587.

New Hampshire.— Merrill *v.* Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

New York.—Thurber *v.* Townsend, 22 N. Y. 517; *In re* Curtis, 61 Hun (N. Y.) 372, 16 N. Y. Suppl. 180, 41 N. Y. St. 131; Lawrence *v.* Miller, 3 Sandf. (N. Y.) 516. But see Benedict *v.* Seymour, 11 How. Pr. (N. Y.) 176.

North Carolina.—Walker *v.* Long, 109 N. C. 510, 14 S. E. 299.

Pennsylvania.— Melizett's Appeal, 9 Leg. Int. (Pa.) 86.

Virginia.— Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

Washington.— Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215.

West Virginia.— Thornburg *v.* Thornburg, 18 W. Va. 522.

United States.— Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Richards *v.* Bellingham Bay Land Co., 54 Fed. 209, 4 C. C. A. 290.

See 10 Cent. Dig. tit. "Constitutional Law," § 201; and, generally, Curtesy; Dower.

60. Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200, holding that a statute enacting that land in the hands of a purchaser, liable to the dower of the vendor's wife, shall belong to her in fee simple in lieu of dower, was unconstitutional as to land so sold before its enactment.

61. Johnson *v.* Fay, 16 Gray (Mass.) 144; Moore *v.* New York, 4 Sandf. (N. Y.) 456; Randall *v.* Kreiger, 2 Dill. (U. S.) 444, 20 Fed. Cas. No. 11,554, 5 Chic. Leg. N. 465, 7 West. Jur. 625.

62. *Illinois.*— Noble *v.* McFarland, 51 Ill. 226.

Indiana.— Frantz *v.* Harrow, 13 Ind. 507; Logan *v.* Walton, 12 Ind. 639; Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200.

Iowa.— Burke *v.* Barron, 8 Iowa 132.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

p. Rights of Action and Defenses[63] — (I) *In General.* An existing right of action is a vested right which cannot be destroyed or impaired by legislation.[64] Statutes, however, permitting a state to be sued are mere matters of grace which do not confer vested rights and may be withdrawn at pleasure.[65]

(II) *Creation of Cause of Action.* The legislature cannot create a cause of action out of an existing transaction where there was none before.[66]

(III) *Creation of Remedy to Enforce Existing Rights.*[67] Where a right already exists for which there is no legal remedy the legislature may constitutionally provide one as no vested rights are thereby impaired.[68]

Rhode Island.— Talbot *v.* Talbot, 14 R. I. 57.

West Virginia.—Wyatt *v.* Smith, 25 W. Va. 813.

See 10 Cent. Dig. tit. "Constitutional Law," § 201.

When an estate has been discharged of all claims of dower the legislature cannot grant the widow a new interest therein against those whose rights are vested. Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

63. As to change in remedy see *infra*, VIII, D, 3.

64. *Alabama.*— Fail *v.* Presley, 50 Ala. 342.

Connecticut.— Hubbard *v.* Brainard, 35 Conn. 563.

Illinois.— Scamm *v.* Commercial Union Assur. Co., 6 Ill. App. 551.

Iowa.— Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116.

Maine.— *Compare* Dudley *v.* Greene, 35 Me. 14.

Maryland.— Williams *v.* Johnson, 30 Md. 500, 96 Am. Dec. 613.

Massachusetts.— Neponset Meadow Co. *v.* Tileston, 133 Mass. 189. But see Walter *v.* Bacon, 8 Mass. 468.

Michigan.— Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599.

New Hampshire.— Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

New Jersey.— Hunt *v.* Gulick, 9 N. J. L. 205.

New York.—McCann *v.* New York, 52 N. Y. App. Div. 358, 65 N. Y. Suppl. 308; Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841; Rice *v.* O'Keefe, 6 Heisk. (Tenn.) 638; Fisher's Negroes *v.* Dabbs, 6 Yerg. (Tenn.) 119.

Texas.— State *v.* Williams, 10 Tex. Civ. App. 346, 30 S. W. 477.

Wisconsin.— Cornell *v.* Hichens, 11 Wis. 353.

United States.— Osborn *v.* Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689; Fitzgerald *v.* Weidenbeck, 76 Fed. 695.

See 10 Cent. Dig. tit. "Constitutional Law," § 228.

The right to contest an election is not a vested right, which cannot be taken away by legislative act. Gilleland *v.* Schuyler, 9 Kan. 569.

The right to recover damages in an action of forcible entry and detainer is not a vested right of property, within the protection of the constitution. Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268.

Acts releasing from liability.— An act to release a county treasurer from liability for school and county funds taken by burglars from a safe furnished the treasurer by the county in which to keep such funds does not operate to disturb any vested right. Pearson *v.* State, 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91.

65. *Ex p.* State, 52 Ala. 231, 23 Am. St. Rep. 567. And see States.

Violation of criminal statute.— The courts and prosecuting attorney have not a vested right to a conviction of the violator of a criminal statute, since it is the province of the legislative department to declare what acts are or are not criminal and what shall be the penalty imposed. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

66. Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

A statute imposing new liabilities cannot have any operation in cases where proceedings have already been instituted. *In re* Kennett, 24 N. H. 139.

67. As to creation of additional remedy see *infra*, VIII, D, 3, c.

68. Whipple *v.* Farrar, 3 Mich. 436, 64 Am. Dec. 99; Atkins *v.* Atkins, 18 Nebr. 474, 25 N. W. 724; Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575; Pittsburg, etc., Turnpike Road Co. *v.* Com., 2 Watts (Pa.) 433; Beck *v.* Borough, 3 Lanc. L. Rev. 386; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

By act of incorporation.— Although an association had no corporate existence at the time a contract for the payment of money was executed to it, a subsequent act incorporating such company, thus authorizing it to sue by its corporate name, affects the remedy merely and does not divest vested rights. Stein *v.* Indianapolis, etc., Bldg. Loan Fund Assoc., 18 Ind. 237, 81 Am. Dec. 353.

For death by wrongful act.—A statute giving to the personal representatives of a person killed by negligence the right of action for damages is not unconstitutional, since the culpability remains, and the act enables the personal representative to bring the ac-

(iv) *Conditions Precedent to Maintaining Action.*[69] Acts imposing[70] or removing[71] conditions precedent to the maintenance of an action may operate retrospectively without interfering with vested rights, as they affect the remedy only.

(v) *Deprivation of Defenses.* A vested cause of defense is as equally protected from being cut off or destroyed by an act of the legislature as is a vested cause of action.[72] The legislature may, however, deprive a party of technical defenses involving no substantial equities.[73]

(vi) *Acts Done Under Military Authority.* An act providing that no one shall be liable in a civil action for acts done in obedience to military authority is not an interference with vested rights and is constitutional.[74]

(vii) *Forfeitures, Fines, and Penalties.*[75] The commencement of a suit for a forfeiture,[76] fine,[77] or a penalty conferred by statute[78] does not give a vested

tion. James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361.

69. As to conditions precedent generally see Actions, 1 Cyc. 692.

70. *Connecticut.*— Crocker *v.* Hartford, 66 Conn. 387, 34 Atl. 98.

Kansas.— Claypoole *v.* King, 21 Kan. 602.

Louisiana.— Baldwin *v.* Bennett, 6 Rob. (La.) 309.

Maine.— Berry *v.* Clary, 77 Me. 482, 1 Atl. 360.

Mississippi.— Watson *v.* Doherty, 56 Miss. 628.

United States.— Lamburth *v.* Winchester Ave. R. Co., 76 Fed. 348.

See 10 Cent. Dig. tit. "Constitutional Law," § 235.

Allowance of reasonable time for performance of condition.— A law imposing a new condition on the enforcement of a preëxisting common-law right of action is void as impairing vested rights when it does not allow a reasonable time for the performance of the condition. Relyea *v.* Tomahawk Paper, etc., Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878.

Where action has been commenced.—An act imposing conditions on foreign corporations to entitle them to maintain actions cannot affect an action which has already been brought by a corporation from another state as it has a vested right to continue such action. Root *v.* Sweeney, 12 S. D. 43, 80 N. W. 149.

71. Phenix Ins. Co. *v.* Pollard, 63 Miss. 614; Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272.

72. Baltimore, etc., R. Co. *v.* Read, (Ind. 1902) 62 N. E. 488; Maguiar *v.* Henry, 84 Ky. 1, 7 Ky. L. Rep. 695, 4 Am. St. Rep. 182; William *v.* Baltimore Butchers' Loan, etc., Assoc., 45 Md. 546; Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104.

73. *Connecticut.*— Stratford First School Dist. *v.* Ufford, 52 Conn. 44.

Georgia.— Baker *v.* Herndon, 17 Ga. 568.

Massachusetts.— Goshen *v.* Richmond, 4 Allen (Mass.) 458.

Michigan.— Gibson *v.* Hibbard, 13 Mich. 214, lack of revenue stamp.

Minnesota.— Christian *v.* Bowman, 49 Minn. 99, 51 N. W. 663.

Missouri.— State Bank *v.* Snelling, 35 Mo. 190.

New York.— Hoppock *v.* Stone, 49 Barb. (N. Y.) 524 (lack of revenue stamp); Washburn *v.* Franklin, 24 How. Pr. (N. Y.) 515 (repeal of statute prohibiting stock-jobbing contracts).

Pennsylvania.— Bleakney *v.* Farmers, etc., Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635.

See 10 Cent. Dig. tit. "Constitutional Law," § 229.

74. Franklin *v.* Vannoy, 66 N. C. 145; Hess *v.* Johnson, 3 W. Va. 645 (holding that an act declaring no action shall lie for acts done under proper authority, in suppression of rebellion, is constitutional, although it retrospectively takes away the right of a person injured to recover damages). *Compare* Terrill *v.* Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500, holding such an act unconstitutional in so far as it precludes a recovery for private wrongs.

75. See, generally, Fines; Forfeitures; Penalties.

76. Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196.

77. Lyon *v.* Morris, 15 Ga. 480 (holding until such moneys are received or collected it is competent for the legislature to remit them); Cushman *v.* Hale, 68 Vt. 444, 35 Atl. 382.

78. *Alabama.*— State Medical College *v.* Muldon, 46 Ala. 603; Pope *v.* Lewis, 4 Ala. 487.

Connecticut.— Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239.

Georgia.— O'Kelly *v.* Athens Mfg. Co., 36 Ga. 51; St. Mary's Bank *v.* State, 12 Ga. 475.

Illinois.— Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344.

Indiana.— Thompson *v.* Bassett, 5 Ind. 535.

Iowa.— Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764.

Maine.— Potter *v.* Sturdivant, 4 Me. 154.

Michigan.— Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

New York.— West Troy Fire Dept. *v.* Ogden, 59 How. Pr. (N. Y.) 21.

right thereto which the legislature may not take away or impair.[79] Nor does such right accrue until final judgment is rendered.[80] When, however, a penalty has once accrued under a statute it is a vested right which cannot be affected by the subsequent repeal of the statute.[81]

(VIII) *PUNITIVE DAMAGES.*[82] A plaintiff has no vested right to punitive damages until judgment is rendered[83] or until they have been assessed after verdict.[84]

(IX) *RECOVERY OR SET OFF OF USURY.* The right to recover or set off usury is not a vested right, and therefore it may be taken away by legislation,[85] except where the payment of usury is a payment of the principal.[86] A repeal of an act taking away the defense of usury will not restore such defense as the right to enforce the contract, according to the terms, became vested.[87]

q. Rights of Heirs and Legatees — (I) *IN GENERAL.* During a person's lifetime his heirs or devisees have no vested interest in his property which may not be destroyed by a statute or constitutional provision regulating the succession of property.[88] When, however, the rights of heirs or legatees are vested, at the

Ohio.— Cleveland, etc., R. Co. *v.* Wells, 65 Ohio St. 313, 62 N. E. 332, 58 L. R. A. 651.

See 10 Cent. Dig. tit. "Constitutional Law," § 233.

79. Giving chancery power to relieve from penalties.— A statute conferring on chancery courts the power to relieve against penalties and forfeitures is not unconstitutional as disturbing vested rights. Potter *v.* Sturdivant, 4 Me. 154.

80. Anderson *v.* Byrnes, 122 Cal. 272, 54 Pac. 821; St. Mary's Bank *v.* State, 12 Ga. 475. See also State *v.* Youmans, 5 Ind. 280, where it was held that if a judgment for a penalty has not become executed before a repeal of the statute creating the right of action the penalty falls with the law.

Where an appeal is taken.— The repeal of a statute, under which judgment was recovered for a penalty pending a review of such judgment, will defeat the action. Speckert *v.* Louisville, 78 Ky. 287; Lewis *v.* Foster, 1 N. H. 61. But see Dunham *v.* Anders, 128 N. C. 207, 38 S. E. 832, 83 Am. St. Rep. 668.

81. Taylor *v.* Rushing, 2 Stew. (Ala.) 160; Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Dow *v.* Norris, 4 N. H. 16, 17 Am. Dec. 400.

Pardon by governor.— Under a statute giving the governor the right to remit fines and penalties, a pardon will not discharge the moiety due the informer (Rowe *v.* State, 2 Bay (S. C.) 565), but will that due the board of commissioners (State *v.* Williams, 1 Nott & M. (S. C.) 26).

82. See, generally, DAMAGES.

83. Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

84. Pryce *v.* New York Security Ins. Co., 29 Wis. 270.

85. *Connecticut.*— Hinman *v.* Goodyear, 56 Conn. 210, 14 Atl. 804; Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Allen, 28 Conn. 97.

Illinois.— Wooley *v.* Alexander, 99 Ill. 188; Parmelee *v.* Lawrence, 44 Ill. 405.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9.

Tennessee.— McAdoo *v.* Smith, 5 Baxt. (Tenn.) 695; Brandon *v.* Green, 7 Humphr. (Tenn.) 130.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

See 10 Cent. Dig. tit. "Constitutional Law," § 234.

Under federal constitution.— An act giving partial validity to usurious loans by providing that the party who seeks to plead the usury act must set out in his plea the sum actually due, with legal interest, is not in violation of the constitution of the United States, even if it be considered as impairing vested rights. Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694.

86. Hunter *v.* Hatch, 45 Ill. 178.

87. Edworthy *v.* Iowa Sav., etc., Assoc., 114 Iowa 226, 86 N. W. 315.

88. Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182; Hyde *v.* Planters' Bank, 8 Rob. (La.) 416; Blackbourn *v.* Tucker, 72 Miss. 735, 17 So. 737; Marshall *v.* King, 24 Miss. 85; Morgan *v.* Perry, 51 N. H. 559; Jackson *v.* Lyon, 9 Cow. (N. Y.) 664; *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310. And see, generally, DESCENT AND DISTRIBUTION.

Advancements.— A statute providing that any real estate given by an intestate in his lifetime as an advancement to any child shall be considered a part of his estate for the purposes of distribution, and taken by the recipient of the advancement toward his share of the intestate's estate, applies to advancements made prior to its enactment, and impairs no vested rights. Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287 [*reversing* 16 Ill. App. 170].

Acts providing for performance of contracts made by deceased before his death.— An act providing that an administrator shall convey land in accordance with an agreement made by deceased before his death is not objectionable as disturbing vested rights. Moore *v.* Maxwell, 18 Ark. 469.

Postponing possession and enjoyment.— An act providing that on the death of a lifetenant the lease shall continue to the end of

death of the testator, they cannot be affected by a subsequent act of the legislature.[89]

(II) *Altering Method of Executing Wills.* The legislature has the power to prescribe rules for the execution of wills, whether made before or after the passage of the statute, if rights have not become vested by the testator's death.[90]

(III) *Changing Rule of Inheritance.* Laws changing the rule of descent, operative in the future only, are not unconstitutional.[91] Accordingly adoption and legitimation laws being but a change in the law of descent, operative in the future only, are valid.[92]

(IV) *Curing Incapacity to Take by Devise.* The right of heirs to property vested in them because of the incapacity of the devisees to take cannot be affected by a subsequent statute authorizing the devisees to take.[93]

(V) *Validating Wills Defectively Executed.* An act of the legislature

the current lease year before terminating is not unconstitutional as impairing vested rights, although it postpones the possession and enjoyment of the remainderman after his estate has vested. King *v.* Foscue, 91 N. C. 116.

Right of devisee in interest of his co-devisees.— A devisee has no vested right in the interest of his co-devisees, with whom he holds in common, which prevents the legislature changing the rules of descent. Gilman *v.* Morrill, 8 Vt. 74.

Taxing right of succession.— N. Y. Laws (1899), c. 76, amending Laws (1896), c. 908, § 230, relating to taxable transfers of property, and providing for a tax on remainders and reversions which had vested before June 30, 1885, upon their coming into actual possession or enjoyment, is an attempt to tax the right of succession, and not a direct tax upon property, and is unconstitutional, as diminishing the value of vested estates. *In re* Pell, 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 540.

89. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Second Universalist Soc. *v.* Dugan, 65 Md. 460, 5 Atl. 415; Rock Hill College *v.* Jones, 47 Md. 1; People *v.* Ryder, 65 Hun (N. Y.) 175, 19 N. Y. Suppl. 977, 47 N. Y. St. 92, 22 N. Y. Civ. Proc. 388; Wolford *v.* Morgenthal, 91 Pa. St. 30; Hinnershits *v.* Bernhard, 13 Pa. St. 518; Norman *v.* Heist, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493.

Statutes which make a change in the method of procedure but which do not affect a right are not unconstitutional. People *v.* Ryder, 58 Hun (N. Y.) 407, 12 N. Y. Suppl. 48, 34 N. Y. St. 322 (holding that an act authorizing the court after twenty-five years from the time of payment into court of proceeds of the sale of real property for unknown heirs, upon proof of due inquiry for such unknown heirs, and that no claim therefor has been made, to decree that the unclaimed portion of such proceeds was vested in the known heirs of the common ancestor, and providing further that after the lapse of twenty-five years such unknown heirs shall be presumed to be dead is not unconstitutional as destroying vested interests, since it simply establishes a rule of evidence); Etheridge *v.* Vernoy, 71 N. C. 184; Bull *v.* Nichols, 15 Vt. 329.

Where land vests subject to power of sale. — Although land vests in an heir on the death of the ancestor, yet where the latter left a will giving his executors a power of sale for a certain purpose, an act of the legislature enabling the executors to accomplish the object of the power is constitutional. Hope *v.* Johnson, 2 Yerg. (Tenn.) 123.

90. Hoffman *v.* Hoffman, 26 Ala. 535; American Baptist Missionary Union *v.* Peck, 10 Mich. 341; Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214 (holding that until a will has been made and the testator has died no one acquires any interest in his estate; and therefore no vested rights are impaired by giving retroactive operation to a statute remedial in its nature); McCarty *v.* Hoffman, 23 Pa. St. 507. And see, generally, Wills.

Construction.—Such statutes should be construed prospectively unless the legislature has already expressed an intention to the contrary. Taylor *v.* Mitchell, 57 Pa. St. 209.

91. Marshall *v.* King, 24 Miss. 85; Woodard *v.* Blue, 103 N. C. 109, 9 S. E. 492. And see, generally, Descent and Distribution.

92. Woodard *v.* Blue, 103 N. C. 109, 9 S. E. 492. The fact that statutes under which one claims to have been adopted were enacted after the execution of the will by the adopting parent in favor of third persons is immaterial, as the will gave no vested rights at the time of its execution. *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Sewall *v.* Roberts, 115 Mass. 262. See also Adoption of Children, 1 Cyc. 918; Bastards, 5 Cyc. 632.

93. *Louisiana.*— New Orleans First. Cong. Church *v.* Henderson, 4 Rob. (La.) 209.

Maryland.— State *v.* Warren, 28 Md. 338; Wilderman *v.* Baltimore, 8 Md. 551.

Missouri.— Catholic Church *v.* Tobbein, 82 Mo. 418.

New Jersey.—Colgan *v.* McKeon, 24 N. J. L. 566; Hartson *v.* Elden, 50 N. J. Eq. 522, 26 Atl. 561.

New York.— Luhrs *v.* Eimer, 80 N. Y. 171; White *v.* Howard, 46 N. Y. 144; Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Lougheed *v.*

validating a will defectively executed is not unconstitutional when applied to a will made before its passage, where testator died thereafter.[94]

r. Rights of Purchaser at Judicial Sale. A purchaser at a judicial sale has no such vested right as will render an act unconstitutional which provides for the curing of irregularities in the sale.[95]

s. Rights of Trustees. Rights acquired by a trustee,[96] whether under letters of administration[97] or as executor under a will,[98] are vested and cannot be impaired by subsequent legislation. The rights of a mere naked trustee under a dry trust, however, are not vested and may be taken away by the legislature.[99]

t. Tax Laws[1] — (i) *In General.* There is no vested right in any particular mode of taxation.[2] The legislature has power to pass retroactive tax laws[3]

Dykeman's Baptist Church, etc., 58 Hun (N. Y.) 364, 12 N. Y. Suppl. 207, 35 N. Y. St. 270; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; Jones *v.* Methodist Episcopal Sunday School, 4 Dem. Surr. (N. Y.) 271.

Pennsylvania.— Schafer *v.* Eneu, 54 Pa. St. 304; Hillyard *v.* Miller, 10 Pa. St. 326.

United States.— Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499.

See 10 Cent. Dig. tit. "Constitutional Law," § 187.

94. Long *v.* Zook, 13 Pa. St. 400. And see, generally, WILLS.

Death of testator before passage of act.— An act purporting to validate the defective execution of a will made before its passage impairs the vested rights of those who would take in absence of such act. Snyder *v.* Bull, 17 Pa. St. 54; Greenough *v.* Greenough, 11 Pa. St. 489, 51 Am. Dec. 567.

Where by operation of law there is no will to validate.— When a husband and wife each prepare a will, giving their property to each other, and by mistake each signs the other's will, an act after the husband's death to reform his will, if the mistake was duly proven, is invalid, there being in law no will to reform, and the estate having vested at once in the husband's heirs at law. Alter's Appeal, 67 Pa. St. 341, 5 Am. Rep. 433.

95. Marshall *v.* Marshall, 4 Bush (Ky.) 248; Thornton *v.* McGrath, 1 Duv. (Ky.) 349. And see, generally, JUDICIAL SALES.

Confirmation of sale.— An act providing that the chancery court shall have power, in its discretion, to refuse confirmation of any sale made in pursuance of its decree is constitutional, even in its application to a mortgagee, under a mortgage prior to the act, who purchased at a foreclosure sale, as it merely affected his remedy. Chaffe *v.* Aaron, 62 Miss. 29.

96. Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394, holding that an act changing the former rule that trustees take as tenants in common is unconstitutional. See, generally, TRUSTS.

Trustees of educational institution.—An act amending the charter and adding new members to the board of trustees is unconstitutional. Norris *v.* Abington Academy, 7 Gill & J. (Md.) 7; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]. But see Pumphrey *v.* Brown, 77 Va. 569, holding that an act providing that an incorporated town may constitute a separate school district, if the council thereof shall so elect, and giving such council power to appoint the school trustees, is not unconstitutional, as infringing the vested rights of the school trustees of the district, a portion of which had been erected into a separate school district under the act.

97. Berry *v.* Bellows, 30 Ark. 198.

The authority conferred upon an administrator to possess the real estate of his intestate and the rents and profits thereof, not being an estate or right of property, but a mere statute power, was properly repealable by an amendatory act, and this applies even after he has taken possession. Campau *v.* Campau, 25 Mich. 127.

98. Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431.

99. Norris *v.* Thomson, 19 N. J. Eq. 307 (taking away a power to dispose of property); Garden St. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613 (transferring legal title to *cestui*); Columbus *v.* Columbus, 82 Wis. 374, 52 N. W. 425, 16 L. R. A. 695 (transferring legal title to another trustee).

Trustee subject to power of removal.— Where an assignee, under a voluntary assignment for creditors, is appointed subject to the power of the court to remove him upon application of a majority of the creditors, he cannot claim a vested right to such office which would prevent his removal. Burtt *v.* Barnes, 87 Wis. 519, 58 N. W. 790. See also Weaver *v.* Weaver, 23 Ala. 789, holding that in the case of an insolvent estate the removal of an executor for an administrator chosen by the creditors is not unconstitutional as impairing the vested rights of such executor. But see Phinney *v.* King County Super. Ct., (Wash. 1899) 57 Pac. 337, which held an act providing for the settlement of insolvent estates by the court to be unconstitutional.

1. See, generally, TAXATION.

2. Detroit *v.* Detroit City R. Co., 76 Mich. 421, 43 N. W. 447; Detroit St. R. Co. *v.* Guthard, 51 Mich. 180, 16 N. W. 328.

3. Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

Tax laws are to be construed prospectively unless a clear intention to the contrary is shown. Chalker *v.* Ives, 55 Pa. St. 81.

Property removed from state before pas-

changing the rules of evidence[4] and providing for the reimbursement of taxes which have been paid and subsequently declared void,[5] or for the purchase-price paid at void tax-sales;[6] but a statute changing the basis of valuation for the assessment of a tax cannot act retrospectively.[7]

(II) *Altering Method of Collecting Taxes.* A tax laid by authority of law or an assessment for benefits conferred by a local improvement creates a duty and obligation which may be enforced by any means which the legislature may from time to time adopt.[8] An act therefore providing a new or additional remedy for collecting taxes is not objectionable on the ground that it divests vested rights.[9]

sage.— A tax law applied to the proceeds of mines extracted and removed from the state during the first quarter of the year before the passage of the law. The whole object of this law was to fix the mode of assessment for a particular year and future years, and it could not assess part of the property liable to taxation in that year without assessing all. It impaired no vested right, created no new liability upon the taxpayer, and did not come within the definition of a retroactive law. State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

Tax-sales.— An act providing that all matters relative to the sale and conveyance of land for taxes under any prior laws under which they originated, as if such laws remained in force, is not an attempt to take away vested rights of property, for its purpose is merely to complete an inchoate tax-title under proceedings instituted according to the former law. Watkins *v.* Inge, 24 Kan. 612. See also Kipp *v.* Johnson, 31 Minn. 360, 17 N. W. 957, holding that an act providing that actions to test the validity of proceedings for a sale of land for taxes or claims made thereunder shall be commenced within three years after the sale or forfeiture of the land was a remedial statute only, and not one which created a vested right. Therefore on its repeal the right remained to resort to any remedies which previous to its enactment existed, notwithstanding that it provided that all rights heretofore acquired should not be affected by the repeal.

4. People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521 (making certified copies of delinquent tax-list *prima facie* evidence of failure to pay taxes); Larson *v.* Dickey, 39 Nebr. 463, 58 N. W. 167, 42 Am. St. Rep. 595 (making a tax deed *prima facie* evidence of the regularity of the proceedings); Hickox *v.* Tallman, 38 Barb. (N. Y.) 608 (depriving grantee under tax deed of presumptions as to its validity); Delaplaine *v.* Cook, 7 Wis. 44 (making a tax deed *prima facie* evidence of the regularity of the proceedings). But see Stoudenmire *v.* Brown, 48 Ala. 699; Doe *v.* Minge, 56 Ala. 121, holding that an act which makes a tax deed conclusive evidence of certain facts is unconstitutional.

5. Coles *v.* Washington County, 35 Minn. 124, 27 N. W. 497.

6. Easton *v.* Hayes, 35 Minn. 418, 29 N. W. 59.

The right to reimbursement of the purchase-price of land bought at a void tax-sale is a vested right and when once acquired cannot be taken away by the repeal of the statute granting it. State *v.* Foley, 30 Minn. 350, 15 N. W. 375. But see Corbin *v.* Washington County Com'rs, 1 McCrary (U. S.) 521, 3 Fed. 356, holding that where an act provided for the return of money paid at a void tax-sale, a subsequent act providing for the return of the money in such a case upon delivery of a quitclaim deed from the party claiming reimbursement is a reasonable regulation and does not impair vested rights.

7. Howard *v.* Savannah, T. U. P. Charlt. (Ga.) 173.

8. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

Providing for trial by jury to confirm an assessment.— An act granting a trial by jury, in proceedings for the confirmation of an assessment, is not unconstitutional, although applied to proceedings pending at the time the act went into effect, since the city had no vested right in the former mode of procedure. Illinois Cent. R. Co. *v.* Wenona, 163 Ill. 288, 45 N. E. 265.

9. *California.*— People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521.

Illinois.— Wabash East R. Co. *v.* East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285.

Iowa.— Haskel *v.* Burlington, 30 Iowa 232.

Kansas.— Pritchard *v.* Madren, 24 Kan. 486.

Missouri.—Wellshear *v.* Kelley, 69 Mo. 343.

Nebraska.— Schoenheit *v.* Nelson, 16 Nebr. 235, 20 N. W. 205.

New Jersey.— *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

Ohio.— Kleinschmidt *v.* Cappeller, 8 Ohio Dec. (Reprint) 212, 6 Cinc. L. Bul. 325.

United States.— League *v.* Texas, 184 U. S. 156, 22 S. Ct. 475, 46 L. ed. 478.

See 10 Cent. Dig. tit. "Constitutional Law," § 213; and, generally, TAXATION.

Penalty for non-payment of taxes.— The legislature may impose a penalty for the non-payment of future accruing taxes, but cannot attach it to taxes which accrued before the statute imposing the penalty. Ryan *v.* State, 5 Nebr. 276.

Rate of interest.—One who owes delinquent taxes has no vested right to have the rate of interest thereon remain unchanged. Webster *v.* Auditor-Gen., 121 Mich. 668, 80 N. W. 705.

(III) *Validating Illegal Assessments and Tax Levies.* Acts validating illegal assessments and tax levies are constitutional where the legislature had power to authorize the tax,[10] and no rights have become vested.[11]

3. Remedies — a. In General. On the question of how far vested rights may be obtained in particular remedies there exists much conflict of authority. Many decisions declare broadly that no vested right to a particular remedy exists,[12] and that the fact that the change may in fact operate prejudicially on parties in pending actions cannot affect the validity of the change, if in form it be only remedial.[13] The proviso is made in other decisions that the remedy must not by the change be entirely destroyed,[14] and must not be a part of the right itself.[15] A different view holds that while a remedy may be varied or modified this cannot be done in such a way as to impair vested rights previously gained;[16] and that legislation which does so impair them is unconstitutional even though not wholly destroying those rights by the entire prevention of their enforcement and although in form purporting to be merely remedial.[17] It is also said that the test

Reassessment.— Where an assessment has been declared void, an act providing for a reassessment of the tax is not unconstitutional, as disturbing vested rights. Frederick *v.* Seattle, 13 Wash. 428, 43 Pac. 364; Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

Transfer of assessment.— Where a valid tax has been levied in aid of a railroad company, the legislature may direct the transfer of the assessment collectively to the same company for the same purpose before its payment. People *v.* Lawrence, 36 Barb. (N. Y.) 177.

10. *California.*— People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521.

Illinois.— Cowgill *v.* Long, 15 Ill. 202.

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 442, 14 Am. St. Rep. 308, 4 L. R. A. 445; Iowa R. Land Co. *v.* Soper, 39 Iowa 112.

Kentucky.— Marion County *v.* Louisville, etc., R. Co., 91 Ky. 388, 12 Ky. L. Rep. 961, 15 S. W. 1061.

Oregon.— Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

South Carolina.— State *v.* County Treasurer, 4 S. C. 520.

Vermont.— Bellows *v.* Weeks, 41 Vt. 590.

See 10 Cent. Dig. tit. "Constitutional Law," § 213; and, generally, Taxation.

Where it is not within the legislative power to authorize a tax in the first place a curative statute can have no effect. Norman *v.* Boaz, 85 Ky. 557, 9 Ky. L. Rep. 127, 4 S. W. 316.

11. People *v.* Moore, 1 Ida. 662 (where existing judgments were affected); Daniels *v.* Watertown Tp., 61 Mich. 514, 28 N. W. 673 (where prior to the validating act the property was sold to satisfy the illegal assessment and suit was brought for money realized at the sale).

12. *Connecticut.*— Mechanics', etc., Bank's Appeal, 31 Conn. 63.

Maine.— Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

Massachusetts.— Com. *v.* Hampden County Highway Com'rs, 6 Pick. (Mass.) 501.

New York.— Howard *v.* Moot, 64 N. Y. 262.

North Carolina.— Oats *v.* Darden, 5 N. C. 500.

See 10 Cent. Dig. tit. "Constitutional Law," § 238.

Repeal of statute creating remedy.—Where a special tribunal is created by statute and the statute is repealed without any saving of proceedings commenced and pending before the tribunal, its whole power ceases and it cannot finish what may have been so commenced. Com. *v.* Hampden County Highway Com'rs, 6 Pick. (Mass.) 501. See also Bennet *v.* Hargus, 1 Nebr. 419, holding that a suit to enforce a remedy founded solely on a statute is terminated by a repeal of the statute before the rendition of judgment.

13. Mechanics', etc., Bank's Appeal, 31 Conn. 63.

14. Lockett *v.* Usry, 28 Ga. 345; Morton *v.* Sharkey, McCahon (Kan.) 535; Williar *v.* Baltimore Butchers' Loan, etc., Assoc., 45 Md. 546; Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

15. Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

16. Thweatt *v.* Hopkinsville Bank, 81 Ky. 1; Hedger *v.* Rennaker, 3 Metc. (Ky.) 255; Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Rich *v.* Flanders, 39 N. H. 304; Rhines *v.* Clark, 51 Pa. St. 96.

17. Rich *v.* Flanders, 39 N. H. 304.

Where a judgment has once been obtained under a former remedy, the legislature has no power to deprive this judgment of its validity or efficacy by a subsequent repeal of or change in the remedy under which it was obtained. Strafford *v.* Sharon, 61 Vt. 126, 17 Atl. 793, 18 Atl. 308, 4 L. R. A. 499; Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920. So an act which authorizes the opening of judgments which are procured by fraud or perjury at any time within three years after discovery, in so far as it is applicable to judgments absolute at the time of its passage, impairs a vested right and is unconstitutional and void. Wieland *v.* Shillock, 24 Minn. 345.

is whether the substituted remedy is in fact substantial and adequate.[18] But there is no doubt that remedial alterations in no wise impairing rights previously acquired or enhancing or enlarging them as by improvements in the mode of procedure are completely within the power of the law-making body, whether such changes operate retrospectively or not.[19]

b. Changing Form of Action or Proceeding or Substituting One Remedy For Another. Changing the form of the action or proceeding or substituting one remedy for another may be accomplished by subsequent legislative action, irrespective of the question whether suits then pending are thereby affected;[20] provided that the new remedy is not less efficacious than the former,[21] and that the change affects no vested rights acquired under existing laws.[22] Thus the remedy may be limited to a particular one,[23] and the new remedy may be created by the act destroying the former one by substitution therefor.[24] Actions may also be con-

18. Rhines *v.* Clark, 51 Pa. St. 96.

The aid of the remedy in question must have once been fairly sought by legal or judicial proceedings. Hedger *v.* Rennaker, 3 Metc. (Ky.) 255; Bigelow *v.* Pritchard, 21 Pick. (Mass.) 169.

19. *Alabama.*— Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

California.— Cohen *v.* Wright, 22 Cal. 293.

Illinois.— Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658.

Indiana.— Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524.

Kentucky.— Redman *v.* Sanders, 2 Dana (Ky.) 68; Howard *v.* Gibson, 22 Ky. L. Rep. 1294, 60 S. W. 491.

Louisiana.— State *v.* New Orleans City, etc., R. Co., 42 La. Ann. 550, 7 So. 606.

Maine.— Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Morse *v.* Rice, 21 Me. 53.

Massachusetts.— Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

Michigan.— Railroad Com'rs *v.* Grand Rapids, etc., R. Co., (Mich. 1902) 89 N. W. 967; Case *v.* Dean, 16 Mich. 12.

Minnesota.— Farnsworth Loan, etc., Co. *v.* Commonwealth Title Ins., etc., Co., 84 Minn. 62, 86 N. W. 877; Spooner *v.* Spooner, 26 Minn. 137, 1 N. W. 838.

New York.—Gildersleeve *v.* People, 10 Barb. (N. Y.) 35.

North Carolina.— Buie *v.* Carver, 75 N. C. 559.

Oregon.— Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Pennsylvania.— Kenyon *v.* Stewart, 44 Pa. St. 179; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Taggart *v.* McGinn, 14 Pa. St. 155; Reading *v.* Savage, 5 Lanc. L. Rev. 135.

Texas.— De Cordova *v.* Galveston, 4 Tex. 470.

West Virginia.— Hutchinson *v.* Landcraft, 4 W. Va. 312.

United States.— U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

See 10 Cent. Dig. tit. "Constitutional Law," § 238; and ACTIONS, II, C [1 Cyc. 705].

Exemption from particular remedy.— A statute giving a railroad company an exemption from suit in ejectment creates no vested rights which will prevent its repeal. Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

A law may stay proceedings by or against a corporation during the pendency of a suit by the state to enforce a forfeiture of its charter, without being unconstitutional or impairing the vested rights of creditors to enforce their claims. State *v.* Judge Third Judicial Dist., 2 Rob. (La.) 307.

20. *Maine.*— Read *v.* Frankfort Bank, 23 Me. 318; Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

Mississippi.— Woods *v.* Buie, 5 How. (Miss.) 285.

New Jersey.— Wanser *v.* Atkinson, 43 N. J. L. 571; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395.

New York.— *In re* New York Protestant Episcopal Public School, 31 N. Y. 574; Eno *v.* New York, 7 Hun (N. Y.) 320; People *v.* Tibbets, 4 Cow. (N. Y.) 384.

Ohio.—Lawrence R. Co. *v.* Mahoning County Com'rs, 35 Ohio St. 1.

Pennsylvania.— Evans *v.* Montgomery, 4 Watts & S. (Pa.) 218.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841; Hope *v.* Johnson, 2 Yerg. (Tenn.) 123.

Texas.— Treasurer *v.* Wygall, 46 Tex. 447.

See 10 Cent. Dig. tit. "Constitutional Law," § 240.

21. Williams *v.* Weaver, 94 N. C. 134.

22. *In re* New York Protestant Episcopal Public School, 31 N. Y. 574.

23. Thayer *v.* Seavey, 11 Me. 284 (sustaining a statute limiting actions for damages for the escape of a debtor committed in execution to a special action on the case); Eno *v.* New York, 7 Hun (N. Y.) 320.

24. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647 (providing that the individual liability of stock-holders for debts of an insolvent bank shall be enforceable by the receiver); Lake Superior Ship Canal, etc., Co. *v.* Auditor-Gen., 79 Mich. 351, 44 N. W. 616 (sustaining an act prohibiting the issuance of an injunction to restrain the assessment or collection of taxes and providing a remedy by suit to recover taxes paid under protest); Com. *v.* Beatty, 1 Watts (Pa.) 382 (sustain-

solidated,[25] as in the case of assessments for damages,[26] or a proceeding at law changed to one in equity, or conversely,[27] and in all such cases the change will be sustained as constitutional.

c. Creation of Additional or Cumulative Remedies. Acts providing a new remedy,[28] or changing the effect of a remedy already existing,[29] do not impair vested rights, although made to operate retrospectively.

d. Remedies of Creditors — (i) *Alteration of Stock-Holders' Liability.* A creditor of a corporation has no vested interest in a debt due to the corporation which the state cannot destroy by an act altering the liability of stock-holders for unpaid subscriptions.[30]

(ii) *Deprivation of Right of Curtesy.* The legislature has no power to divest an estate by curtesy in which the creditor of the tenant by curtesy has once acquired a lien by attachment.[31]

(iii) *Exemption Laws.* Laws which by increasing the amount of exempt property withdraw land from the lien of a judgment previously rendered are invalid, as destroying a vested right to property acquired by the creditor.[32]

(iv) *Exemption of Husband From Liability For Wife's Debts.* An act exempting a husband from liability for debts contracted by the wife before marriage, when applied to a debt contracted before the passage of the act, does not take from the creditor such a vested right in the contingent liability of the future husband as to render the act void on this ground.[33]

ing an act substituting a new proceeding to ascertain damages done to lands by the construction of a canal).

25. See, generally, Consolidation and Severance of Actions.

26. Baldwin *v.* Newark, 38 N. J. L. 158.

27. **Change of legal proceeding into one in equity.**— George *v.* Everhart, 57 Wis. 397, 15 N. W. 387, holding that the statutory action to enforce a mechanic's lien may be changed into an equitable one *pendente lite*, although plaintiff will thereby be entitled to more costs.

Change of equitable proceeding into one at law.— Shickel *v.* Berryville Land, etc., Co., 99 Va. 88, 37 S. E. 813, sustaining an act giving courts of common law exclusive jurisdiction for the recovery of unpaid stock subscription in lieu of the previous remedy in equity.

28. Linzee *v.* Mixer, 101 Mass. 512 (sustaining a law giving grantees from commissioners of public lands the right by proceedings in equity to compel the commissioners to remove and alter buildings according to the stipulation contained in the deeds in cases where the commonwealth has such right); Heinemann *v.* Schloss, 83 Mich. 153, 47 N. W. 107 (sustaining a law allowing plaintiff in garnishment proceedings to recover the value of property fraudulently received by garnishees and converted into money, as applied to such conversion before the passage of the act); *In re* Beams, 17 How. Pr. (N. Y.) 459; U. S. *v.* Samperyac, Hempst. (U. S.) 118, 27 Fed. Cas. No. 16,216*a*. See also *supra*, VIII, D, 2, p, (III).

Giving a remedy at law which before could be available in equity only.— Paschall *v.* Whitsett, 11 Ala. 472; Bartlett *v.* Lang, 2 Ala. 401.

29. Vanzant *v.* Waddel, 2 Yerg. (Tenn.) 260, sustaining a statute making the debtors of a bank liable to the process of foreign attachment as garnishees.

30. Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307. See also Corporations.

31. Plumb *v.* Sawyer, 21 Conn. 351. See also Curtesy; and *supra*, VIII, D, 2, o, (II).

32. Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212. See also Exemptions; and *supra*, VIII, D, 2, d.

A homestead exemption law is not unconstitutional in that it destroys a vested right. Hardeman *v.* Downer, 39 Ga. 425. But see Sluder *v.* Rogers, 64 N. C. 289; McKeithan *v.* Terry, 64 N. C. 25; Hill *v.* Kessler, 63 N. C. 437, which cases hold that a vested lien by levy cannot be impaired by the constitutional provision for a homestead. See also Tillotson *v.* Millard, 7 Minn. 513, 82 Am. Dec. 112, holding that the right of a judgment creditor to sell premises exempt as a homestead on the contingency of their ceasing to be a homestead is a valuable and vested right of which the legislature cannot subsequently deprive him. See, generally, Homesteads.

33. Foote *v.* Morris, 12 N. Y. Leg. Obs. 61. But see Berley *v.* Rampacher, 5 Duer (N. Y.) 183, holding that marriage in such a case before the passage of the exempting act gives the creditors of the wife a vested right which cannot be subsequently impaired. See, generally, Husband and Wife; and *supra*, VIII, D, 2, o, (I).

An act in destroying the liability of the wife's property for debts incurred before its passage is not unconstitutional. Headley *v.* Ettling, 1 Phila. (Pa.) 39, 7 Leg. Int. (Pa.) 39.

(v) *Insolvency Laws.* A creditor of an assigning debtor acquires no vested right in the estate by virtue of such assignment, and the trustee's action and all proceedings in the settlement of the estate are subject to legislative control.[34] Thus a subsequent law may vary the form of the creditor's remedy,[35] may extend a prior insolvency act so as to bring within its scope securities already held by such creditor,[36] may invalidate payments made to a creditor,[37] may cure defects in the assignee's bond and thus destroy the efficacy of a previous garnishment process,[38] or may order distribution between individual and partnership creditors according to equitable priorities.[39]

e. Jurisdiction of Courts. Acts affecting the jurisdiction of courts are usually sustained as relating merely to the remedy, although they may operate upon existing causes,[40] at least so long as the change does not make the trial more burdensome or less speedy or efficacious.[41] It has been held, however, that such laws cannot operate to divest a title gained under a decree in a court in which jurisdiction was rightfully acquired, although the decree and gaining of title were subsequent to the passage of the act;[42] nor to cure a previous jurisdictional defect or one going to the substance of a vested right, thus cutting off an acquired defense.[43]

f. Service of Process. An act making the official return of the sheriff evidence of the service of the notice of a mechanic's lien, the return of the sheriff

34. Mechanics', etc., Bank's Appeal, 31 Conn. 63. See also Insolvency; and *supra*, VIII, D, 2, e.

But a provision of an insolvency law dissolving a previous attachment or levy on the property of an insolvent debtor on his making a general assignment within ten days thereafter is unconstitutional as to debts incurred previous to the taking effect of the act, although the debts were included in a note executed by the debtor after the act took effect. Wilson *v.* Brochon, 95 Fed. 82. See also Demeritt *v.* Exchange Bank, Brunn. Col. Cas. (U. S.) 898, 7 Fed. Cas. No. 3,780, 20 Law Rep. 606, holding that an act providing that the creditor's remedy shall be by presenting their claims to receivers, from whom exceptions are allowed to be taken to the state supreme court whose decision shall be final, cannot defeat the right of citizens of other states to bring action in the federal courts.

35. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647 (holding that an act providing that the individual liability of stock-holders for debts of an insolvent bank shall be enforceable by the receiver does not affect any vested right of the creditors of a bank previously incorporated under an act fixing the statutory liability of stock-holders in favor of the creditors, the latter act being merely remedial); Leathers *v.* Shipbuilders' Bank, 40 Me. 386 (sustaining an act authorizing an equal distribution among creditors of property in the hands of a receiver, and providing that no action shall be maintained against any bank after the appointment of receivers therefor, but that all creditors shall have their remedy under the provisions of the new law).

36. Mechanics', etc., Bank's Appeal, 31 Conn. 63, sustaining a change bringing within the scope of the insolvency act mortgaged securities held by creditors for claims presented by them for settlement under the new act, so as to affect a mortgage held by one whose claim has been filed already.

37. Stiefel *v.* New York Novelty Co., 25 Misc. (N. Y.) 221, 55 N. Y. Suppl. 90, holding that a law making void any payment to a creditor by a corporation whose insolvency is imminent impairs no vested right when applied to an indebtedness contracted before the law took effect.

38. Freiberg *v.* Singer, 90 Wis. 608, 63 N. W. 754.

39. Jewett *v.* Phillips, 5 Allen (Mass.) 150; Simmons *v.* Hanover, 23 Pick. (Mass.) 188, sustaining a provision that proof of partnership and individual creditor's claims shall be kept distinct and distribution made among the creditors according to equitable priorities.

40. *Georgia.*— McLellan *v.* Weston, 59 Ga. 883.

New Hampshire.— Cummings *v.* White Mountain R. Co., 43 N. H. 114.

New York.— Johnson *v.* Ackerson, 3 Daly (N. Y.) 430.

North Carolina.— Kingsbury *v.* Chatham R. Co., 66 N. C. 284.

United States.— Corbett *v.* U. S., 1 Ct. Cl. 139.

See 10 Cent. Dig. tit. "Constitutional Law," § 252; and, generally, Courts.

41. March *v.* State, 44 Tex. 64.

42. Elston *v.* Piggott, 94 Ind. 14, holding that a state law providing that foreign corporations beginning suit against a citizen of the state in the United States courts shall forfeit all title to land in the state cannot prevent a corporation which has begun such suit before the passage of the act from taking valid title by purchase at a judicial sale in satisfaction of a decree rendered thereafter.

43. Maguiar *v.* Henry, 84 Ky. 1, 7 Ky. L. Rep. 695, 4 Am. St. Rep. 182; Yeatman *v.* Day, 79 Ky. 186.

not previously having been sufficient to prove such service, is valid, as remedial only and furnishing a new rule of evidence.[44]

g. Abatement of Actions. A statute providing that no action for injury to the person or property shall abate by death is not unconstitutional in that it applies to actions pending at the time of its passage.[45]

h. Changing Venue of Actions. Laws affecting the venue of actions, whether allowing a change not previously permitted or withdrawing a permission to change which had previously been in force, relate merely to the remedy, and as furnishing a new rule of practice are sustained, although affecting existing cases.[46]

i. Continuance. Statutes giving or withdrawing rights of parlance or continuance may constitutionally affect existing causes.[47]

j. Statutes of Limitation — (i) *In General.* Before prescription has been acquired therein no vested right exists in any particular limitation so as to make alteration of the same unconstitutional;[48] but such rights being inchoate may be changed or modified by a subsequent retrospective law, provided a reasonable time is left after the passage of the act, and before its operation as a bar, in which parties may claim and exercise the rights which had previously belonged to them.[49] But after prescription has once been acquired there may under the

44. Kick *v.* Doerste, 45 Mo. App. 134. And see PROCESS.

45. Pritchard *v.* Savannah St., etc., R. Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721. See also Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112, holding that a statute providing for the survival of causes of action for personal injuries "on which suit has been or may hereafter be brought" does not, as to actions pending at its passage, violate any vested right of defendant. But see Vrooman *v.* Jones, 5 How. Pr. (N. Y.) 369, holding that a code provision declaring that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, so far as it is made applicable to existing suits commenced before the code took effect, and to transfers of interest made before that time, is unconstitutional. And see Officer *v.* Young, 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268, holding that a statute authorizing J "to prosecute a suit now pending in the circuit court of White county, in the name of Peter Elrod against Robert Officer, without taking out letters of administration upon the estate of said Elrod, dec'd" is unconstitutional and void, as impairing vested rights.

As to abatement and revival of actions generally see ABATEMENT AND REVIVAL, 1 Cyc. 10.

46. Elkenberry *v.* Edwards, 71 Iowa 82, 32 N. W. 183; Kingsbury *v.* Chatham R. Co., 66 N. C. 284; State *v.* Lake Shore, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 300, 1 Ohio N. P. 292; Lewis' Appeal, 67 Pa. St. 153. And see VENUE.

47. Brotherton *v.* Brotherton, 41 Iowa 112; Woods *v.* Buie, 5 How. (Miss.) 285. And see CONTINUANCES.

48. *Alabama.*— Scales *v.* Doe, 127 Ala. 582, 29 So. 63.

Illinois.— Stokes *v.* Riley, (Ill. 1886) 9 N. E. 69; Ryhiner *v.* Frank, 105 Ill. 326.

Kentucky.— Louisville, etc., R. Co. *v.* Williams, (Ky. 1897) 41 S. W. 287; Vandiver *v.* Hodge, 4 Bush (Ky.) 538.

Maine.— Beal *v.* Nason, 14 Me. 344.

United States.—Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365.

See 10 Cent. Dig. tit. "Constitutional Law," § 246; and, generally, LIMITATIONS OF ACTIONS.

49. Stearns *v.* Gitting, 23 Ill. 387; Smith *v.* Packard, 12 Wis. 371; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

Illustrations.— A statute providing that corporations shall have three years after the expiration of their charters to bring suits and defend actions (Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135); a statute providing for a limitation of nine months within which to test the validity of tax judgments or sale, by bringing any form of action, making parties all persons interested (Whitney *v.* Wegler, 54 Minn. 235, 55 N. W. 927 [*distinguishing* Baker *v.* Kelley, 11 Minn. 480]); a statute barring suits and proceedings against tax purchasers to defeat conveyances, except in certain cases if not begun within three years from the time of recording the deed (Hill *v.* Atterbury, 88 Mo. 114); a statute altering the period of limitation of the lien of existing judgments (Miller *v.* Com., 5 Watts & S. (Pa.) 488); a statute barring recovery on ground rents after twenty-one years without payment or acknowledgment (Korn *v.* Browne, 64 Pa. St. 55); a statute providing that no mortgage judgment shall constitute a lien on land after twenty years from its creation unless the holder files a note of payment or acknowledgment, leaving a period of seven years before taking effect (Henry *v.* Henry, 31 S. C. 1, 9 S. E. 726); and a statute extending time for bringing debt or assumpsit (Landa *v*

former statute have been gained a vested right which cannot be affected by subsequent legislation.[50] Nor ought the statute to operate so as entirely to destroy an existing remedy.[51]

(II) *Reducing or Extending Time to Bring Action.* Statutes reducing or extending the time to bring an action and having a retrospective bearing on existing causes of action, but not affecting such as are already barred, are constitutional in that respect, if a reasonable time is allowed by them for bringing action before they go into operation;[52] but they are held unconstitutional if no such reasonable time is allowed before they go into effect.[53] So too they will be held invalid if their effect is to remove a bar once actually gained, which is properly called a vested right.[54]

(III) *Suspending Operation of Statute.* Acts suspending for good cause the operation of statutes of limitation are usually sustained as constitutional, as affecting the remedy, and may act retrospectively so far as not to affect actions already barred.[55] But under such suspension it has been held that a vested right

Obert, 78 Tex. 33, 14 S. W. 297) have all been sustained. But a statute requiring one in actual or constructive possession of property to bring action against an opposing claimant within a certain time or lose his right in the property has been held void as an unlawful confiscation of property rather than a limitation act. Groesbeck *v.* Seeley, 13 Mich. 329.

50. Boyers *v.* Vinson, 9 Rob. (La.) 518. See also Gilman *v.* Cutts, 23 N. H. 376.

51. Byers *v.* Pennsylvania R. Co., 26 Pittsb. Leg. J. N. S. 447. But a retrospective law is not unreasonable in that it bars actions already barred by the laws of the state where the parties reside and where the cause of action arose. Hyman *v.* Bayne, 83 Ill. 256.

52. *California.*— Swamp Land Dist. No. 307 *v.* Glide, 112 Cal. 85, 44 Pac. 451.

Indiana.— Pritchard *v.* Spencer, 2 Ind. 486.

Kentucky.— Pearce *v.* Patton, 7 B. Mon. (Ky.) 162, 45 Am. Dec. 61.

Louisiana.— Dunlop *v.* Minor, 26 La. Ann. 117; Michel *v.* Tenney, 6 La. Ann. 89.

Michigan.— Ludwig *v.* Stewart, 32 Mich. 27.

Minnesota.— Bradley *v.* Norris, 63 Minn. 156, 65 N. W. 357; Stine *v.* Bennett, 13 Minn. 153.

Mississippi.— Cameron *v.* Louisville, etc., R. Co., 69 Miss. 78, 10 So. 554; West Feliciana R. Co. *v.* Stockett, 13 Sm. & M. (Miss.) 395.

Missouri.— Seibert *v.* Copp, 62 Mo. 182; Adamson *v.* Davis, 47 Mo. 268; State *v.* Heman, 7 Mo. App. 420.

Montana.— Guiterman *v.* Wishon, 21 Mont. 458, 54 Pac. 566.

New York.— Wheeler *v.* Jackson, 41 Hun (N. Y.) 410; Slocum *v.* Stoddard, 7 N. Y. Civ. Proc. 240.

North Carolina.— Strickland *v.* Draughan, 91 N. C. 103.

Pennsylvania.— Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 44 Wkly. Notes Cas. (Pa.) 105, 42 Atl. 953; Focht *v.* Reading Stove Works, 21 Pa. Co. Ct. 524.

Texas.— Dabbs *v.* Rothe, (Tex. Civ. App. 1901) 60 S. W. 811; Houston, etc., R. Co. *v.* Rogers, 15 Tex. Civ. App. 680, 39 S. W. 1112.

Wisconsin.— Mecklem *v.* Blake, 22 Wis. 495, 99 Am. Dec. 68; Pleasants *v.* Rohrer, 17 Wis. 577; Howell *v.* Howell, 15 Wis. 55; Falkner *v.* Dorman, 7 Wis. 388; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

United States.— Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886; Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365.

See 10 Cent. Dig. tit. "Constitutional Law," § 247; and Limitations of Actions.

Reasonable time need not be left when the new statute confers as a favor a right which did not exist before. Bacon *v.* Howard, 20 How. (U. S.) 22, 15 L. ed. 811, sustaining a law permitting suits on foreign judgments, not before allowed, but limiting the period to four years.

53. *Kentucky.*— Berry *v.* Ransdall, 4 Metc. (Ky.) 292, where the act was to take effect thirty days after passage.

Michigan.— Ludwig *v.* Stewart, 32 Mich. 27; Price *v.* Hopkin, 13 Mich. 318.

Nebraska.— Horbach *v.* Miller, 4 Nebr. 31.

Wisconsin.— Osborn *v.* Jaines, 17 Wis. 573.

United States.— Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

See 10 Cent. Dig. tit. "Constitutional Law," § 247.

Action for past torts.— The legislature has unrestricted power to reduce the time allowed for commencing actions for past torts, although not as to actions of contracts. Guillotel *v.* New York, 55 How. Pr. (N. Y.) 114.

54. Horbach *v.* Miller, 4 Nebr. 31; Bradford *v.* Brooks, 2 Aik. (Vt.) 284, 16 Am. Dec. 715 (holding invalid an act authorizing a judge of probate to extend the time allowed by law for the exhibition and allowance of claims against a certain estate); Pleasants *v.* Rohrer, 17 Wis. 577.

55. *Florida.*—Hart *v.* Bostwick, 14 Fla. 162.

Kentucky.— Trimble *v.* Vaughn, 6 Bush (Ky.) 544.

Mississippi.— Mister *v.* McLean, 43 Miss. 268; Buchanan *v.* Smith, 43 Miss. 90; State *v.* McGinty, 41 Miss. 435, 93 Am. Dec. 264; Hill *v.* Boyland, 40 Miss. 618.

may be acquired which cannot be divested by the repeal of the suspending statute.[56]

(IV) *Repeal of Statute or Extending Time as Affecting Rights Barred.* Upon the question as to how far vested rights may be gained in the running of the statute for the time requisite to bar actions, and whether a bar thus once gained may be subsequently affected by the repeal of the statute or a renewal of time for bringing the action once barred, the authorities are in conflict. The weight of authority in the several states, it is believed, supports the view that the bar gained by the running of the statute is a vested right which cannot subsequently be taken away by the legislature either by creating a new right, repealing the former statute, or withdrawing a specified past period from its operation.[57] There are, however, contrary authorities in several jurisdictions,

New Jersey.— Smith *v.* Tucker, 17 N. J. L. 82.

Ohio.— Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338.

Texas.— Bentinck *v.* Franklin, 38 Tex. 458.

Vermont.— Cardell *v.* Carpenter, 43 Vt. 84.

See 10 Cent. Dig. tit. "Constitutional Law," § 248; and, generally, Limitations of Actions.

Illustrations.—Suspension of the statute in favor of soldiers (Mister *v.* McLean, 43 Miss. 268; Buchanan *v.* Smith, 43 Miss. 90; State *v.* McGinty, 41 Miss. 435, 93 Am. Dec. 264; Cardell *v.* Carpenter, 43 Vt. 84. But where the suspension was "during term of service" and the enlistment was "during the war" it was held that the law was invalid, the period being too indefinite. Clark *v.* Martin, 5 Phila. (Pa.) 251, 20 Leg. Int. (Pa.) 180); suspension until the time when courts could be opened (Trimble *v.* Vaughn, 6 Bush (Ky.) 544); and suspension in cases of causes of action accruing against non-residents or persons removed from the state (Smith *v.* Tucker, 17 N. J. L. 82) have all been sustained. See also Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338, sustaining a law declaring that the statute should not be deemed to have run in favor of any person or corporation for obstructing roads on the ground that no limitation can bar action for maintaining a public nuisance and that the new law was purely remedial.

56. Pope *v.* Ashley, 13 Ark. 262, wherein a statute of limitation contained a proviso that the time when the debtor was out of the state should be deducted from the years specified. After suit brought on a claim which would then have been barred had there been no such proviso, the legislature repealed the proviso without reservation. It was held that plaintiff could not thereby be deprived of his vested right to sue.

57. *Arkansas.*— Couch *v.* McKee, 6 Ark. 484.

Florida.— Bradford *v.* Shine, 13 Fla. 393, 7 Am. Rep. 239.

Illinois.— Gibbs *v.* Chicago Title, etc., Co., 79 Ill. App. 22.

Indiana.— Stipp *v.* Brown, 2 Ind. 647; McKinney *v.* Springer, 8 Blackf. (Ind.) 506.

Iowa.— Thompson *v.* Read, 41 Iowa 48.

Kentucky.— McCracken County *v.* Mercantile Trust Co., 84 Ky. 344, 8 Ky. L. Rep. 314, 1 S. W. 585.

Massachusetts.— Kinsman *v.* Cambridge, 121 Mass. 558; Bigelow *v.* Bemis, 2 Allen (Mass.) 496; Holden *v.* James, 11 Mass. 396, 6 Am. Dec. 174. But see Dunbar *v.* Boston, etc., R. Corp., 181 Mass. 383, 63 N. E. 916.

Minnesota.— Whitney *v.* Wegler, 54 Minn. 235, 55 N. W. 927.

Mississippi.— Woodman *v.* Fulton, 47 Miss. 682; Davis *v.* Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.

New Hampshire.— Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131; Woart *v.* Winnick, 3 N. H. 473, 14 Am. Dec. 384.

New Jersey.—Ryder *v.* Wilson, 41 N. J. L. 9.

North Carolina.— Whitehurst *v.* Dey, 90 N. C. 542.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

Tennessee.— Mynatt *v.* Hubbs, 6 Heisk. (Tenn.) 320; Girdner *v.* Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; Rogers *v.* Winton, 2 Humphr. (Tenn.) 178.

Utah.— Ireland *v.* Mackintosh, 22 Utah 296, 61 Pac. 901.

Vermont.— Wires *v.* Farr, 25 Vt. 41.

West Virginia.— Hall *v.* Webb, 21 W. Va. 318.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871; Pleasants *v.* Rohrer, 17 Wis. 577; Hill *v.* Kricke, 11 Wis. 442; Sprecker *v.* Wakeley, 11 Wis. 432.

See 10 Cent. Dig. tit. "Constitutional Law," § 249; and, generally, Limitations of Actions.

A bar once gained cannot be divested in case of: The repeal of a statute limiting time in which creditors may present claims against an estate. Bradford *v.* Shine, 13 Fla. 393, 7 Am. Rep. 239; Kinsman *v.* Cambridge, 121 Mass. 558; Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131; Ryder *v.* Wilson, 41 N. J. L. 9.

Change of limitation as to period for testing validity of tax judgments or sales. Whitney *v.* Wegler, 54 Minn. 235, 55 N. W. 927.

Setting aside will when statute has run in favor of devisee. Rogers *v.* Winton, 2 Humphr. (Tenn.) 178.

Right of action for damages for land taken

and the rule that the bar to a claim for debt cannot be a vested right is established in the United States supreme court by a series of decisions. These authorities would usually distinguish cases where the bar gained is merely against the remedy of the creditors, as in case of a debt from cases where the bar has vested an absolute title to real or personal property.[58] There can be no right gained in the running of the statute till the prescribed period of limitations is completed,[59] or according to some authorities till not only the remedy is barred but the limitation has entirely extinguished the former right and vested a title.[60] But where only one particular form of remedy is barred, while other equivalent forms remain, there can be no objection to a removal of a bar on the first.[61] A distinction is sometimes attempted as to whether a statute as it originally stood conferred a right not existing at common law or limited one which did so exist before, the doctrine being that in the latter case a bar already complete under the statute may be removed by later act.[62]

(v) *Limiting or Extending Time For Review.* The bar arising from the lapse of time within which an appeal may be taken is a vested right and cannot be affected by subsequent legislation.[63] There is, however, authority to the contrary.[64]

k. Parties.[65] The legislature may alter at pleasure the rules as to parties to actions,[66] and may affect pending suits by acts allowing or forbidding the inter-

to widen street. Kinsman *v.* Cambridge, 121 Mass. 558.

58. *Georgia.*— Cox *v.* Berry, 13 Ga. 306.

Kentucky.—Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563, sustaining a law declaring that a certain past period should not be computed. See also Smart *v.* Baugh, 3 J. J. Marsh. (Ky.) 363; Com. *v.* McGowan, 4 Bibb (Ky.) 62, 7 Am. Dec. 737.

Maryland.— Hagerstown *v.* Sehner, 37 Md. 180.

West Virginia.— McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609 (holding that the right of sheriffs to levy unpaid taxes after they have become barred may be revived by legislative act); Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270.

United States.—Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483, wherein the court, in deciding that the repeal of a statute of limitations on actions for a personal debt is not invalid as affecting any vested right of the debtor, observes: "It may therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative Act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing Act the property had become the defendant's. Both the legal title and the real ownership had become vested in him. . . . But we are of opinion that to remove the bar which the Statute of Limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground." See also Townsend *v.* Jemison, 9 How. (U. S.) 407, 13 L. ed. 194; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177.

See 10 Cent. Dig. tit. "Constitutional Law," § 249.

59. Calvit *v.* Mulhollan, 12 Rob. (La.) 266.

Claimants by adverse possession may be required to give notice of their claims, on the principle that there can be no vested right in a title by adverse possession short of the statutory period. Scales *v.* Otts, 127 Ala. 582, 29 So. 63.

60. Kipp *v.* Johnson, 31 Minn. 360, 17 N. W. 957. See also Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270.

61. Power *v.* Telford, 60 Miss. 195, holding that where the right to bring replevin has been lost but not the right to maintain detinue or trover, the limitation as to replevin may be removed.

62. Hinton *v.* Hinton, 61 N. C. 410, so holding in case of an act giving widows of testators six months in which to dissent from wills, as not conferring a right of dower but as being a statutory limitation upon that right.

63. Hewitt *v.* Colorado Springs Co., 5 Colo. 184; Bond *v.* Santa Fé First Nat. Bank, 5 Colo. 83; Willoughby *v.* George, 5 Colo. 80; Beaupre *v.* Hoerr, 13 Minn. 366; Staniford *v.* Barry, 1 Aik. (Vt.) 314, 15 Am. Dec. 691; Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77; Sydnor *v.* Palmer, 32 Wis. 406; Davis *v.* Menasha, 21 Wis. 491. And see Appeal and Error, 2 Cyc. 789.

64. Noles *v.* Noles, 40 Ala. 576; Page *v.* Matthews, 40 Ala. 547. See also Odum *v.* Garner, 86 Tex. 374, 25 S. W. 18; Smith *v.* Packard, 12 Wis. 371, which cases hold that acts limiting the time for review are valid as applied to existing cases where reasonable opportunity for review still remains. And see Alvord *v.* Little, 16 Fla. 158.

65. See, generally, Parties.

66. Hancock *v.* Ritchie, 11 Ind. 48.

Allowing joining of adverse parties.— Templeton *v.* Kraner, 24 Ohio St. 554.

vention of new parties,[67] substitution of new for former parties,[68] and amendments by striking out names of plaintiffs or defendants.[69] It has been held, however, that such a change cannot deprive a party in a pending action of a right to sue where such a right would have enabled him to recover a penalty.[70]

l. Pleading. The doctrine is established that no vested right can obtain in rules of pleading.[71]

m. Practice and Procedure. The parties to a suit have no vested right to the rules of practice or modes of procedure prescribed by the laws in force when a suit is brought, but being remedial only such rules may be amended, altered, or repealed, and others substituted in their place, at any time before a final trial; or at least before indivestable rights have been acquired under them.[72] It has been held, however, that the rule is otherwise where the effect of the new statute when applied to decisions previously rendered is to give a right to a trial on appeal not before existing.[73]

n. Evidence — (1) *In General.* No vested rights can be gained in rules of evidence,[74] but such rules may at pleasure be modified or repealed, although the

Allowing judgment to be entered for those of several plaintiffs who have established title. — Hinckle *v.* Riffert, 6 Pa. St. 196.

Authorizing suit by party not previously entitled to sue.— Lanier *v.* Irvine, 24 Minn. 116.

67. Peevey *v.* Cabaniss, 70 Ala. 253.

68. Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338.

69. Knight *v.* Dorr, 19 Pick. (Mass.) 48.

70. Kent *v.* Gray, 53 N. H. 576.

Laws giving parties jointly sued the right to sever and demand change of venue.— A law giving parties jointly sued the right to sever, and if not sued in the county of their residence to demand change of venue to the county of their several residences (rights which had previously been discretionary in the court), cannot be applied to pending suits, as it does not furnish plaintiff with a remedy substantially the same as that in force when suit was brought. Mabry *v.* Baxter, 11 Heisk. (Tenn.) 682.

71. Baker *v.* Barton, 20 Colo. 506, 39 Pac. 65 (holding that a rule that in actions for false imprisonment a defendant cannot give proof of justification without pleading it may be altered); Brotherton *v.* Brotherton, 41 Iowa 112 (holding that the time in which pleadings may be filed may be changed); Nelson *v.* North, 1 Overt. (Tenn.) 33 (holding that a statute may enlarge the time within which defendant may answer after a bill is taken as confessed); and PLEADING.

72. *Illinois.*— Palmer *v.* Danville, 166 Ill. 42, 46 N. E. 629; Holcomb *v.* People, 79 Ill. 409.

Minnesota.— Barry *v.* McGrade, 14 Minn. 163.

New Hampshire.—Rich *v.* Flanders, 39 N. H. 304.

New York.— Burch *v.* Newberry, 3 How. Pr. (N. Y.) 271, 1 Code Rep. (N. Y.) 41.

Wisconsin.— Blonde *v.* Menominee Bay Shore Lumber Co., 106 Wis. 540, 82 N. W. 552; Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318.

See 10 Cent. Dig. tit. "Constitutional Law," § 259.

Advancing suits.— An act authorizing suits for the ejectment of tenants to be tried in preference to other suits has been held simply to apply to pending actions so as to advance their trial and valid as merely remedial. Hoa *v.* Lefranc, 18 La. Ann. 393.

Amendment of affidavit.— A statute may authorize the filing of an amended affidavit in an action pending when the statute was passed. Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318.

Assignment to dead docket.— A law may provide that the clerk of a court shall assign to a dead docket all cases that have been assigned for trial and continued indefinitely for more than one year. Dours *v.* Cazentre, McGloin (La.) 251.

Examination by order of court.—A law may authorize examination of persons by order of court on petition of the attorney-general. *In re* Davies, 168 N. Y. 89, 61 N. E. 118, 32 N. Y. Civ. Proc. 163, 56 L. R. A. 855 [*reversing* People *v.* Nussbaum, 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492].

If a remedy is changed by statute all rights of action are enforceable under the new procedure, without regard to whether they accrued before or after the change in the law. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135.

73. State *v.* Flint, 61 Minn. 539, 63 N. W. 1113, holding that a statute giving a right on appeal in habeas corpus proceedings to a trial *de novo* in the supreme court, so far as applicable to decisions rendered prior to its passage, is unconstitutional. But see Blonde *v.* Menominee Bay Shore Lumber Co., 106 Wis. 540, 82 N. W. 552.

74. *Kansas.*— Wheelock *v.* Myers, 64 Kan. 47, 67 Pac. 632.

Mississippi.— Carothers *v.* Hurley, 41 Miss. 71.

Missouri.— Coe *v.* Ritter, 86 Mo. 277.

New York.— People *v.* Ryder, 124 N. Y. 500, 26 N. E. 1040, 36 N. Y. St. 468; Howard

change may incidentally affect a right of parties to suits. It is said, however, that such party must not thus be left without remedy.[75]

(II) *Presumptions and Burden of Proof.*[76] Similarly the legislature may at pleasure enact or repeal laws dispensing with proof in actions.[77] It may establish the requisites of *prima facie* evidence,[78] fix rules of presumption as to the inferences to be drawn from certain states of fact,[79] or shift the burden of proof from one to the other party,[80] and such laws, regarded as relating merely to matters of practice and procedure, disturb no vested right by being given a retrospective operation.

(III) *Competency of Witnesses.* Vested rights cannot be obtained in the testimony of witnesses,[81] and the legislature may incidentally affect pending

v. Moot, 2 Hun (N. Y.) 475 [*affirmed* in 64 N. Y. 262].

North Carolina.— Lowe *v.* Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; Tabor *v.* Ward, 83 N. C. 291.

Ohio.— State *v.* Weston, 3 Ohio S. & C. Pl. Dec. 15, 1 Ohio N. P. 350.

See 10 Cent. Dig. tit. "Constitutional Law," § 260.

Admission of copies.— Copies of sheriff's deeds previously recorded have been made admissible as evidence where the original deeds would be evidence. Foster *v.* Gray, 22 Pa. St. 9.

Time of taking exceptions.— An act requiring exceptions to be taken in the court below, and enacting that no point relating to admissibility shall be raised in or noticed by the court of appeals is valid, although under it the higher court is obliged to sustain a judgment determining rights founded on the written instrument on parol evidence contradicting such instrument to which the opposing party failed to object. Gibbs *v.* Gale, 7 Md. 76.

Unstamped documents.—A party's right to object to the introduction in evidence of an instrument not properly stamped is not a vested right and is liable to be destroyed by a repeal of the law requiring such stamp, although the repealing act is passed subsequent to the execution of the instrument. Gibson *v.* Hibbard, 13 Mich. 214; Hoppock *v.* Stone, 49 Barb. (N. Y.) 524.

75. Tabor *v.* Ward, 83 N. C. 291.

76. See, generally, Evidence.

77. Murphy *v.* Williamson, 85 Ill. 149, sustaining a statute providing that plaintiff in ejectment need not prove defendant's possession unless his possession is denied by special plea or affidavit.

78. Howard *v.* Moot, 64 N. Y. 262.

Burnt record acts.— An act providing that deeds or certificates of purchase in case of destruction of records by fire or otherwise shall not afford *prima facie* evidence of the legality of the prior proceedings for tax-sale has been held to provide only a rule of evidence, and to be not unconstitutional as affecting vested rights. Bertrand *v.* Taylor, 87 Ill. 235; Roby *v.* Chicago, 64 Ill. 447.

Documents as prima facie evidence of facts recorded.— Instruments made by public officers according to law as tax-lists of a city may be made *prima facie* evidence of facts therein recorded. Lumsden *v.* Cross, 10 Wis. 282. So a sheriff's deed may be made *prima facie* evidence of title in the grantee of real estate of the judgment debtor, and the change be made applicable to deeds previously executed. Ehle *v.* Brown, 31 Wis. 405. And a law may be repealed making probate decrees of heirship *prima facie* evidence of facts stated therein in proceedings relating to succession of the real estate. Irwin *v.* Pierro, 44 Minn. 490, 47 N. W. 154. A statute may also provide that in suits for municipal assessments claims filed may be read in evidence of the facts set forth. Northern Liberties *v.* St. John's Church, 13 Pa. St. 104. So recitals in a mortgage or a deed of trust may be made *prima facie* evidence of facts recited. Coe *v.* Ritter, 86 Mo. 277. And a statute making church and parish records of births and deaths admissible as *prima facie* evidence governs in proceedings to determine the heirs of one who died before the enactment of such statute, as such statutes merely regulate procedure, and neither create nor impair any vested rights. Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504.

A law making delivery of intoxicating liquors evidence of a sale is valid. State *v.* Huley, 54 Me. 562. But see People *v.* Lyon, 27 Hun (N. Y.) 180, holding that a law making the drinking of liquor on the premises *prima facie* evidence of the sale on the premises is unconstitutional.

79. Belcher *v.* Mhoon, 47 Miss. 613; Hand *v.* Ballou, 12 N. Y. 541.

80. Belcher *v.* Mhoon, 47 Miss. 613.

Illustrations.— The burden of proof of a surrogate's jurisdiction may be altered as between claimants under a surrogate's sale, retroactive operation being given to the change. Chandler *v.* Northrop, 24 Barb. (N. Y.) 129. So the burden of proving contributory negligence may be imposed on defendant in actions against railways for injuries through negligence. Wallace *v.* Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552.

81. Wilson *v.* Wilson, 86 Ind. 472.

No vested right in testimony of any particular witness.— Little *v.* Gibson, 39 N. H. 505.

actions by laws either admitting the testimony of witnesses formerly incompetent to testify[82] or excluding that of others previously competent.[83]

(IV) *WEIGHT AND SUFFICIENCY.* The legislature has no right to make evidence conclusive which is not so necessarily and thus deprive the opposite party of the opportunity of showing the truth.[84] The legislature, however, may enact that less proof of public records than is required by act of congress shall be sufficient.[85]

o. Judgment and Execution[86]— (I) *IN GENERAL.* Although statutes operating to annul, set aside, or impair the value of the final judgments of courts of competent jurisdiction are held to be void,[87] it is not so with laws regulating the procedure under which judgments may be vacated, modified, or set aside. Thus it is competent for the legislature retroactively to deprive a court of the right to modify or vacate a judgment after the term at which it was rendered,[88] or to enact that the setting aside of judgments shall not after a certain period affect the right of *bona fide* purchasers,[89] and there is no doubt that existing laws gov-

82. Walthall *v.* Walthall, 42 Ala. 450; Little *v.* Gibson, 39 N. H. 505; Rich *v.* Flanders, 39 N. H. 304; John *v.* Bridgman, 27 Ohio St. 22. But see State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218, holding that the legislature cannot restore the competency of a witness rendered incompetent by reason of conviction of felony. See, generally, WITNESSES.

Admission of attorney to testify.—A change in the rule may enable an attorney to testify on the probate of his client's will as to its preparation and execution in a case where he is a subscribing witness. *In re* Gagan, 20 N. Y. Suppl. 426, 47 N. Y. St. 444, 1 Pow. Surr. (N. Y.) 231.

Admission of wife as witness for husband. — The wife's testimony may be made competent in case of suits for damages by husband for personal injuries to wife. Dunning *v.* West, 51 La. Ann. 618, 24 So. 306.

83. Goodlett *v.* Kelly, 74 Ala. 213; O'Bryan *v.* Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595.

84. Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Howard *v.* Moot, 64 N. Y. 262.

A law making an uncontested probate of a will devising realty conclusive after five years from the date has been sustained. Kenyon *v.* Stewart, 44 Pa. St. 179. See also State *v.* Weston, 3 Ohio S. & C. Pl. Dec. 15, 1 Ohio N. P. 350, holding valid a law fixing the quantity of evidence to establish that a building is a house of ill fame.

85. Parke *v.* Williams, 7 Cal. 247.

86. See, generally, EXECUTIONS; JUDGMENTS.

87. Matter of Greene, 55 N. Y. App. Div. 475, 67 N. Y. Suppl. 291 [*affirmed* in *In re* Greene, 166 N. Y. 485, 60 N. E. 183]; Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306; Mills *v.* Charlton, 29 Wis. 400, 9 Am. Rep. 578. See also New Holland *v.* Holland, 99 Ill. App. 251.

A change reducing the rate of interest on existing judgments can affect such rate from the time of its passage only (Wyoming Nat. Bank *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 9 Wyo. 153, 61 Pac. 465, 75 Am. St. Rep. 935. See also O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Ellis *v.* Barlow, (Tex. Civ. App. 1894) 26 S. W. 908; Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925), or according to other authorities cannot affect existing judgments at all (Sharpe *v.* Morgan, 44 Ill. App. 346; Cox *v.* Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454; Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378; Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717).

A new method of procedure necessary to obtain judgment cannot be retroactively enforced on a party in whose favor judgment has once been given. Strafford *v.* Sharon, 61 Vt. 126, 17 Atl. 793, 18 Atl. 308; Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920. See also Maynard *v.* Freeman, (Tex. Civ. App. 1900) 60 S. W. 334, where a previous statute had made the award of certain commissioners appointed to appraise deceased animals conclusive, and entitled plaintiff to an order from the county judge for a warrant on the county treasurer for their value. After plaintiff had filed a petition for mandamus to compel the judge to issue such a warrant the statute was amended by making it necessary to present a bill to the commissioners' court and entitling the party to such an amount only as might be allowed by that tribunal. It was held that in this respect the amendment was unconstitutional, as impairing plaintiff's vested rights and lessening the value of his remedy; but that it was valid as far as merely directing the warrant to be issued by one authority instead of another.

Subsequent repeal of statute under which judgment was rendered cannot impair the validity of the judgment. McCullough *v.* Virginia, 172 U. S. 102, 19 S. Ct. 134, 43 L. ed. 382 [*reversing* 90 Va. 597, 19 S. E. 114].

88. Bagby *v.* Champ, 83 Ky. 13.

89. Drew *v.* St. Paul, 44 Minn. 501, 47 N. W. 158, where a previous statute had allowed any party to litigation in the district courts of the state, within one year after

erning proceedings by which judgments may be enforced may be altered or repealed so as to affect pending actions, if they do not substantially impair the remedy.[90] So a retrospective statute may alter the law or procedure as to executions,[91] redemption,[92] and levies,[93] may deprive a debtor of the indulgence of a stay of proceedings,[94] or change the remedy by substituting the lien of the judgment for that of a fieri facias.[95]

(II) *Lien.* A statute which changes the time when judgments first become a lien is constitutional, although it applies to those previously existing, as it merely affects the remedy.[96] But a specific lien once obtained by levy or otherwise cannot be divested by subsequent legislation.[97]

(III) *Supplementary Proceedings.* The right of a judgment creditor to

notice of a judgment rendered against him by mistake, to make application to be relieved therefrom. A later provision enacted that the setting aside of the judgment should not prevail against a *bona fide* purchaser whose title was based thereon, when the judgment had been properly on record for three years before the making of such application. It was held that the amendment infringed no vested rights of the party against whom the judgment was rendered.

90. Spencer *v.* Rippe, 7 Okla. 608, 56 Pac. 1070 (sustaining a law requiring existing judgments to be filed in the county court within sixty days after the passage of the act under penalty of suspension of the lien); Maynard *v.* Freeman, (Tex. Civ. App. 1900) 60 S. W. 334 (sustaining a law directing that a warrant on the county treasurer for the value of diseased animals destroyed should be issued by the commissioners' court instead of the county judge).

91. Henshall *v.* Schmidtz, 50 Mo. 454 (holding that a previous requirement of motion without notice to the adverse party for leave of the court to issue an execution on a judgment rendered more than five years previously may be dispensed with); Catlin *v.* Munger, 1 Tex. 598 (holding that sales on executions on judgments for debts and liabilities incurred prior to a certain past date may be required to be made for cash without appraisement).

Releasing debtors imprisoned on execution. — But a statute releasing a debtor imprisoned on execution and providing that his going abroad shall be deemed no breach of his prison bonds has been held invalid, as a retrospective enactment in a particular case affecting private rights. Kendall *v.* Dodge, 3 Vt. 360; Lyman *v.* Mower, 2 Vt. 517; Keith *v.* Ware, 2 Vt. 174; Ward *v.* Barnard, 1 Aik. (Vt.) 121.

92. Dunn *v.* Dewey, 75 Minn. 153, 77 N. W. 793, holding that a statute providing that where an action is brought to set aside an execution sale and the time to redeem may expire before the determination of the action, any person having the right to redeem may, before the term to redeem expires, deposit with the sheriff the necessary amount with interest, and that such deposit shall extend the time for redemption until thirty days after the final determination of the action is valid in its application to existing judgments.

93. Grosvenor *v.* Chesley, 48 Me. 369.

Confirming levies previously defective. — Mather *v.* Chapman, 6 Conn. 54; Baker *v.* Smith, 91 Ga. 142, 16 S. E. 967.

94. Peddie *v.* Hollinshead, 9 Serg. & R. (Pa.) 277, holding that an indulgence granted to a debtor by an act directing that on an execution appraisement shall be had, and if the land will not sell for two thirds of its appraised value further proceedings shall be stayed for one year, does not give the debtor such a vested right to such stay as will prevent the legislature from suspending it.

95. Whitehead *v.* Latham, 83 N. C. 232.

96. Curry *v.* Landers, 35 Ala. 280. See also McCormick *v.* Alexander, 2 Ohio 65, holding that a new law may prevent judgments previously rendered on which execution was not levied within a specified period from operating as liens on the estate to the prejudice of other judgment creditors. But see Warren *v.* Jones, 9 S. C. 288, holding that an act cannot operate to deprive an execution issued after the adoption thereof upon a judgment recovered before of the lien which it would have created under the previous provisions of the law, since to give it such effect would divest vested rights.

Right to perfect lien. — The right of a judgment creditor to perfect his lien by filing a transcript of his judgment may be taken away by subsequent legislation. Borrman *v.* Schober, 18 Wis. 437.

97. Waters *v.* Dixie Lumber, etc., Co., 106 Ga. 592, 32 S. E. 636, 71 Am. St. Rep. 281 (holding that the lien of a materialman cannot be affected by the repeal or modification of the statute under which it was served); Sluder *v.* Rogers, 64 N. C. 289; McKeithan . Terry, 64 N. C. 25; Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306; Hyatt *v.* Lewis, 24 Wash. 47, 63 Pac. 1104 (holding invalid an act providing that after six years a judgment shall cease to be a lien, so far as it applied to judgment rendered before its passage). See also Wilson *v.* Brochon, 95 Fed. 82.

A lien cannot be divested by an act validating an earlier mortgage originally defective so as to give latter priority. McFadden *v.*

institute supplementary proceedings or issue execution on a judgment previously obtained is a vested right which cannot be summarily taken away, although the time of its exercise may be limited.[98]

p. Review by New Trial, Appeal, or Writ of Error — (I) *Granting New Right of Review.* Statutes granting a right of review by new trial, appeal, writ of error, or otherwise, where such right had not been previously allowed have been sustained.[99] Decisions, however, are not wanting which hold that changes in the mode of review which have a retroactive operation upon judgments previously rendered are unconstitutional.[1]

(II) *Withdrawal of Right of Review.* Most authorities allow the retroactive withdrawal of the right of review.[2] There are, however, authorities which

Blocker, 2 Indian Terr. 260, 48 S. W. 1043; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311, holding that an execution creditor who levied on chattels covered by a chattel mortgage and acquired priority on the mortgage because of the mortgagee's failure to file the same and take immediate possession of the property cannot be deprived of his priority by a subsequent act making the filing of a chattel mortgage needless when registered as a conveyance.

98. Murne *v.* Schwabacher, 2 Wash. Terr. 130, 3 Pac. 899.

99. *California.*—People *v.* Frisbie, 26 Cal. 135.

Connecticut.— Wheeler's Appeal, 45 Conn. 306.

Kansas.— Simmons *v.* Garrett, McCahon (Kan.) 82.

Maine.— Colby *v.* Dennis, 36 Me. 9.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193.

Missouri.— Lovell *v.* Davis, 52 Mo. App. 342.

New York.—Bay *v.* Gage, 36 Barb. (N. Y.) 447; Church *v.* Rhodes, 6 How. Pr. (N. Y.) 281.

Pennsylvania.— Long's Appeal, 87 Pa. St. 114.

United States.— Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; Essex Public Road Board *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446; Freeland *v.* Williams, 131 U. S. 405, 9 S. Ct. 763, 33 L. ed. 193; Garrison *v.* New York City, 21 Wall. (U. S.) 196, 22 L. ed. 612; Freeborn *v.* Smith, 2 Wall. (U. S.) 160, 17 L. ed. 922; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

See 10 Cent. Dig. tit. "Constitutional Law," § 267.

Former appeal dismissed for defect in procedure.— A first appeal having been made unaccompanied by a necessary certificate, the statute requiring the certificate was amended by dispensing with the same. Defendant then appealed without the certificate. It was held that plaintiff had no vested right in the mode of appeal existing at the time judgment was entered and that defendant's second appeal would not be dismissed. Blonde *v.* Menominee Bay Shore Lumber Co., 106 Wis. 540, 82 N. W. 552.

1. *Maine.*— Atkinson *v.* Dunlap, 50 Me. 111; Durham *v.* Lewiston, 4 Me. 140; Lewis *v.* Webb, 3 Me. 326.

Maryland.— Prout *v.* Berry, 2 Gill (Md.) 147.

Mississippi.— Hooker *v.* Hooker, 10 Sm. & M. (Miss.) 599.

New Hampshire.— Merrill *v.* Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

New York.— Germania Sav. Bank *v.* Suspension Bridge, 159 N. Y. 362, 54 N. E. 33.

North Carolina.— Morrison *v.* McDonald, 113 N. C. 327, 18 S. E. 704.

Pennsylvania.— McCabe *v.* Emerson, 18 Pa. St. 111.

Wisconsin.— Lancaster *v.* Barr, 25 Wis. 560. But see Calkins *v.* State, 21 Wis. 501.

See 10 Cent. Dig. tit. "Constitutional Law," § 267.

2. *Colorado.*— Callahan *v.* Jennings, 16 Colo. 471, 27 Pac. 1055.

Delaware.— Cunningham *v.* Dixon, 1 Marv. (Del.) 163, 41 Atl. 519.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

Indiana.— Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

Kansas.— Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114.

Louisiana.—Myers *v.* Mitchell, 20 La. Ann. 533.

Michigan.—Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499.

Mississippi.— Dismukes *v.* Stokes, 41 Miss. 430.

New York.— People *v.* Fowler, 55 N. Y. 675; *In re* Palmer, 40 N. Y. 561; Grover *v.* Coon, 1 N. Y. 536.

North Carolina.— See Norfolk, etc., R. Co. *v.* Warren, 92 N. C. 620.

Utah.— Eastman *v.* Gurrey, 14 Utah 169, 46 Pac. 828; North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 14 Utah 155, 46 Pac. 824.

Wisconsin.— Power *v.* Catlin, 10 Wis. 26.

United States.— The Rachel *v.* U. S., 6 Cranch (U. S.) 329, 3 L. ed. 239.

See 10 Cent. Dig. tit. "Constitutional Law," § 267.

Remedy by certiorari.— The right of appeal may be withdrawn when the right of certio-

hold that the right to have one's case reviewed is a constitutional right which cannot be taken away.[8]

(III) *Procedure.* The procedure in appeal proceedings, like other systems of procedure, is a subject within the regulating power of the legislative body.[4]

(IV) *Transfer of Causes From One Appellate Court to Another.* There exists no substantive right to have one's case tried in any particular tribunal of appeal, and hence pending actions may be transferred by law from one court of appeal to another.[5]

q. Costs. The right to recover costs is usually held not a vested right till judgment is pronounced; and in the meantime a law may be passed changing the amount of costs recoverable or depriving a party of them entirely.[6] There is authority, however, to the effect that this cannot be done after verdict is rendered.[7]

IX. OBLIGATION OF CONTRACTS.

A. In General — 1. The Constitutional Guaranty. The provision of the constitution of the United States which forbids a state to pass any law impairing the obligation of contracts[8] does not extend to a state law enacted before the date of the operation of that constitution, which was the first Wednesday in March, 1789.[9] But a retroactive state law[10] passed after that date which impairs the obligation of a contract violates the constitution.[11] The prohibition in question does not

rari still survives. Tierney *v.* Dodge, 9 Minn. 166.

Where a party still has a right to one trial, his cause not yet having been adjudicated, his right to a second as a matter of course may be withdrawn. People *v.* Boulder County Dist. Ct., 28 Colo. 161, 63 Pac. 321 [*citing* Brown *v.* Challis, 23 Colo. 145, 46 Pac. 679; Templeton *v.* Horne, 82 Ill. 491; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559].

3. Emerson *v.* Clark, 3 Ill. 489, 2 Ill. 596; Ringgold's Case, 1 Bland (Md.) 5; Anderson *v.* Berry, 15 N. J. Eq. 232. See also Campbell *v.* Iron-Silver Min. Co., 83 Fed. 643, 27 C. C. A. 646, in which it was held that the right of appeal is a vested right in cases wherein a verdict is standing which a party is entitled to have set aside before the statute withdrawing the right to review takes effect.

4. *Alabama.*— Wharton *v.* Cunningham, 46 Ala. 590.

Iowa.— Johnson *v.* Semple, 31 Iowa 49.

Kansas.— Simmons *v.* Garrett, McCahon (Kan.) 82.

Kentucky.—Broaddus *v.* Broaddus, 10 Bush (Ky.) 299.

North Carolina.— Rollins *v.* Love, 97 N. C. 210, 2 S. E. 166.

Pennsylvania.— McGinnis *v.* Vernon, 67 Pa. St. 149.

Washington.— Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490.

See 10 Cent. Dig. tit. "Constitutional Law," § 267.

5. Branson *v.* Studahaker, 133 Ind. 147, 33 N. E. 98; Scott *v.* Smart, 1 Mich. 295; Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; *In re* Garesche, 85 Mo. 469; Alexander *v.* Bennett, 38 N. Y. Super. Ct. 492.

6. Taylor *v.* Keeler, 30 Conn. 324; Rader *v.* Southeasterly Road Dist., 36 N. J. L. 273; Defendorf *v.* Defendorf, 42 N. Y. App. Div. 166, 59 N. Y. Suppl. 163 [*affirming* 26 Misc. (N. Y.) 677, 57 N. Y. Suppl. 843]; Gardenhire *v.* McCombs, 1 Sneed (Tenn.) 83. See also Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658, where the court sustained, as applying to pending proceedings, a statute providing that in case the petitioner in condemnation proceedings failed to make payment of full compensation within the time named in the order, the court should order the petitioner to pay all costs, expenses, and reasonable attorney's fees of defendant. See, generally, Costs.

7. Cook *v.* New York Floating Dry Dock Co., 1 Hilt. (N. Y.) 556.

8. U. S. Const. art. 1, § 10.

9. Thomas *v.* Daniel, 2 McCord (S. C.) 354; Owings *v.* Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124.

10. As to retrospective laws generally see *infra*, X, A.

11. *Alabama.*—Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

Louisiana.—Weaver *v.* Maillot, 15 La. Ann. 395; Baldwin *v.* Bennett, 6 Rob. (La.) 309.

New Jersey.— Scaine *v.* Belleville Tp., 39 N. J. L. 526.

New York.— Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Powers *v.* Shepard, 1 Abb. Pr. N. S. (N. Y.) 129, 30 How. Pr. (N. Y.) 8.

United States.— Bonaparte *v.* Camden, etc., R. Co., Baldw. (U. S.) 205, 3 Fed. Cas. No. 1,617; Bennett *v.* Boggs, Baldw. (U. S.) 60, 3 Fed. Cas. No. 1,319; Beers *v.* Haughton, 1 McLean (U. S.) 226, 3 Fed. Cas. No. 1,230.

See 10 Cent. Dig. tit. "Constitutional Law," § 271.

Territorial statute.—In Morton *v.* Sharkey,

apply to acts of congress, which may pass laws directly or indirectly impairing the obligation of contracts;[12] nor does it protect contracts made after the passage of the hostile law.[13]

2. "CONTRACT" PROTECTED.[14] A "contract" within the constitution of the United States is one relating to property or some object of value which imposes an obligation capable in legal contemplation of being impaired.[15] The constitution embraces all contracts, executed or executory,[16] whether between individuals,[17] or between a state and individuals,[18] and a state has no more power to impair an obligation into which she herself has entered than she has the contracts of individuals.[19] Likewise compacts between states[20] or between states and the

McCahon (Kan.) 113, it was held that the territorial legislature has no power to pass a law impairing the obligation of a contract.

12. George *v.* Concord, 45 N. H. 434; Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70; *In re* Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287; Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900; Bloomer *v.* Stolley, 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559, 1 Fish. Pat. Rep. 376, 8 West. L. J. 158; Evans *v.* Eaton, Pet. C. C. (U. S.) 322, 8 Fed. Cas. No. 4,559, 1 Robb. Pat. Cas. 68; Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337; Corbett *v.* U. S., 1 Ct. Cl. 139. *Contra*, Hopkins *v.* Jones, 22 Ind. 310; Territory *v.* Reybun, McCahon (Kan.) 134.

13. South Carolina, etc., R. Co. *v.* Augusta Cotton, etc., Co., 105 Ga. 486, 30 S. E. 891; Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 104 Ga. 403, 30 S. E. 888; Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491; Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793.

14. For definition of contract generally see CONTRACTS.

15. Bishop's Fund *v.* Rider, 13 Conn. 87; Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090, where it was said that "the term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence." And see Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 629, 4 L. ed. 629, where Marshall, C. J., said: "The provision of the constitution (regarding the impairment of the obligation of contracts) never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice."

Void contract.— The constitutional provision is not intended to protect void contracts. Cameron *v.* State, (Tex. Civ. App. 1902) 67 S. W. 348 [*reversed* on other grounds in 95 Tex. 545, 68 S. W. 508].

16. Bishop's Fund *v.* Rider, 13 Conn. 87; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 136, 3 L. ed. 162.

17. See *infra*, IX, C, D.

18. See *infra*, IX, B.

19. *Arkansas.*— Woodruff *v.* State, 3 Ark. 285.

California.— Myers *v.* English, 9 Cal. 341.

Georgia.— Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

Kentucky.—Baldwin *v.* Com., 11 Bush (Ky.) 417, 419.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

Minnesota.— State *v.* Young, 29 Minn. 474, 9 N. W. 737.

New York.— Young *v.* Beardsley, 11 Paige (N. Y.) 93.

North Carolina.— Clements *v.* State, 76 N. C. 199.

United States.— Hall *v.* Wisconsin, 103 U. S. 5, 26 L. ed. 302 (holding that a contract between a state and a party, whereby he is to perform certain duties for a specific period, at a stipulated compensation, is within the protection of the constitution; and on his executing it he is entitled to that compensation, although before the expiration of the period the state repealed the statute pursuant to which the contract was made); Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

See 10 Cent. Dig. tit. "Constitutional Law," § 279 *et seq.*

It has been held that a consideration is not necessary to render inviolable by the state a private statute amounting to a contract between the state and a corporation. Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 700.

20. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Bass *v.* Dinwiddie, Cooke (Tenn.) 130, 2 Fed. Cas. No. 1,092 [see Carson *v.* Gorden, Cooke (Tenn.) 149, 5 Fed. Cas. No. 2,463, holding that an act of 1807 did not violate a compact between North Carolina and Tennessee]; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. ed. 962 [*reversing* 15 Ky. L. Rep. 320, 22 S. W. 851, and holding where by concurrent acts of the legislatures of two states a bridge company was made a corporation of each state, and authorized to fix rates of toll over a bridge to be constructed by it over a navigable river between the states, and congress afterward declared the bridge a lawful struc-

United States are contracts protected by the constitution of the United States.[21] A state constitution, however, is not a contract within the meaning of the federal constitution.[22] Likewise neither a judgment[23] nor a marriage is a contract within the federal constitutional provision as to the impairment of contracts.[24]

3. WHAT CONSTITUTES "OBLIGATION." The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other. There can be no other standard by

ture, but made no provision as to tolls, that congress thereby manifested the intention that the rates of toll should be as established by the two states, and that the acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other]; Hawkins *v.* Barney, 5 Pet. (U. S.) 457, 8 L. ed. 190; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547 (holding that the compact of 1789 between Virginia and Kentucky was a contract within the meaning of the constitution of the United States). And see Ruggles *v.* Manistee River Imp. Co., 123 U. S. 297, 8 S. Ct. 117, 31 L. ed. 152; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149 [*affirming* 53 Mich. 593, 19 N. W. 199], where a statute of Michigan authorized the improvement of a river wholly within that state, and the exaction of tolls for the use of the river so improved, and it was held that the statute did not impair the contract contained in the ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio, giving to the people the right to use the waters leading into the St. Lawrence, free of duty, tax, or impost. See also McKinney *v.* Carroll, 5 T. B. Mon. (Ky.) 96; Bodley *v.* Gaither, 3 T. B. Mon. (Ky.) 57 (where a particular statute was held not to violate a contract between Kentucky and Virginia); Fowler *v.* Halbert, 4 Bibb (Ky.) 52.

21. U. S. *v.* Great Falls Mfg. Co., 21 Md. 119; Fenn *v.* Kinsey, 45 Mich. 446, 8 N. W. 64; Lowry *v.* Francis, 2 Yerg. Tenn.) 534.

22. Church *v.* Kelsey, 121 U. S. 282, 284, 7 S. Ct. 897, 30 L. ed. 960, where Waite, C. J., said: "It (a state constitution) is the fundamental law adopted by the people for their government in a State of the United States, and as such it may be construed and carried into effect by the courts of the State, without review by this court, except in cases where what is done comes, or is supposed to come, in conflict with the Constitution of the United States."

23. *Iowa.*— Ferry *v.* Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; Sprott *v.* Reid, 3 Greene (Iowa) 489, 56 Am. Dec. 549.

Louisiana.— State *v.* New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168.

Mississippi.— Carson *v.* Carson, 40 Miss. 349.

Ohio.— *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284.

Texas.— Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

United States.— Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925 (holding that a law of New York that changed the rate of interest thereafter to accrue on a subsisting judgment based on a contract did not infringe a contract within the meaning of the constitution of the United States); Freeland *v.* Williams, 131 U. S. 405, 9 S. Ct. 763, 33 L. ed. 193 (judgment in an action of tort); Louisiana *v.* New Orleans, 109 U. S. 285, 288, 3 S. Ct. 211, 27 L. ed. 936 (where the judgment was founded on damages caused by a mob; Field, J., said: "A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. Chitty Contr. (Perkins ed.) 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises from the operation of the prohibition"); Garrison *v.* New York City, 21 Wall. (U. S.) 196, 22 L. ed. 612; Livingston *v.* Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751 (confession of judgment); Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900.

Contra, Weaver *v.* Lapsley, 43 Ala. 224; Scarborough *v.* Dugan, 10 Cal. 305 (judgment rendered in another state); Briggs *v.* Hubbard, 19 Vt. 86 (judgment of a justice); Bates *v.* Kimball, 2 D. Chipm. (Vt.) 77 (report of commissioners entered in the probate court held to be a final judgment and as such a contract within the federal constitution).

See 10 Cent. Dig. tit. "Constitutional Law," § 284; and, generally, JUDGMENTS.

24. Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654. And see, generally, MARRIAGE.

which to ascertain the extent of either, than that which the terms of the contract indicate, according to the settled legal meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force.[25] The constitution refers to and preserves the legal not the moral obligation of a contract.[26]

4. The Law Impairing the Obligation — a. In General. If any subsequent law affect to diminish the duty or to impair the right which the law defines upon the consummation of a contract it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, although professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.[27]

25. McCracken *v.* Hayward, 2 How. (U. S.) 608, 11 L. ed. 397. "The 'obligation' of a contract . . . is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge. . . . It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced." Washington, J., in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 257, 6 L. ed. 606. See also the following cases:

Georgia.— Aycock *v.* Martin, 37 Ga. 124, 92 Am. Dec. 56.

Illinois.— Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Kentucky.— Johnson *v.* Higgins, 3 Metc. (Ky.) 566; Lapsley *v.* Brashears, 4 Litt. (Ky.) 47; Blair *v.* Williams, 4 Litt. (Ky.) 34.

Louisiana.— Sabatier *v.* His Creditors, 6 Mart. N. S. (La.) 585.

Minnesota.— State *v.* Young, 29 Minn. 474, 9 N. W. 737.

Tennessee.— Webster *v.* Rose, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583.

Vermont.— Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 172, 22 Atl. 76, 13 L. R. A. 70.

United States.— Louisiana *v.* Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574 (where it was said by Field, J., that "by the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement"); U. S. *v.* Conway, Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849.

See 10 Cent. Dig. tit. "Constitutional Law," § 285.

26. Marshall, C. J., in his dissenting opinion in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 338, 6 L. ed. 606, where he further says: "Obligations purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on estates by the constitution are intended for those objects which would, if not restrained, be the subject of state legislation."

27. McCracken *v.* Hayward, 2 How. (U. S.) 608, 11 L. ed. 397. See also generally the following cases:

California.— People *v.* Brooks, 16 Cal. 11.

Georgia.— Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379, holding that the objection to a law on the ground that it impairs the obligation of a contract does not depend upon the extent of the change which the law may make in it.

Kentucky.— Griswold *v.* Hepburn, 2 Duv. (Ky.) 20.

Louisiana.— Rowlett *v.* Shepherd, 4 La. 86 (holding that any law imposing conditions not in the contract when made, or dispensing with those that were, impairs the obligation of the contract); Griffon *v.* New Orleans, 5 Mart. N. S. (La.) 279.

Maryland.— Watkins *v.* Worthington, 2 Bland (Md.) 509.

Pennsylvania.— Wartman *v.* Philadelphia, 33 Pa. St. 202; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

Texas.— Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

Washington.— State *v.* Dorsey, 19 Wash. 120, 52 Pac. 1065.

Wisconsin.— Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

United States.— Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716 (holding that an enactment of the Confederate states, enforced as a law of one of those states sequestering a debt owing by one of its citizens to a citizen of a lawful state as an alien enemy was void because impeaching the obligation of the contract); Westerly Waterworks *v.* Westerly, 75 Fed. 181; Western Arkansas Nat. Bank *v.* Sebastian County, 5 Dill. (U. S.) 414, 17 Fed. Cas. No. 10,040; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27.

See 10 Cent. Dig. tit. "Constitutional Law," § 274.

A state may pass laws impairing its own rights under a contract. Bell *v.* Haw, 8 Mart. N. S. (La.) 243; Davis *v.* Dawes, 4 Watts & S. (Pa.) 401; Johnston *v.* U. S., 17 Ct. Cl. 157.

b. Constitutions and Constitutional Amendments. A state constitution is a "law" within the meaning of the federal constitution prohibiting laws impairing the obligation of contracts;[28] so too is a constitutional amendment.[29]

c. Existing Statutes. The provision of the federal constitution as to the impairment of the obligation of contracts does not apply to laws enacted prior to the making of the contract, the obligation of which is claimed to be impaired.[30]

d. Judicial Decisions. Where parties have entered into a contract valid at the time under the laws of the state it is not competent for the courts of the state to impair the obligation of that contract.[31] The law, however, as declared by a decision of the highest court of the state, when such decision is not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision therefore does not impair the obligation of contracts.[32]

28. Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706; *In re* Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; White *v.* Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Mississippi, etc., R. Co. *v.* McClure, 10 Wall. (U. S.) 511, 19 L. ed. 997; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718.

29. *California.*— Oakland Paving Co. *v.* Barstow, 79 Cal. 45, 21 Pac. 544.

New York.— Sheehan *v.* Long Island City, 11 Misc. (N. Y.) 487, 33 N. Y. Suppl. 428, 67 N. Y. St. 277.

Pennsylvania.— Lejee *v.* Continental Pass. R. Co., 10 Phila. (Pa.) 362, 32 Leg. Int. (Pa.) 386.

Tennessee.—Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648.

United States.— Pacific R. Co. *v.* Maguire, 20 Wall. (U. S.) 36, 22 L. ed. 282; Delmas *v.* Merchants Mut. Ins. Co., 14 Wall. (U. S.) 661, 20 L. ed. 757.

See 10 Cent. Dig. tit. "Constitutional Law," § 275.

A change of constitutions does not release a state from a contract made under a constitution which authorized it to be made. Jefferson Branch Bank *v.* Skelley, 1 Black (U. S.) 436, 17 L. ed. 173; Mechanics, etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Mechanics, etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401. See also Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25.

The fact that when Georgia applied for readmission to the Union under the constitution of 1868 congress imposed certain conditions does not make such constitution an act of congress, so as to render valid a provision therein which in effect impairs the obligation of a contract. Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718. See, however, Shorter *v.* Cobb, 39 Ga. 285. See also *In re* Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507, holding that congress has no power to authorize a state to pass laws impairing the obligations of contracts.

30. *Florida.*— Columbia County *v.* King, 13 Fla. 451.

Illinois.— Ford *v.* Chicago Milk Shippers' Assoc., 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298.

Louisiana.— Guillotte *v.* New Orleans, 12 La. Ann. 432.

Pennsylvania.— Philadelphia *v.* Com., 52 Pa. St. 451.

Rhode Island.—People's Sav. Bank *v.* Tripp, 13 R. I. 621.

United States.— Lehigh Water Co. *v.* Easton, 121 U. S. 388, 7 S. Ct. 916, 30 L. ed. 1059; Mississippi, etc., R. Co. *v.* McClure, 10 Wall. (U. S.) 511, 19 L. ed. 997.

See 10 Cent. Dig. tit. "Constitutional Law," § 277.

31. *Alabama.*— Farrior *v.* New England Mortg. Security Co., 92 Ala. 176, 9 So. 532, 12 L. R. A. 856.

Illinois.— Harmon *v.* Auditor, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

New Hampshire.— Willoughby *v.* Holderness, 62 N. H. 227.

South Carolina.— Walker *v.* State, 12 S. C. 200.

United States.—Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 S. Ct. 736, 44 L. ed. 886; Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 672; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; Butz *v.* Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Union Bank *v.* Board of Com'rs, 90 Fed. 7.

See 10 Cent. Dig. tit. "Constitutional Law," § 278.

32. Springer *v.* Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. 986; Agerter *v.* Vandergrift, 138 Pa. St. 576, 27 Wkly. Notes Cas. (Pa.) 230, 21 Atl. 202; Mertz *v.* Vandergrift, 138 Pa. St. 576, 27 Wkly. Notes Cas. (Pa.) 230, 20 Atl. 1067; Ray *v.* Western Pennsylvania Natural Gas Co., 138 Pa. St. 576, 27 Wkly. Notes Cas. (Pa.) 230, 20 Atl. 1065, 21 Am. St. Rep. 922, 12 L. R. A. 290; Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666, holding that a decision is not a law

5. Attributes of Sovereignty — a. In General. In accordance with the well-established general principle that a state cannot barter away or in any manner abridge or weaken any of the essential attributes of sovereignty,[33] one state legislature cannot by any agreement bind itself or its successors not to exercise the police power of the state[34] or the right of eminent domain.[35] A state may, however, agree that certain property, rights, or franchises shall be exempt from taxation or be taxed at a certain agreed rate, and such an agreement, based on a consideration, is a contract protected by the federal constitution;[36] but it has

within the constitutional prohibition. See also, generally, the following cases:

Alabama.— Johnson *v.* State, 91 Ala. 70, 9 So. 71.

California.—Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

Iowa.— McClure *v.* Owen, 26 Iowa 243.

South Carolina.— McLure *v.* Melton, 24 S. C. 559, 58 Am. Rep. 272.

Texas.— Smith *v.* Elliott, 39 Tex. 201.

United States.— Baltzer *v.* North Carolina, 161 U. S. 240, 16 S. Ct. 500, 40 L. ed. 684; Wood *v.* Brady, 150 U. S. 18, 14 S. Ct. 6, 37 L. ed. 981; Pleasant Tp. *v.* Ætna L. Ins. Co., 138 U. S. 67, 11 S. Ct. 215, 34 L. ed. 864.

See 10 Cent. Dig. tit. "Constitutional Law," § 278.

Where contracts have been made in reliance on a decision erroneously construing a statute, a reversal of the decision is not prohibited, as a law impairing contracts. Alferitz *v.* Borgwardt, 126 Cal. 201, 58 Pac. 460; Central Land Co. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. ed. 91.

33. See note in 2 Cruise Real Prop. (Greenleaf ed.), p. 67, where the editor observes: "It is with great deference submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for the public purposes, to provide for the common defense, to provide for safe and convenient ways for the public necessity and convenience, and to take property for public uses, and the like, and those powers which are not essential, such as the power to alienate the lands and other property of the state, and to make contracts of service, and of purchase and sale, or the like."

34. *Alabama.*— Birmingham Mineral R. Co. *v.* Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92, 27 L. R. A. 263.

Connecticut.—Barlow *v.* Greogory, 31 Conn. 261.

Michigan.— People *v.* Hawley, 3 Mich. 330.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

Rhode Island.— State *v.* Paul, 5 R. I. 185.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

United States.— New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036 (where a company was authorized within a certain locality to manufacture and convert animal matter into chemical products and the act of incorporation declared that the company should "have continued succession and existence for the term of fifty years," it was held that said act did not constitute a contract guaranteeing to the company exemption for fifty years from the exercise of the police power of the state); Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989 (holding that the power of prescribing general public regulations is resident in the legislature and inalienable even by express grant); Cantini *v.* Tillman, 54 Fed. 969.

See, however, State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414.

See 10 Cent. Dig. tit. "Constitutional Law," § 286.

As to police power in general see *supra*, VI.

Liquor licenses.— It has been held that a state after granting licenses to sell liquors for which a fee is received can revoke them by a general law forbidding such sales. Com. *v.* Brennan, 103 Mass. 70; Calder *v.* Kurby, 5 Gray (Mass.) 597; State *v.* Sterling, 8 Mo. 697; Freleigh *v.* State, 8 Mo. 606; Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657. *Contra*, Boyd *v.* State, 46 Ala. 329. See also State *v.* Hawthorn, 9 Mo. 389; Hirn *v.* State, 1 Ohio St. 15.

35. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

Illinois.— Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627; Mills *v.* St. Clair County, 7 Ill. 197.

Indiana.— Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

New Hampshire.— Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York.— *In re* Kerr, 42 Barb. (N. Y.) 119.

Vermont.— West River Bridge Co. *v.* Dix, 16 Vt. 446.

United States.— Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165; Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 12 L. ed. 535.

36. *Arkansas.*— St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693; State *v.* Crittenden County Ct., 19 Ark. 360.

Connecticut.— Seymour *v.* Hartford, 21

been held that such a contract must be clear and explicit and will never be presumed.[37]

b. Exercise of War Power. A state constitutional provision that no judg-

Conn. 481; Landon *v.* Litchfield, 11 Conn. 251; Osborne *v.* Humphrey, 7 Conn. 335; Atwater *v.* Woodbridge, 6 Conn. 223, 16 Am. Dec. 46. See Lord *v.* Litchfield, 36 Conn. 116, 4 Am. Rep. 41; Brainard *v.* Colchester, 31 Conn. 407; Hart *v.* Cornwall, 14 Conn. 228.

Minnesota.— Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942.

New Jersey.— State *v.* Railroad Taxation Com'rs, 37 N. J. L. 240.

Pennsylvania.— Londonderry *v.* Berger, 7 Leg. Gaz. (Pa.) 231.

United States.— Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271; Murray *v.* Charlestown, 96 U. S. 432, 24 L. ed. 760; Raleigh, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 269, 20 L. ed. 570; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 264, 20 L. ed. 568 (holding that where a state law chartering a company provided that the property of the company shall be exempt from taxation, such exemption constituted a contract between the state and the company, which was violated by taxing the franchise and rolling-stock of the company); Washington University *v.* Rouse, 8 Wall. (U. S.) 439 note, 19 L. ed. 498; Home of Friendless *v.* Rouse, 8 Wall. (U. S.) 430, 19 L. ed. 495; McGehee *v.* Mathis, 4 Wall. (U. S.) 143, 18 L. ed. 314; Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Mechanics', etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 14 L. ed. 997; Piqua Branch Ohio Bank *v.* Knoop, 16 How. (U. S.) 369, 14 L. ed. 977; Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529; New Jersey *v.* Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303 (holding that a legislative act declaring that certain lands which should be purchased from the Indians should not thereafter be subject to any tax constituted a contract which could not be rescinded by a subsequent legislative act); Thompson *v.* Holton, 6 McLean (U. S.) 386, 23 Fed. Cas. No. 13,958; Hewitt *v.* New York, etc., R. Co., 12 Blatchf. (U. S.) 452, 12 Fed. Cas. No. 6,443.

No contract within the prohibition.— See the following cases where it was held that on the facts there was no contract within the constitutional prohibition:

Iowa.— Miller *v.* Hageman, 114 Iowa 195, 86 N. W. 281.

Kentucky.— Newport *v.* Com., 106 Ky. 434, 21 Ky. L. Rep. 42, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518.

Maryland.—Appeal Tax Ct. *v.* State University, 50 Md. 457.

Minnesota.— State *v.* Stearns, 72 Minn. 200, 75 N. W. 210.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

New Jersey.— New Brunswick *v.* Williamson, 44 N. J. L. 165; State *v.* Parker, 33 N. J. L. 192; State *v.* Wilson, 2 N. J. L. 300.

New York.— People *v.* Roper, 35 N. Y. 629; Matter of Vanderbilt, 50 N. Y. App. Div. 246, 63 N. Y. Suppl. 1079.

South Carolina.— Rose *v.* Charleston, 3 S. C. 369.

West Virginia.— Probasco *v.* Moundsville, 11 W. Va. 501.

United States.—Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679; Welch *v.* Cook, 97 U. S. 541, 24 L. ed. 1112; U. S. *v.* Memphis, 97 U. S. 284, 24 L. ed. 937; Kentucky Northern Bank *v.* Stone, 88 Fed. 413; East Tennessee, etc., R. Co. *v.* Pickerd, 24 Fed. 614; Dundee Mortg., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359; Reclamation Dist. No. 108 *v.* Hagar, 6 Sawy. (U. S.) 567, 4 Fed. 366. See also Orr *v.* Gilman, 183 U. S. 278 22 S. Ct. 213, 46 L. ed. 196; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86.

Contra, see the following cases: Brainard *v.* Colchester, 31 Conn. 407; East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Brewster *v.* Hough, 10 N. H. 138; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Milan, etc., Plank Road Co. *v.* Husted, 3 Ohio St. 578; Toledo Bank *v.* Bond, 1 Ohio St. 622; Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603; Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591; Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563.

Miller, J., in his dissenting opinion, in Washington University *v.* Rouse, 8 Wall. (U. S.) 439, 19 L. ed. 498, speaking for Mr. Chief Justice Chase, Mr. Justice Field, and himself, said: "We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual Legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

37. Brewster *v.* Hough, 10 N. H. 138; McCallie *v.* Chattanooga, 3 Head (Tenn.) 317; Christ Church *v.* Philadelphia, 24 How. (U. S.)

ment hitherto obtained on account of an act done in the prosecution of war in accordance with civilized usages shall be enforced does not impair obligations of contracts.[38]

c. Making Debtor Liable For Taxes on Debt. Acts requiring corporations to pay taxes on their bonds and authorizing them to deduct the amount thereof in accounting with the bondholders do not violate the obligation of contracts.[39] A state law, however, requiring a corporation to retain for the non-payment of taxes a certain portion of the interest due on the bonds made and payable out of the state to non-residents impairs the obligation of the contract evidenced by the bonds.[40] It has been held that a state constitutional provision making a mortgagee primarily liable for taxes assessed against the property and providing that if the mortgagor pays all the taxes he may deduct from the debt the amount assessed against the mortgagee does not impair an obligation executed prior thereto, containing no express provision that the mortgagee should pay the taxes.[41]

d. Slave Contracts. A clause in a state constitution to the effect that no court shall have jurisdiction to try, give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof, is void as to debts contracted previous to its adoption, which were valid when adopted.[42]

B. Contracts of States and Municipalities[43] **— 1. In General — a. Contracts**

300, 16 L. ed. 602; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 561, 7 L. ed. 939, where Marshall, C. J., said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

As to the effect of the constitutional prohibition of the impairment of contracts on the taxing power see, generally, the following cases:

Iowa.— Haskel *v.* Burlington, 30 Iowa 232.

New Jersey.— State *v.* Runyon, 41 N. J. L. 98.

Ohio.— Champaign County Bank *v.* Smith, 7 Ohio St. 42.

Oregon.— Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585, 50 Am. Rep. 462.

Wisconsin.— Eaton *v.* North, 32 Wis. 303.

United States.— Hanford *v.* Davies, 51 Fed. 258; Dundee Mortg. Trust Invest. Co. *v.* Parrish, 24 Fed. 197.

38. Peirce *v.* Kitzmiller, 19 W. Va. 564.

39. Ammidown *v.* Freeland, 101 Mass. 303, 3 Am. Rep. 359. See also Com. *v.* Delaware, etc., Canal Co., 150 Pa. St. 245, 24 Atl. 599; Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609; Com. *v.* Clearfield Coal Co., 129 Pa. St. 461, 20 Wkly. Notes Cas. (Pa.) 15, 28, 18 Atl. 414; Com. *v.* North Pennsylvania R. Co., 129 Pa. St. 460, 18 Atl. 414; Com. *v.* Delaware, etc., R. Co., 129 Pa. St. 458, 18 Atl. 414; Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410; Maltby *v.* Reading, etc., R. Co., 52 Pa. St. 140; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562, holding that a corporation tax law providing that when a railroad is operated under a lease the tax shall be paid by the lessee and deducted from the rent is not unconstitutional as impairing the obligation of contracts.

40. *In re* State Tax, etc., 15 Wall. (U. S.) 300, 21 L. ed. 179 [*reversing* Pittsburg, etc., R. Co. *v.* Com., 66 Pa. St. 73, 5 Am. Rep. 344; Delaware, etc., R. Co. *v.* Com., 66 Pa. St. 64].

41. Hannill *v.* Littner, (Cal. 1885) 7 Pac. 707; Hay *v.* Hill, 65 Cal. 383, 4 Pac. 378. See also Detroit *v.* Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Cook *v.* Smith, 30 N. J. L. 387.

42. *Alabama.*— Hubbard *v.* Baker, 48 Ala. 491; Curry *v.* Davis, 44 Ala. 281; Fitzpatrick *v.* Heane, 44 Ala. 171, 6 Am. Rep. 128; McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106.

Arkansas.— Hastings *v.* White, 26 Ark. 308; Sevier *v.* Haskell, 26 Ark. 133.

Florida.— McNealy *v.* Gregory, 13 Fla. 417.

Illinois.— Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597.

Louisiana.— Tate *v.* Fletcher, 19 La. Ann. 371; Wainwright *v.* Bridges, 19 La. Ann. 234.

South Carolina.— Calhoun *v.* Calhoun, 2 S. C. 283.

United States.— Osborn *v.* Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689; White *v.* Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Buckner *v.* Street, 1 Dill. (U. S.) 248, 4 Fed. Cas. No. 2,098, 13 Int. Rev. Rec. 114, 7 Nat. Bankr. Reg. 255.

See 10 Cent. Dig. tit. "Constitutional Law," § 291.

43. See also, generally, Municipal Corporations; States.

For Printing. It being a well-established general principle that a contract entered into between the state and an individual is as fully protected by the constitutional prohibition against states impairing the obligation of contracts as a contract between two individuals,[44] it is necessary to examine into the effect of that prohibition on the particular contracts of the states. For example contracts for state printing are protected by the constitutional prohibition against the impairment of contracts.[45]

b. Exemptions, Bounties, and Annuities. Exemption from jury duty or military service is not a contract between the state and those exempted;[46] nor is a bounty[47] or annuity.[48]

c. Grants. A legislative grant, being an executed contract, is within the constitutional prohibition.[49]

44. See *supra*, IX, A, 2.

45. State *v.* Barker, 4 Kan. 379, 96 Am. Dec. 175; Matter of Headnotes, etc., 43 Mich. 641, 8 N. W. 552; Jones *v.* Hobbs, 4 Baxt. (Tenn.) 113.

46. Bloom *v.* State, 20 Ga. 443 (exemption of members of fire company from jury duty); *In re* Powell, 5 Mo. App. 220 [see, however, *Ex p.* Goodwin, 67 Mo. 637]; Gatlin *v.* Walton, 60 N. C. 325 (exemption from military service). But see Hasbrouck *v.* Shipman, 16 Wis. 296; Kirkman *v.* Bird, 21 Utah 100, 61 Pac. 338, 83 Am. St. Rep. 774, 58 L. R. A. 669 (exemption from execution).

For exemption from taxation see *supra*, IX, A, 5.

47. East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82 [*affirmed* in 13 Wall. (U. S.) 373, 20 L. ed. 611], holding that a state law offering a bounty for every bushel of salt manufactured in the state from water obtained by boring in the state is not a contract in such a sense that it cannot be repealed. See, however, Smith *v.* Auditor-Gen., 80 Mich. 205, 45 N. W. 136, holding that a bounty of one hundred dollars to a soldier created a vested right.

As to bounties generally see BOUNTIES, 5 Cyc. 976.

48. Dale *v.* Governor, 3 Stew. (Ala.) 387. See, however, Planters' Consol. Assoc. *v.* Lord, 35 La. Ann. 425; St. John's College *v.* State, 15 Md. 330.

As to annuities generally see ANNUITIES, 2 Cyc. 458.

49. *California.*— Grogan *v.* San Francisco, 18 Cal. 590.

Illinois.— Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Minnesota.— U. S. *v.* Minnesota, etc., R. Co., 1 Minn. 127.

Mississippi.— Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9.

Vermont.— Herrick *v.* Randolph, 13 Vt. 525; Caledonia County Grammar School *v.* Burt, 11 Vt. 632.

Washington.— State *v.* Bridges, 22 Wash. 64, 60 Pac. 60, 79 Am. St. Rep. 714.

United States.— Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Minnesota *v.* Duluth, etc., R. Co., 97 Fed. 353; Baltimore Trust, etc., Co. *v.* Baltimore, 64 Fed. 153.

See 10 Cent. Dig. tit. "Constitutional Law," § 293; and *supra*, IX, A, 2.

Illustrations of state statutes held to impair the obligation of contracts based on grants or conveyances:

California.— Rich *v.* Maples, 33 Cal. 102; Montgomery *v.* Kasson, 16 Cal. 189, holding that a contract by the state to convey lands upon the performance of a condition precedent by the grantee creates a contract with parties accepting and partly performing the condition, which the legislature cannot take away by a repeal of the granting act.

Kentucky.— Graded School Dist. No. 2 *v.* Bracken Academy, 95 Ky. 436, 15 Ky. L. Rep. 856, 26 S. W. 8; Gaines *v.* Buford, 1 Dana (Ky.) 481.

Louisiana.— Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830.

Maryland.— Baltimore, etc., R. Co. *v.* Chase, 43 Md. 23.

Nebraska.— State *v.* Thayer, 46 Nebr. 137, 64 N. W. 700; State *v.* McPeak, 31 Nebr. 139, 47 N. W. 691; Koenig *v.* Omaha, etc., R. Co., 3 Nebr. 373.

New Jersey.— Glover *v.* Powell, 10 N. J. Eq. 211.

New York.— People *v.* Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679.

North Carolina.— State *v.* Richmond, etc., R. Co., 73 N. C. 527, 21 Am. Rep. 473; Stanmire *v.* Taylor, 48 N. C. 207.

Pennsylvania.— Drew *v.* New York, etc., R. Co., 81 Pa. St. 46.

Tennessee.— Williams *v.* Register of West Tennessee, Cooke (Tenn.) 214.

Texas.— Houston, etc., R. Co. *v.* Texas, etc., R. Co., 70 Tex. 649, 8 S. W. 498.

Vermont.— Franklin County Grammar School *v.* Bailey, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405.

Wisconsin.— State *v.* School Lands, 4 Wis. 414.

United States.— Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363 [*affirming* 43 Fed. 196]; Illinois *v.* Illinois

d. Hiring Out Convicts. Contracts for convict labor, whether made with the warden or the inspectors, are always subject to the right of the legislature to change its policy in regard to the penal system. Such interference with such contracts is not an impairment of the obligation in the constitutional sense.[50]

e. Licenses. As a license authorizing a person to practise a profession[51] or to carry on a particular business[52] is not a contract which vests a right but merely

Cent. R. Co., 33 Fed. 730; Gray *v.* Davis, 1 Woods (U. S.) 420, 10 Fed. Cas. No. 5,715.

See 10 Cent. Dig. tit. "Constitutional Law," § 293.

Illustrations of state statutes held not to impair the obligation of contracts:

California.— Reclamation Dist. *v.* Hagar, 66 Cal. 54, 4 Pac. 945; Floyd *v.* Blanding, 54 Cal. 41.

Georgia.— Brinsfield *v.* Carter, 2 Ga. 143.

Louisiana.— State *v.* Lanier, 47 La. Ann. 110, 16 So. 647.

Massachusetts.— Com. *v.* Bailey, 13 Allen (Mass.) 541; Humphrey *v.* Whitney, 3 Pick. (Mass.) 158.

New York.— Corning *v.* Greene, 23 Barb. (N. Y.) 33; Lansing *v.* Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; New York *v.* Slack, 3 Wheel. Crim. Cas. (N. Y.) 237.

Tennessee.— Huntsman *v.* Randolph, 5 Hayw. (Tenn.) 263.

Washington.— Allen *v.* Forrest, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606.

United States.— Hagar *v.* Reclamation Dist., 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569 [*affirming* 6 Sawy. (U. S.) 567, 4 Fed. 366]; League *v.* De Young, 11 How. (U. S.) 185, 13 L. ed. 657; Livingston *v.* Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751; Jackson *v.* Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679; Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 28 Fed. Cas. No. 16,857; Bennett *v.* Boggs, Baldw. (U. S.) 60, 3 Fed. Cas. No. 1,319; McCoy *v.* Washington County, 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, 7 Am. L. Reg. 193, 3 Phila. (Pa.) 290, 15 Leg. Int. 388. And see Wilson *v.* Standefer, 184 U. S. 399, 22 S. Ct. 384, 46 L. ed. 612 [*affirming* (Tex. Civ. App. 1900) 55 S. W. 1136].

Escheat.— A statute providing for escheat proceedings, and a determination of the rights of the state as against all possible claimants, after actual notice to all known claimants and constructive notice to all unknown ones, does not impair the obligation of any contract contained in the grant under which the deceased owner held, whether that grant was from the state or from a private person. Den *v.* Foy, 5 N. C. 58, 3 Am. Dec. 672; Hamilton *v.* Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. ed. 691. See also Mulligan *v.* Corbin, 7 Wall. (U. S.) 487, 19 L. ed. 222. And see, generally, ESCHEAT.

50. Mason, etc., Co. *v.* Main Jellico Mountain Coal Co., 87 Ky. 467, 10 Ky. L. Rep. 440, 9 S. W. 391; Hancock *v.* Ewing, 55 Mo. 101. See Georgia Penitentiary Co. *v.* Nelms, 71 Ga. 301.

As to convicts generally see CONVICTS.

51. **License to practise law.**— *California.*— Cohen *v.* Wright, 22 Cal. 293, holding that the act of April 25, 1863, requiring attorneys at law to file affidavits of allegiance in order to practise law is not unconstitutional as impairing the obligation of contracts.

Kentucky.— Baker *v.* Lexington, 21 Ky. L. Rep. 809, 53 S. W. 16.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289 (holding that the statute of Missouri imposing a tax upon lawyers according to their income is constitutional); State *v.* Garesche, 36 Mo. 256; Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131.

Ohio.— State *v.* Gazlay, 5 Ohio 14.

West Virginia.— *Ex p.* Quarrier, 4 W. Va. 210; *Ex p.* Hunter, 2 W. Va. 122.

United States.— *In re* Baxter, 2 Fed. Cas. No. 1,118, 5 Am. L. Reg. N. S. 159 note.

See 10 Cent. Dig. tit. "Constitutional Law," § 299; and, generally, ATTORNEY AND CLIENT, 4 Cyc. 898.

52. **License to carry on a particular business.**—*Florida.*—Bishoff *v.* State, (Fla. 1901) 30 So. 808.

Louisiana.— New Orleans *v.* Turpin, 13 La. Ann. 56 (holding that the license granted to auctioneers by the auditor of public accounts involves no contract exempting them from taxation); First Municipality *v.* Manuel, 4 La. Ann. 328 (license as confectioner).

Maryland.— Pfefferling *v.* Baltimore, 98 Md. 475, 41 Atl. 778.

Ohio.— State *v.* Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105.

Pennsylvania.— Drexel *v.* Com., 46 Pa. St. 31 [*affirming* 1 Pearson (Pa.) 337, license as broker].

West Virginia.— Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514.

But see Buffalo *v.* Chadeayne, 134 N. Y. 163, 31 N. E. 443, 45 N. Y. St. 765 [*affirming* 7 N. Y. Suppl. 501, 27 N. Y. St. 60], holding that where a person, under a permit granted by a city council to erect frame buildings within the fire limits, has made contracts and incurred liabilities thereon before a remission thereof, he acquires a private property right in which he is entitled to protection.

See 10 Cent. Dig. tit. "Constitutional Law," § 299 *et seq.*

License to a corporation to do business does not curtail the authority of the state to regulate the conduct of the corporation in the future. Ætna Standard Iron, etc., Co. *v.* Taylor, 4 Ohio S. & C. Pl. Dec. 180, 3 Ohio N. P. 152 (increase of fee of foreign corpo-

the grant of a privilege, such a license is not protected by the constitutional prohibition as to the impairment of the obligation of contracts; but an act which requires a person selling tax-receivable coupons or tendering or passing such coupons for another to pay a certain high license impairs the obligation of a contract.[53]

f. Location of County-Seat or Court-House. Likewise there is no contract within the purview of the federal constitution, where a county-seat or court-house is located at a particular place, upon certain conditions which have been fulfilled.[54]

g. Making Bank Paper Receivable in Payment of Debts Due State. A state act, however, which makes bank paper receivable in payment of debts due the state is a contract which cannot be impaired by a subsequent repeal of the act, so far as such repeal affects notes in circulation at the time thereof.[55]

ration to do business); People *v.* Cook, 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498 [*affirming* 110 N. Y. 443, 18 N. E. 113, 18 N. Y. St. 100]; Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825, holding annual license-tax on insurance companies to be valid. See CORPORATIONS.

Licenses to sell liquors are not contracts between the states and the persons licensed, giving the latter vested rights protected on general principles or by the federal constitution prohibiting subsequent legislation impairing the obligation of contracts.

Alabama.— Powell *v.* State, 69 Ala. 10.

Connecticut.— La Croix *v.* Fairfield County, 49 Conn. 591.

Georgia.— Brown *v.* State, 82 Ga. 224, 7 S. E. 915.

Illinois.— Schwuschow *v.* Chicago, 68 Ill. 444; Gutzweller *v.* People, 14 Ill. 142.

Indiana.— Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

Iowa.—Columbus *v.* Cutcomp, 61 Iowa 672, 17 N. W. 47; State *v.* Carney, 20 Iowa 82.

Kansas.— *In re* Prohibitory Amendment Cases, 24 Kan. 700.

Louisiana.— State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Massachusetts.— Moran *v.* Goodwin, 130 Mass. 158, 160, 39 Am. Rep. 443 (where the court said: "The license is not a contract. The license is simply an authority to sell according to law, and subject to all the limitations, restrictions and liabilities which the law imposes"); Com. *v.* Brennan, 103 Mass. 70; Calder *v.* Kurby, 5 Gray (Mass.) 597.

Mississippi.— Coulson *v.* Harris, 43 Miss. 728; Reed *v.* Beall, 42 Miss. 472.

Nebraska.— Martin *v.* State, 23 Nebr. 371, 36 N. W. 544.

New Hampshire.— State *v.* Holmes, 38 N. H. 225; Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657; Franklin *v.* Schermerhorn, 8 Hun (N. Y.) 112; Baker *v.* Pope, 2 Hun (N. Y.) 556; People *v.* Krushaw, 31 How. Pr. (N. Y.) 344 note; Holt *v.* Excise Com'rs, 31 How. Pr. (N. Y.) 334 note.

Pennsylvania.— Hadtner *v.* Williamsport, 15 Wkly. Notes Cas. (Pa.) 138.

South Carolina.— State *v.* Chester, 39 S. C. 307, 17 S. E. 752.

Tennessee.— Smith *v.* Knoxville, 3 Head (Tenn.) 245.

Texas.— Rowland *v.* State, 12 Tex. App. 418.

United States.— Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Kresser *v.* Lyman, 74 Fed. 765.

See 10 Cent. Dig. tit. "Constitutional Law," § 300.

53. McGahey *v.* Virginia, 135 U. S. 662, 685, 10 S. Ct. 972, 34 L. ed. 304. *Contra*, Cuthbut *v.* Com., 85 Va. 899, 9 S. E. 16; Com. *v.* Krise, 84 Va. 521, 9 S. E. 1121; Com. *v.* Plunkett, 84 Va. 519, 9 S. E. 1120; Com. *v.* Larkin, 84 Va. 517, 5 S. E. 526; Com. *v.* Maury, 82 Va. 883, 1 S. E. 185.

54. *Arkansas.*— Moses *v.* Kearney, 31 Ark. 261, holding that an act providing that a county-seat shall not be removed without repayment to landowners of expenditure incurred by them on the faith of its location is not a contract but an act of legislation which may be repealed.

Indiana.— Swartz *v.* Lake County, 158 Ind. 141, 63 N. E. 31; Armstrong *v.* Dearborn County, 4 Blackf. (Ind.) 208; Elwell *v.* Tucker, 1 Blackf. (Ind.) 285.

North Carolina.— State *v.* Jones, 23 N. C. 414.

Ohio.— Newton *v.* Mahoning County, 26 Ohio St. 618; State *v.* Perry County, 5 Ohio St. 497.

Texas.— Alley *v.* Denson, 8 Tex. 297.

United States.— Newton *v.* Mahoning County, 100 U. S. 548, 25 L. ed. 710.

See 10 Cent. Dig. tit. "Constitutional Law," § 305.

But see Gill *v.* Scowden, 14 Phila. (Pa.) 626, 36 Leg. Int. (Pa.) 487.

55. Graniteville Mfg. Co. *v.* Roper, 15 Rich. (S. C.) 138; State *v.* Sneed, 9 Baxt. (Tenn.) 472; Furman *v.* Nichol, 3 Coldw. (Tenn.) 432; Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; Woodruff *v.* Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383. *Contra*, Paup *v.* Drew, 9 Ark. 205; Woodruff *v.* Atty.-Gen., 8 Ark. 236. See also State *v.* Gaillard, 11 S. C. 309; State *v.* Stoll. 2 S. C. 538; South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. ed. 937; Tennessee *v.* Sneed,

h. Purchases at Tax-Sale. State laws which merely regulate the remedy by changing the rules of evidence in connection with tax-titles and do not take away any right do not impair the obligations of a contract.[56]

i. State Indebtedness. An act of the legislature allowing the state to be sued is a mere privilege, and not a contract the obligation of which is impaired by a subsequent statute destroying the right;[57] but a law passed by a state withdrawing from its officers the power of carrying out the contract embodied in its bonds and coupons or certificates of indebtedness is unconstitutional as impairing the obligation thereof.[58]

96 U. S. 69, 24 L. ed. 610, where only the remedy was affected.

56. *California.*— Tuttle *v.* Block, 104 Cal. 443, 38 Pac. 109.

Kansas.— Watkins *v.* Inge, 24 Kan. 612.

Oregon.— State *v.* Sears, 29 Oreg. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808; Strode *v.* Washer, 17 Oreg. 50, 16 Pac. 926, holding that where a law providing that a tax deed shall be conclusive evidence of the regularity of the levy, etc., and sale of the property is amended so as to destroy the conclusive effect of the tax deed, such amendment does not impair the obligation of contracts as to prior purchase but simply changes the rules of evidence. See, however, Tracy *v.* Reed, 3 Sawy. (U. S.) 622, 38 Fed. 69, 2 L. R. A. 773; Marx *v.* Hanthorn, 30 Fed. 579.

Pennsylvania.—Smith *v.* Merchand, 7 Serg. & R. (Pa.) 260, 10 Am. Dec. 465.

Washington.— Herrick *v.* Neisz, 16 Wash. 74, 47 Pac. 414.

Wisconsin.— International L. Ins. Co. *v.* Scales, 27 Wis. 640; Lain *v.* Shepardson, 18 Wis. 59.

United States.—Coulter *v.* Stafford, 56 Fed. 564, 6 C. C. A. 18 [see, however, Gage *v.* Stewart, 127 Ill. 207, 19 N. E. 702, 11 Am. St. Rep. 116]; Barrett *v.* Holmes, 102 U. S. 651, 26 L. ed. 291 (holding that a statute providing that an action by one claiming under a tax deed for recovery of real estate sold for taxes shall be brought within five years is valid); Curtis *v.* Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513.

A law which extends the time of redemption from tax-sales previously made is invalid as impairing the obligation of contracts. State *v.* Bradshaw, 39 Fla. 137, 22 So. 296; Dikeman *v.* Dikeman, 11 Paige (N. Y.) 484; State *v.* Fylpaa, 3 S. D. 586, 54 N. W. 599; Robinson *v.* Howe, 13 Wis. 341.

Special provisions as to tax-sales held to impair the obligation of contracts see Hull *v.* State, 29 Fla. 79, 11 So. 97, 30 Am. St. Rep. 95, 16 L. R. A. 308; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Roberts *v.* First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; State *v.* Capealler, 6 Ohio Dec. (Reprint) 702, 7 Am. L. Rec. 473; Corbin *v.* Washington County, 1 McCrary (U. S.) 521, 3 Fed. 356.

57. *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567; Baltzer *v.* State, 109 N. C. 187, 13 S. E. 724; Baltzer *v.* State, 104 N. C. 265, 10 S. E. 153; State *v.* Tennessee Bank, 3 Baxt. (Tenn.) 395; Baltzer *v.* North Carolina, 161 U. S. 240, 16 S. Ct. 500, 40 L. ed. 684; South, etc., Alabama R. Co. *v.* Alabama, 101 U. S. 832, 25 L. ed. 973; Memphis, etc., R. Co. *v.* Tennessee, 101 U. S. 337, 25 L. ed. 960; Washington Bank *v.* Arkansas, 20 How. (U. S.) 530, 15 L. ed. 993; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991. In Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370, it was held that while a state may not enact laws impairing the obligation of its contracts, yet it may avoid payment of its obligations by failure or refusal to make the necessary appropriation, for there is no power to coerce it into so doing.

A state may change time and method of enforcement of claim against it.

Arkansas.—Platenius *v.* State, 17 Ark. 528.

California.—Sharp *v.* Contra Costa County, 34 Cal. 284.

Idaho.— Lamkin *v.* Sterling, 1 Ida. 92.

Louisiana.—State *v.* Jumel, McGloin (La.) 144.

Mississippi.— Swann *v.* Buck, 40 Miss. 268.

North Carolina.— Wilson *v.* Jenkins, 72 N. C. 5.

Tennessee.— School Com'rs *v.* State, 7 Humphr. (Tenn.) 113.

See, however, Forstall *v.* Planters Consol. Assoc., 34 La. Ann. 770.

See 10 Cent. Dig. tit. "Constitutional Law," § 319.

58. Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448. See also Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705.

A fund or property created or held for the purpose of paying a state indebtedness cannot be diverted from such purpose. People *v.* Brooks, 16 Cal. 11; State *v.* Cardoza, 8 S. C. 71, 28 Am. Rep. 275; Wabash, etc., Canal Co. *v.* Beers, 2 Black (U. S.) 448, 17 L. ed. 327 (holding that a lien of a bondholder who has lent money to a state on the pledge of certain property by its legislature cannot be destroyed or postponed by a subsequent act of such legislature); Ford *v.* Delta, etc., Land Co., 43 Fed. 181; Chaffraix *v.* Board of Liquidation, 11 Fed. 638; McComb *v.* Board of Liquidation, 2 Woods (U. S.) 48, 15 Fed. Cas. No. 8,707, 7 Chic. Leg. N. 251. See, however, Internal Imp. Fund *v.* St. Johns R. Co., 16 Fla. 531; Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882; State *v.* Hoeflinger, 31 Wis. 257.

Where by a funding act a state authorizes

2. LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS — a. In General. Municipal corporations, such as counties, cities, and towns, being mere creatures and agents of the state, stand in their governmental or public character in no contract relations with the state, and so are not within the provision that renders laws impairing the obligation of contracts unconstitutional; but at the pleasure of the state their charters may be amended, changed, or revoked, subject only to the restraints of special constitutional provisions.[59] So in general the imposition by the state

the payment of taxes by coupons cut from the state bonds a subsequent repealing act impairs the obligation of the contract. People *v.* Brooks, 16 Cal. 11; State *v.* Young, 29 Minn. 474, 9 N. W. 737; Antoni *v.* Wright, 22 Gratt. (Va.) 833; McGahey *v.* Virginia, 135 U. S. 662, 10 S. Ct. 972, 34 L. ed. 304; Sands *v.* Edmunds, 116 U. S. 585, 6 S. Ct. 516, 29 L. ed. 739; Royall *v.* Virginia, 116 U. S. 572, 6 S. Ct. 510, 29 L. ed. 735; Chaffin *v.* Taylor, 116 U. S. 567, 6 S. Ct. 518, 29 L. ed. 727; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. ed. 200; Chaffin *v.* Taylor, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. ed. 198; White *v.* Greenhow, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. ed. 199; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185; Strickler *v.* Yager, 29 Fed. 244; Willis *v.* Miller, 29 Fed. 238; Harvey *v.* Virginia, 20 Fed. 411; Baltimore, etc., R. Co. *v.* Allen, 17 Fed. 171.

Statutes, however, which merely regulate the payment of taxes by coupons do not impair the obligation of contracts. State *v.* Board of Liquidation, 27 La. Ann. 577; Whaley *v.* Gaillard, 21 S. C. 560; Maury *v.* Com., 92 Va. 310, 23 S. E. 757; Laube *v.* Com., 85 Va. 530, 8 S. E. 246 (holding that the act of Jan. 26, 1886, entitled "An act to prescribe a rule of evidence in certain cases," under which the state may require the bonds from which state coupons offered in payment of taxes are alleged to have been detached to be produced in evidence is not unconstitutional as impairing the obligation of a contract); Bryan *v.* Com., 85 Va. 526, 8 S. E. 246; McGahey *v.* Com., 85 Va. 519, 8 S. E. 244; Ellett *v.* Com., 85 Va. 517, 8 S. E. 246; Com. *v.* Booker, 82 Va. 964, 7 S. E. 381; Com. *v.* Jones, 82 Va. 789, 1 S. E. 84; Com. *v.* Weller, 82 Va. 721, 1 S. E. 102 (holding that an act forbidding the use of expert testimony in the trial of an issue as to the genuineness of coupons detached from bonds of the state of Virginia is valid); Cornwall *v.* Com., 82 Va. 644, 3 Am. St. Rep. 121; Wise *v.* Rogers, 24 Gratt. (Va.) 169; *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; Strickler *v.* Yager, 29 Fed. 244; Willis *v.* Miller, 29 Fed. 238.

Statutes authorizing certain methods of taxation for the payment of bonds are not contracts with the bondholders which are impaired by subsequent statutes repealing or changing such methods of taxation.

Indiana.— Marion Tp. Grave Road Co. *v.* Sleeth, 53 Ind. 35.

Mississippi.— Bunch *v.* Wolverstein, 62 Miss. 56. See also Gibbs *v.* Green, 54 Miss. 592.

New York.— People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94.

South Carolina.— See Morton *v.* Comptroller-Gen., 4 S. C. 430.

Texas.— State *v.* Delesdenier, 7 Tex. 76.

United States.— Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305.

See 10 Cent. Dig. tit. "Constitutional Law," § 322.

59. *California.*— People *v.* Hill, 7 Cal. 97.

Illinois.— Cornell *v.* People, 107 Ill. 372; People *v.* Power, 25 Ill. 187; Richland County *v.* Lawrence County, 12 Ill. 1.

Louisiana.— State *v.* People's Slaughter House, etc., Co., 46 La. Ann. 1031, 15 So. 408; Moore *v.* New Orleans, 32 La. Ann. 726; Layton *v.* New Orleans, 12 La. Ann. 515; Reynolds *v.* Baldwin, 1 La. Ann. 162.

Maine.— Bradford *v.* Cary, 5 Me. 339.

Maryland.— Hagerstown *v.* Schner, 37 Md. 180 (excellent statement of principles of control); Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. Rep. 566, 2 L. R. A. 142.

Michigan.— Detroit *v.* Blackeby, 21 Mich. 84, 4 Am. Rep. 450; Smith *v.* Adrian, 1 Mich. 495.

Mississippi.— State Bd. of Education *v.* Aberdeen, 56 Miss. 518.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 54.

Nevada.— State *v.* Rosenstock, 11 Nev. 128.

New Hampshire.— Weeks *v.* Gilmanton, 60 N. H. 500.

New Jersey.— Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360.

New York.— People *v.* Pinckney, 32 N. Y. 377.

North Carolina.— Lilly *v.* Taylor, 88 N. C. 489; Mills *v.* Williams, 33 N. C. 558.

Oregon.— Ladd *v.* Portland, 32 Oreg. 271, 51 Pac. 654, 67 Am. St. Rep. 526.

Pennsylvania.—Downingtown Gas, etc., Co. *v.* Downingtown, 175 Pa. St. 341, 38 Wkly. Notes Cas. (Pa.) 376, 34 Atl. 799; Philadelphia *v.* Fox, 64 Pa. St. 169; Erie *v.* Erie Canal Co., 59 Pa. St. 174; Philadelphia *v.* Field, 58 Pa. St. 320; Matter of Clinton St., 2 Brewst. (Pa.) 599.

Tennessee.— Lynch *v.* Lafland, 4 Coldw. (Tenn.) 96.

United States.—Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699 [*affirming* Beckwith *v.* Racine, 7 Biss. (U. S.) 142, 3 Fed. Cas. No. 1,213]; Laramie County *v.* Albany County, 92 U. S. 307, 311, 23 L. ed.

of added burdens upon them as governmental agents of the state for the public benefit is valid,[60] provided that property owned by such corporations is secured for the use of those having an interest in it.[61] As regards duties owed to the state at large, the control of the state precludes the exercise of discretionary authority by the corporation.[62] Powers of a public nature granted may be recalled,[63] modified,[64] lodged in other public bodies,[65] or enlarged,[66] one exercise of such legislative power not precluding another,[67] but as to municipal powers and

552 (where it is said: "Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the Legislature of the State, because there is not, and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact"); Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

See 10 Cent. Dig. tit. "Constitutional Law," § 325; and, generally, MUNICIPAL CORPORATIONS. *Compare* Woodfork *v.* Union Bank, 43 Tenn. 488.

School districts are subject to control similar to that exercisable over other municipal corporations. Mobile School Com'rs *v.* Putnam, 44 Ala. 506; *In re* Farnum, 51 N. H. 376.

Legislative release of a penalty which had accrued to a county does not impair the obligation of a contract, although the release was given after verdict but before judgment. Coles *v.* Madison County, 1 Ill. 154.

A contract made by a state for the use and benefit of a county.—The legislature may release or it may discontinue an action brought in its name for the enforcement thereof for the use of the county. State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 317.

Acceptance of a municipal charter is not a contract between the municipality and individuals. Gray *v.* Brooklyn, 2 Abb. Dec. (N. Y.) 267, 10 Abb. Pr. N. S. (N. Y.) 186.

Statutory provisions may be incorporated in a municipal charter as a valid part of its terms. Douglasville *v.* Johns, 62 Ga. 423.

One legislature cannot impose restrictions which a future legislature cannot modify or abrogate, except where vested rights have come into existence. State *v.* Pilsbury, 31 La. Ann. 1.

Legislative control over municipal charters is not impaired by the fact that such charters are granted in the same acts which create private corporations whose rights cannot be changed or repealed. Paterson *v.* Useful Manufactures Soc., 24 N. J. L. 385.

The legislature may force a municipal corporation upon the corporators without their consent.— Paterson *v.* Useful Manufactures Soc., 24 N. J. L. 385. *Compare* St. Louis *v.* Russell, 9 Mo. 507, holding that in Missouri consent of all to a change is not required.

Preservation by a new state constitution of existent municipal rights does not operate to restrain future legislative control. Demarest *v.* New York, 74 N. Y. 161.

Change of powers of municipal corporations may be effected by general laws affecting the whole state as well as by special acts. People *v.* Morris, 13 Wend. (N. Y.) 325.

The statutory limit of city indebtedness is not a contract with the taxpayers, and as to them the state may later provide for the payment of claims in excess of that limit. People *v.* Burr, 13 Cal. 343.

Existence of an unexecuted trust for educational purposes, founded upon charter powers and state grants of lands, does not prevent revocation by the state of the trust. Bass *v.* Fontleroy, 11 Tex. 698.

60. Baltimore *v.* Keeley Institute, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 646 (holding that a city may be compelled to support its habitual drunkards in a state institution for treatment); Revell *v.* Annapolis, 81 Md. 1, 31 Atl. 695 (holding that a city may be compelled to issue bonds for educational purposes); Bridgewater *v.* Plymouth, 97 Mass. 382 (sustaining changes in pauper settlement rules, which imposed new burdens on certain towns); People *v.* Flagg, 46 N. Y. 401 (holding that towns may be forced to provide for highways therein).

61. North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530; Cobb *v.* Kingman, 15 Mass. 197.

62. People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

63. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604 (holding that an authority to subscribe for railroad stock under certain conditions may be recalled by legislature); People *v.* New York, 32 Barb. (N. Y.) 102 (holding that power granted to a city to establish ferries may be recalled); Richmond County Gas-Light Co. *v.* Middletown, 1 Thomps. & C. (N. Y.) 433 (holding that power conferred to make lighting contracts could be affected by later legislation, even after a contract had been entered into); Stafford County *v.* Luck, 80 Va. 223 (holding that authority to county supervisors to build a bridge may be revoked); Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339 (holding that street grading powers given to a city may be altered).

64. Millburn *v.* South Orange, 55 N. J. L. 254, 26 Atl. 75.

65. People *v.* New York, 32 Barb. (N. Y.) 102.

66. People *v.* Burr, 13 Cal. 343; Moore *v.* New Orleans, 32 La. Ann. 726.

67. People *v.* Burr, 13 Cal. 343; Governor *v.* McEwen, 5 Humphr. (Tenn.) 241. *Com-*

rights held by the corporation in its proprietary or private character, and as to contracts made with reference thereto, it is to be regarded nearly if not quite as a private corporation.[68]

b. Creation and Discharge of Liability. The legislature may compel municipal corporations to pay claims not enforceable at law or in equity, when they are morally binding,[69] may force municipalities in their public character to incur obligations necessary for the performance of their governmental duties,[70] and

pare Board of Education *v.* Henderson, 126 N. C. 689, 36 S. E. 158, holding that the state could not deprive a county of its right under existing law to the application of funds collected for the breach of penal laws to the common school fund of the counties in which they were collected.

Granting of franchises.— A delegation by the legislature of power to grant franchises with certain restrictions does not preclude the legislature from granting such franchises without such restrictions. Fall *v.* Sutter County, 21 Cal. 237. And generally a prior delegation of power over franchises does not preclude later legislative interference as public exigencies may require. Day *v.* Stetson, 8 Me. 365. Street railway franchises may be granted by the legislature without the consent of the city owning and controlling the streets. New York *v.* Kerr, 38 Barb. (N. Y.) 369. The legislature may revoke franchises granted under delegated power by a city. State *v.* Hilbert, 72 Wis. 184, 39 N. W. 326.

Franchises of municipal corporations may be modified or destroyed according to the public need, provided municipal property is not diverted improperly. School Trustees *v.* Tatman, 13 Ill. 27; Police Jury *v.* Shreveport, 5 La. Ann. 661; Douglass *v.* Craig, 2 La. Ann. 919.

Ordinances are subject to legislative control and may be annulled. Marietta *v.* Fearing, 4 Ohio 427.

68. *Kentucky.*— Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

Maine.— Small *v.* Danville, 51 Me. 359.

Massachusetts.— Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

Michigan.— Detroit *v.* Detroit, etc., R. Co., 43 Mich. 140, 5 N. W. 275.

New York.—People *v.* Fields, 58 N. Y. 491; People *v.* Briggs, 50 N. Y. 553.

Pennsylvania.— Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534.

Texas.— State *v.* Williams, 10 Tex. Civ. App. 346, 30 S. W. 477.

Vermont.— Atkins *v.* Randolph, 31 Vt. 226.

United States.— Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410. And see U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597; Weightman *v.* Washington, 1 Black (U. S.) 39, 17 L. ed. 52.

See 10 Cent. Dig. tit. "Constitutional Law," § 325 *et seq.*; 1 Dillon Mun. Corp. (4th ed.), §§ 66, 67.

A public corporation can acquire no vested contract rights as to the time of maturity of the bonds held by it against another public corporation. Little River Tp. *v.* Reno County, 65 Kan. 9, 68 Pac. 1105.

69. *California.*— Creighton *v.* San Francisco, 42 Cal. 446; People *v.* Burr, 13 Cal. 343.

Maryland.— Hagerstown *v.* Sehner, 37 Md. 180, holding valid a retroactive law making a city liable for mob damage, although a defense under the statute of limitations was thereby destroyed.

New Jersey.— Rader *v.* Union Tp. Committee, 39 N. J. L. 509 (holding that town might be compelled to pay an individual for street work done, although no legal obligation existed); Cleveland *v.* Board of Finance, etc., 38 N. J. L. 259 (holding state may dispense with city charter formalities so as to give contractors their equitable rights for work done).

New York.— People *v.* Essex County, 70 N. Y. 228; Brewster *v.* Syracuse, 19 N. Y. 116; Guilford *v.* Chenango County, 13 N. Y. 144; Thomas *v.* Leland, 24 Wend. (N. Y.) 65.

Texas.— Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607, sustaining a retroactive law compelling a county to pay a just debt barred by a statute of limitations.

United States.— Jefferson City Gas-Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521; New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233.

And *compare* Mosher *v.* Ackley Independent School Dist., 44 Iowa 122 (holding that holders of bonds issued in excess of the constitutional limit of indebtedness could not be given a lien for materials supplied); State *v.* Board of Liquidation, 40 La. Ann. 398, 4 So. 122 (holding that creditors of a municipality originally possessing no contract rights cannot be placed in the class with those creditors who had); Baldwin *v.* New York, 42 Barb. (N. Y.) 549 (holding invalid an act recognizing an alleged claim against a city, and providing for ascertainment of damages by arbitrators).

See 10 Cent. Dig. tit. "Constitutional Law," § 339.

Stay of execution upon a judgment recovered by a municipal corporation, as by trustees of the poor, may validly be given by statute. Lynn *v.* Gridley, Walk. (Miss.) 528, 12 Am. Dec. 591.

70. *Maine.*— Rangeley *v.* Bowdoin, 77 Me. 592, 1 Atl. 892.

Maryland.—Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446.

New York.— People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

may create municipal tort liability.[71] Certain contract rights of municipal corporations obtained under public contracts may be released by the state.[72] And generally contracts made by municipalities as governmental agents are subject to legislative supervision.[73]

c. Levy and Collection of Taxes. In the absence of special constitutional provisions, the state has full control over the exercise of powers of taxation by a municipal corporation in its character as an agency of the general government, although in its private or local character the municipality may enjoy powers and rights free from legislative interference; so that the purposes for which municipal corporations may lay taxes, and the time and manner in which property may be assessed and taxed by municipal authorities, are under the absolute control of the legislature, and no municipality can acquire contract rights to any particular portion of its revenue, or to any particular assessment or method of assessment, which cannot be controlled, modified, or taken away by the legislature.[74]

d. Municipal Property and Debts — (i) *In General.* There may be rights

Pennsylvania.— Philadelphia *v.* Field, 58 Pa. St. 320.

United States.— U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597.

And *compare* People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278, holding that a city could not be compelled to contract a debt against its consent. Local constitutional provisions appear to have influenced the decision.

See 10 Cent. Dig. tit. "Constitutional Law," § 339.

71. Hagerstown *v.* Sehner, 37 Md. 180; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; Luke *v.* Brooklyn, 43 Barb. (N. Y.) 54, holding that a city may be made liable for riot or mob violence causing property destruction.

72. People *v.* Fishkill, etc., Road Co., 27 Barb. (N. Y.) 445.

73. People *v.* Coon, 25 Cal. 635; Cleveland *v.* Board of Finance, etc., 38 N. J. L. 259; Richmond County Gaslight Co. *v.* Middletown, 59 N. Y. 228; Duanesburgh *v.* Jenkins, 57 N. Y. 177 [*overruling* 46 Barb. (N. Y.) 294]. But see New York *v.* Eighth Ave. R. Co., 43 Hun (N. Y.) 614; Sala *v.* New Orleans, 2 Woods (U. S.) 188, 21 Fed. Cas. No. 12,246.

Taking away a privilege given to a municipality to purchase gas works erected by a private company is a valid act. Crescent City Gas Light Co. *v.* New Orleans Gas Light Co., 27 La. Ann. 138.

74. *California.*— People *v.* Burr, 13 Cal. 343.

Illinois.— People *v.* Chicago, 51 Ill. 58.

Maine.— Augusta Bank *v.* Augusta, 49 Me. 507.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Michigan.— People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202.

Missouri.— Pacific R. Co. *v.* Watson, 61 Mo. 57; State *v.* Severance, 55 Mo. 378; State *v.* St. Louis, etc., R. Co., 9 Mo. App. 532.

New Hampshire.— Weeks *v.* Gilmanton, 60 N. H. 500.

New Jersey.— Essex Public Road Bd. *v.* Skinkle, 49 N. J. L. 65, 10 Atl. 435; Williamson *v.* State, 46 N. J. L. 204.

New York.— Brewster *v.* Syracuse, 19 N. Y. 116; People *v.* Draper, 15 N. Y. 532; Guilford *v.* Chenango County, 13 N. Y. 143.

Pennsylvania.— McGinnes *v.* South Ward Waterworks Co., 2 Del. Co. (Pa.) 127.

Virginia.— Richmond *v.* Richmond, etc., R. Co., 21 Gratt. (Va.) 604.

United States.— Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446 [*affirming* 49 N. J. L. 641, 10 Atl. 379].

See 10 Cent. Dig. tit. "Constitutional Law," § 337; Cooley Tax. (1st ed.), pp. 34, 474 *et seq.*

But express or implied constitutional restrictions securing a local application of funds raised by taxation may exist.— See State *v.* Haben, 22 Wis. 660, in which the subject is discussed, the case holding that where the legislature had authorized a board of education to raise money by a special tax for a high school building, and the proceeds of the tax were in the hands of the city treasurer, the state could not later provide that part of such money should be devoted to the construction of a state normal school.

When municipal territorial limits are changed the state has full power in adjusting the respective property and territorial rights of the municipalities involved, to accomplish an equitable result by extension, modification, or abolition of local taxing powers. Layton *v.* New Orleans, 12 La. Ann. 515; Weeks *v.* Gilmanton, 60 N. H. 500.

The state may require municipalities to remit penalties due for unpaid taxes. Beecher *v.* Webster County, 50 Iowa 538.

Exempting certain property from municipal taxation may be a valid exercise of state power. Richmond *v.* Richmond, etc., R. Co., 21 Gratt. (Va.) 604.

Even after assessment and levy, but before a tax becomes due, the assessment may be annulled and the right of assessment lodged in another body. State *v.* St. Louis, etc., R. Co., 9 Mo. App. 532.

A city may be authorized to levy a tax to pay sewer constructors a sum beyond the contract price, and forbidden by the charter. Brewster *v.* Syracuse, 19 N. Y. 116.

under contracts and grants between the state and a municipal corporation which the legislature cannot destroy, although the limits of the doctrine are not settled.[75] The grant of a right to maintain a ferry may be repealed,[76] and wharf and wharfage rights may be revoked, if property rights of the municipality acquired under legislative sanction are not destroyed.[77] The legislature may define the uses of property held by a municipality in public trust for public benefit,[78] may so control the property as to secure performance of the trust,[79] and may limit its control of its streets to further public ends.[80] The state has full power to direct the mode of applying the public property of a municipality for its benefit;[81] may control the manner of payment of municipal debts;[82] may validate an existent local act for the disposition of municipal property;[83] and may control the disposition of funds raised by taxation, as from license-fees.[84] To insure performance of public duties the state may compel a municipality to incur debts.[85]

Rights of municipal taxation conferred to enable improvement by municipality of swamp lands granted to it conditionally by the state cannot be impaired by the state so as to prevent the performance of the conditions. State *v.* Cage, 34 La. Ann. 506.

A levy of taxes does not create a contractual relation between the taxpayer and the government, and the taxpayer has no vested right in the method of its collection. Flock *v.* Smith, 65 N. J. L. 224, 47 Atl. 442.

75. *Alabama.*— Columbus *v.* Rodgers, 10 Ala. 37, protecting municipal franchise rights purchased by the city from individuals.

Arkansas.—Perry County *v.* Conway County, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665.

California.—Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; Grogan *v.* San Francisco, 18 Cal. 590, holding that a grant to a city of certain water frontage property for a term could not be impaired by the legislature.

Illinois.— Sangamon County *v.* Springfield, 63 Ill. 66; Richland County *v.* Lawrence County, 12 Ill. 1.

Maryland.—Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

New Hampshire.— Spaulding *v.* Andover, 54 N. H. 38, holding that a state grant of state bonds for a definite purpose could not be impaired.

Pennsylvania.— Dunmore's Appeal, 52 Pa. St. 374; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 185, 72 Am. Dec. 730.

Vermont.— Montpelier *v.* East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

United States.— Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

And *compare* People *v.* Long Island R. Co., 60 How. Pr. (N. Y.) 395.

See 10 Cent. Dig. tit. "Constitutional Law," § 332; Cooley Const. Lim. 238; Dillon Mun. Corp. (4th ed.), §§ 68, 68*a*.

In the exercise of its police power the legislature may regulate the use by a municipal corporation of its property. Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843, holding that a city may be prohibited from using its property for burial purposes. As to police power generally see *supra*, VI.

Reducing width of a road taken and paid for by a town for public uses by legislative act impairs the obligation of contracts. People *v.* Highway Com'rs, 53 Barb. (N. Y.) 70.

A legislative grant to a city of all escheated property within certain limits cannot be impaired. *In re* Malone, 21 S. C. 435.

76. East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511, 13 L. ed. 518, 531.

As to ferries generally see FERRIES.

77. Ellerman *v.* McMains, 30 La. Ann. 190, 31 Am. Rep. 218; New Orleans, etc., R. Co. *v.* Ellerman, 105 U. S. 166, 26 L. ed. 1015.

As to wharves generally see WHARVES.

78. Kelsey *v.* King, 1 Transcr. App. (N. Y.) 133, 33 How. Pr. (N. Y.) 39.

79. Milam County *v.* Bateman, 54 Tex. 153.

80. Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495, holding that the state might take away a city's power to use its streets for construction of waterworks, by incorporating a private company for that purpose. *Compare* Coffin *v.* Portland, 27 Fed. 412, holding that a state might grant a railroad the right to use a public levee in a city, although the city had already undertaken to hold the levee for public use.

81. People *v.* Power, 25 Ill. 187; Ballingall *v.* Carpenter, 5 Ill. 306; Bush *v.* Shipman, 5 Ill. 186; State *v.* St. Louis County Ct., 34 Mo. 530.

82. McDonald *v.* Maddux, 11 Cal. 187.

83. Payne *v.* Treadwell, 16 Cal. 220, holding that invalid municipal grants may be confirmed by the legislature.

84. Winona *v.* Whipple, 24 Minn. 61; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Patterson, 53 N. J. L. 120, 20 Atl. 828.

Where no sort of obligation, legal or equitable, existed against a county it was invalid to provide by statute for the payment of county money for attorney's fees. Warren County Sup'rs *v.* Cowan, 60 Miss. 876, 45 Am. Rep. 453.

A state appropriation to a county for local purposes, unacted upon, may be revoked or diverted by the state. Richland County *v.* Lawrence County, 12 Ill. 1.

85. Carter *v.* Cambridge, etc., Bridge Proprietors, 104 Mass. 236; Guilder *v.* Otsego, 20 Minn. 74; Thomas *v.* Leland, 24 Wend.

(11) *Where Territorial Limits Are Changed.* The public property of a municipal corporation, held by it as a subordinate part of the government for public uses, is subject to the authority of the legislature, upon changing corporate boundaries, to transfer or apportion it to or among the municipalities affected by the changes for the same uses.[86] And as incidental to territorial change, the legislature may direct the manner in which debts or liabilities of the municipalities affected shall be met and by whom, as to it seems equitable.[87]

e. Officers. In the absence of special constitutional restrictions, the legislature has full control over offices and officers concerning the state at large as distinguished from those of a local municipal character, and may transfer, alter, or abolish such functions as it sees fit.[88] So in the absence of such a constitutional

(N. Y.) 65; Philadelphia *v.* Field, 58 Pa. St. 320; Dillon Mun. Corp. (4th ed.), §§ 71–74.

86. *California.*— Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178.

Connecticut.— Granby *v.* Thurston, 23 Conn. 416.

Iowa.— Langworthy *v.* Dubuque, 16 Iowa 271.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Massachusetts.— Stone *v.* Charlestown, 114 Mass. 214; Rawson *v.* Spencer, 113 Mass. 40; Whitney *v.* Stow, 111 Mass. 368; Weymouth, etc., Fire Dist. *v.* Norfolk County Com'rs, 108 Mass. 142; Salem Tp., etc., Bridge Co. *v.* Essex County, 100 Mass. 282; Hampshire County *v.* Franklin County, 16 Mass. 76; Shirley *v.* Lunenburgh, 11 Mass. 379; Windham *v.* Portland, 4 Mass. 384.

Mississippi.— Portwood *v.* Montgomery County, 52 Miss. 523.

New Hampshire.— Londonderry *v.* Derry, 8 N. H. 320; Bristol *v.* New Chester, 3 N. H. 524.

New York.— Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248.

Pennsylvania.— Dunmore's Appeal, 52 Pa. St. 374.

United States.—Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

And *compare* Wellington *v.* Wellington Tp., 46 Kan. 213, 26 Pac. 415, holding that where by operation of law title to town property had vested in a city there could not be a later sale and division of proceeds between town and city, under a legislative act.

See 10 Cent. Dig. tit. "Constitutional Law," § 335.

87. *Alabama.*— State *v.* Mobile, 24 Ala. 701.

California.— Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; People *v.* Alameda County Sup'rs, 26 Cal. 641.

Illinois.— Sangamon County *v.* Springfield, 63 Ill. 66; Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Maine.— North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts.— Stone *v.* Charlestown, 114 Mass. 214; Rawson *v.* Spencer, 113 Mass. 40; Whitney *v.* Stow, 111 Mass. 368.

Mississippi.— Portwood *v.* Montgomery County, 52 Miss. 523.

New Hampshire.— Londonderry *v.* Derry, 8 N. H. 320; Briston *v.* New Chester, 3 N. H. 524.

New York.— People *v.* Draper, 15 N. Y. 532; Sill *v.* Corning, 15 N. Y. 297.

Wisconsin.— Schriber *v.* Langdale, 66 Wis. 616, 29 N. W. 547, 554.

United States.— Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896; Barkley *v.* Levee Com'rs, 93 U. S. 258, 23 L. ed. 893.

See 10 Cent. Dig. tit. "Constitutional Law," § 335.

Exercise of legislative power in one instance in apportionment of property or liabilities does not preclude later action.— In some cases the view is taken that only an apportionment made at the time of territorial change can be binding, and that such cannot be altered by subsequent legislation. Bowdoinham *v.* Richmond, 6 Me. 112, 19 Am. Dec. 197; Hampshire County *v.* Franklin County, 16 Mass. 76; Windham *v.* Portland, 4 Mass. 384. But the better view appears to be *contra*. Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178 (holding that where the legislature set apart Coronado Beach from San Diego in 1889, then providing for a *pro rata* meeting of debts by the municipalities, the state could validly in 1893 change such provisions); Layton *v.* New Orleans, 12 La. Ann. 515; Dunmore's Appeal, 52 Pa. St. 374; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; 1 Dillon Mun. Corp. (4th ed.), § 189.

88. *Indiana.*— State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566 (sustaining a transfer of police powers to state-appointed commissioners); State *v.* Boyles, 7 Blackf. (Ind.) 90.

Louisiana.— Pickles *v.* McLellan Dry Dock Co., 38 La. Ann. 412; Galley *v.* Guichard, 27 La. Ann. 396, holding that the state might fully control the management and payment of the police.

Maryland.— Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572, holding that control of the police may be taken from cities and lodged in a commission.

Michigan.— State *v.* Cogshall, 107 Mich. 181, 65 N. W. 2 (holding that the functions of a supervisor in cities might be abolished

restriction it may direct the mode of municipal payment for officers which have been chosen by the state.[89]

f. Territorial Limits. Unless controlled by some constitutional limitation the legislature may, as public convenience or necessity requires, prescribe, enlarge, or diminish the territorial boundaries of municipal corporations[90] regardless of the wishes of inhabitants affected,[91] and the exercise of this legislative discretion is not controllable by the courts.[92]

3. Contracts of Municipalities — a. In General. When municipal corporations engage in transactions not public in their nature, they act under the same pecuniary responsibility as individuals, and are to as great a degree bound by their con-

or transferred); People *v.* Detroit, 29 Mich. 108 (board of public works).

Missouri.— State *v.* Finn, 8 Mo. App. 341, holding that a city marshal's duties might be lodged in the hands of the sheriff.

Nebraska.— State *v.* Seavey, 22 Nebr. 454, 35 N. W. 228, holding that a state may appoint fire and police commissioners for metropolitan cities.

New York.— *In re* Woolsey, 95 N. Y. 135; Astor *v.* New York, 62 N. Y. 567; People *v.* Draper, 15 N. Y. 532; People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205; People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445, highway commissioners.

Pennsylvania.— Hawkins *v.* Com., 76 Pa. St. 15.

See 10 Cent. Dig. tit. "Constitutional Law," § 336; 1 Dillon Mun. Corp. (4th ed.), §§ 58, 59.

89. *Illinois.*— Sangamon County *v.* Springfield, 63 Ill. 66.

Indiana.— Stilz *v.* Indianapolis, 55 Ind. 515.

Massachusetts.— Weymouth, etc., Fire Dist. *v.* Norfolk County Com'rs, 108 Mass. 142.

Missouri.— St. Louis *v.* Sheilds, 52 Mo. 351.

New York.— People *v.* Morris, 13 Wend. (N. Y.) 325.

Contra, Nashville *v.* Towns, 5 Sneed (Tenn.) 186.

See 10 Cent. Dig. tit. "Constitutional Law," § 336.

Control of municipal property devoted to public uses may validly be given to officers appointed by the state for governmental purposes. Baltimore *v.* Board of Police, 15 Md. 376, 74 Am. Dec. 572. *Compare* People *v.* Albertson, 55 N. Y. 50.

Legislature may appoint officers within a city for a specified purpose, such as laying out a street and assessing damages and benefits therefrom; and the municipality is bound by their acts. Daley *v.* St. Paul, 7 Minn. 390.

Release and reimbursement of municipal officers.— The state may release a municipal officer from an obligation running to the municipality or to the state in a bond. Pearson *v.* State, 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91; State *v.* Board of Education, 38 Ohio St. 3; Board of Education *v.* McLandsborough, 36 Ohio St. 227, 38 Am. Rep. 582. But the contrary view also prevails. Johnson *v.* Randolph County, 140 Ind. 152, 39 N. E. 311; McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089; Hardenburgh *v.* Van Keuren, 16 Hun (N. Y.) 17. *Compare* Mount *v.* State, 90 Ind. 29, 46 Am. Rep. 192, holding that the state may order a township to repay to a township trustee money he had paid the town for a breach of trust without moral fault.

Trusts and trustees.— While at times the state may have power to change the trustees of a charity granted or devised to a municipality (Philadelphia *v.* Fox, 64 Pa. St. 169), yet the right is limited (New Gloucester School Fund Trustees *v.* Bradbury, 11 Me. 118, 26 Am. Dec. 515). And trusts for public purposes, as for library or educational purposes, are protected by the constitutional safeguard to contracts, the grant accepted constituting a contract. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

The appointment and acts of municipal officers, proceeding under a doubtful charter, may be validated by the state. State *v.* Kline, 23 Ark. 587.

90. *Indiana.*—Stilz *v.* Indianapolis, 55 Ind. 515.

Kansas.— *In re* Howard County, 15 Kan. 194.

Louisiana.— Stoner *v.* Flournoy, 28 La. Ann. 850; New Orleans *v.* Cazelar, 27 La. Ann. 156.

Maryland.— Groff *v.* Frederick City, 44 Md. 67.

Massachusetts.— Chandler *v.* Boston, 112 Mass. 200.

Missouri.— State *v.* Miller, 65 Mo. 50.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Tennessee.— McCallie *v.* Chattanooga, 3 Head (Tenn.) 317.

Virginia.— Wade *v.* Richmond, 18 Gratt. (Va.) 583.

United States.— Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552.

See 10 Cent. Dig. tit. "Constitutional Law," § 334.

91. Chandler *v.* Boston, 112 Mass. 200; State *v.* Miller, 65 Mo. 50; Giboney *v.* Cape Girardeau, 58 Mo. 141; St. Louis *v.* Russell, 9 Mo. 507; Manly *v.* Raleigh, 57 N. C. 370. *Compare* Fulton *v.* Davenport, 17 Iowa 404; Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330.

92. Groff *v.* Frederick City, 44 Md. 67; Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

tracts; nor is it in the power of the legislature to cause or sanction violation of their contracts.[93] Grants legally made by municipal corporations are executed contracts which cannot be impaired by the legislature.[94] So a franchise granted

93. People *v.* Otis, 90 N. Y. 48 [*affirming* 24 Hun (N. Y.) 519, holding invalid an act which purported to discharge the city of Yonkers from liability on its stolen negotiable bonds]; Powers *v.* Shephard, 1 Abb. Pr. N. S. (N. Y.) 129, 30 How. Pr. (N. Y.) 8; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Flewellin *v.* Proetzel, 80 Tex. 191, 15 S. W. 1043 (holding that an authorized municipal contract for paving could not be impaired by repeal of the charter authorizing the contract); Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

Exemption of a municipality from tort liability does not impair the obligation of any contract rights of individuals arising from acceptance by a municipality of a charter. Gray *v.* Brooklyn, 2 Abb. Dec. (N. Y.) 267, 10 Abb. Pr. N. S. (N. Y.) 186; O'Harra *v.* Portland, 3 Oreg. 525.

Contracts for municipal aid to corporations. —An act of the legislature authorizing municipal corporations to subscribe to the capital stock of a railroad company does not create a contract (Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; List *v.* Wheeling, 7 W. Va. 501) and such legislative authorization to subscribe to stock not acted upon may be repealed by the state (Wilson *v.* Polk County, 112 Mo. 126, 20 S. W. 469). And a mere local vote to subscribe, in pursuance of legislative authority, does not constitute a contract, and the legislature may even then take away the power to subscribe. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604; List *v.* Wheeling, 7 W. Va. 501. But a proposition for municipal aid, submitted by a railroad and accepted by a municipality, becomes a binding contract which the legislature cannot impair. Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543. When a contract exists by which a municipality is to aid a railroad the obligation cannot be impaired by the legislature. State *v.* Lancaster County Com'rs, 6 Nebr. 214; Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369; Dodge *v.* Platte County, 16 Hun (N. Y.) 285 [*reversed* in 82 N. Y. 218]; Buffalo, etc., R. Co. *v.* Collins R. Com'rs, 5 Hun (N. Y.) 485; Nelson *v.* Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Seibert *v.* U. S., 129 U. S. 192, 9 S. Ct. 271, 32 L. ed. 643, 122 U. S. 284, 7 S. Ct. 1190, 30 L. ed. 1161; Moultrie County *v.* Rockingham Sav. Bank, 92 U. S. 631, 23 L. ed. 631. A contract to subscribe to railroad stock made *ultra vires* does not prevent the state from forbidding subscriptions by municipalities. Buffalo, etc., R. Co. *v.* Falconer, 103 U. S. 821, 26 L. ed. 471. Mere change in the form of execution of municipal bonds, by which the legislature requires registration and certification before issue, does not impair the obligation, and may be provided for. Hoff *v.* Jasper County, 110 U. S. 53, 3 S. Ct. 476, 28 L. ed. 68.

Right to pay taxes with municipal warrants, vested under existing legislation, cannot be impaired by the legislature. People *v.* Hall, 8 Colo. 485, 9 Pac. 34; New Orleans *v.* City Hotel, 28 La. Ann. 423.

Contracts for local improvements.—The obligation of a municipality under a valid contract for the construction of local improvements cannot be impaired. Shreveport *v.* Cole, 129 U. S. 36, 9 S. Ct. 210, 32 L. ed. 589. The state may authorize the supreme court of the state to vacate an order confirming the report of commissioners of estimate and assessment respecting the property taken, and to refer the matter back to new commissioners to amend or correct the report or to make a new assessment. Garrison *v.* New York, 21 Wall. (U. S.) 196, 22 L. ed. 612 [*affirming* 61 Barb. (N. Y.) 483, 42 How. Pr. (N. Y.) 220]. But *compare* People *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485, 55 N. Y. St. 648, 37 Am. St. Rep. 563 [*affirming* 2 Misc. (N. Y.) 7, 21 N. Y. Suppl. 601, 49 N. Y. St. 576], holding that where, under N. Y. Laws (1890), c. 393, directing a city to audit and adjust the amount of damage done to certain private property by the opening of a street, providing for an appraisal thereof by commissioners, and requiring the city to raise the amount by assessment and pay it over to the owner of the property, the commissioners have made the appraisal and their report has been confirmed by the court the owner's claim against the city is fixed and cannot be affected by a subsequent repeal of the act by N. Y. Laws (1891), c. 42. Where condemnation proceedings to acquire land for a boulevard do not exempt abutting landowners from liability to construct sidewalks thereon, the state may later provide for the construction of sidewalks at the expense of abutting owners, without the impairment of contracts. Turner *v.* Detroit, 104 Mich. 326, 62 N. W. 405.

94. *California.*— Los Angeles *v.* Southern Pac. R. Co., 67 Cal. 433, 7 Pac. 819.

Louisiana.— Municipality No. 1 *v.* The Anna No. 2, 7 La. Ann. 149.

Maryland.— Classen *v.* Chesapeake Guano Co., 81 Md. 258, 31 Atl. 808.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

New York.— New York Sanitary Utilization Co. *v.* Board of Health, 61 N. Y. App. Div. 106, 70 N. Y. Suppl. 510 [*affirming* 32 Misc. (N. Y.) 577, 67 N. Y. Suppl. 324, holding invalid the act of April 25, 1900, amending Greater New York Charter, § 1212, in requiring removal of a garbage plant erected

by a municipality to maintain railroad lines,[95] telegraph or telephone appli-

under municipal franchise]; New York *v.* New York Refrigerating Const. Co., 8 Misc. (N. Y.) 61, 28 N. Y. Suppl. 614, 59 N. Y. St. 295. *Compare* People *v.* Pratt, 14 N. Y. Suppl. 804, 38 N. Y. St. 598 [*affirming* 14 N. Y. Suppl. 551]; Whitney *v.* New York, 6 Abb. N. Cas. (N. Y.) 329 note.

United States.— Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 S. Ct. 736, 44 L. ed. 886 [*affirming* 88 Fed. 720, sustaining a grant of right to supply city water]; American Waterworks, etc., Co. *v.* Home Water Co., 115 Fed. 171; Crocker *v.* New York, 21 Blatchf. (U. S.) 197, 15 Fed. 405, holding that one should be protected who had bought wharf property from a city, in reliance on a legislative provision establishing a wharf line not to be exceeded; and that a later act extending such line was invalid as against the grantee.

See 10 Cent. Dig. tit. "Constitutional Law," § 342.

The authorized erection of a toll bridge near a licensed ferry does not violate vested rights of the ferryman. Dyer *v.* Tuscaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655.

Grants cannot deprive municipal or state authorities of police power.— Coates *v.* New York, 7 Cow. (N. Y.) 585 (holding valid a later law restricting use of land for cemetery purposes); Davenport *v.* Richmond, 81 Va. 636, 59 Am. Rep. 694 (holding that a state could require the removal of a powder magazine from land sold for the use of such magazine). And see Westport *v.* Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L. R. A. 442; Brick Presbyterian Church Corp. *v.* New York, 5 Cow. (N. Y.) 538.

Licenses.— A license for the privilege of carrying on a particular business in a city as required by ordinance for a period of one year is not a contract for the whole period, within the protection of the constitution. Bishoff *v.* State, (Fla. 1901) 30 So. 808. *Compare* St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878; Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514. And authorizing a licensee, for a valuable consideration, to connect by a spur track with a railroad is not such a contract as to prevent the city from ordering its removal when demanded for the public welfare. Benson *v.* Philadelphia, 47 Pa. St. 329. But the repeal of an ordinance requiring the giving of a bond before issuing an auctioneer's license cannot destroy rights acquired under the bond before repeal. McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41. A license for a ferry does not constitute a contract. Robinson *v.* Lamb, 126 N. C. 492, 36 S. E. 29; Williams *v.* Wingo, 177 U. S. 601, 20 S. Ct. 793, 44 L. ed. 905.

Where an exclusive grant of a franchise is void because made by a town without authority it is not a contract which the state is forbidden to impair. Clarksburg Electric Light Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

Where by implication the grant by a municipality confers exclusive privileges the municipality cannot itself enter into competition with the grantee. Southwest Missouri Light Co. *v.* Joplin, 113 Fed. 817.

95. *Alabama.*— Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615.

Illinois.— People *v.* Chicago West Div. R. Co., 18 Ill. App. 125.

Indiana.— City R. Co. *v.* Citizens' St. R. Co., (Ind. 1898) 52 N. E. 157.

Iowa.— Drady *v.* Des Moines, etc., R. Co., 57 Iowa 393, 10 N. W. 754; Des Moines *v.* Chicago, etc., R. Co., 41 Iowa 569, holding that tolls could not be demanded of a railroad for the use of city bridge, after a grant of the right to use the bridge free of tolls.

Louisiana.— East Louisiana R. Co. *v.* New Orleans, 46 La. Ann. 526, 15 So. 157.

Massachusetts.— Browne *v.* Turner, 176 Mass. 9, 56 N. E. 969, subway tunnel.

Missouri.— Springfield R. Co. *v.* Springfield, 85 Mo. 674; State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361 (holding a requirement for later additional street paving invalid); Hovelman *v.* Kansas City Horse R. Co., 79 Mo. 632 (holding that where a railroad had accepted a franchise and had at great expense constructed part of the road, the state could not make the consent of abutting property-owners a necessary condition to further construction).

New York.— Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282 (holding that additional paving burdens could not be imposed on street railways); Binghamton *v.* Binghamton, etc., R. Co., 61 Hun (N. Y.) 479, 16 N. Y. Suppl. 225, 41 N. Y. St. 83.

Ohio.— Cleveland *v.* Cleveland Electric R. Co., 3 Ohio S. & C. Pl. Dec. 92, 1 Ohio N. P. 413.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Philadelphia, 47 Pa. St. 325.

United States.— City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114; Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 11 S. Ct. 226, 34 L. ed. 898 [*affirming* 78 Iowa 367, 43 N. W. 224]; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 99 Fed. 812; Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385; Citizens' St. R. Co. *v.* City R. Co., 56 Fed. 746; Coast-Line R. Co. *v.* Savannah, 30 Fed. 646, holding that a street railway could not be compelled to do additional paving without compensation. *Compare* Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

See 10 Cent. Dig. tit. "Constitutional Law," § 344; and, generally, STREET RAILROADS.

An injunction will be granted to restrain a city from preventing the construction of a

ances,[96] a water-supply,[97] or gas or electric lighting appliances,[98] within municipal limits, when accepted and acted upon by the grantee according to its terms, is a contract which the municipality cannot abolish or alter without the consent of the grantee.

railroad authorized by valid municipal grant. Asheville St. R. Co. *v.* Asheville, 109 N. C. 688, 14 S. E. 316.

A grant by a city to a railroad of permission to construct bridges over its track where it crosses streets does not prevent the city from changing street grades so as to necessitate the removal of the bridges. Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87.

Railroad rates of fare.— Acceptance by a street railroad company of an ordinance, adopted under legislative authority, that the rate of fare shall not exceed five cents, gives the company a contract right to charge that rate which cannot be reduced by the city without consent of the railroad. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592.

The state may relieve street railroads from the obligation to maintain streets imposed on railroads by cities in granting locations to the former. Worcester *v.* Worcester Consol. St. R. Co., 182 Mass. 49, 64 N. E. 581; Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 64 N. E. 577.

A city grant of railroad privileges to a corporation does not prevent the city from requiring a license-tax as a means of revenue, although not for police purposes. Springfield *v.* Smith, 138 Mo. 645, 40 S. W. 757, 60 Am. St. Rep. 569, 37 L. R. A. 446.

Where a company incorporated under the general laws of New York to operate a street railroad in a city has not obtained the consent of the city authorities it cannot enjoin the city from constructing a railroad along or under the streets selected for its line under the amended rapid transit act. New York Underground R. Co. *v.* New York, 116 Fed. 952.

Compelling railroads to erect crossing gates is not an impairment of charter rights, where a railroad is operating by a lease which granted a right to cross highways at grade on constructing passages across its railroad, so that the passage of vehicles should not be prevented. Palmyra Tp. *v.* Pennsylvania R. Co., 63 N. J. Eq. 799, 52 Atl. 1132 [*affirming* 62 N. J. Eq. 601, 50 Atl. 369].

Requiring a railroad to maintain, repair, etc., crossings over its road and giving a right of action for the costs of such in case of default is a valid police regulation, although obligations additional to those of the charter are thereby imposed. Clarendon *v.* Rutland R. Co., (Vt. 1902) 52 Atl. 1057. *Compare* Lehigh Valley R. Co. *v.* Adam, 70 N. Y. App. Div. 427, 75 N. Y. Suppl. 515, holding valid provisions for the alteration of grades of railroad crossings.

96. New Orleans *v.* Great Southern Telephone, etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502; Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; People *v.* Squires, 14 Daly (N. Y.) 154, 1 N. Y. St. 633; Western Union Tel. Co. *v.* Syracuse, 24 Misc. (N. Y.) 338, 53 N. Y. Suppl. 690; Sunset Telephone, etc., Co. *v.* Medford, 115 Fed. 202, holding that after the acceptance of and action upon a grant of right to use streets additional conditions could not be imposed. *Compare* People *v.* Squires, 14 Daly (N. Y.) 154, 1 N. Y. St. 633, holding that telegraph companies might be required to bury their wires without impairing the city grant of franchise to lay wires. And see, generally, TELEGRAPHS AND TELEPHONES.

But a city which has given a telephone company permission to occupy certain streets may, when public safety requires, compel removal to another location. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

97. Skaneateles Water Works Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687 [*affirming* 33 N. Y. App. Div. 642, 54 N. Y. Suppl. 1115].

Authorizing a city to condemn a water-supply system, providing that compensation is made for the contract and for tangible property is legal, although the city has a contract with the water company to pay it for the use of hydrants for a term of years. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165.

Where a statute authorized a town to construct waterworks, and also to contract with third parties for a water-supply, and the town granted to a corporation a right to construct waterworks, the town could not, after construction by the corporation of an adequate plant, construct works of its own. Westerly Waterworks *v.* Westerly, 75 Fed. 181.

Where the power to "regulate" water-rates is reserved to a municipality it may later reduce water-rates stipulated for by agreement between a water company and the municipality granting the franchise. Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075.

98. Hot Springs Electric Light Co. *v.* Hot Springs, 70 Ark. 300, 67 S. W. 761 (holding that a city could not exact compensation for the use of streets for lighting appliances, after the company had at great expense erected its plant and had made a contract for lighting the city streets); State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Lima Gas Co. *v.* Lima, 2 Ohio Cir. Dec. 396; St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 21 S. Ct. 575, 45 L. ed. 788 [*dismissing* writ of error in 78 Minn. 39, 80 N. W. 774, 877]; Little Falls Electric, etc., Co. *v.* Little Falls, 102 Fed. 663; Levis *v.* Newton, 75 Fed. 884.

b. Rights of Municipal Creditors. The power of the legislature to interfere with contracts to which a municipal corporation is a party is subject to the limitation that the substance of rights of existent municipal creditors who have dealt with it in its local or private character be not impaired;[99] so the power or duty of a municipality to levy taxes, existent at the date of the contract and relied upon as security by the creditor, cannot be so affected as to hinder, delay, or defraud the latter;[1] and legislation working such hindrance by extinguishment,

Where nothing had been done by the grantee of a right to construct and maintain an electric light plant, looking toward the erection and operation of such a plant, the state may authorize the city to construct and maintain its own electric light plant, although the right given to the grantee was exclusive, and the grantee had in operation a gas plant authorized by the same act which gave the electric light privileges. Capital City Light, etc., Co. *v.* Tallahassee, 186 U. S. 401, 22 S. Ct. 866, 46 L. ed. 1219 [*affirming* 42 Fla. 462, 28 So. 810].

Where a proviso states that exclusive privileges are not granted, the city granting a franchise may itself later enter the same business without violating its grant. State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

99. *Louisiana.*— Haynes *v.* Municipality No. 2, 5 La. Ann. 760.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

New Jersey.— Munday *v.* Rahway, 43 N. J. L. 338; Rader *v.* Southeasterly Road Dist., 36 N. J. L. 273.

Texas.— Morris *v.* State, 62 Tex. 728.

Washington.— Townsend Gas, etc., Light Co. *v.* Hill, 24 Wash. 469, 64 Pac. 778.

Wisconsin.— State *v.* Madison, 15 Wis. 30.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Butz *v.* Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; Lee County *v.* Rogers, 7 Wall. (U. S.) 181, 19 L. ed. 160; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; De Vignier *v.* New Orleans, 4 Woods (U. S.) 206, 16 Fed. 11; Milner *v.* Pensacola, 2 Woods (U. S.) 632, 17 Fed. Cas. No. 9,619, 2 Am. L. T. Rep. N. S. 186.

But see Wallace *v.* Sharon Tp., 84 N. C. 164.

A contracting municipality cannot impair its own contracts by later license-taxes. New Castle *v.* Electric Co., 16 Pa. Co. Ct. 663, 26 Pittsb. Leg. J. N. S. 197.

Contracts with municipalities on subject-matters understood to be within the control of the legislature may be altered by the legislature. Pott *v.* Sheboygan County Sup'rs, 25 Wis. 506, where a publisher contracted with county supervisors for printing a tax-list of delinquents.

Legislation impairing the rights of creditors can be assailed only by one who shows that he is a creditor or is otherwise in a position to be injured thereby. Smith *v.* Inge, 80 Ala. 283.

Mere authority in a charter to a railroad company to receive subscriptions to the capital stock from municipal corporations, where no consideration is given and where there is no attempted exercise of the power, is not a contract. Wilkes County *v.* Call, 123 N. C. 308, 31 S. E. 481.

Mere change of trustees acting as agents of the state does not impair constitutional rights. State *v.* Knowles, 16 Fla. 577.

Stopping the running of interest on judgments against counties on county warrants or other county obligations is not an impairment of contracts. Read *v.* Mississippi County, 69 Ark. 365, 63 S. W. 807, 86 Am. St. Rep. 202.

The legislature may change the tribunal of a city which receives and inspects contract work before payment, after a contract is entered into. Isenberg *v.* Selvage, 103 Ky. 260, 19 Ky. L. Rep. 1963, 44 S. W. 974.

An exemption from taxation of obligations issued by a municipality is a part of the contract of loan which cannot be recalled. Com. *v.* Southworth, Dauph. Co. (Pa.) 402.

1. *Alabama.*— Edwards *v.* Williamson, 70 Ala. 145.

Arkansas.— Brodie *v.* McCabe, 33 Ark. 690.

Florida.— Columbia County *v.* King, 13 Fla. 451.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

Louisiana.— Saloy *v.* New Orleans, 33 La. Ann. 79; Moore *v.* New Orleans, 32 La. Ann. 726; Shields *v.* Pipes, 31 La. Ann. 765.

Michigan.— People *v.* Lansing, 27 Mich. 131.

Mississippi.— Fosdick *v.* Board of Mississippi Levee Com'rs, 76 Miss. 859, 26 So. 637.

Missouri.— State *v.* St. Louis, etc., R. Co., 130 Mo. 243, 32 S. W. 664.

Nebraska.— State *v.* Walsh, 31 Nebr. 469, 48 N. W. 263.

New Jersey.— Rahway *v.* State, 44 N. J. L. 395, holding that the legislature cannot take away the creditor's right to enforce taxation by mandamus.

North Carolina.—Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99.

Ohio.— Goodale *v.* Fennell, 27 Ohio St. 426, 22 Am. Rep. 321.

South Carolina.— Morton *v.* Comptroller-Gen., 4 S. C. 430.

Tennessee.— Memphis *v.* Bethel, (Tenn. 1875) 17 S. W. 191.

Wisconsin.— State *v.* Madison, 15 Wis. 30.

United States.— Board of Liquidation *v.*

annexation, or division of municipal corporations is an unconstitutional impairment of contracts.[2] Mere changes in the form of a provision for the means of

Louisiana, 179 U. S. 622, 21 S. Ct. 263, 45 L. ed. 347 [*affirming* 51 La. Ann. 1849, 26 So. 679]; Cape Girardeau County Ct. *v.* Hill, 118 U. S. 68, 6 S. Ct. 951, 30 L. ed. 73; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Louisiana *v.* Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; Ralls County *v.* U. S., 105 U. S. 733, 26 L. ed. 1220; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Padgett *v.* Post, 106 Fed. 600, 45 C. C. A. 488; Hicks *v.* Cleveland, 106 Fed. 459. 45 C. C. A. 429; Devereaux *v.* Brownsville, 29 Fed. 742; Sun Mut. Ins. Co. *v.* Board of Liquidation, 24 Fed. 4; U. S. *v.* Treasurer, 2 Abb. (U. S.) 53, 1 Dill. (U. S.) 522, 28 Fed. Cas. No. 16,538, 9 Am. L. Reg. N. S. 415, 12 Int. Rev. Rec. 56; U. S. *v.* Jefferson County, 5 Dill. (U. S.) 310, 1 McCrary (U. S.) 356, 26 Fed. Cas. No. 15,472, 7 Am. L. Rec. 154, 7 Centr. L. J. 130, 24 Int. Rev. Rec. 354, 26 Pittsb. Leg. J. (Pa.) 8, 6 Reporter 486, 2 Tex. L. J. 164; U. S. *v.* Johnson County, 5 Dill. (U. S.) 207 note, 26 Fed. Cas. No. 15,489; U. S. *v.* Howard County Ct., 1 McCrary (U. S.) 218, 2 Fed. 1; Sawyer *v.* Concordia Parish, 4 Woods (U. S.) 273, 12 Fed. 754; Maenhaut *v.* New Orleans, 2 Woods (U. S.) 108, 16 Fed. Cas. No. 8,939, 3 Woods (U. S.) 1, 16 Fed. Cas. No. 8,940.

And *compare* Hall *v.* Parker, 33 N. J. L. 312; Bailey *v.* Sutch, 6 Phila. (Pa.) 408, 24 Leg. Int. (Pa.) 181 (holding valid an exemption of certain inhabitants from taxation to meet prior indebtedness); U. S. *v.* Thoman, 156 U. S. 353, 15 S. Ct. 378, 39 L. ed. 450 [*affirming* 44 Fed. 590].

See 10 Cent. Dig. tit. "Constitutional Law," § 354.

A provision for taxation, passed to supply the place of invalid tax laws, cannot be later repealed after judgment obtained and mandamus applied for, when work has been done in reliance upon the invalid mode of taxation. Brooks *v.* Memphis, 4 Fed. Cas. No. 1,954, 3 Centr. L. J. 356.

A change in a state constitution cannot impair existing rights of municipal creditors vested under the taxing powers of a municipality. U. S. *v.* Jefferson County, 5 Dill. (U. S.) 310, 1 McCrary (U. S.) 356, 26 Fed. Cas. No. 15,472, 7 Am. L. Rec. 154, 7 Centr. L. J. 130, 24 Int. Rev. Rec. 354, 26 Pittsb. Leg. J. (Pa.) 8, 6 Reporter 486, 2 Tex. L. J. 164.

The fact that additional county expenses are to be met out of the fund available when the debt was contracted does not impair the obligation of contracts entered into when the expenses chargeable to the fund arising from taxation were less. U. S. *v.* Knox County, 51 Fed. 880.

The fact that improper assessments were made cannot impair a creditor's right to be paid by a valid exercise of existing taxing power. Favrot *v.* East Baton Rouge Parish, 34 La. Ann. 491; People *v.* Lansing, 27 Mich. 131.

A judgment founded on a tort is not a contract; so the state may later reduce the power of the city, against which the judgment was obtained, to levy taxes to pay it. Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258. See also Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936.

Pleading.— A creditor attacking the validity of an act restricting the power of municipal taxation must, on the ground that his judgment is impaired, allege that the judgment was founded upon a contract. State *v.* Police Jury, 32 La. Ann. 884.

2. Blanchard *v.* Bissell, 11 Ohio St. 96; Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Jefferson City Gas-Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521; U. S. *v.* Treasurer, 2 Abb. (U. S.) 53, 1 Dill. (U. S.) 522, 28 Fed. Cas. No. 16,538, 9 Am. L. Reg. N. S. 415, 12 Int. Rev. Rec. 56; Brewis *v.* Duluth, 3 McCrary (U. S.) 219, 9 Fed. 747. But see Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197, in which by extinguishment of the municipality of Memphis the creditors were left without any practicable means of enforcing their obligations.

Allowing taxpayers to set off municipal obligations which they have bought in in payment of their taxes is constitutional as to municipal creditors. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 5 S. Ct. 895, 29 L. ed. 172.

The division of a county which had pledged all its taxable property for the payment of debts is not unconstitutional if it is provided that the separated portions shall pay their proportional parts of the original debts. Savings, etc., Assoc. *v.* Alturas County, 65 Fed. 677.

Exempting taxpayers from an obligation to pay a fee prescribed by a former act for the services of the attorney conducting tax-sales is valid. People *v.* Lee, 28 Hun (N. Y.) 469.

A transfer of the municipal property of one city to another, the latter assuming the obligations of the former, does not of itself constitute an impairment of contracts. Stone *v.* Charlestown, 114 Mass. 214. To similar effect see Shotwell *v.* Louisville, etc., R. Co., 69 Miss. 541, 11 So. 455.

Where the resignation of municipal officers deprives the courts of power to act through mandamus the courts cannot assist the creditor by a levy of taxes (Rees *v.* Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72); nor can

enforcement or payment of municipal obligations may be valid,[3] but changes which impair substantially the enforcement of creditors' rights are unconstitutional.[4]

a receiver be appointed to collect a tax already levied (Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472).

3. *Alabama.*— Shell *v.* Beeland, 123 Ala. 569, 26 So. 342; Amy *v.* Selma, 77 Ala. 103.

California.— Sharp *v.* Contra Costa County, 34 Cal. 284 (funding of debts); Chapman *v.* Morris, 28 Cal. 393 (sustaining a provision for the substitution of interest-bearing bonds in the place of old non-interest-bearing obligations); Babcock *v.* Middleton, 20 Cal. 643; English *v.* Sacramento, 19 Cal. 172; Thornton *v.* Hooper, 14 Cal. 9; People *v.* Bond, 10 Cal. 563 (sustaining refunding provisions); Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130 (sustaining a change in the mode and time of payment which did not impair substantial rights). *Compare* People *v.* Morse, 43 Cal. 534, holding valid a funding act which provided for the payment of a part, but not all, of certain municipal indebtedness.

Louisiana.— Rousseau *v.* New Orleans, 35 La. Ann. 557 (sustaining the prohibition of writs of fieri facias against New Orleans); State *v.* Pilsbury, 31 La. Ann. 1 (holding that the imposition of a special tax to pay consolidated bonds was a mere form of legal remedy which could be altered); New Orleans *v.* Holmes, 13 La. Ann. 502.

Nevada.— Youngs *v.* Hall, 9 Nev. 212.

New Jersey.— Warner *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166.

Oklahoma.— Diggs *v.* Lobitz, 4 Okla. 232, 43 Pac. 1069.

Wisconsin.— Oshkosh Water Works Co. *v.* Oshkosh, 109 Wis. 208, 85 N. W. 376.

United States.— Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669 [*reversing* 55 Fed. 361], sustaining Kan. Laws (1881), c. 170, Kan. Laws (1883), c. 157, authorizing the refunding of bonded indebtedness.

See 10 Cent. Dig. tit. "Constitutional Law," § 353.

An act exempting county property from a forced sale upon execution is an affirmance of the common law and so impairs no previous contract. Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

In respect to service of process in suits on municipal bonds previously issued the legislature has power to alter the terms of a municipal charter. Perkins *v.* Watertown, 5 Biss. (U. S.) 320, 19 Fed. Cas. No. 10,991, 12 Am. L. Reg. N. S. 777, 5 Chic. Leg. N. 472.

4. *California.*— People *v.* San Francisco County, 12 Cal. 300; People *v.* Tillinghast, 10 Cal. 584; People *v.* Bond, 10 Cal. 563; People *v.* Woods, 7 Cal. 579; Smith *v.* Morse, 2 Cal. 524, holding invalid an act lowering the rate of interest and subjecting creditors to twenty years' delay in payment.

Indiana.— Dodd *v.* Miller, 14 Ind. 433, holding that rights to be paid out of a particular fund could not be impaired.

Kansas.— Dillingham *v.* Hook, 32 Kan. 185, 4 Pac. 166, holding invalid an act changing the place of payment of bonds.

Louisiana.— New Orleans Tax Payers' Assoc. *v.* New Orleans, 33 La. Ann. 567 (holding invalid the funding act of 1880, No. 74); State *v.* New Orleans, 29 La. Ann. 863.

Nebraska.— State *v.* Cathers, 25 Nebr. 250, 41 N. W. 182; Brewer *v.* Otoe County, 1 Nebr. 373.

New Jersey.— Gabler *v.* Treasurer, 42 N. J. L. 79.

New York.— Hadfield *v.* New York, 6 Rob. (N. Y.) 501, 2 Abb. Pr. N. S. (N. Y.) 95; Wood *v.* New York, 6 Rob. (N. Y.) 463.

Pennsylvania.— Williams' Appeal, 72 Pa. St. 214; O'Donnell *v.* Philadelphia, 2 Brewst. (Pa.) 481, 7 Phila. (Pa.) 234, holding that the order of the payment of obligations could not be made to accord with the dates of presentment and registration.

Washington.— Eidemiller *v.* Tacoma, 14 Wash. 376, 44 Pac. 877.

United States.— New Orleans *v.* Morris, 105 U. S. 600, 26 L. ed. 1184; *In re* Copenhaver, 54 Fed. 660; Amy *v.* Galena, 10 Biss. (U. S.) 263, 7 Fed. 163; Western Arkansas Nat. Bank *v.* Sebastian County, 5 Dill. (U. S.) 414, 17 Fed. Cas. No. 10,040; U. S. *v.* Mobile, 4 Woods (U. S.) 536, 12 Fed. 768.

But see Tribune Assoc. *v.* New York, 48 Barb. (N. Y.) 240, holding valid a provision forbidding the entry of contract judgments except upon proof of the existence of such amount in the city treasury to the credit of the appropriation for the specific object upon which the claim sued for was founded, although plaintiff's recovery was delayed until an appropriation to cover the claim should be made. And see Young *v.* Territory, 1 Oreg. 213.

See 10 Cent. Dig. tit. "Constitutional Law," § 349.

Diverting fund created for particular purposes.— Money collected to pay the interest on bonds, levied, collected, and set apart according to the provisions of an act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders. Maenhaut *v.* New Orleans, 2 Woods (U. S.) 108, 16 Fed. Cas. No. 8,939. And where bonds were issued to build a municipal market-house, and by their terms the market revenue was to be applied on the interest and to form a sinking-fund, such revenue could not be diverted. Fazende *v.* Houston, 34 Fed. 95. So where a sinking-fund was created, a depositary chosen, and an appropriation of funds was made to pay certain debts, the creditors acquired vested rights under the contract of pledge. Board of Liquidators *v.* Municipality No. 1, 6 La. Ann. 21. To a similar effect see State *v.* Board of Liquidation, 40 La. Ann. 398, 4 So.

4. Public Offices — a. In General — (i) *Constitutional Changes.* Public offices, even though created or protected by the constitution, may be abolished and their incidents affected by the adoption of a new constitution [5] or of an amendment to an existing constitution.[6]

(ii) *Power of Legislature.* Except in so far as created or protected from interference by the constitution,[7] public offices confer upon their holders no vested

122. And see People *v.* San Francisco County, 12 Cal. 300 (holding that an act which is substantially a trust deed is binding in favor of municipal creditors); State *v.* Butler, 11 Lea (Tenn.) 493. *Compare* Harold *v.* Herrington, 95 Ala. 395, 11 So. 131; Esser *v.* Spaulding, 17 Nev. 289, 30 Pac. 896.

A special pledge by a municipality of lands for the payment of bonds is binding, so as to prevent a later sale of such lands free of the trust or pledge. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70 [*reversing* 3 Lans. (N. Y.) 429].

Imposition of conditions precedent to payment of municipal indebtedness.—Reasonable conditions precedent may be imposed by the legislature, the limitation being that no substantial right shall be invaded. Lincoln *v.* Grant, 38 Nebr. 369, 56 N. W. 995 (sustaining a requirement that claims for unliquidated damages against a city be presented within three months); Parker *v.* Buckner, 67 Tex. 20, 2 S. W. 746 (requirement that claims be presented within six months, sustained); Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. ed. 132 (holding valid a requirement that judgments against the city be registered, as a condition precedent to payment). But when the conditions imposed are a substantial interference with the contract rights of creditors they are unconstitutional. McCracken *v.* Moody, 33 Ark. 81 (holding invalid a requirement that holders of obligations present them within ninety days); Rose *v.* Estudillo, 39 Cal. 270; Robinson *v.* Magee, 9 Cal. 81, 70 Am. Dec. 638 (holding invalid a requirement for the presentation of claims for registry); Priestly *v.* Watkins, 62 Miss. 798 (holding invalid a requirement for presentation for registration and an affidavit as to holder's claim of title).

Provisions made prior to an issue of bonds that no later bonds should be issued except to meet such bonds is a part of the contract of loan which cannot be impaired. Smith *v.* Appleton, 19 Wis. 468.

5. Coffin *v.* State, 7 Ind. 157; Sigur *v.* Crenshaw, 8 La. Ann. 401; Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]; People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. (N. Y.) 27; French *v.* Com., 78 Pa. St. 339. *Contra, In re* Gibbes, 1 Desauss. (S. C.) 587, holding that a master in chancery appointed under the constitution of 1778 could not be deprived of his office after the adoption of a new constitution; since he had a freehold in his office, holding his commission during good behavior.

In so far as the constitution protects the office, any act of the legislature abolishing such office or abridging its scope impairs an obligation of contract between the incumbent and the state (Hays *v.* Harley, 1 Mill (S. C.) 267); but where the office is created by the constitution and the terms and compensation are fixed by statute, such tenure and compensation are entirely subject to legislative control, except that the office cannot be virtually abolished by the legislature by a reduction of the compensation or by taking away compensation altogether (Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]; Bailey *v.* Caldwell, 68 N. C. 472).

Where by the constitution an office is elective, a statute providing that henceforth a certain other officer upon election shall become *ex officio* the holder of the first-mentioned office is constitutional as to elections held after the expiration of the present incumbent's term; but it cannot operate to divest the present incumbent of the office to which he has been elected under the constitution, and substitute therefor a person not elected to such office. Mills *v.* Sargent, 36 Cal. 379.

A constitutional provision that no person who now is, or hereafter shall be, a collector of public moneys, shall be eligible to any office until he has paid over all sums for which he is liable, does not defeat any vested rights of a previously elected officer who was in default of public moneys. Taylor *v.* Governor, 1 Ark. 21.

In territories of the United States acts of congress are of course superior to territorial legislation, and hence an act of the territorial legislature altering fees fixed for certain services by act of congress is void (People *v.* Pyper, 6 Utah 160, 21 Pac. 722); but in the absence of any congressional legislation on the subject such an act would be valid (Harwood *v.* Perrin, (Ariz. 1900) 60 Pac. 891).

6. Bailey *v.* State, 56 Miss. 637.

7. The placing of a maximum limit on salaries of all county officers by the constitution does not make the offices held by such persons constitutional offices and preclude the legislature from abolishing such offices or changing their duties. Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

Where the constitution forbids the diminution of the salary of a judge during his term of office, an act directing that one half of his salary be deducted for such time as a special judge is required to sit in his absence is unconstitutional. White *v.* State, 123 Ala. 577, 26 So. 343.

rights of which they cannot be deprived by the legislature.[8] The legislature may deal with such offices absolutely as it pleases, and may even abolish them altogether,[9] since they are not grants, contracts, or obligations which cannot be

8. *Alabama.*— *Ex p.* Lambert, 52 Ala. 79; Beebe *v.* Robinson, 52 Ala. 66. *Contra*, Wammack *v.* Holloway, 2 Ala. 31, holding that the right to exercise an office is as much a species of property as any other thing capable of possession.

Kentucky.— Standeford *v.* Wingate, 2 Duv. (Ky.) 440.

New York.— Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355], holding that neither public officers nor the prospective emoluments attached thereto are incorporeal hereditaments or property in any sense.

North Carolina.— State *v.* Wilson, 121 N. C. 480, 28 S. E. 554. But see King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754, holding that the right of a sheriff to collect taxes was property of which he could not be deprived without his consent during his term of office. And *compare* Taylor *v.* Stanly, 15 N. C. 31 note; Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 677, both holding that while a clerk appointed under the North Carolina act of 1806 had an estate in his office, the legislature could destroy the office and his estate in it.

South Carolina.— Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; Alexander *v.* McKenzie, 2 S. C. 81.

United States.— Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187 (holding that a decision by a state court against a claimant to the office of governor does not deprive him of any rights to property within the fourteenth amendment of the United States constitution so as to give jurisdiction to the supreme court of the United States on a writ of error); Wilson *v.* North Carolina, 169 U. S. 586, 18 S. Ct. 435, 42 L. ed. 865.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

9. *Alabama.*— *Ex p.* Wiley, 54 Ala. 226; *Ex p.* Lambert, 52 Ala. 79; Beebe *v.* Robinson, 52 Ala. 66; Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; Benford *v.* Gibson, 15 Ala. 521.

Arkansas.— Vincenheller *v.* Reagan, 69 Ark. 460, 64 S. W. 278; Humphry *v.* Sadler, 40 Ark. 100; Robinson *v.* White, 26 Ark. 139; State *v.* Scott, 9 Ark. 270; *Ex p.* Tully, 4 Ark. 220, 38 Am. Dec. 33; Taylor *v.* Governor, 1 Ark. 21.

California.— Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; *In re* Bulger, 45 Cal. 553; People *v.* Kelsey, 34 Cal. 470; People *v.* Squires, 14 Cal. 12; People *v.* Haskell, 5 Cal. 357.

Connecticut.— State *v.* Baldwin, 45 Conn. 134.

Illinois.— Donahue *v.* Will County, 100 Ill. 94; People *v.* Auditor, 2 Ill. 537.

Indiana.—State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; Jeffries *v.* Rowe, 63 Ind. 592; Blakemore *v.* Dolan, 50 Ind. 194; Turpin *v.* Tipton County, 7 Ind. 172; Coffin *v.* State, 7 Ind. 157; Ellis *v.* State, 4 Ind. 1.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Kansas.— Harvey *v.* Rush County, 32 Kan. 159, 4 Pac. 153; Reed *v.* Francis, 22 Kan. 510.

Kentucky.— Standeford *v.* Wingate, 2 Duv. (Ky.) 440. *Compare* Williams *v.* Newport, 12 Bush (Ky.) 438, holding that the election or appointment of an officer for a fixed period cannot be deemed a contract for a stipulated term, when the officer cannot be required to serve for the entire term.

Maine.— Rounds *v.* Smart, 71 Me. 380; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Farwell *v.* Rockland, 62 Me. 296.

Massachusetts.— Opinion of Justices, 117 Mass. 603; Taft *v.* Adams, 3 Gray (Mass.) 126.

Michigan.— People *v.* Detroit, 38 Mich. 636.

Mississippi.— Fant *v.* Gibbs, 54 Miss. 396; Kendall *v.* Canton, 53 Miss. 526; Hyde *v.* State, 52 Miss. 665.

Missouri.— *In re* Burris, 66 Mo. 442; Wilcox *v.* Rodman, 46 Mo. 322; State *v.* Davis, 44 Mo. 129; State *v.* Bernondy, 40 Mo. 192; State *v.* Ford, 41 Mo. App. 122; State *v.* Hermann, 11 Mo. App. 43.

Montana.— People *v.* Van Gaskin, 5 Mont. 352, 6 Pac. 30, holding that the legislature of a territory may declare vacant an office which it has created.

Nevada.— Denver *v.* Hobart, 10 Nev. 28; State *v.* Tilford, 1 Nev. 240.

New Jersey.— Kenny *v.* Hudspeth, 59 N. J. L. 320, 36 Atl. 662; Hoboken *v.* Gear, 27 N. J. L. 265.

New York.— People *v.* Whitlock, 92 N. Y. 191; People *v.* Green, 58 N. Y. 295; People *v.* Batchelor, 22 N. Y. 128; Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]; People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205; Coulter *v.* Murray, 4 Daly (N. Y.) 506; Warner *v.* People, 2 Den. (N. Y.) 272, 43 Am. Dec. 740.

North Dakota.— State *v.* Harris, 1 N. D. 190, 45 N. W. 1101.

Pennsylvania.— Com. *v.* Weir, 165 Pa. St. 284, 35 Wkly. Notes Cas. (Pa.) 556, 30 Atl. 835; Koontz *v.* Franklin County, 76 Pa. St. 154; Com. *v.* McCombs, 56 Pa. St. 436; Barker *v.* Pittsburgh, 4 Pa. St. 49; Com. *v.* Mann, 5 Watts & S. (Pa.) 403; Com. *v.* Bacon, 6 Serg. & R. (Pa.) 322.

South Carolina.— Alexander *v.* McKenzie, 2 S. C. 81.

Tennessee.—Jones *v.* Hobbs, 4 Baxt. (Tenn.) 113; Haynes *v.* Slate, 3 Humphr. (Tenn.) 480, 39 Am. Dec. 187.

Virginia.— Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907; Holladay *v.* Auditor, 77 Va. 425.

impaired by an act of the legislature. It necessarily follows that it may

Wisconsin.— Hall *v.* State, 39 Wis. 79; State *v.* Douglas, 26 Wis. 428, 7 Am. Rep. 87; State *v.* Von Baumbach, 12 Wis. 310.

United States.— Crenshaw *v.* U. S., 134 U. S. 99, 10 S. Ct. 431, 33 L. ed. 825; Blake *v.* U. S., 103 U. S. 227, 26 L. ed. 462; Newton *v.* Mahoning County, 100 U. S. 548, 25 L. ed. 710; Butler *v.* Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472; *Ex p.* Hennen, 13 Pet. (U. S.) 230, 10 L. ed. 138; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

Contra, King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754, holding that where a statute makes it a part of the duty of the sheriff to collect taxes a contract arises between him and the state which cannot be impaired by a subsequent act for the appointment of a separate tax-collector. And see State *v.* Jumel, 30 La. Ann. 861; People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. (N. Y.) 27, both holding that the acceptance of the office of judge, conferred upon one by a legislative act, constitutes a contract within the meaning of the constitution. See also *In re* Gibbes, 1 Desauss. (S. C.) 587; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229, both holding that the tenure of the office of a person holding during good behavior, with a fixed salary, cannot be altered without impairing the obligation of a contract.

An act abolishing one office and creating another in its place is not unconstitutional merely because the difference between the two offices are small. Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 46 Pittsb. Leg. J. (Pa.) 385, 8 Am. St. Rep. 801, 53 L. R. A. 837.

Offices which have been abolished.— The following offices have been abolished or their incidents and tenure affected by act of legislature: Assistant alderman (Demarest *v.* New York, 11 Hun (N. Y.) 19; Demarest *v.* Wickham, 4 Hun (N. Y.) 627); canal commissioners (Butler *v.* Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472); chief of fire department (Williams *v.* Newport, 12 Bush (Ky.) 438); city offices in general (Standeford *v.* Wingate, 2 Duv. (Ky.) 440; State *v.* Dolan, 93 Mo. 467, 6 S. W. 366); commissioners of chancery court (Smith *v.* Com., 8 Bush (Ky.) 108); county commissioner (Taft *v.* Adams, 3 Gray (Mass.) 126); county treasurer (People *v.* Banvard, 27 Cal. 470); jailer of the county (State *v.* Dews, 4 R. M. Charlt. (Ga.) 443); judges, by abolishing the court (Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; Russell *v.* Howe, 12 Gray (Mass.) 147); mayor and aldermen of a city (Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 8 Am. St. Rep. 801, 53 L. R. A. 837, 46 Pittsb. Leg. J. (Pa.) 385; Alexander *v.* McKenzie, 2 S. C. 81); notary public (State *v.* Hermann, 11 Mo. App. 43); pomologist in a state university (Vincenheller *v.* Reagan, 69 Ark. 460, 64 S. W. 278); register of probate court (Opinion of Justices, 117 Mass. 603); registrar clerk of orphans' court (French *v.* Com., 78 Pa. St. 339); state printer (Walker *v.* Peelle, 18 Ind. 264; Walker *v.* Dunham, 17 Ind. 483; Ellis *v.* State, 4 Ind. 1; Reed *v.* Francis, 22 Kan. 510; Wilcox *v.* Rodman, 46 Mo. 322; Jones *v.* Hobbs, 4 Baxt. (Tenn.) 113); tax-collector (Hiestand *v.* New Orleans, 14 La. Ann. 330); teacher in state university (Head *v.* Missouri University, 19 Wall. (U. S.) 526, 22 L. ed. 160 [*affirming* 47 Mo. 220]); and trustees of a town (Frisbie *v.* Fogg, 78 Ind. 269).

Offices which cannot be abolished.— It has been held that the following offices could not be abolished: city engineer by the city (Chase *v.* Lowell, 7 Gray (Mass.) 33); judge (State *v.* Jumel, 30 La. Ann. 861; People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. (N. Y.) 27); master in chancery (*In re* Gibbes, 1 Desauss. (S. C.) 587); office which the incumbent holds during good behavior (*In re* Gibbes, 1 Desauss. (S. C.) 587; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229); and ordinary (Hayes *v.* Harley, 1 Mill (S. C.) 267).

What operates to abolish offices.—Acts consolidating two offices into one (Hall *v.* Burks, 96 Ga. 622, 24 S. E. 349); authorizing the governor to appoint new officers for full terms (Bailey *v.* State, 56 Miss. 637); establishing a new form of city government (State *v.* Dolan, 93 Mo. 467, 6 S. W. 366; People *v.* Feitner, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094), amending a city's charter (Alexander *v.* McKenzie, 2 S. C. 81), or the adoption by a city of a general law for the incorporation of municipalities (People *v.* Blair, 82 Ill. App. 570) have all been held to abolish the offices affected by them, unless the acts in question especially provide to the contrary (People *v.* Feitnor, 30 N. Y. App. Div. 241, 51 N. Y. Suppl. 1094; Com. *v.* Ricketts, 9 Kulp (Pa.) 361).

While the office is continued and not abolished the legislature cannot oust an incumbent during the term for which he was chosen (Cotton *v.* Ellis, 52 N. C. 545), nor fill the office except in the prescribed manner (Demarest *v.* New York, 11 Hun (N. Y.) 19; Demarest *v.* Wickham, 4 Hun (N. Y.) 627); and therefore an act declaring his office vacant (Hayes *v.* Harley, 1 Mill (S. C.) 267), transferring the office to another (Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 677), so amending the act which established the office as to deprive the incumbent of his office, without abolishing the same (State *v.* Griffin, 125 N. C. 332, 34 S. E. 429; State *v.* Webb, 125 N. C. 243, 34 S. E. 430), or abolishing the office to take effect in the future, and then before the act takes effect recreating the office by a second act and appointing a new incumbent (Silvey *v.* Boyle, 20 Utah 265, 57 Pac. 880), is unconstitutional.

The governor of a state has no power to revoke the commission of an officer not re-

abridge,[10] or extend,[11] the terms, change the duties,[12] and increase [13] or reduce [14] the

movable at his pleasure, whether the appointing power be in the governor or elsewhere; and where the appointing power is not in the governor he must commission the person duly elected or appointed by the proper authorities. Ewing *v.* Thompson, 43 Pa. St. 372.

10. *Arkansas.*—Robinson *v.* White, 26 Ark. 139.

California.— *In re* Bulger, 45 Cal. 553.

Indiana.— Blakemore *v.* Dolan, 50 Ind. 194.

Kentucky.— Standeford *v.* Wingate, 2 Duv. (Ky.) 440.

Massachusetts.— Taft *v.* Adams, 3 Gray (Mass.) 126.

Missouri.— State *v.* Evans, 166 Mo. 347, 66 S. W. 355.

Oregon.— Territory *v.* Pyle, 1 Oreg. 149, holding constitutional an act cutting down the terms of an office from two years to one after the election of the officer.

Pennsylvania.— Com. *v.* Weir, 165 Pa. St. 284, 35 Wkly. Notes Cas. (Pa.) 556, 30 Atl. 835; Com. *v.* McCombs, 56 Pa. St. 436.

South Carolina.—Alexander *v.* McKenzie, 2 S. C. 81.

Wisconsin.— State *v.* Douglas, 26 Wis. 428, 7 Am. Rep. 87.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

11. *In re* Bulger, 45 Cal. 553.

12. *California.*— Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; Christy *v.* Sacramento County, 39 Cal. 3; People *v.* Squires, 14 Cal. 12.

Georgia.— State *v.* Dews, R. M. Charlt. (Ga.) 397.

Indiana.— Walker *v.* Peelle, 18 Ind. 264; Walker *v.* Dunham, 17 Ind. 483.

Kansas.—Interstate Nat. Bank *v.* Ferguson, 48 Kan. 732, 30 Pac. 237, holding constitutional a statute transferring certain duties of a city treasurer to mayors and councils.

Nevada.— Denver *v.* Hobart, 10 Nev. 28.

New York.— Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355].

North Carolina.— State *v.* Gales, 77 N. C. 283; Cotten *v.* Ellis, 52 N. C. 545; Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 677. *Contra*, King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754.

Pennsylvania.— Com. *v.* McCombs, 56 Pa. St. 436.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

The legislature may change the duties of an office without a corresponding change in the compensation or *vice versa*. Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355].

13. People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; People *v.* Warner, 7 Hill (N. Y.) 81.

14. *Alabama.*— Benford *v.* Gibson, 15 Ala. 521.

California.— Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; Christy *v.* Sacramento County, 39 Cal. 3; People *v.* Squires, 14 Cal. 12.

Indiana.— Walker *v.* Peelle, 18 Ind. 264; Walker *v.* Dunham, 17 Ind. 483; Gilbert *v.* Board of Com'rs, 8 Blackf. (Ind.) 81.

Kentucky.— Com. *v.* Bailey, 81 Ky. 395.

Louisiana.— Seale *v.* Madison Parish, 34 La. Ann. 365; State *v.* Police Jury, 34 La. Ann. 41; *In re* Merchants Bank, 2 La. Ann. 68.

Michigan.—Wyandotte *v.* Drennan, 46 Mich. 478, 9 N. W. 500.

Mississippi.— State *v.* Smedes, 26 Miss. 47.

Missouri.— Wilcox *v.* Rodman, 46 Mo. 322.

Montana.— *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

Nevada.— Denver *v.* Hobart, 10 Nev. 28.

New Jersey.— Love *v.* Jersey City, 40 N. J. L. 456.

New York.—Matter of New York, 158 N. Y. 668, 52 N. E. 1125 [*affirming* 33 N. Y. App. Div. 365, 53 N. Y. Suppl. 875]; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]; People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. (N. Y.) 27; People *v.* Warner, 7 Hill (N. Y.) 81.

North Carolina.— State *v.* Gales, 77 N. C. 283; Cotten *v.* Ellis, 52 N. C. 545.

Ohio.— Canal Com'rs *v.* Com., 1 Am. L. J. N. S. 79.

Pennsylvania.— Com. *v.* McCombs, 56 Pa. St. 436; Barker *v.* Pittsburgh, 4 Pa. St. 49; Com. *v.* Bacon, 6 Serg. & R. (Pa.) 322.

Tennessee.— Haynes *v.* State, 3 Humphr. (Tenn.) 480, 39 Am. Dec. 189.

Vermont.— Cushman *v.* Hale, 68 Vt. 444, 35 Atl. 382.

United States.— Butler *v.* Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

An administrator's claim to fees allowed by statute is not a contract within the constitutional provision against impairment of the obligation of contract. *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

The legislature may substitute a salary for fees; and it may continue the fees, but direct them to be paid into the public treasury (Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]), or it may deprive the office of the fees by transferring the duties by which they are earned to another office (Stephens *v.* Williamson, 4 Ky. L. Rep. 985).

Recovery of illegal fees exacted by an officer may be constitutionally authorized by statute, although such statute changes the common-law rule in force at the time the officer took his office. Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26.

State reporter.— A statute limiting the price to be charged by the reporter of a state court for copies of his reports sold to the public is constitutional, as a regulation of the compensation of a public official. Black *v.* Merrill, 51 Ind. 32.

A statute giving a part of the fines for

compensation of persons already in office.[15] The legislature may also create new disqualifications for holding office,[16] new causes for removal from offices already existing,[17] and new tribunals or modes of procedure to try title to office or removal therefrom.[18]

(III) *Power of Municipalities.* Although in some jurisdictions it has been held that cities and towns have not the same power as the legislature over city and town offices,[19] yet the rule generally adopted accords them a like power.[20]

b. Intervening Rights of Third Persons. Contract rights incident to the holding of public office, in which third parties have an interest, may arise; and these cannot be violated by the legislature.[21]

certain offenses to the prosecuting officer (Cushman *v.* Hale, 68 Vt. 444, 35 Atl. 382) or to an educational institution (Watson Seminary *v.* Pike County Ct., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675) may be repealed without impairing the obligation of a contract.

Where the constitution fixes the salary of a public officer, the legislature cannot reduce it during the term of an incumbent, even if the constitution provides that the salary shall be as fixed "until otherwise provided" (State *v.* Jumel, 31 La. Ann. 142); but the adoption of a new constitution gives the legislature power to reduce a salary fixed by the former constitution (People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. (N. Y.) 27.

While an attorney's right to compensation for services rendered under a statute has been held to be in the nature of a contract, and hence not affected by subsequent legislation (Files *v.* Fuller, 44 Ark. 273), yet the statutory compensation of a city solicitor may be reduced by a subsequent constitutional provision limiting the amount to be raised by taxation (Seale *v.* Madison Parish, 34 La. Ann. 365; State *v.* Police Jury, 34 La. Ann. 41).

15. The mode of trying title to an office may be changed by act of legislature, while proceedings under the old form are pending; and the legislature may confirm irregularities in the election of one of the contestants. Lovejoy *v.* Benson, 121 Ala. 605, 25 So. 599.

16. Taylor *v.* Governor, 1 Ark. 21; Matter of Stebbins, 41 N. Y. App. Div. 269, 58 N. Y. Suppl. 468; Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

The states have power to prescribe the qualifications of their officers, and the manner of choosing them and of trying title to their offices (Missouri *v.* Andriano, 138 U. S. 496, 11 S. Ct. 385, 34 L. ed. 1012), and the jurisdiction of the United States supreme court extends only to an examination of the power of state courts to proceed at all (Boyd *v.* Nebraska, 134 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103) and not of mere errors or irregularities in their proceedings (Foster *v.* Kansas, 112 U. S. 210, 5 S. Ct. 897, 28 L. ed. 629; Kennard *v.* Louisiana, 92 U. S. 480, 23 L. ed. 478).

17. State *v.* Majors, 16 Kan. 440; Rounds *v.* Smart, 71 Me. 380; People *v.* Whitlock, 92 N. Y. 191.

18. See Hyde *v.* State, 52 Miss. 665, holding constitutional a statute providing that certain officers should forfeit their respective offices, in case they failed to execute new bonds. But see State *v.* Majors, 16 Kan. 440, holding that the law will apply to such causes of removal only as shall in fact be brought into existence subsequent to the enactment of the law creating them.

19. State *v.* Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65. See also Chase *v.* Lowell, 7 Gray (Mass.) 33, holding that cities and towns, in the absence of express statutory authority, have not the same power as the legislature in regard to the abolition, etc., of city and town offices, since the election or appointment for a definite time of a city officer or agent (here the city engineer) entitled to compensation, and the acceptance by him of such office, constitute a contract between the city and the officer, which cannot be dissolved by the act of the city alone.

20. *Georgia.*— Augusta *v.* Sweeney, 44 Ga. 463, 9 Am. Rep. 172.

Kentucky.— Williams *v.* Newport, 12 Bush (Ky.) 438.

Louisiana.— Hiestand *v.* New Orleans, 14 La. Ann. 330.

Missouri.— Primm *v.* Carondelet, 23 Mo. 22.

North Carolina.— Ward *v.* Elizabeth City, 121 N. C. 1, 27 S. E. 993.

Pennsylvania.— Barker *v.* Pittsburgh, 4 Pa. St. 49; Com. *v.* Bacon, 6 Serg. & R. (Pa.) 322; Smith *v.* Philadelphia County, 2 Pars. Eq. Cas. (Pa.) 293.

Utah.— Heath *v.* Salt Lake City, 16 Utah 374, 52 Pac. 602; McAllister *v.* Swan, 16 Utah 1, 50 Pac. 812.

See 10 Cent. Dig. tit. "Constitutional Law," § 356 *et seq.*

If forbidden by statute, a municipality cannot of course abolish city offices. Womsley *v.* Jersey City, 61 N. J. L. 499, 39 Atl. 710; Sutherland *v.* Board of Street, etc., Com'rs, 61 N. J. L. 436, 39 Atl. 710.

21. Woodruff *v.* State, 3 Ark. 285, holding that an act increasing the rate of interest to be paid by the state treasurer on moneys remaining in his hands violates the obligation of the contract made between the treasurer, the sureties on his official bond, and the state, in the execution and acceptance of such official bond. See also Tyack *v.* Bromley, 4 Edw. (N. Y.) 258, holding that

c. Right to Compensation For Services Rendered. While a public officer has no rights of any sort to compensation for his services before he has earned it,[22] even if prevented from performing such services by legislative action,[23] yet after services have been rendered, a contract is implied which cannot be impaired, to pay for them at the statutory rate.[24]

5. Legislative Control of Private Corporations — a. In General — (i) *Nature of Corporate Charters* **— (a)** *Generally.* The charter of a corporation created by the state is a contract and is in all particulars inviolable, unless in the charter itself or in some general or special law subject to which it was taken, there is a power reserved to the legislature to alter, amend, or repeal.[25] A state,

the master and wardens of the port of New York could not, as a corporation, be deprived of their right to earn the compensation granted to them by the legislature.

22. *Kentucky.*— Standeford *v.* Wingate, 2 Duv. (Ky.) 440.

Louisiana.— State *v.* Police Jury, 35 La. Ann. 544.

Mississippi.— Bailey *v.* State, 56 Miss. 637.

New York.— Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. (N. Y.) 355]; Phillips *v.* New York, 1 Hilt. (N. Y.) 483.

South Carolina.—Alexander *v.* McKenzie, 2 S. C. 81.

See 10 Cent. Dig. tit. "Constitutional Law," § 360.

23. Wheatly *v.* Covington, 11 Bush (Ky.) 18.

The abolition of the office determines the compensation incident thereto. People *v.* Auditor, 2 Ill. 537; Bailey *v.* State, 56 Miss. 637; Hall *v.* State, 39 Wis. 79.

24. *Indiana.*— Fulk *v.* Monroe County, 46 Ind. 150.

Maryland.— Bradford *v.* Jones, 1 Md. 351.

Missouri.— State *v.* Auditor, 33 Mo. 287.

New York.— Young *v.* Rochester, 73 N. Y. App. Div. 81, 76 N. Y. Suppl. 224, holding that an act reducing the compensation of certain officers could not take effect as to compensation earned prior to its passage.

United States.— Fisk *v.* Police Jury, 116 U. S. 131, 6 S. Ct. 329, 29 L. ed. 587, holding that a state statute so restricting taxation that compensation for services already rendered by public officers could not be paid was an impairment of the obligation of contract and hence unconstitutional. And see Bassett *v.* U. S., 2 Ct. Cl. 448.

See 10 Cent. Dig. tit. "Constitutional Law," § 360.

And *compare* Holladay *v.* Auditor, 77 Va. 425, holding that services rendered by a judge do not so partake of the nature of a contract, as to prevent the state auditor from refusing to audit a claim for salary on the ground that it should be paid by a city rather than by the state by which it had been paid previously for several years.

25. *Alabama.*—Alabama, etc., R. Co. *v.* Burkett, 46 Ala. 569; State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30.

Connecticut.— Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451; Washington Bridge Co. *v.* State, 18 Conn. 53; Enfield Toll-Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Derby Turnpike Co. *v.* Parke, 10 Conn. 522, 27 Am. Dec. 700.

Delaware.— Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506.

Georgia.— Macon, etc., R. Co. *v.* Davis, 13 Ga. 68; Young *v.* Harrison, 6 Ga. 130.

Illinois.— Ruggles *v.* People, 91 Ill. 256; Bruffet *v.* Great Western R. Co., 25 Ill. 353; People *v.* Marshall, 6 Ill. 672.

Indiana.— Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104.

Kansas.— Territory *v.* Reyburn, McCahon (Kan.) 134.

Kentucky.— Sinking Fund Com'rs *v.* Green, etc., Nav. Co., 79 Ky. 73; Hamilton *v.* Keith, 5 Bush (Ky.) 458; Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259; Maysville Turnpike Road Co. *v.* How, 14 B. Mon. (Ky.) 426.

Louisiana.— Montpelier Academy Trustees *v.* George, 14 La. 395, 33 Am. Dec. 585.

Maine.— State *v.* Noyes, 47 Me. 189; Coffin *v.* Rich, 45 Me. 507, 51 Am. Dec. 559.

Maryland.— State *v.* Northern Cent. R. Co., 44 Md. 131; State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

Massachusetts.— Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

Michigan.— Tripp *v.* Pontiac, etc., Plank-Road Co., 66 Mich. 1, 32 N. W. 907; Flint, etc., Plank-Road Co. *v.* Woodhull, 25 Mich. 99, 12 Am. Rep. 233.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517; O'Donnell *v.* Bailey, 24 Miss. 386; Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599; Payne *v.* Baldwin, 3 Sm. & M. (Miss.) 661.

New Hampshire.— Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New Jersey.— Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Passaic, etc., River Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81.

New York.— New York *v.* Second Ave. R.

however, does not part with its right to pass laws in the nature of police regulations, even though no power is reserved to alter or amend the charter.[26] The

Co., 34 Barb. (N. Y.) 41; Benson *v.* New York, 10 Barb. (N. Y.) 223.

North Carolina.—Atty.-Gen. *v.* Charlotte Bank, 57 N. C. 287; State Bank *v.* Cape Fear Bank, 35 N. C. 75.

Pennsylvania.— Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742; Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431; Mullen *v.* Philadelphia Traction Co., 4 Pa. Co. Ct. 164, 20 Wkly. Notes Cas. (Pa.) 203; Second, etc., St. Pass. R. Co. *v.* Green, etc., Pass. R. Co., 3 Phila. (Pa.) 430, 16 Leg. Int. (Pa.) 197; Hartman *v.* Bechtel, 1 Woodw. (Pa.) 32.

Tennessee.— Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495; Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488; Ferguson *v.* Miners', etc., Bank, 3 Sneed (Tenn.) 609; White's Creek Turnpike Co. *v.* Davidson County, 3 Tenn. Ch. 396.

Texas.— State *v.* Southern Pac. R. Co., 24 Tex. 80.

United States.— New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; Chenango Bridge Co. *v.* Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. ed. 137; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Pearsall *v.* Great Northern R. Co., 73 Fed. 933; Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

See 10 Cent. Dig. tit. "Constitutional Law," § 362.

The leading case on this subject is Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629, 638, 643. This was an action of trover brought by the trustees of Dartmouth College to recover the books of record, corporate seal, and other corporate property to which the plaintiffs alleged they were entitled. In 1769 the king granted a charter to Dartmouth College for the purpose of educating Indian and English youth. It was provided in that charter that the college should be managed by a board of trustees, "the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more." The charter expressly stated that the corporation was to have perpetual succession and continuance forever. In 1816 the legislature of New Hampshire passed an act amending the charter of Dartmouth College, increasing the number of trustees from twelve to twenty-one and appointing a board of overseers consisting of twenty-five. This new act, which completely changed Dartmouth College, the old trustees refused to accept. The court held that the original charter was a contract, the obligation of which could not be impaired without violating the constitution of the United States. Chief Justice Marshall, in giving the opinion, after holding that the college was a private eleemosynary corporation, said: "The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations. From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. . . . This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also."

A statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration or repeal. San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 113 Fed. 930.

26. *Massachusetts.*— Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153, 155. In this case the claimant was created a corporation to manufacture malt liquors under a charter which the legislature had no power to alter, amend, or repeal. The legislature later passed an act which prohibited the manufacture and sale of intoxicating liquors. The court said: "The authority of the legislature over the property or the use of the property of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting

intention of the legislature to grant an exclusive privilege must be clearly shown,[27] and no rights can be taken from the public by implication beyond those which the words of the charter clearly purport to convey.[28] The revoking of a mere license previously granted by a legislature is not an impairment of the obligation of a contract.[29]

(B) *To Operate a Lottery.* Some courts have held that a right conferred on a corporation to dispose of its property by means of lottery tickets is not a contract between the state and the corporation, and is revokable at the will of the

the sale of a particular kind of property for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them. . . . They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of these terms."

Michigan.— People *v.* Hawley, 3 Mich. 330.

New York — Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349; Brick Presb. Church Corp. *v.* New York, 5 Cow. (N. Y.) 538.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

United States.— Douglass *v.* Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

See 10 Cent. Dig. tit. "Constitutional Law," § 362 *et seq.*

Extent and limits of doctrine.— Although a public service, such as supplying gas or water for public or private uses in a city, is a matter within the control of the state, which it may perform itself, or may delegate to appropriate agencies, and although even after it has granted an exclusive franchise for the performance of such service it may, in the exercise of its police power, retain control and regulation thereof so far as it affects public health, safety, and morals, yet such a grant, after a due compliance with the conditions on which it is made, becomes a contract, the obligation of which is within the protection of the constitution of the United States. Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; New Orleans Gas-Light Co. *v.* Louisiana Light, etc., Producing, etc., Co., 115 U. S. 650, 6 S. Ct. 273, 29 L. ed. 516. But one case has been found which dissents from this practically universal doctrine. This is the case of the Toledo Bank *v.* Bond, 1 Ohio St. 622. This case takes the ground that the charter of a private corporation is in form and in its inherent terms and nature a law, and does not possess the essential elements of a contract, to wit, two competent contracting parties, a proper subject-matter, a legal consideration, and a mutuality of obligation; and therefore does not come within the purview and true intent of the clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. The case of State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, held that the proviso in Md. Acts (1835), c. 395, § 5, "that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County," although assented to by the company, does not constitute a case of contract but a case of penalty, subject as to its enforcement to the will and pleasure of the legislature. In St. Clair County Turnpike Co. *v.* Illinois, 97 U. S. 63, 24 L. ed. 651, it was held that the act of Feb. 16, 1861, supplemental to the charter of a turnpike company, authorizing said company to extend its road over a dike and bridge in consideration of keeping the same in repair, did not amount to a contract, and therefore the state, by resuming control of the bridge and dike after the expiration of the charter of the company, did not impair the obligation of any contract.

27. Johnson *v.* Crow, 87 Pa. St. 184; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60; Chapin *v.* Crusen, 31 Wis. 209; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

A provision in a charter that the corporation "shall have perpetual succession" does not plainly express an intent not to reserve power to amend or repeal the charter. Cumberland, etc., R. Co. *v.* Barren County Ct., 10 Bush (Ky.) 604.

28. Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 549, 9 L. ed. 773.

29. *Mississippi.*— Sullivan *v.* Lafayette County, 58 Miss. 790, a license to keep a ferry.

Missouri.— State *v.* Gilmore, 141 Mo. 506, 42 S. W. 817, a right to construct a milldam.

North Carolina.— Robinson *v.* Lamb, 126 N. C. 492, 36 S. E. 29.

Ohio.— Ætna Standard Iron, etc., Co. *v.* Taylor, 4 Ohio S. & C. Pl. Dec. 180, 3 Ohio N. P. 152.

Pennsylvania.— Monongahela Nav. Co. *v.* Coons, 6 Watts & S. (Pa.) 101, a license to build a dam.

United States.— Williams *v.* Wingo, 177 U. S. 601, 20 S. Ct. 793, 44 L. ed. 906 (a ferry license); Douglas *v.* Com., 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553 (a license to carry

legislature; and that a statute which prohibits the sale of lottery tickets passed after the charter to the company is not unconstitutional.[30]

(II) *Reservation of Power to Alter or Amend* — (A) *In General.* Where the charter of a corporation, granted by a state legislature, or the constitution or a law of the state in force when such charter is granted, reserves to the legislature the power to alter, amend, or withdraw any franchise or privilege granted by such charter, this reservation qualifies the grant,[31] and a subsequent exercise of the reserved power is not within the prohibition of the federal consti-

on a lottery); Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335 (a license to build a highway).

See 10 Cent. Dig. tit. "Constitutional Law," § 362 *et seq.*

30. *Indiana.*— State *v.* Woodward, 89 Ind. 110, 46 Am. Rep. 160.

Missouri.— State *v.* Sterling, 8 Mo. 697; Freleigh *v.* State, 8 Mo. 606. But see State *v.* Miller, 50 Mo. 129; State *v.* Hawthorn, 9 Mo. 389.

North Carolina.— State *v.* Morris, 77 N. C. 512.

Virginia.— Dismal Swamp Canal Co. *v.* Com., 81 Va. 220; Justice *v.* Com., 81 Va. 209; *In re* Phalen, 1 Rob. (Va.) 713.

United States.— Douglas *v.* Kentucky, 168 U. S. 488, 18 S. Ct. 199, 12 L. ed. 553; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 5 Fed. Cas. No. 2,541.

See 10 Cent. Dig. tit. "Constitutional Law," § 363; and *infra*, IX, B, 5, c, (VII), (B).

Grant by constitution.—But where the constitution of a state grants a charter to conduct a lottery, the legislature cannot impair or take away the right. New Orleans *v.* Houston, 119 U. S. 265, 30 L. ed. 411.

31. *California.*— Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

Illinois.— Chicago L. Ins. Co. *v.* Auditor, 101 Ill. 82.

Kentucky.— Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259.

Maryland.— American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15.

Michigan.— Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929.

Missouri.—Gregg *v.* Granby Min., etc., Co., 164 Mo. 616, 65 S. W. 312.

New Jersey.— Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15.

New York.— Grobe *v.* Erie County Mut. Ins. Co., 169 N. Y. 613, 62 N. E. 1096; Beardsley *v.* New York, etc., R. Co., 15 N. Y. App. Div. 251, 44 N. Y. Suppl. 175; Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601; Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595; McLaren *v.* Pennington, 1 Paige (N. Y.) 102. And see *In re* Oliver Lee, etc., Bank, 21 N. Y. 9.

Pennsylvania.— Chincleclemouche Lumber, etc., Co. *v.* Com., 100 Pa. St. 438; Com. *v.* Fayette County R. Co., 55 Pa. St. 452.

Tennessee.—Ferguson *v.* Miners', etc., Bank, 3 Sneed (Tenn.) 609, holding that where several charters are contained in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficient to embrace the whole act.

Texas.— Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

Wisconsin.— West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

United States.— *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550. And *compare* San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 113 Fed. 930.

See 10 Cent. Dig. tit. "Constitutional Law," § 366.

Kan. Laws (1897), c. 145, entitled "An act to secure to laborers and others the payment of their wages, and prescribing a penalty for the violation of this act, and repealing sections 2441, 2442 and 2443 of the General Statutes of 1889, and all acts and parts of acts in conflict herewith," is not to be construed as an exercise by the legislature of its power to alter and amend corporate charters. State *v.* Haun, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369 [*reversing* 7 Kan. App. 509, 54 Pac. 130].

Mich. Pub. Acts (1891), No. 90, reducing the rate per mile on the Michigan Central Railroad to two cents where a one-thousand-mile ticket is bought, which does not purport to amend the charter of the railroad or to make a provision for compensating the railroad for the loss is not an exercise of the reserved power "to alter, amend, or repeal the same: Provided, that said company shall be compensated by the State for all damages." Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

N. J. Pub. Laws (1897), p. 189, changing the number of votes to which a stock-holder is entitled under the corporate charter, impairs the obligation of the charter contract, although the act of Feb. 14, 1846, § 6, passed previous to the grant of the charter, provides that subsequent charters shall be subject to alteration, suspension, and repeal, as such provision does not reserve the power to change the rights of the corporation. *In re* Newark Library Assoc., 64 N. J. L. 217, 43 Atl. 435.

The New York constitution of 1821 required two thirds of the legislature to concur in an act altering a charter of a corporation. The New York court held that such provision was not a part of the contract between the state and a corporation whose charter was granted while that constitution was in force so as to prevent an alteration by a mere majority vote under the present constitution, the right to alter, modify, or repeal being expressly reserved in the act of incorporation. *In re*

tution as an act impairing the obligation of a contract. This is true even if the powers granted are substantially changed,[32] or if an entirely new charter is substituted.[33]

(B) *By Constitution or General Law.* The charter of a private corporation organized under a state constitution or a general law is as inviolable as that of one organized under a special act, and the power to alter or amend may be reserved by either.[34] This rule is applicable in the case of a consolidation even

Reciprocity Bank, 22 N. Y. 9 [*affirming* 17 How. Pr. (N. Y.) 323].

A railroad company's right to take lands by eminent domain, so long as it is unexecuted except by merely filing a map of a proposed route, is not vested, so as to make the condemnation of the land by the state for other purposes operate as an impairment of the obligation of the contract with the railroad company, when the company was organized under general statutes, which provided for the alteration, amendment, or repeal of corporate charters. People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689 [*affirmed* in 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492].

32. Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595.

33. Sprigg *v.* Western Tel. Co., 46 Md. 67.

34. *Delaware.*— Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454.

Illinois.— Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.

Indiana.— State *v.* Dawson, 22 Ind. 272.

Kentucky.— Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259.

Maine.— State *v.* Maine Cent. R. Co., 66 Me. 488.

Maryland.— State *v.* Northern Cent. R. Co., 44 Md. 131.

New Jersey.— Morris, etc., R. Co. *v.* Railroad Taxation, 37 N. J. L. 228; State *v.* Person, 32 N. J. L. 134; Passaic, etc., Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81.

New York.— *In re* Oliver Lee, etc., Bank, 21 N. Y. 9; People *v.* Keese, 27 Hun (N. Y.) 483; Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

Ohio.— Toledo Bank *v.* Bond, 1 Ohio St. 622.

Pennsylvania.— Com. *v.* Hock-Age Mut. Ben. Assoc., 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245, 21 Pittsb. Leg. J. (Pa.) 203; Zimmerman *v.* Perkiomen, etc., Turnpike Co., 30 Leg. Int. (Pa.) 46, 1 Leg. Chron. (Pa.) 33.

United States.— Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963; Hoge *v.* Richmond, etc., R. Co., 99 U. S. 348, 25 L. ed. 303; Holyoke Water Power Co. *v.* Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133; Miller *v.* New York, 15 Wall. (U. S.) 478, 21 L. ed. 98; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550; Matthews *v.* Board of Corp. Com'rs, 97 Fed. 400; Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33, 42 Conn. 583; *In re* Northwestern R. Co., 18 Fed. Cas. No. 10,340, 20 Int. Rev. Rec. 18. In Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625, 1 Month. West. Jur. 188, it was held that a constitutional provision that the charters of railroad corporations may be altered or repealed by the legislature at any time after their passage is to be read into all subsequent railroad charters and into all contracts and mortgages made by such railroad companies, so that every creditor and mortgagee is affected with notice thereof.

See 10 Cent. Dig. tit. "Constitutional Law," § 367.

As the power to alter or repeal the charter of the Northern Central Railway Company was reserved to the state under the constitution of 1850, as fully as if such reservation had been set forth in express terms in the act of incorporation, the right to exercise this power could not in any manner be affected by the adoption of the constitutions of 1864 and 1867. Said charter must be construed as if the right to alter, amend, or repeal it had been reserved to the legislature by the express language of the charter itself. It was not within the power of the legislature, under the constitution of the state, to grant to the company immunity from taxation or any other corporate privilege, beyond the power of repeal or revocation by a subsequent legislature. State *v.* Northern Cent. R. Co., 44 Md. 131.

A toll-road company organized under a special charter accepted the provisions of an act amending its charter, and giving it "the same privileges granted to plank road companies by the general plank road law." It was held that it became subject to the restriction of Rev. Stat. c. 138, p. 12, which forbids the erection of toll-gates within the corporate limits of any city, although said section was enacted after the company had accepted the amendment to its charter. Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.

The New Jersey act of 1846, providing that corporate charters thereafter granted shall be subject to alteration, suspension, and repeal, is not limited to grants of corporate franchises and privileges made to corporations created after the passage of that act. It extends to every grant of franchise and privileges thereafter made to corporations which were created before the act was passed. State *v.* Railroad Taxation Commissioner, 37 N. J. L. 228.

The act of the legislature of South Carolina, passed in 1856, granting a charter to a rail-

though the domestic corporation has consolidated with a company chartered by another state.[35]

(c) *Extent of Power.* The power of a legislature "to alter, amend, or repeal" is unlimited, provided that such amendment does not go beyond the regulation, supervision, and control of the corporation.[36] The state can take from the corporation nothing more than it has granted to it;[37] but power to withdraw an entire franchise includes power to modify or restrict its exercise.[38] If the corporation refuses to accept statutory modification it must cease to transact business in a corporate capacity.[39]

(d) *Consent of Corporation.* With the consent of the corporation, the legislature may make any change in the charter.[40] This consent may be shown by the corporation asking for the amendment,[41] by expressly accepting one made without request,[42] or by acting upon or acquiescing in one enacted without request.[43]

(e) *When Corporation Has Not Accepted Charter.* An act or charter of incorporation is nothing more than an offer until consummated by acceptance;[44]

road company, did not expressly exempt it from the provisions of the act of Dec. 17, 1841, which declares that all charters of corporations thereafter granted shall be "subject to amendment, alteration or repeal by the legislative authority," but conferred upon the company all the rights, privileges, and immunities granted to a certain other company which had been incorporated in 1845 with an express exemption from taxation for the period of thirty-six years, and from the operation of said act of Dec. 17, 1841. The act of 1856 was amended in 1868. It was held that the provisions of the act of 1841 are applicable to the act of 1856, and that the latter act must be read as if it declared that the capital stock of the company and its real estate should be exempt from taxation for thirty-six years, unless the legislature should in the meantime withdraw the exemption; that if an exemption from future legislative control had been originally acquired it ceased when the company in 1868 obtained an amendment to its charter. Hoge *v.* Richmond, etc., R. Co., 99 U. S. 348, 25 L. ed. 303.

Power subordinate to federal constitution. — The power of a state, reserved by its constitution, to alter, amend, or repeal general laws concerning corporations, is subordinate to, and limited by, the provisions of the federal constitution inhibiting laws impairing the obligations of contracts, depriving persons of property without due process of law, or denying the equal protection of the laws. San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 113 Fed. 930.

35. Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625, 1 Month. West. Jur. 188.

36. *Kentucky.*— Bryan *v.* Board of Education, 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276.

Massachusetts.— Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247.

New Jersey.— State *v.* Railroad Taxation Commissioner, 37 N. J. L. 228.

New York.— Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457.

South Carolina.— Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

United States.— Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722.

See 10 Cent. Dig. tit. "Constitutional Law," § 368.

37. Ashuelot R. Co. *v.* Elliot, 58 N. H. 451.

38. West End, etc., R. Co. *v.* Atlanta St. R. Co., 49 Ga. 151.

39. Yeaton *v.* Old Dominion Bank, 21 Gratt. (Va.) 593. Where a company is organized under an act of the legislature which expressly exempts charters of companies formed thereunder from legislative operations, it is not subject to the general provisions of the statutes which declare that the charter of every corporation thereafter granted shall be subject to alteration. Granby Min., etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246.

40. Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742 (where a charter was not subject to amendment and the corporation accepted powers under an amended statute); MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578, 91 Am. St. Rep. 659, 58 L. R. A. 768. And see State *v.* Montgomery Light Co., 102 Ala. 594, 15 So. 347.

41. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Atty.-Gen. *v.* Society, etc., 10 Rich. Eq. (S. C.) 604.

42. Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Sprigg *v.* Western Tel. Co., 46 Md. 67; Monongahela Bridge Co. *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 478, 8 Atl. 233; MacDonald *v.* New York, etc., R. Co., 23 R. I. 558, 51 Atl. 578, 91 Am. St. Rep. 659, 58 L. R. A. 768.

43. State *v.* Montgomery Light Co., 102 Ala. 594, 15 So. 347; St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245, 19 S. W. 839 [*following* St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452]; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Houston, etc., R. Co. *v.* Texas, 170 U. S. 243, 18 S. Ct. 610, 42 L. ed. 1023.

44. **An accepted act of incorporation of a private corporation is a contract** between the state and the corporation, and any law which impairs any valuable franchise granted by

and until such acceptance either by direct act or by commencing business, the legislature can alter or repeal.[45]

(F) *Where Corporations Consolidate.* By consolidation, two or more corporations become subject to a statute which reserves to the legislature the right to alter, amend, or repeal, enacted subsequent to their original incorporation.[46]

such an act is unconstitutionl unless the right to impair the franchise is reserved by the state before or at the time the charter is granted. Pearsall *v.* Great Northern R. Co., 73 Fed. 933.

45. *Florida.*— Capital City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810 [*affirmed* in 186 U. S. 401, 22 S. Ct. 866, 46 L. ed. 1219].

Indiana.— Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524.

Louisiana.— Davis *v.* Caldwell, 2 Rob. (La.) 271.

Maryland.— State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

New York.— *In re* New York Cable R. Co., 40 Hun (N. Y.) 1.

Tennessee.— Nashville, etc., Turnpike Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68.

United States.— Capital City Light, etc., Co. *v.* Tallahassee, 186 U. S. 401, 22 S. Ct. 866, 46 L. ed. 1219 [*affirming* 42 Fla. 462, 28 So. 810].

See 10 Cent. Dig. tit. "Constitutional Law," § 364.

New constitution pending organization.— A corporation was chartered by the general laws of Wisconsin. Before the organization was completed a new constitution was adopted in which was a provision for the alteration or repealing of charters granted by the legislature. Inasmuch as the organization was not completed until after the adoption of the constitution, the court held the power of alteration and repeal were thereby ingrafted on the contract created by the charter. Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

46. State *v.* Maine Cent. R. Co., 66 Me. 488; Wagner *v.* Meety, 69 Mo. 150; Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Shields *v.* Ohio, 95 U. S. 319, 24 L. ed. 357; Pearsall *v.* Great Northern R. Co., 73 Fed. 933; Tennessee *v.* Whitworth, 22 Fed. 75; Illinois Cent. R. Co. *v.* Stone, 20 Fed. 468. And see Central R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757. *Compare* Monongahela Bridge Co. *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 478, 8 Atl. 233, where a bridge company which under certain incorporating acts had the right to charge tolls for street-cars going over th bridge subsequently accepted an act authorizing it to rebuild its bridge, which repealed its right to charge tolls on street-cars. It was held that in view of this acceptance an act prior thereto authorizing the street-railway company to apply to the court of quarter sessions to fix tolls, in the event of disagreement with the bridge company, could not be considered as impairing the contract obligations of the original incorporating acts.

Consolidation.— A railroad company obtained the privilege of having county subscriptions made to it without the sanction of a popular vote, and did not avail itself of the privilege. It then became consolidated with another company after the constitution of 1865, which required a vote of the people to sanction such a subscription, took effect. It was held that the consolidated company could not make use of said privilege. Wagner *v.* Meety, 69 Mo. 150. The statutory code of a state contained a provision enacting that certain private corporations were subject to be changed, modified, or destroyed at the will of the creator, except so far as forbidden by law, and that in all cases of private charters thereafter granted the state reserved the right to withdraw the franchise, unless such right was expressly negatived in the charter. Some time after this code took effect two railroad corporations, created prior to that date, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the state legislature, which authorized a consolidation of the stocks of the two companies, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. It was held that a subsequent legislative act, taxing the property of the new corporation so formed by consolidation as other property in the state was taxed, was not prohibited by that provision of the constitution of the United States that declares that no state shall pass a law impairing the obligation of contracts. Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185.

New corporation.— A railroad company's charter declared it not subject to amendment. Afterward an act was passed requiring railroad corporations to be taxed to meet the expense of the state railroad commission. The property of the company was sold at judicial sale, and a new corporation formed under the general law. It was held that this new corporation was properly taxed to meet the expense of the commission. Columbia, etc., R. Co. *v.* Gibbes, 24 S. C. 60. The funds of "the Society for the relief of elderly and disabled Ministers, and of the widows and orphans of the Clergy, of the Independent or Congregational Church in the State of South

(III) *Distinction Between Public and Private Corporations.* The inviolability of charters applies only to private corporations,[47] and therefore if a corporation is a public one, established for the general good, the legislature may modify its charter at will.[48]

b. Nature and Extent of Corporate Rights and Privileges — (I) *Right to Exclusive Exercise of Franchise.* Where a legislature grants to a private corporation a franchise not in its terms exclusive, there is no constitutional obligation on the legislature not to grant to another corporation a similar franchise, even though the latter greatly impairs or destroys the value of the former.[49] Accordingly it is not necessary for the legislature to reserve in its first grant a right to make a second grant;[50] and no compensation need be made to the first corporation for the consequential injury.[51] The intention of the legislature to grant an exclusive privilege must be clear, else the grant of a similar franchise to a second corporation would not be unconstitutional.[52] The number of cases in

Carolina," a corporation which had existed since the year 1789, having increased to an amount much beyond what was necessary for the purposes of their charter, in 1834, the legislature, upon the petition of the society, passed an act to amend the charter of 1789, whereby said charter was repealed, the name of the society changed, and the society authorized to appropriate its funds to other purposes than those mentioned in the charter of 1789. The act of 1834 was accepted by the society. It was held that the act of 1834 was no violation of that provision of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts. Atty.-Gen. *v.* Society, etc., 10 Rich. Eq. (S. C.) 604.

47. Downing *v.* State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664 (holding that the state board of agriculture was a private corporation, and that the legislature, by loaning it money and taking back a mortgage, so recognized it); Edwards *v.* Jagers, 19 Ind. 407 (holding that a county seminary was a private corporation); Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; Yarmouth *v.* North Yarmouth, 34 Me. 411, 56 Am. Dec. 666 (holding that trustees of a school fund were a private and not a public corporation); Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 (holding that the fact that a corporation is established for educational purposes generally does not *per se* make it a public corporation).

See 10 Cent. Dig. tit. "Constitutional Law," § 370; and, generally, Corporations.

48. *Arkansas.*— State *v.* Curran, 12 Ark. 321, where the capital stock of a state bank consisted wholly of public funds and securities.

Georgia.— Dart *v.* Houston, 22 Ga. 506, trustees of an academy supported entirely by state funds were held not to be a private corporation.

Illinois.— Smith *v.* People, 140 Ill. 355, 29 N. E. 676 [*affirming* 39 Ill. App. 238], a drainage district was held not to be a private corporation.

Kansas.— State *v.* Stover, 47 Kan. 119, 27 Pac. 850, holding that the state normal school was part of the public school system and not a private corporation.

Louisiana.—Montpelier Academy *v.* George, 14 La. 395, 33 Am. Dec. 585.

Missouri.— Watson Seminary *v.* Pike County Ct., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

New Jersey.— Auryansen *v.* Hackensack Imp. Commission, 45 N. J. L. 113, the power to grade and pave streets, construct sewers, and make ordinances, make a corporation a public one.

Virginia.— Wambersie *v.* Orange Humane Soc., 84 Va. 446, 5 S. E. 25.

But see Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715.

See 10 Cent. Dig. tit. "Constitutional Law," § 370.

49. Shorter *v.* Smith, 9 Ga. 517; Com. *v.* Stevens, 2 Ky. L. Rep. 315; Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44; *In re* Hamilton Ave., 14 Barb. (N. Y.) 405; Washington, etc., Turnpike Co. *v.* Maryland, 3 Wall. (U. S.) 210, 18 L. ed. 180.

50. Ft. Plain Bridge Co. *v.* Smith, 30 N. Y. 44.

51. White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

52. Collins *v.* Sherman, 31 Miss. 679; New Orleans Gaslight Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516.

An act regulating slaughter-houses and granting to a corporation the exclusive right to maintain such houses is a police regulation and does not create a contract between the state and the corporation, which is protected by the United States constitution prohibiting the impairment of contracts. Crescent City Live Stock Landing, etc., Co. *v.* New Orleans, 33 La. Ann. 934; Butchers Union Slaughter-House, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585 [*reversing* 4 Woods (U. S.) 96, 9 Fed. 743].

Change in business and population.— If the legislature grants a charter with an exclusive privilege, and the change in business and pop-

which the grant of an exclusive right has been claimed is very great. Thus it has been claimed in the case of corporations to operate or maintain bridges;[53] canals;[54] and electric light works.[55] It has also been claimed for ferries;[56]

ulation requires other grants similar to the first, by providing just compensation for the first, the legislature may grant other charters within the original exclusive grant. Shorter *v.* Smith, 9 Ga. 517.

53. The following cases held the grant was not exclusive and a second grant was not unconstitutional:

California.— Fall *v.* Sutter County, 21 Cal. 237.

Connecticut.— Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

New York.— Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87 [*reversed* in 3 Wall. (U. S.) 51, 18 L. ed. 137]; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. (N. Y.) 547; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

North Carolina.— McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

United States.— Wright *v.* Nagle, 101 U. S. 791, 25 L. ed. 921; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Parrot *v.* Lawrence, 2 Dill. (U. S.) 332, 18 Fed. Cas. No. 10,772.

See 10 Cent. Dig. tit. "Constitutional Law," § 374; and, generally, BRIDGES.

The following cases have held that the grant was exclusive, and a second grant impaired the obligation of the contract and was unconstitutional:

Alabama.— Micou *v.* Tallassee Bridge Co., 47 Ala. 652.

Connecticut.— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Georgia.— McLeod *v.* Burroughs, 9 Ga. 213.

New Hampshire.— Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.— Passaic, etc., River Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81 [*affirmed* in 1 Wall. (U. S.) 116, 17 L. ed. 571].

United States.— Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. (U. S.) 51, 18 L. ed. 137 [*reversing* 27 N. Y. 87]; Passaic, etc., River Bridges *v.* Hoboken Land, etc., Co., 1 Wall. (U. S.) 116, 17 L. ed. 571 [*affirming* 13 N. J. Eq. 81].

See 10 Cent. Dig. tit. "Constitutional Law," § 374.

54. Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374, holding that a second grant was no violation of the original charter. And see Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, holding that a second grant impaired the obligation of the first. See also, generally, CANALS.

55. An ordinance passed by a city, under assumed authority from the state, providing for the erection of electric light works for the purpose of supplying lights to its inhabitants, in competition with an electric light company, in violation of the implied terms of a contract made by a prior ordinance granting a franchise to such company for a term of years, is a law impairing the obligation of contracts, within the meaning of the contract clause of the federal constitution. Southwest Missouri Light Co. *v.* Joplin, 113 Fed. 817.

56. The following cases hold that the grant was not exclusive and a second grant was not unconstitutional:

Alabama.— Dyer *v.* Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655.

Illinois.— Mills *v.* St. Clair County, 7 Ill. 197, in this case compensation was provided.

Iowa.— McEwan *v.* Taylor, 4 Greene (Iowa) 532, holding that if a ferry license was not in its terms exclusive, no such privilege would be inferred.

Kentucky.— Piatt *v.* Covington, etc., Bridge Co., 8 Bush (Ky.) 31.

Maine.— Day *v.* Stetson, 8 Me. 365.

Minnesota.— Perrin *v.* Oliver, 1 Minn. 202.

New Jersey.— Hudson County *v.* State, 24 N. J. L. 718.

North Carolina.— Robinson *v.* Lamb, 126 N. C. 492, 36 S. E. 29.

Pennsylvania.— Johnson *v.* Crow, 87 Pa. St. 184, holding that where, by an act of assembly, certain privileges — as here, of maintaining a ferry — are conferred upon an individual for a valuable consideration, and by a subsequent act they are made exclusive without any new consideration, the latter act cannot be sustained by reason of the consideration in the original grant and may be repealed.

West Virginia.— Clarksburg Electric Light Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

United States.— Williams *v.* Wingo, 177 U. S. 601, 20 S. Ct. 793, 44 L. ed. 906; Parrot *v.* Lawrence, 2 Dill. (U. S.) 332, 18 Fed. Cas. No. 10,772.

See 10 Cent. Dig. tit. "Constitutional Law," § 375; and, generally, FERRIES.

The following cases hold that the grant was exclusive and a subsequent grant was unconstitutional: Murray *v.* Menefee, 20 Ark. 561; Carter *v.* Kalfus, 6 Dana (Ky.) 43; Aikin *v.* Western R. Corp., 20 N. Y. 370 [*reversing* 30 Barb. (N. Y.) 305]; Costar *v.* Brush, 25 Wend. (N. Y.) 628; Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652; Montgomery *v.* Multnomah R. Co., 11 Oreg. 344, 3 Pac. 435.

Compare Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35, holding that a grant of an exclusive right to maintain a ferry within certain limits is not infringed by a subsequent grant of a right to erect and

railroads;[57] street railroads;[58] turnpikes, and toll-roads;[59] and in the case of water and gas companies.[60]

maintain a bridge within such limits, the grant of an exclusive ferry right not being exclusive of all the modes of transportation and conveyance.

57. The following cases hold that the grant was not exclusive and the second grant was constitutional:

Florida.—Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145.

Maine.— State *v.* Noyes, 47 Me. 189.

Maryland.—Baltimore, etc., R. Co. *v.* State, 45 Md. 596.

Massachusetts.— Boston, etc., R. Corp. *v.* Boston, etc., R. Co., 5 Cush. (Mass.) 375.

New Jersey.— Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 15 N. J. Eq. 13.

Pennsylvania.— *In re* Citizens' Pass. R. Co., 2 Pittsb. (Pa.) 10, holding that the grant of the franchise of a railway is not a contract, but a mere easement; and the legislature may grant as many other easements on the same territory as public convenience may require, always making indemnity for damage done to those corporations which were the recipients of antecedent grants.

United States.— Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55.

See 10 Cent. Dig. tit. "Constitutional Law," § 376; and, generally, RAILROADS.

The following cases hold that the grant was exclusive and the second grant was unconstitutional: Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

Compare Pontchartrain R. Co. *v.* Lafayette, etc., R. Co., 10 La. Ann. 741, holding that an exclusive privilege — for example, the right to construct a railroad from New Orleans to the lake — must be construed in reference to the extent of the city at the date of the grant. No subsequent law contracting the city limits can affect the extent of territory within which the privilege is to operate.

58. The following cases hold that the first grant was not exclusive and the second grant was not unconstitutional: Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138 (compensation made to the first company); Sixth Ave. R. Co. *v.* Gilbert Elevated R. Co., 3 Abb. N. Cas. (N. Y.) 372; Philadelphia, etc., R. Co. *v.* Berks County R. Co., 2 Woodw. (Pa.) 361. And see, generally, STREET RAILROADS.

59. The following cases hold that the first grant was not exclusive, and the second was not unconstitutional: Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451; Washington, etc., Turnpike Road *v.* Baltimore, etc., R. Co., 10 Gill & J. (Md.) 392; Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626; Washington, etc., Turnpike Co. *v.* Maryland, 3 Wall. (U. S.) 210, 18 L. ed. 180. Where a turnpike road corporation had power under its charter, granted in 1834–1835, to acquire title to lands for toll-house purposes, and to sell them to whomsoever would buy, a general law thereafter enacted forbidding such corporations from selling and conveying lands to any person except the owner of adjacent land was void as to that company, being an impairment of the obligation of its contract. Foster *v.* Frankfort, etc., Turnpike Road Co., 23 Ky. L. Rep. 1690, 65 S. W. 840. The first grant was held to be exclusive and the second unconstitutional in Nashville, etc., Turnpike Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68. In Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626, it was held that the legislature cannot authorize the construction of a road, the sole purpose of which is to evade the payment of tolls on a turnpike. And see, generally, TOLL ROADS.

60. The following cases hold that the first grant was not exclusive and the second was not unconstitutional:

Florida.— Capitol City Light, etc., Co. *v.* Tallahassee, 42 Fla. 462, 28 So. 810.

Maine.— Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388.

New York.— Skaneateles Water Works Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; *In re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

Pennsylvania.—Lehigh Water Co.'s Appeal, 102 Pa. St. 515.

Washington.— North Springs Water Co. *v.* Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

United States.— Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 11 S. Ct. 892, 35 L. ed. 622 [*affirming* 34 Fed. 145]; Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529.

See 10 Cent. Dig. tit. "Constitutional Law," § 379; and, generally, WATERS.

The following cases hold that the first grant was exclusive and the second unconstitutional: Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, 10 Atl. 170; St. Tammany Water-Works Co. *v.* New Orleans Water Works Co., 120 U. S. 64, 7 S. Ct. 405, 30 L. ed. 563; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674, 6 S. Ct. 273, 29 L. ed. 525; New Orleans Gas Light Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516. In Citizens' Water Co. *v.* Bridgeport Hydraulic Co., *supra*, it was held that when the legislature of a state has ratified by its gift of a charter the grant by a city of a monopoly of supplying it with water, and the grantee of the monopoly so incorporated has expended large amounts of money in establishing its "plant," the legislature cannot, by a subsequent similar charter to another corporation, authorize

(II) *Right to Regulate Charges and Tolls.* The right of a legislature to regulate and control charges and tolls depends largely on the power reserved by the legislature to alter, amend, or repeal the charter of the corporation which is authorized to collect such charges and tolls. The decisions are not altogether in accord on this point, but the weight of authority seems to be that a simple grant to a corporation to take tolls does not prevent the legislature from fixing a maximum toll or from regulating and limiting the amount which can be charged.[61] The matter of regulating tolls has frequently arisen in regard to bridges;[62] in regard to ferries;[63] in regard to floating logs;[64] and in regard to railroads.[65]

it to appropriate, by the exercise of the right of eminent domain, the property and water rights of the first corporation, so long as that corporation continues to fulfil the conditions of the monopoly. And in St. Tammany Water-Works Co. *v.* New Orleans Water Works Co., *supra*, it was held that the constitution of Louisiana of 1879, which abrogates the monopoly features of existing corporations, is inoperative to affect the obligation of contract incurred by the state in granting to the New Orleans Water Works Company the exclusive privilege of using the streets of New Orleans to lay water-pipes; and another company which by virtue of the state constitution attempts to lay pipes cannot justify its action, under the police power of the state to regulate the public supply of water, by simply showing that it will supply purer and more suitable water than the New Orleans Water Works Company, neither the legislature nor the city having taken any steps in the matter.

Where a city is empowered by the laws of the state to contract for a water-supply, and to grant an exclusive franchise to use its streets for such purpose to the person contracted with during the term of the contract, it acts under such power in a legislative, and not an administrative, capacity, and its enactments thereunder are laws of the state, within the meaning of the contract clause of the federal constitution. American Waterworks, etc., Co. *v.* Home Water Co., 115 Fed. 171.

61. Winchester, etc., Turnpike Road Co. *v.* Croxton, 98 Ky. 739, 17 Ky. L. Rep. 1299, 34 S. W. 518, 33 L. R. A. 117; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345. But see Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85, holding that rates of toll which a turnpike company is authorized to charge by its charter cannot be later altered by the legislature without the consent of the company. See also Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94, which holds that if a legislature does not exercise a reserved power to regulate tolls charged by a railroad company for twenty years the right so to do is in no way impaired.

62. Com. *v.* Covington, etc., Bridge Co., 14 Ky. L. Rep. 836, 21 S. W. 1042, 15 Ky. L. Rep. 320, 22 S. W. 851; Canada Southern R. Co. *v.* International Bridge Co., 8 Fed. 190.

63. Parker *v.* Metropolitan R. Co., 109 Mass. 506 (holding as a charter was liable to alteration or repeal, the legislature could limit the rate of toll to be charged); People *v.* New York, 32 Barb. (N. Y.) 102.

64. Machias Boom *v.* Sullivan, 85 Me. 343, 27 Atl. 189; Androscoggin River *v.* Haskell, 7 Me. 474.

65. The following cases hold that the legislature could change an existing toll-rate:

Arkansas.— Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297, holding that a provision in the charter of a railroad corporation that the rate of transportation for each passenger should not exceed five cents per mile is not a contract by the state with the corporation that the fare should never be reduced below that rate.

Colorado.— *In re* Senate Bill No. 69, 15 Colo. 601, 27 Pac. 157.

Georgia.— Georgia R. Co. *v.* Smith, 70 Ga. 694.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Illinois Cent. R. Co. *v.* People, 95 Ill. 313 (holding that the act of May 2, 1873, "to prevent extortion and unjust discrimination," and prescribing rates of toll for railroads, is not a violation of the charter contract between the state and a railroad company granting to the latter "power to establish such rates of tolls for the conveyance of persons and property" as it should direct, since it is necessarily implied in the charter that the grant is subject to the power of the state to define and prohibit extortion); Ruggles *v.* People, 91 Ill. 256 (where the court held that the act of April 15, 1871, entitled, "An act to establish a reasonable maximum rate of charges for the transportation of passengers on railroads in this State," does not impair a charter previously given to a railroad company, whereby its directors were given the power to fix the rates of toll and to alter the same).

Iowa.— Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436, holding that the regulation by the state of "joint through rates" is not unconstitutional, as impairing the obligation of the charter of a railway company.

Maryland.— American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15.

Minnesota.— State *v.* Winona, etc., R. Co., 19 Minn. 434; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

The same question has also arisen in regard to turnpike companies;[66] and in regard to water and gas companies.[67]

Mississippi.— Stone *v.* Natchez, etc., R. Co., 62 Miss. 646; Stone *v.* Yazoo, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193.

Missouri.— Owen *v.* St. Louis, etc., R. Co., 83 Mo. 454, where the court held that a railroad corporation organized after the passage of laws authorizing the legislature to fix maximum charges for transportation is subject to such regulations, although it had purchased the franchises of roads created before the passage of such laws.

New Jersey.— Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623.

New York.— Beardsley *v.* New York, etc., R. Co., 15 N. Y. App. Div. 251, 44 N. Y. Suppl. 175; Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 43 N. Y. Suppl. 320.

North Carolina.— Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 250; Gardner *v.* Hall, 61 N. C. 21. In McGowan *v.* Wilmington, etc., R. Co., 95 N. C. 417, the court held that the clause in the charter of a railroad corporation which confers upon its officers the power to fix its charges for the transportation of freight is not infringed by a statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation.

Ohio.— Shields *v.* State, 26 Ohio St. 86.

Oregon.— State *v.* Southern Pac. Co., 23 Oreg. 424, 31 Pac. 960.

Wisconsin.— Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

United States.— Minneapolis Eastern R. Co. *v.* Minnesota, 134 U. S. 467, 10 S. Ct. 473, 33 L. ed. 985; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970; Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 6 S. Ct. 348, 388, 1191, 29 L. ed. 650; Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636; Ruggles *v.* Illinois, 108 U. S. 526, 2 S. Ct. 832, 27 L. ed. 812; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97; Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94. In Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 9 S. Ct. 47, 32 L. ed. 377, the court held that a railroad charter giving an exclusive right to transfer persons and property, "provided, that the charge of transportation or conveyance shall not exceed" certain specified rates, does not preclude subsequent legislation establishing a commission to regulate railroad tariffs. In Stone *v.* New Orleans, etc., R. Co., 116 U. S. 352, 6 S. Ct. 349, 29 L. ed. 651, the court held that a charter authorizing a railroad company to receive "such tolls and charges as shall be from time to time established, fixed and regulated by the directors, . . . provided, that nothing contained in the charter shall be so construed as to prevent the Legislature from regulating the rate of transportation for passage and freight over the same in this State" does not amount to a surrender of legislative control. In Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270, the court held that the right to fix and regulate tolls to be charged and received for the transportation of persons and property does not fall within the police power of the state.

See 10 Cent. Dig. tit. "Constitutional Law," § 384.

The following cases hold that the legislature could not change an existing toll-rate:

Arkansas.— St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.

Delaware.— Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 79 Ill. 121.

Kentucky.— Hamilton *v.* Keith, 5 Bush (Ky.) 458.

Michigan.— Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

Ohio.— Iron R. Co. *v.* Lawrence Furniture Co., 29 Ohio St. 208.

United States.— Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385; Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1; *Ex p.* Koehler, 23 Fed. 529; Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270; Wells *v.* Oregon, etc., R. Co., 8 Sawy. (U. S.) 600, 15 Fed. 561, 53 L. R. A. 33.

And *compare* Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, where the court held that a charter granted to a railway company with the power to fix tolls is a contract within the protection of U. S. Const. art. 1, par. 10, subs. 1, inhibiting laws impairing the obligation of contracts, and hence as to such railroad corporations a maximum rate act is unconstitutional.

See 10 Cent. Dig. tit. "Constitutional Law," § 384.

Street railroad.— An ordinance adopted under legislative authority, which provides that the rate of fare to be charged by a street railway company shall not exceed five cents gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company under the right to prescribe from time to time rules and regulations for the running and operation of the road. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592.

66. Rochester, etc., Turnpike Road Co. *v.* Joel, 41 N. Y. App. Div. 43, 58 N. Y. Suppl. 346 (statute prohibiting charge of toll for bicycles previously granted was held to be unconstitutional); Philadelphia, etc., Turnpike Co. *v.* Gartland, 6 Phila. (Pa.) 128, 23 Leg. Int. (Pa.) 132; Hartman *v.* Bechtel, 1 Woodw. (Pa.) 32; Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676.

67. *California.*— Spring Valley Water Works *v.* San Francisco, 61 Cal. 3.

Illinois.— Freeport Water Co. *v.* Freeport,

(III) *Right to Regulate Conduct of Business.* The legislature has a general right to supervise and superintend the business of a corporation, and to make such reasonable regulations as the public good may require, provided that such regulations are not repugnant to the franchises and privileges granted in the charter;[68] and this doctrine has been applied to the business of banks;[69] and to the business of factories.[70] It has also been applied to the business of insurance

186 Ill. 179, 57 N. E. 862; Rogers Park Water Co. *v.* Fergus, 178 Ill. 571, 53 N. E. 363 (village annexed to Chicago with special rates for thirty years, and water-rates reduced to make them uniform; held not an impairment, as the provision as to the thirty years was simply a declaration that the rates were reasonable); Danville *v.* Danville Water Co., 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304.

New York.— Warsaw Water Works Co. *v.* Warsaw, 161 N. Y. 176, 55 N. E. 486.

Ohio.— State *v.* Columbus Gas Light, etc., Co., 34 Ohio St. 572, 32 Am. Rep. 390.

Tennessee.— Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075.

United States.— Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 4 S. Ct. 48, 28 L. ed. 173; Cleveland Gaslight, etc., Co. *v.* Cleveland, 71 Fed. 610; Santa Ana Water Co. *v.* San Buenaventura, 56 Fed. 339; Spring Valley Water Works *v.* Bartlett, 8 Sawy. (U. S.) 555, 16 Fed. 615. And see Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 S. Ct. 736, 44 L. ed. 886, which holds that the reduction of the income of a water company need not be shown in order to establish the fact that a reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction.

See 10 Cent. Dig. tit. "Constitutional Law," § 385.

The Illinois constitution of 1870, and the general corporation act, reserve power in the state to regulate within reasonable limits the rates to be charged by gas companies incorporated under such act, in the absence of explicit contracts created by ordinance, fixing such rates. The Illinois act of June 5, 1897, authorizes gas companies in the same city to consolidate into a single corporation, but provides that the consolidated corporation shall be subject to the legal obligations arising on each of the constituent companies. Complainant, a gas company, was incorporated in 1855 by special act, which, as subsequently amended, gave the city a right to regulate its charges, but provided that it should not have authority to compel the company to furnish gas at a less rate than three dollars per thousand feet. Subsequently complainant acquired, by consolidation under the Illinois act of 1897, the lines of other companies organized after 1870, and later instituted suit in a federal court against the city to enjoin the enforcement against it of an ordinance limiting the charge to be made for gas to seventy-five cents per thousand feet. It was held that in the absence of allegations showing that the rate fixed by the ordinance was unreasonable, complainant was not entitled to relief on the ground that such ordinance was unconstitutional as impairing the obligation of the contract made by its charter. People's Gaslight, etc., Co. *v.* Chicago, 114 Fed. 384.

68. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; State *v.* Matthews, 44 Mo. 523; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084; Tucker *v.* Russell, 82 Fed. 263.

Cumulative voting.— See Gregg *v.* Granby Min., etc., Co., 164 Mo. 616, 65 S. W. 312; Looker *v.* Maynard, 179 U. S. 46, 21 S. Ct. 21, 45 L. ed. 79 [*affirming* 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947].

Interest.— See Columbus Ins., etc., Co. *v.* Columbus First Nat. Bank, 73 Miss. 96, 15 So. 138 (where there was a statute declaring all charters repealable, the state could take away a right given to a bank to charge ten per cent discount); Hazen *v.* Union Bank, 1 Sneed (Tenn.) 115 (holding that a charter allowing a bank to demand more than the legal rate of interest cannot be impaired by the state).

Police regulations.— Under this head the following cases have allowed legislatures to regulate the conduct of corporations created by them. Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238; Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347; Knoxville *v.* Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084. But see State *v.* Lebanon, etc., Turnpike Co., (Tenn. Ch. 1900) 61 S. W. 1096, which held that an act which compelled a turnpike company chartered in 1835 to build a bridge was not a valid exercise of the police power.

69. Opinion of Justices, 9 Cush. (Mass.) 604 (holding that a bank chartered in 1816 is subject to the general laws relating to investment of deposits by institutions for savings); Com. *v.* Farmers', etc., Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290; American Bldg., etc., Assoc. *v.* Rainboldt, 48 Nebr. 424, 67 N. W. 493. And see, generally, Banks and Banking.

70. Com. *v.* Hamilton Mfg. Co., 120 Mass. 383 (holding that a statute prohibiting the employment of minors and women for more than sixty hours per week violates no contract implied in granting a charter to a manufacturing company); State *v.* Brown,

companies;[71] to the business of lottery companies;[72] to the business of railroad companies;[73] to the business of street railroad companies;[74] and to the business of turnpike companies.[75]

(IV) *RIGHT TO PUBLIC AID.* If a company is given the right in its charter to receive public aid, such right is a part of the contract and cannot be impaired by subsequent legislation.[76]

etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856 (statute requiring employees' wages to be paid weekly was held to be constitutional).

71. *Georgia.*— Word *v.* Southern Mut. Ins. Co., 112 Ga. 585, 37 S. E. 897.

Michigan.— Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929; People *v.* State Ins. Co., 19 Mich. 392, a provision for an examination into affairs of an insurance company is constitutional.

Missouri.— State *v.* Matthews, 44 Mo. 523 (an act requiring insurance companies to furnish the insurance commissioners with information is constitutional); Price *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 262 (a general regulation of companies).

New York.— Grobe *v.* Erie County Mut. Ins. Co., 169 N. Y. 613, 62 N. E. 1096, holding that a law allowing a mutual insurance company to change to a joint stock one under certain conditions is not unconstitutional.

Ohio.— State *v.* Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056 [*affirmed* in 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778].

Pennsylvania.— Com. *v.* Hock Age Mut. Ben. Assoc., 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245, under a statute providing for alteration, amendment, or repeal, the legislature can compel insurance companies to file statements as to their business.

Texas.— Phœnix Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45, 33 S. W. 992; Merchants' Ins. Co. *v.* Levy, (Tex. Civ. App. 1895) 33 S. W. 996; Phœnix Ins. Co. *v.* Levy, (Tex. Civ. App. 1895) 33 S. W. 995.

United States.— Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778 [*affirming* 50 Ohio St. 252, 33 N. E. 1056]; Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084; Dupuy *v.* Delaware Ins. Co., 63 Fed. 680, conditions required to be in large type.

72. State *v.* Judge First Dist. Ct., 32 La. Ann. 719. And see, generally, LOTTERIES.

73. *Indiana.*— Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238, conditions to be printed in large type.

Massachusetts.—Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103, a statute requiring railroads to unite in a union passenger station and abandon their own.

Minnesota.— Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389, a statute allowing railroad commissioners to compel railroads to put in a connecting switch and make joint rates.

New Jersey.— Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369, an ordinance to compel railroads to erect gates at crossings.

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688; Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347; Gardner *v.* Hall, 61 N. C. 21, imposing a tax on certain classes of people does not impair the contract.

Pennsylvania.— Second, etc., St. Pass. R. Co. *v.* Green, etc., St. Pass. R. Co., 3 Phila. (Pa.) 430, 16 Leg. Int. (Pa.) 197.

Wisconsin.—Purtell *v.* Chicago Forge, etc., Co., 74 Wis. 132, 42 N. W. 265, enforcement of liens for labor on railroad property.

United States.— St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611, a statute making railroad companies liable for property destroyed by fire communicated by their locomotives was held not to impair obligation of charter.

But see State *v.* Noyes, 47 Me. 189, holding that a statute requiring trains which cross at grade to wait twenty minutes and imposing a fine on the engineer and superintendent for not so waiting was in conflict with the rights acquired under the charter.

See 10 Cent. Dig. tit. "Constitutional Law," § 389.

74. Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79 (an ordinance requiring street-cars to sell tickets on the cars does not impair or destroy the franchise); Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802 (requiring street railways to pave the streets); Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282 (holding matter of paving a contract and inviolable); Mechanicsville *v.* Stillwater, etc., St. R. Co., 35 Misc. (N. Y.) 513, 71 N. Y. Suppl. 1102 (an ordinance altering the method of paving streets was not unconstitutional); St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 21 S. Ct. 575, 45 L. ed. 788 [*dismissing* writ of error, 78 Minn. 39, 80 N. W. 774, 877, an ordinance commanding the removal of lamp posts no longer in use, was no impairment of the contract].

75. Forster *v.* Frankfort, etc., Turnpike Road Co., 23 Ky. L. Rep. 1690, 65 S. W. 840, where a company had power to acquire land for toll-houses and to sell them, a general law later enacted forbidding the sale of such lands except to adjoining owner was held to be unconstitutional.

76. *Alabama.*— Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371.

Illinois.— Peoria, etc., R. Co. *v.* People, 116 Ill. 401, 6 N. E. 497.

c. Laws Impairing Obligation — (I) *Extent of Legislative Control* — (A) *In General.* The rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute, unless power for that purpose be reserved to the legislature in the act of incorporation;[77] but a corporation, like a natural

Louisiana.— State *v.* Graham, 23 La. Ann. 622.

Minnesota.— De Graff *v.* St. Paul, etc., R. Co., 23 Minn. 144.

United States.— Callaway County *v.* Foster, 93 U. S. 567, 23 L. ed. 911.

But see the case of Ehrenzeller *v.* Union Canal Co., 1 Rawle (Pa.) 181, which holds that the act of March 29, 1819, relating to the distribution of public aid granted to the Union Canal Company, and providing that the officers of the company should receive no compensation until work on the canal was recommenced, was not invalid as impairing the obligation to pay such officers, in view of the fact that the company, in order to obtain the benefit of the latter act, must have accepted its provisions as an amendment to their charter.

See 10 Cent. Dig. tit. "Constitutional Law," § 388.

77. *Kentucky.*— Hamilton *v.* Keith, 5 Bush (Ky.) 458.

Louisiana.— Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453.

Massachusetts.— Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

Mississippi.— Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

See 10 Cent. Dig. tit. "Constitutional Law," § 390.

That the subsequent statute did impair the obligation of a contract and was therefore unconstitutional see the following cases:

Connecticut.— Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149.

Delaware.— Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506.

Illinois.— Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71. And see Bruffett *v.* Great Western R. Co., 25 Ill. 353, holding that the debts of a corporation cannot be discharged or transferred by means of legislative enactments.

Maryland.— State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

New Jersey.—Glover *v.* Powell, 10 N. J. Eq. 211.

Pennsylvania.— Com. *v.* U. S. Bank, 2 Ashm. (Pa.) 349.

South Carolina.—State *v.* Heyward, 3 Rich. (S. C.) 389.

United States.— Westerly Waterworks *v.* Westerly, 75 Fed. 181. In New Orleans Water-Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607; Capital City Gaslight Co. *v.* Des Moines, 72 Fed. 829, it was held that an ordinance of a municipal corporation regulating the exercise of the franchise of a private corporation within its limits, adopted in pursuance of authority delegated by the legislature of the state, is the act of the state, and if in excess of its power to regulate or modify such franchise is void as impairing the obligation of a contract.

And *compare* Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642 (holding that the state does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, nor to control funds belonging to the state, nor to conduct transactions in which the state alone was interested); Fitchburg R. Co. *v.* Grand Junction R., etc., Co., 4 Allen (Mass.) 198 (holding that the legislature have power to determine in what manner a railroad company, whose charter was made subject to Rev. Stat. c. 44, reserving to the legislature the right to amend or repeal charters granted, shall exercise its franchise, and to make changes in the level, grade, and connections thereof, and to direct the construction of a new connecting track, if this is necessary in order to preserve the continuity of the road, and to provide in what manner and under whose supervision the work shall be done, and how paid for); People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285 (holding that when the public, through the legislature, enter into a contract for securing the public convenience, they cannot be required to insist upon the highest possible degree of public convenience, nor can their failure to do so render the contract amendable at their option).

See 10 Cent. Dig. tit. "Constitutional Law," § 390.

That the subsequent statute did not impair any rights and therefore was not void see the following cases:

Alabama.—State *v.* Stebbins, 1 Stew. (Ala.) 299.

Iowa.— Skillman *v.* Chicago, etc., R. Co., 78 Iowa 404, 43 N. W. 275, 16 Am. St. Rep. 452.

Kentucky.— Bryan *v.* Board of Education, 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276; Louisville Turnpike Road Co. *v.* Ballard, 2 Metc. (Ky.) 165.

Maine.— Bangor, etc., R. Co. *v.* Smith, 47 Me. 34; Portland, etc., R. Co. *v.* Grand Trunk R. Co., 46 Me. 69.

Maryland.— State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363. In Taggart *v.* Western Maryland Co., 24 Md. 563, 89 Am. Dec. 760, it was held that the modifications of a charter, in enlarging the time of commencing and completing the work, is one of those incidents to all charters which is within the constitutional power of the state to exercise, and with due notice of which all its citizens must be presumed to contract.

person, is subject to remedial legislation and amenable to general laws.[78] A decision of a court is not a "law" within the United States constitution forbidding states from passing any law impairing the obligation of any contract, and therefore overruling a decision, on reliance of which contracts have been made, is not an impairment.[79] The implied powers of a corporation are as much beyond the control of subsequent legislation as powers expressly granted.[80] A charter secures to a corporation immunity from changes of rights not from changes of remedy.[81] No fundamental change can be made in a charter without the consent of the stock-holders.[82]

(B) *Where State Is Interested.* The fact that the state owns some shares of stock in a corporation does not affect the right of the state to pass laws regulating the charter of such company.[83]

(C) *Exercise of Police Power.* A private corporation, unless otherwise provided in its charter, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as individuals, and is subject to the same control under the police powers of a state or a municipal corporation.[84] A corporation must submit to proper police regulation in the

Massachusetts.— Com. *v.* Farmers', etc., Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290 (in which case, however, the court held that a statute of the state of Massachusetts providing for the appointment of bank commissioners to examine the officers and agents of the bank under oath as to its condition, and to apply when necessary to a justice of the supreme court to enjoin the corporation from further proceeding in business is not unconstitutional, as impairing the right secured to corporations by their charter by diminishing the time for which they are empowered to act); Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135 (holding that an act continuing the existence of corporations for a certain period after the time limited by their charters, for the purpose of suing and being sued, and settling their affairs and dividing their capital stock, but not of continuing the business for which they were established, is not unconstitutional as infringing or interfering with any of the privileges secured by the charter).

Tennessee.— Shields *v.* Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509; Burton *v.* School Com'rs, Meigs (Tenn.) 585.

Vermont.— State *v.* Bosworth, 13 Vt. 402.

United States.— New York *v.* Cook, 148 U. S. 397, 13 S. Ct. 645, 37 L. ed. 498 [*affirming* 110 N. Y. 443, 18 N. E. 113, 18 N. Y. St. 100]; Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 25 L. ed. 496.

And *compare* Joslyn *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. (N. Y.) 329, holding that where a charter is granted subject to a power reserved by the legislature to amend or repeal it, a subsequent act authorizing the company to reduce the capital, on consent of a certain majority of the stockholders, is not unconstitutional as impairing the obligation of a contract.

See 10 Cent. Dig. tit. "Constitutional Law," § 390.

78. Bank of Republic *v.* Hamilton County, 21 Ill. 53 [*followed* in Smith *v.* Bryan, 34 Ill. 364]; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

79. Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

80. People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

81. Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755. Although, in the absence of provisions to the contrary, the franchises may be regulated by subsequent legislation they cannot be destroyed. State *v.* Southern Pac. R. Co., 24 Tex. 80.

82. Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

83. *Kentucky.*—Cassell *v.* Lexington Turnpike Road Co., 10 Ky. L. Rep. 486, 9 S. W. 502, 701.

Maryland.— Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778.

Massachusetts.—Atty.-Gen. *v.* Fitchburg R. Co., 142 Mass. 40, 6 N. E. 854.

South Carolina.— State *v.* State Bank, 1 S. C. 63.

United States.— Tilley *v.* Savannah, etc., R. Co., 4 Woods (U. S.) 427, 5 Fed. 641.

See 10 Cent. Dig. tit. "Constitutional Law," § 391.

84. *Colorado.*— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Illinois.— Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Dingman *v.* People, 51 Ill. 277; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471.

Kansas.— Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573.

Maine.— Portland, etc., R. Co. *v.* Boston, etc., R. Co., 65 Me. 122.

Minnesota.— Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

Mississippi.— Mobile, etc., R. Co. *v.* State, 51 Miss. 137.

New York.— Benson *v.* New York, 10 Barb.

interests of society, even though such regulation operates to injure the business authorized by its charter and diminishes the value of its property,[85] but under color of such laws, the legislature cannot destroy or impair the franchise or any right or power essential to its beneficial exercise.[86]

(II) *Exercise of Power of Eminent Domain.* The charter of a corporation, like other contracts, is made subject to the right of eminent domain in the state, and the property of a corporation and its franchises may be taken for public uses, like the property of individuals, without violating the obligation of a contract.[87] This right of eminent domain may be exercised by the state, even though the powers of the corporation are thereby suspended or the corporation actually dissolved;[88] but in such case adequate compensation must be made to the corporation.[89]

(III) *Exercise of Power of Taxation*—(A) *In General.* A state at all times has the right of taxation which is sovereign and inherent in the state;[90] but it has no power to deprive itself of its sovereign right to raise revenue by exercising the power to tax, for essential powers of sovereignty cannot be bargained away; yet a state has the right to tax or not to tax according to public necessity.[91] A state, however, has no authority to impose taxes which impair the obligations of a contract;[92] but as long as the obligation of a contract is not impaired a state may impose any tax upon a corporation.[93] A state also has the constitutional right to tax foreign corporations and to prohibit them from doing

(N. Y.) 223. And see Lehigh Valley R. Co. *v.* Adam, 70 N. Y. App. Div. 427, 75 N. Y. Suppl. 515.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Virginia.— Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83.

United States.— Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079 [*affirming* 1 Ky. L. Rep. 146]; Stein *v.* Bienville Water Supply Co., 34 Fed. 145; Farmers' L. & T. Co. *v.* Stone, 20 Fed. 270.

See 10 Cent. Dig. tit. "Constitutional Law," § 392.

As to police power generally see *supra*, VI.

85. Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

86. Philadelphia, etc., R. Co. *v.* Bowers, 4 Houst. (Del.) 506; Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397.

87. *Illinois.*— Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627.

Indiana.— Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

Pennsylvania.— *Ex p.* Girard College, 31 Leg. Int. (Pa.) 164.

Virginia.— Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

United States.— Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 S. Ct. 718; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 12 L. ed. 535.

See 10 Cent. Dig. tit. "Constitutional Law," § 393; and EMINENT DOMAIN.

The state cannot bargain away its sovereign powers. A statute attempting to divest the state of the power of eminent domain would be void; and a charter granting a corporation an exemption from the liability to have its property taken by the power of eminent domain would be so far void. The provision of the federal constitution that the obligation of contracts shall not be impaired has no application to such a case. Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627.

88. Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

89. Mills *v.* St. Clair County, 7 Ill. 197; Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455; Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165.

90. Easton Bank *v.* Com., 10 Pa. St. 442. And see Com. *v.* People's Five Cents Sav. Bank, 5 Allen (Mass.) 428.

91. Colton *v.* Montpelier, 71 Vt. 413, 45 Atl. 1039; Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 S. Ct. 790, 35 L. ed. 446; Williamson *v.* New Jersey, 130 U. S. 189, 9 S. Ct. 453, 32 L. ed. 915; Laramie County *v.* Albany County, 92 U. S. 307, 23 L. ed. 552; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

92. Louisville, etc., Turnpike Road Co. *v.* Boss, 19 Ky. L. Rep. 1954, 44 S. W. 981; Lucas *v.* Atty.-Gen., 11 Gill & J. (Md.) 490; St. Louis *v.* Manufacturers' Sav. Bank, 49 Mo. 574.

93. Matter of Vanderbilt, 50 N. Y. App. Div. 246, 63 N. Y. Suppl. 1079 [*affirmed* in 163 N. Y. 597, 57 N. E. 1127]; New York, etc., R. Co. *v.* Pennsylvania, 153 U. S. 628, 14 S. Ct. 952, 38 L. ed. 854.

business within the state until the tax is paid.[94] If a corporation is to be exempt from taxation such intention must clearly appear in its charter,[95] whether granted with or without a bonus,[96] and although in the charter the state reserves a right to impose certain taxes, even then the corporation is not protected from all taxation except such as the state reserves;[97] for a corporation has no more rights than its charter grants.[98] The mere imposition of taxes at the time a charter is granted or afterward upon the property of a corporation will not authorize the assumption that the legislature has contracted that no additional taxation shall be imposed either on the property owned by the corporation at the time of the grant or afterward,[99] and unless the state expressly relinquishes it the right to impose a tax on the capital stock, etc., of a corporation would still belong to the state, even though the corporation had been incorporated previous to the imposition of the tax.[1] A state legislature has the right to pass an act which lays down a rule for the taxation of corporations formed under that act, but such rule cannot be changed by future legislation without the consent of the corporation.[2] Where a charter provides that the state will accept from a company a percentage on the cost of its railway in lieu and satisfaction of all other taxation, this applies as well to franchises and property acquired after the act as to those previously granted.[3] A municipal corporation cannot interfere with the rights granted a private cor-

94. Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717.

The state has the right to tax the indebtedness of a foreign railroad corporation doing business in the state, even though by its charter it appears that the corporation is to pay a certain sum annually to the state after its completion. Com. *v.* New York, etc., R. Co., 145 Pa. St. 38, 22 Atl. 212; Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 478, 25 Wkly. Notes Cas. (Pa.) 25, 27, 18 Atl. 412, 414, 15 Am. St. Rep. 724.

95. *Mississippi.*—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Missouri.—North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

Pennsylvania.—Com. *v.* New York, etc., R. Co., 145 Pa. St. 38, 22 Atl. 212; Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 478, 25 Wkly. Notes Cas. (Pa.) 25, 27, 18 Atl. 412, 414, 15 Am. St. Rep. 724.

Rhode Island.—Brown University *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847.

Utah.—Judge *v.* Spencer, 15 Utah 242, 48 Pac. 1097.

When a state grants a charter to two corporations, the charter to the first of which contains no provision in regard to exemption from taxation, and the charter to the second exempts the corporation from taxation except upon fixed and permanent work in the state, and those two companies are afterward incorporated into one corporation, the state has the right to impose a tax upon that part of the new company which belonged to the first corporation, and such tax is not unconstitutional as impairing the obligation of a contract. Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376, 13 L. ed. 461.

96. Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531.

97. Minot *v.* Philadelphia, etc., R. Co., 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645, 5 Am. L. Rev. 370, 3 Am. L. T. Rep. (U. S. Cts.) 193, 7 Phila. (Pa.) 555, 27 Leg. Int. (Pa.) 396, 2 Leg. Gaz. (Pa.) 385 [*affirmed* in 18 Wall. (U. S.) 206, 21 L. ed. 888].

98. Massachusetts Gen. Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227.

99. Louisville, etc., R. Co. *v.* Com., 10 Bush (Ky.) 43.

1. Judson *v.* State, Minor (Ala.) 150; Portland Bank *v.* Apthorp, 12 Mass. 252; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939.

2. State *v.* Moore, 5 Ohio St. 444.

Where by a state constitution it is provided that the power to alter, revoke, or annul the charter of a corporation shall be reserved to the state in the charter of the corporation, the legislature may authorize the imposition of taxes for other than state purposes, and this the legislature may do notwithstanding the fact that the corporation obtained its charter under a law providing that "the capital stock of such banks shall not be subject to taxation for any other than state purposes." Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Bank of Commerce *v.* Tennessee, 163 U. S. 416, 16 S. Ct. 1113, 41 L. ed. 211. But where a state provides by general laws for the organization of corporations, which laws may at any time be altered, amended, or repealed, but that no such alterations or repeal shall interfere with vested rights, a corporation organized previous to that provision is not liable for any taxes other than called for in its charter. State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993.

3. State *v.* Stearns, 72 Minn. 200, 75 N. W. 210; State Bd. of Assessors *v.* Morris, etc., R. Co., 49 N. J. L. 193, 7 Atl. 826.

poration by the state.[4] A state has the constitutional right to levy a tax of a certain percentage on the annual net income of a corporation.[5]

(B) *Contractual Nature if Taxation Is at a Certain Rate or in a Particular Method.* Where a charter provides that taxes shall be levied against a corporation at a certain rate, in a certain manner, or for a certain length of time, a contract exists between the state and the corporation which cannot be impaired by subsequent legislation.[6] A contract which cannot be impaired exists also when the charter provides that a certain per cent of the profits shall be set off in lieu of taxes.[7] Where, however, the language of the charter is such that no contract to tax at a certain rate or in a certain manner exists, the rate or manner of taxation may be changed at the will of the legislature.[8] So where taxation is to

4. Johnson *v.* Philadelphia, 60 Pa. St. 445, holding that where a state grants a charter to a railroad corporation by the terms of which it is exempt from all municipal control except such regulations as may be required for the paving, repairing, and grading of streets, a city cannot levy an annual tax on the company's cars for the purpose of raising revenue.

Where a state legislature grants a charter to a railway company in a city which contains the words "that the Company shall also pay such license for each car run as is now paid by other passenger railway companies in the city," such provision does not import a contract that the company shall never be required to pay a license-fee greater than that required of such company at the date when the company was incorporated. For a license is not a contract; it is revokable. Union Pass. R. Co. *v.* Philadelphia, 101 U. S. 528, 25 L. ed. 912. See also New London *v.* Colby Academy, 69 N. H. 443, 46 Atl. 743; Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1.

5. Savannah, etc., R. Co. *v.* State, 55 Ga. 557; Atlantic, etc., R. Co. *v.* State, 55 Ga. 312.

Although a legislature authorizes a lottery without receiving a bonus or imposing any restrictions, it may thereafter levy a tax upon the franchise for the privilege of vending tickets or authorize such a tax to be levied by the city of the state wherein tickets are sold without impairing the obligations of a contract. Wendover *v.* Lexington, 15 B. Mon. (Ky.) 258.

6. *Florida.*—Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

Kentucky.— Com. *v.* Farmers' Bank, 97 Ky. 590, 17 Ky. L. Rep. 465, 31 S. W. 1013; Franklin County Ct. *v.* Franklin Deposit Bank, 87 Ky. 370, 10 Ky. L. Rep. 506, 9 S. W. 212; Louisville, etc., R. Co. *v.* Com., 10 Bush (Ky.) 43.

Louisiana.—New Orleans *v.* Southern Bank, 11 La. Ann. 41.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Mississippi.— O'Donnell *v.* Bailey, 24 Miss. 386.

New Jersey.— State Bd. of Assessors *v.* Morris, etc., R. Co., 49 N. J. L. 193, 7 Atl. 826.

North Carolina.— Raleigh, etc., R. Co. *v.* Reid, 64 N. C. 155; Atty.-Gen. *v.* Charlotte Bank, 57 N. C. 287.

Ohio.— Sebastian *v.* Covington, etc., Bridge Co., 21 Ohio St. 451; Ross County Bank *v.* Lewis, 5 Ohio St. 447.

Pennsylvania.— Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340.

Tennessee.— State *v.* Butler, 86 Tenn. 614, 8 S. W. 586; Union Bank *v.* State, 9 Yerg. (Tenn.) 490.

United States.— Central R., etc., Co. *v.* Wright, 164 U. S. 327, 17 S. Ct. 80, 41 L. ed. 454; Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558; New Jersey *v.* Yard, 95 U. S. 104, 24 L. ed. 352; Franklin Branch Bank *v.* Ohio, 1 Black (U. S.) 474, 17 L. ed. 180; Jefferson Branch Bank *v.* Skelley, 1 Black (U. S.) 436, 17 L. ed. 173 [*reversing* 9 Ohio St. 606]; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529.

See 10 Cent. Dig. tit. "Constitutional Law," § 407.

7. Ohio Piqua Branch Bank *v.* Knoop, 16 How. (U. S.) 369, 14 L. ed. 977. But where a charter of a bank provided that the bank should pay a tax at a certain rate on the whole of its capital stock actually paid in in lieu of other taxes, it was held that the words, "in lieu of other taxes," will not warrant the inference that the state agreed not to impose any tax thereafter on this or any other property of the bank, and that therefore an act imposing a tax on the surplus of the banks of the state is not unconstitutional as violating the obligation of the contract. State *v.* Smyrna Bank, 2 Houst. (Del.) 99, 73 Am. Dec. 699; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455.

8. Holly Springs Sav., etc., Co. *v.* Marshall County, 52 Miss. 281, 24 Am. Rep. 668; State *v.* Petway, 55 N. C. 396; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 14 L. ed. 997.

A provision in an act amending the charter of a railroad prescribing a mode for ascertaining the tax due the state does not amount to a contract that the state will not pass any law to assess the property of the company for taxation for state purposes in a different manner. Bailey *v.* Magwire, 22 Wall. (U. S.) 215, 22 L. ed. 850.

be regulated by general laws, these laws may be changed,[9] and where an act provides that all subsequent acts of incorporation shall be subject to amendment or repeal and such act is in force at the time of the passage of another act which provides that corporations organized under this act should set off a certain per cent of their profits to be in lieu of all taxes, this latter act is subject to amendment by the legislature.[10]

(c) *Contractual Nature if There Is Exemption From Taxation.* An act of the legislature exempting property from taxation is not a contract to exempt it unless there be a consideration for the act.[11] The intention to hamper or restrict the power of a state to tax must be clearly stated, otherwise the presumption is against it.[12] Where there is a general law which states that all the corporate charters shall be subject to amendment or repeal by the legislature, a subsequent legislature may revoke provisions in charters granted under that act;[13] but where a charter exempts a corporation from taxation and an act of incorporation reserves no "right to repeal or amend," a contract exempting from taxation exists between the state and the incorporators which the state cannot impair by subsequent legislation,[14] or even by constitutional amend-

A provision in the charter of a railroad corporation that the company should pay annually into the treasury of the state a certain tax did not, on acceptance by the stockholders, constitute a contract between the company and the state which precluded the state from imposing any greater or different tax upon the company. Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888 [*affirming* 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645, 5 Am. L. Rev. 370, 3 Am. L. T. Rep. (U. S. Cts.) 193, 7 Phila. (Pa.) 555, 27 Leg. Int. (Pa.) 396, 2 Leg. Gaz. (Pa.) 385].

The provisions of the charter of a street-car company that it shall pay an annual tax upon the cost of its road, provided that no other tax or import shall be levied or raised from the said corporation by virtue of any law of this state, is not an irrepealable contract. Newark, etc., Horse Car R. Co. *v.* Clark, 54 N. J. L. 213, 25 Atl. 963, 53 N. J. L. 332, 21 Atl. 302.

The provisions in the charter of the Manufacturers' Savings Bank providing that one per cent of the net profits of the bank shall be paid to the state does not amount to a contract which will preclude the state from imposing other taxes or from delegating power to a city to impose a license. St. Louis *v.* Manufacturers' Sav. Bank, 49 Mo. 574.

Since as applied to corporations, every grant of a franchise is a charter, the original charter of a railroad company, which expressly reserved the power to alter, amend, or repeal the same at pleasure must be considered as incorporated in a later act which gave to the company the option of selecting which of two methods of taxation it would submit t , and hence the exercise of its option by the company did not create an irrepealable contract with the state, and it is subject to taxation under a still later act without its consent. Morris, etc., R. Co. *v.* Railroad Taxation, 38 N. J. L. 472.

9. Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416, 14 L. ed. 997.

10. Sandusky City Bank *v.* Wilbor, 7 Ohio St. 481.

11. Manistee, etc., R. Co. *v.* Railroad Commissioner, 118 Mich. 349, 76 N. W. 633; Washington University *v.* Rowse, 42 Mo. 308; Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171, 19 Atl. 490; West Wisconsin R. Co. *v.* Trempealeau County, 93 U. S. 595, 23 L. ed. 814; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805.

Gifts made to a corporation upon the faith of its exemption from taxation do not constitute such consideration, since the donors must be presumed to have known that the legislature had power to repeal the exempting act. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171, 19 Atl. 490.

12. Wells *v.* Savannah, 107 Ga. 1, 32 S. E. 669; Newport *v.* Com., 21 Ky. L. Rep. 42, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; Parker *v.* Quinn, 23 Utah 332, 64 Pac. 961.

The grant of a franchise in the charter of a gas company does not imply a contract exempting the company from taxation, and a subsequent statute imposing a license-tax on the privilege so granted is not invalid as impairing the obligation of a contract. Memphis Gas Light Co. *v.* Shelby County Taxing Dist., 109 U. S. 398, 3 S. Ct. 205, 27 L. ed. 976.

13. Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Covington *v.* Kentucky, 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 679; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204; Northern Bank *v.* Stone, 88 Fed. 413.

14. *Arkansas.*— Memphis, etc., R. Co. *v.* Berry, 41 Ark. 436.

Florida.— Gonzales *v.* Sullivan, 16 Fla. 791.

Illinois.— Board of Directors *v.* People, 189 Ill. 439, 59 N. E. 977; People *v.* Soldiers' Home, etc., 95 Ill. 561.

Louisiana.— New Orleans *v.* St. Anna's Asylum, 31 La. Ann. 292; New Orleans *v.* Southern Bank, 15 La. Ann. 89.

Maryland.— State *v.* Baltimore, etc., R. Co., 48 Md. 49.

ment.[15] And where a corporation is by its charter exempted from taxation, the legislature has no right to grant to the city or town in which the corporation is situated the power of taxing such corporation;[16] but where a state constitution gives the legislature power to alter or revoke any corporate charter whenever in their opinion the privilege becomes injurious to the citizens of the commonwealth, a grant to a corporation is only a quasi-contract in the nature of a license and can be altered, amended, or repealed.[17] And where a corporation is exempted from taxation by an act which is afterward held to be unconstitutional, a new act may be passed requiring corporations who have accepted the old act to be assessed anew, credit being given for sums paid by them and any excess to be refunded.[18] A release of a right to tax by a charter granted since the amendment of the constitution could not bind a succeeding legislature so as to prevent it from imposing a tax.[19]

(IV) *Enlarging or Restricting Corporate Powers*—(A) *In General.* The legislature may give additional powers to a corporation or restrict the powers of a corporation, provided that there is no interfering with any vested rights;[20] but if by such change any vested right is interfered with the law making the

Mississippi.— Mohile, etc., R. Co. *v.* Moseley, 52 Miss. 127.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

Tennessee.—Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442.

Virginia.— Com. *v.* Richmond, etc., R. Co., 81 Va. 355.

United States.— Northwestern University *v.* Illinois, 99 U. S. 309, 25 L. ed. 387; Washington University *v.* Rouse, 8 Wall. (U. S.) 439, 19 L. ed. 498; Home of Friendless *v.* Rouse, 8 Wall. (U. S.) 430, 19 L. ed. 495; East Tennessee, etc., R. Co. *v.* Pickerd, 24 Fed. 614.

See 10 Cent. Dig. tit. "Constitutional Law," § 408.

Doctrine applied.— A railroad charter providing that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever," prevents the imposition of any tax either upon the gross receipts or the capital stock. Worth *v.* Petersburg R. Co., 89 N. C. 301; Worth *v.* Wilmington, etc., R. Co., 89 N. C. 291, 45 Am. Rep. 679; Raleigh, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 269, 20 L. ed. 570; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 264, 20 L. ed. 568. Where by an act amending the charter of a railroad company its property was exempted from taxation and by a subsequent act of the legislature another company was given the right and privileges granted to the first entitled company, the legislature could not repeal such second act so as to subject the whole to taxation. Humphrey *v.* Pegues, 16 Wall. (U. S.) 244, 21 L. ed. 326; Tennessee *v.* Whitworth, 22 Fed. 81. Where the charter of a railroad company exempts from taxation "roads, with all their works, improvements and profits, and all the machinery of transportation" the legislature, in the absence of a provision authorizing it to repeal or amend the charter, cannot impose a tax on the gross receipts of the road. State *v.* Baltimore, etc., R. Co., 48 Md. 49. See also Hardy *v.* Waltham, 7 Pick. (Mass.) 108. A clause in the charter of a benevolent institution providing that its property "shall not be subject to taxes or assessments" followed by another clause providing that the legislature may at any time amend or modify the charter as they think proper, amounts to a contract that until the legislature rescind the first clause, the society shall be exempt from taxation. State *v.* Newark, 35 N. J. L. 157, 10 Am. Rep. 223. But where a provision was inserted in the charter of a railroad company whereby the property of the company and the shares therein were exempt from any public charge or tax whatever, it was held that a subsequent legislature might notwithstanding levy an *ad valorem* tax upon the franchise. Wilmington, etc., R. Co. *v.* Reid, 64 N. C. 226. See also Norwalk Plank Road Co. *v.* Husted, 3 Ohio St. 586; Milan, etc., Plank Road Co. *v.* Husted, 3 Ohio St. 578.

The taxation of corporate stock to the shareholders without deducting the value of the state and city bonds which are exempt from taxation in the hands of corporations is not an indirect taxation of the bonds, and therefore is not in conflict with U. S. Const. art. 1, § 10, which provides that no state shall pass any law impairing the obligation of contracts. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618.

15. Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; Pacific R. Co. *v.* Maguire, 20 Wall. (U. S.) 36, 22 L. ed. 282.

16. O'Donnell *v.* Bailey, 24 Miss. 386.

17. Wagner Glee Institute *v.* Philadelphia, 132 Pa. St. 612, 25 Wkly. Notes Cas. 437, 19 Atl. 297, 19 Am. St. Rep. 613.

18. Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 24 L. ed. 1091.

19. Jones, etc., Mfg. Co. *v.* Com., 69 Pa. St. 137.

20. *Louisiana.*— Hyde *v.* Planters' Bank, 8 Rob. (La.) 416, an act preventing indorsement by bank of evidences of debt.

Massachusetts.— Dedham Bank *v.* Chickering, 4 Pick. (Mass.) 314.

change would be void as impairing the obligation of a contract.[21] If the power to alter, amend, or repeal is reserved, such alteration or modification cannot change the object of the incorporation or substitute another for it;[22] but the grant of an additional franchise not affecting or impairing those before granted does not alter or modify the charter, if it does not compel the corporation to exercise such franchise;[23] and such grant can be made whether the right to alter and modify be reserved or not;[24] but in neither case can the corporation be compelled to accept the grant without the consent of all the members.[25]

(B) *Alterations in Management.* If no right to alter, amend, or repeal is reserved by the legislature, any change in the number of directors granted in the original charter or in the method of electing the directors is void as an impairment of the obligation of the original charter;[26] and even if there is a power to amend reserved to the legislature that does not give the right to deprive the corporation of the control of the corporate property, nor to change the object of the charter by giving to others the right to select officers, without the consent of the corporation.[27] If, however, the state is interested, either in whole or in part, in a corporation, a change in the method of electing or in the number of directors does not impair any obligation.[28] Nevertheless it has been held that the state

New Jersey.— Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.

New York.— Joslyn *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. (N. Y.) 329.

Pennsylvania.— Ritter *v.* Bausman, 2 Woodw. (Pa.) 248, formation of a new church.

United States.— Bank of Commerce *v.* Tennessee, 163 U. S. 416, 16 S. Ct. 1113, 41 L. ed. 211; East Tennessee, etc., R. Co. *v.* Frazier, 139 U. S. 288, 11 S. Ct. 517, 35 L. ed. 196 [*affirming* 88 Tenn. 138, 12 S. W. 537].

See 10 Cent. Dig. tit. "Constitutional Law," § 394.

21. *Alabama.*— Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

Illinois.— People *v.* Ketchum, 72 Ill. 212.

North Carolina.— State Bank *v.* Cape Fear Bank, 35 N. C. 75.

Pennsylvania.— Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597.

United States.— Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838; Planters Bank *v.* Sharp, 6 How. (U. S.) 301, 12 L. ed. 447.

See 10 Cent. Dig. tit. "Constitutional Law," § 394.

22. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. But see Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601, which holds that the power of a corporation may be substantially changed, where the right to alter, amend, or repeal was reserved in the original charter.

23. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

24. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

25. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

26. *Kentucky.*— Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

Maryland.— Sheriff *v.* Lowndes, 16 Md. 357; State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7.

Missouri.— State *v.* Adams, 44 Mo. 570. And see State *v.* Greer, 78 Mo. 188 [*reversing* 9 Mo. App. 219], holding that a general constitutional provision for cumulative voting at all elections of corporation directors did not operate upon a corporation then existing, whose charter was irrepealable, and provided for one vote for every share.

New Jersey.— Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

Pennsylvania.— Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431.

United States.—American Printing House for Blind *v.* Louisiana Bd. Trustees American Printing House for Blind, 104 U. S. 711, 26 L. ed. 902; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629 [*reversing* 1 N. H. 111]; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229.

Contra, Dartmouth College *v.* Woodward, 1 N. H. 111 [but *reversed* in 4 Wheat. (U. S.) 518, 4 L. ed. 629]; State *v.* Southern Pac. R. Co., 24 Tex. 80.

And *compare* Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105, holding that the act of Feb. 28, 1849, relating to corporations, which provides that all corporations under the laws of the state, whose charters do not designate their places of meeting, shall hold their business meetings, the meetings of their directors, etc., in the state, does not apply to existing companies whose charters are not subject, by their terms, to alteration, modification, or repeal.

See 10 Cent. Dig. tit. "Constitutional Law," § 396.

27. Orr *v.* Bracken County, 81 Ky. 593; Sage *v.* Dillard, 15 B. Mon. (Ky.) 340; Smith *v.* Atchison, etc., R. Co., 64 Fed. 272. *Contra,* Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. ed. 408.

28. Dart *v.* Houston, 22 Ga. 506; Cassell *v.* Lexington, etc., Turnpike Road Co., 10 Ky. L. Rep. 486, 9 S. W. 502, 701; Jackson *v.*

has no right to remove the trustees of a corporation by act of legislature for breach of duty.[29]

(c) *Method of Acquiring Land.* While some cases hold that a statute changing the method by which a corporation can acquire land is void as impairing the obligation of a contract,[30] by the weight of authority, such a statute is not void.[31]

(v) *Imposing Additional Burdens or Changing Nature of Those Already Assumed.* The legislature does not have the power to annex new and onerous conditions or to impose additional burdens to the original contract as stated in the charter of a corporation;[32] but in the exercise of the police powers the legislature in its discretion may change and add to these burdens. This has been done in the case of banks;[33] in the case of bridges;[34] in the case of dams and canals;[35] in the case of electric wires in streets;[36] in the case of gas

Walsh, 75 Md. 304, 23 Atl. 778; People *v.* Hills, 46 Barb. (N. Y.) 340; Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78.

29. Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431.

30. Alabama, etc., R. Co. *v.* Burkett, 46 Ala. 569; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494, 25 Am. Rep. 564; Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706.

31. *Kentucky.*— Chattaroi R. Co. *v.* Kinner, 81 Ky. 221.

Missouri.— St. Joseph, etc., R. Co. *v.* Cudmore, 103 Mo. 634, 15 S. W. 535.

New Jersey.— United R., etc., Cos. *v.* Weldon, 47 N. J. L. 59, 54 Am. Rep. 114.

Pennsylvania.— Appeal of Long, 87 Pa. St. 114; Philadelphia, etc., R. Co. *v.* Patent, 17 Wkly. Notes Cas. (Pa.) 198, 5 Atl. 747 [*affirming* 14 Wkly. Notes Cas. (Pa.) 545, 17 Phila. (Pa.) 291, 11 Leg. Int. (Pa.) 224, 1 Lanc. L. Rev. 217]; Duncan *v.* Pennsylvania R. Co., 7 Wkly. Notes Cas. (Pa.) 551.

Tennessee.— Mississippi R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54.

Wisconsin.— Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433.

United States.— Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469.

See 10 Cent. Dig. tit. "Constitutional Law," § 395.

32. State *v.* Phalen, 3 Harr. (Del.) 441; Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339; Com. *v.* Erie, etc., Transp. Co., 107 Pa. St. 112.

Where a law passed previous to the formation of a corporation, or which it afterward accepts, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559.

Where a telephone company has the right to use the streets of a city by permission of its officers, the city cannot, after the company has accepted the grant and established its plant, add a new condition — that it pay for the use of the streets. Sunset Telephone, etc., Co. *v.* Medford, 115 Fed. 202.

33. A statute compelling banks to receive their own notes in payment of their debts is not unconstitutional as impairing the obligation of a contract.

Arkansas.— Thurston *v.* Peay, 21 Ark. 85.

Louisiana.— Williams *v.* Planters' Bank, 12 Rob. (La.) 125.

North Carolina.— Columbia Exch. Bank *v.* Tiddy, 67 N. C. 169.

Ohio.— Gallipolis Bank *v.* Domigan, 12 Ohio 220, 40 Am. Dec. 475.

United States.— Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141.

See 10 Cent. Dig. tit. "Constitutional Law," § 405; and, generally, BANKS AND BANKING.

34. Washington Bridge Co. *v.* State, 18 Conn. 53 (holding that in the absence of the power to alter, amend, or repeal, a statute increasing the width of the draw was unconstitutional); New Haven, etc., Toll-Bridge Co. *v.* Bunnel, 4 Conn. 54 (holding that a statute compelling a drawbridge to open for the passage of vessels without charge was not unconstitutional); Com. *v.* New Bedford Bridge, 2 Gray (Mass.) 339 (a statute requiring a wider draw in a bridge, in the absence of the reserved power to change the charter, is unconstitutional); Newport, etc., Bridge Co. *v.* U. S., 105 U. S. 470, 26 L. ed. 1143.

35. Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68 (compelling the covering of canals and ditches is not unconstitutional); Com. *v.* Essex County, 13 Gray (Mass.) 239; Erie *v.* Erie Canal Co., 59 Pa. St. 174; Holyoke Water-Power Co. *v.* Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133 [*affirming* 104 Mass. 446, 6 Am. Rep. 247].

36. A statute requiring electric wires to be laid underground is a legitimate exercise of the police power of the state and does not impair the obligation of contracts created by the acceptance by a corporation of a grant permitting it to run wires in and through the streets. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 36 N. Y. St. 252, 21 Am. St. Rep. 764, 13 L. R. A. 454 [*affirming* 58 Hun (N. Y.) 610, 12 N. Y. Suppl. 536, 35 N. Y. St. 606]; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirming* 14 Daly 154, 1 N. Y. St. 633]. So providing for a board of commissioners of

companies;[37] and in the case of railroads,[38] especially with regard to the erec-

electric subways, whose approval is necessary before any conduits can be constructed, is a police regulation. People *v.* Squire, 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666 [*affirming* 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893].

Where a city granted to an electric light company the privilege of erecting and maintaining poles along its streets for a certain period of years, and the company, pursuant thereto, occupied the streets, expended large sums of money in making improvements, and later contracted with the council to light the streets themselves, the city could not afterward require the company to pay compensation for the use of the ground occupied by the poles; the grant having become in effect a contract which could not be changed or abrogated without the company's consent. Hot Springs Electric Light Co. *v.* Hot Springs, 70 Ark. 300, 67 S. W. 761.

37. Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963 [*affirming* 37 Fed. 832], holding that a statute requiring a gas company to perform certain duties, when required to by the municipal authorities, or forfeit the charter is not unconstitutional.

38. *Colorado.*— Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350, making railroads liable for fires set by the locomotives.

Connecticut.— English *v.* New Haven, etc., Co., 32 Conn. 240.

Illinois.— Galena, etc., R. Co. *v.* Appleby, 28 Ill. 283, an act making a company liable for failure to ring a bell.

Indiana.—Pittsburgh, etc., R. Co. *v.* Brown, 67 Ind. 45, 33 Am. Rep. 71 (an act requiring railroads to sound whistles within a certain distance from crossings); Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84 (making railroads liable for animals killed by locomotives).

Iowa.— Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592, making a railroad liable for damages by fire.

Maine.— Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152, limiting the liability of railroads for fires to the excess of the injury over the insurance; and if insurance not first recovered, providing the policy shall be assigned to the railroad.

Missouri.— Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, holding a railroad responsible for fires set by its locomotives.

New Jersey.— Delaware, etc., R. Co. *v.* East Orange Tp., 41 N. J. L. 127 (compelling railroads to keep flagmen at crossings); Palmyra Tp. *v.* Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369 (compelling railroads to erect gates at crossings).

Ohio.— Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152, compelling railroad to light that portion of it within the city limits.

South Carolina.— Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; Lipfield *v.* Charlotte, etc., R. Co., 41 S. C. 285, 19 S. E. 497; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440, making roads liable for damage done by fires set by locomotives.

See 10 Cent. Dig. tit. "Constitutional Law," § 401.

If there is a general power reserved to alter, amend, or repeal, a railroad can be compelled to build a station at a new point on the road. Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555. But such reserved power does not permit the state to require a chartered railway company to construct lines between points other than those contemplated by the charter. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. In English *v.* New Haven, etc., Co., 32 Conn. 240, the defendants were an incorporated company, with a charter open to amendment or repeal, which empowered them to construct and use a railroad terminating in the city of New Haven, and provided that the construction and use of that part of the road within the limits of the city should be subject to such regulations as the common council of the city should prescribe. After the defendants had constructed their road and built bridges over the same within the city to the acceptance of the city, an act was passed empowering the common council to order them widened in such a manner as public convenience might require and to enforce the order. It was held that the act was not unconstitutional as impairing the obligation of contracts.

A law giving the representative of one killed in a railroad accident an action against the railroad in all cases where he would have had an action had he survived is not void as impairing the obligation of the contracts entered into between the state and the roads previously chartered. Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

An act giving a right of action for obstructions in a navigable river entirely within the borders of a state, authorized by an act of the legislature of such state, giving a railroad company a charter to build a bridge across such river, such act giving such right of action being passed after such obstructions were made, and not accepted by the railroad company, is a violation of their charter and of the obligations of the contract with them, and is therefore unconstitutional; but an act giving a remedy by summary action for unauthorized obstructions is constitutional, although passed after the injury was sustained. Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

tion and maintenance of fences and crossings.[39] Under this rule additional bur-

An act limiting the amount of recovery against common carriers for negligence to three thousand dollars in cases of personal injuries and five thousand dollars in cases of death, and providing that, "upon the acceptance of the provisions hereof, by any carrier or corporation, the same shall become a part of its act of incorporation," does not constitute a contract between the state and an accepting railroad company having a previously granted charter and whose road was not constructed or money expended on the faith of it. It is simply the grant of a new franchise, which may be taken away by repeal, as is done by the new constitution. Pennsylvania R. Co. *v.* Bowers, 124 Pa. St. 183, 23 Wkly. Notes Cas. (Pa.) 257, 16 Atl. 836, 2 L. R. A. 621.

An act which provides for the appointment of commissioners to fix the compensation which shall be paid by one railroad corporation for the drawing of its passengers, merchandise, and cars over the railroad of another company does not infringe upon any rights which the latter company may have under its charter to regulate tolls on its own road. Vermont, etc., R. Co. *v.* Fitchburg R. Co., 9 Cush. (Mass.) 369.

The right of one railroad corporation to cross another's tracks in constructing and operating its road is derived by grant of the franchise so to do from the state, the first road having no vested exclusive right to such a crossing as against the right of the public; for it is contrary to public policy to grant exclusive public franchises. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Where a grant by a municipality to a railroad company to construct its road over a street is accepted, it constitutes a contract, which the municipality cannot arbitrarily impair or revoke; but the grant is always subject to conditions imposed by statute or by its terms, and to the proper exercise of police power by the municipality. Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

39. *Connecticut.*—Westbrook *v.* New York, etc., R. Co., (Conn. 1889) 16 Atl. 724.

Illinois.— Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Galena, etc., R. Co. *v.* Crawford, 25 Ill. 529; Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140.

Indiana.— New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195.

Minnesota.— Emmons *v.* Minneapolis, etc., R. Co., 35 Minn. 503, 29 N. W. 202; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100.

Missouri.— Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220.

Ohio.— Cincinnati St. R. Co. *v.* Cincinnati, etc., R. Co., 32 Cinc. L. Bul. 4.

Pennsylvania.—Pennsylvania R. Co. *v.* Riblet, 66 Pa. St. 164, 5 Am. Rep. 360.

Vermont.— Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625; Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

United States.— New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269 [*affirming* 62 Conn. 527, 26 Atl. 122].

See 10 Cent. Dig. tit. "Constitutional Law," § 402.

If there is a clause providing for alteration, amendment, or repeal, subsequent legislation compelling fencing or grade crossings or cattle-guards is valid. Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; Boston, etc., R. Co. *v.* Greenbush, 5 Lans. (N. Y.) 461; Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

Railroads may be compelled to build and maintain crossings and to fence their tracks even though there is no reserved power to alter, amend, or repeal. New Albany, etc., R. Co. *v.* Tilton, 12 Ind 3, 74 Am. Dec. 195; Boston, etc., R. Co. *v.* York County, 79 Me. 386, 10 Atl. 113. But see Milliman *v.* Oswego, etc., R. Co., 10 Barb. (N. Y.) 87 (holding that a statute requiring railroads to erect farm crossings for the benefit of adjoining owners is not applicable to corporations existing before the act, and which had previously obtained the right of way for their road and paid the landowners damage); Gulf, etc., R. Co. *v.* Ellis, 70 Tex. 307, 7 S. W. 722 (to the same effect); Gulf, etc., R. Co. *v.* Rowland, 70 Tex. 298, 7 S. W. 718; San Antonio, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1895) 32 S. W. 374. In New York, etc., R. Co. *v.* Board of Railroad Com'rs, 162 Mass. 81, 38 N. E. 27, it was held that N. Y. Laws (1892), c. 171, p. 1, providing that where one is cut off from access to his land by construction of a railroad, commissioners may order the railroad to maintain crossings, is constitutional, it being merely a regulation of the right to a way of necessity previously existing in such case, and no new burden being thereby placed upon a railroad company. And in Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199, it was held that Mass. Laws (1890), c. 428, providing for the abolition of grade crossings, and requiring the cost of changes made to be paid by the town, the railroad company, and the state, in proportions fixed, without reference to the value of the property owned by them or the benefits which they severally receive is valid, as being an exercise of legislative power to enact laws to prevent accidents. In Minneapolis, etc., R. Co. *v.* Nelson, 149 U. S. 368, 13 S. Ct. 871, 37 L. ed. 772; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364, 13 S. Ct. 870, 37 L. ed. 769, it was held that a state statute requiring railroad companies to fence their right of way through the lands of private persons is not in violation of the company's chartered right to buy and hold lands for specified purposes.

dens have also been imposed in the case of street railroads;[40] and in the case of corporations organized to operate turnpikes and toll-roads.[41]

(VI) *Creation and Change of Remedy to Enforce Corporate Liability.* A legislature may provide remedies more effectually to compel a corporation which it has chartered to perform its duties and liabilities, and may prescribe the mode, time when, and court where such remedy shall be enforced.[42] The mode of serving process on a corporation may be changed.[43] Railroads and other corporations may be made liable to employees or their contractors for wages,[44] even though the contracts were made previous to the passage of the law;[45] and liens for labor may be given to them.[46] So too the jurisdiction in which a suit against the corporation may be brought may be changed.[47]

40. Mechanicville *v.* Stillwater, etc., R. Co., 35 Misc. (N. Y.) 513, 71 N. Y. Suppl. 1102 [*affirmed* in 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1149].

41. Chandler *v.* Montgomery County, 31 Ark. 25; Carver *v.* Detroit, etc., Plank Road Co., 69 Mich. 616, 25 N. W. 183. And see Board of Internal Improvement *v.* Scearce, 2 Duv. (Ky.) 576, which holds that the charter of a turnpike company is not impaired in its legal obligation by the act of March 10, 1854, providing for the redress of injuries occasioned by the negligence or misconduct of railroads or other companies. But see White's Creek Turnpike Co. *v.* Davidson County, 3 Tenn. Ch. 396, which holds an attempted exercise of the police power to be unconstitutional.

That the changes made in the original act of incorporation were void see the following cases:

Alabama.— Powell *v.* Sammons, 31 Ala. 552.

Georgia.— Habersham, etc., Turnpike Co. *v.* Taylor, 73 Ga. 552.

Kentucky.— Foster *v.* Frankfort, etc., Road Co., 23 Ky. L. Rep. 1690, 65 S. W. 840.

Massachusetts.— Nichols *v.* Bertram, 3 Pick. (Mass.) 342.

Michigan.— Highland Park *v.* Detroit, etc., Plank Road Co., 95 Mich. 489, 55 N. W. 382; Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 5 N. W. 275.

Pennsylvania.— Atty.-Gen. *v.* Germantown, etc., Turnpike Road, 55 Pa. St. 466.

Tennessee.— State *v.* Lebanon, etc., Turnpike Co., (Tenn. Ch. 1900) 61 S. W. 1096.

42. Gowen *v.* Penobscot R. Co., 44 Me. 140; Swan *v.* Mutual Reserve Fund L. Assur. Co., 155 N. Y. 9, 49 N. E. 258 [*affirming* 20 N. Y. App. Div. 255, 46 N. Y. Suppl. 841, holding that a statute preventing an order restraining or interfering with the business of an insurance company except on the application of the attorney-general was not void]; Island Sav. Bank *v.* Galvin, 20 R. I. 347, 39 Atl. 196. But see Second Ward Sav. Bank *v.* Schranch, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569; Heath, etc., Mfg. Co. *v.* Union Oil, etc., Co., 83 Fed. 776.

A statute providing that suicide shall not be a defense to life-insurance policy unless contemplated at the time of his application does not relate to the remedy, but enters into the consideration and becomes a constituent part of every policy of insurance to which it applies; and therefore such policies are not affected by a later repeal of the statute. Jarman *v.* Knights Templars', etc., Life Indemnity Co., 95 Fed. 70.

If there is power to alter, amend, or repeal, a statute giving a remedy against the corporation for injuries already done is constitutional. Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379, 47 Am. Dec. 474.

Specific enforcement of the obligation to maintain a ferry by a suit in court may be provided for by the legislature. Brownell *v.* Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 49 Am. St. Rep. 442, 29 L. R. A. 169.

Statutes making enforceable contracts of any foreign corporation made before it has filed a statement and certificate, if later it made such filing, merely confer a remedy and impair no obligation. Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446.

43. New Albany, etc., R. Co. *v.* McNamara, 11 Ind. 543; Columbia Bank *v.* Okely, 14 Wheat. (U. S.) 235, 4 L. ed. 559. And see Cairo, etc., R. Co. *v.* Hecht, 29 Ark. 661 [*affirmed* in 95 U. S. 168, 24 L. ed. 423], holding that the words process "shall be served," mean "may be served."

44. Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214.

45. Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546. *Contra*, Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387, holding that the change was of substantial rights and not merely of remedy.

46. Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107; Virginia Development Co. *v.* Crozer Iron Co., 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893. See, however, Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387 (holding that a lien to a second subcontractor was void); Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 29 C. C. A. 1 (holding that a statute making a mechanic's lien prior to an existing mortgage is void as to mortgages which were then a prior lien).

47. Lyon *v.* State Bank, 1 Stew. (Ala.) 442; Davis *v.* Central R., etc., Co., 17 Ga. 323.

(VII) *REPEAL OR FORFEITURE OF CHARTER*—(A) *In General.* Where an act incorporating a corporation, or a general law or state constitution under which it is incorporated, expressly reserves the right to repeal or amend the charter at will, this becomes part of the contract, and a subsequent act revoking the charter or declaring a forfeiture is not an impairment of the original contract;[48] and so too if the corporation later accepts the provisions of such an act;[49] but for such repeal the legislature must make suitable compensation.[50] If on the other hand there is no reservation of the power to alter, amend, or repeal the charter, a statute attempting to repeal such a charter without the consent of the corporation is void;[51] although on account of non-user, or by the right of eminent domain, the government may take possession of a franchise on the payment of compensa-

48. *Delaware.*— Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454.

Iowa.— Miners' Bank *v.* U. S., Morr. (Iowa) 482, 43 Am. Dec. 115.

Kentucky.— Simpson County Ct. *v.* Arnold, 7 Bush (Ky.) 353.

Massachusetts.— Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

Michigan.— Tripp *v.* Pontiac, etc., Plank-Road Co., 66 Mich. 1, 32 N. W. 907.

Minnesota.— Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549.

New York.— People *v.* O'Brien, 45 Hun (N. Y.) 519.

United States.— Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241.

See 10 Cent. Dig. tit. "Constitutional Law," § 411.

A transfer of the franchises and tracks of a street railway is constitutional under such a power. Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961.

If the right to repeal is made dependent upon the failure to fulfil any condition of the original act, "conviction of misuse or abuse of privileges" is sufficient. Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454. So with a failure to comply with the condition (Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588), or representation that a ferry was not maintained as required (Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549).

In franchises of a private nature, like ferries, the state cannot take away the ferry itself or deprive the grantee of his legitimate rents and profits. Benson *v.* New York, 10 Barb. (N. Y.) 223.

49. Mobile, etc., R. Co. *v.* State, 29 Ala. 573.

50. Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

51. *Arkansas.*— Little Rock, etc., R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663.

Connecticut.—Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 100.

Illinois.— People *v.* Marshall, 6 Ill. 672.

Louisiana.— Carondelet Canal, etc., Co. *v.* Chevere Tedesco, 37 La. Ann. 100.

Michigan.— Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549.

Pennsylvania.— Com. *v.* U. S. Bank, 2 Ashm. (Pa.) 349.

United States.— Loring *v.* Marsh, 2 Cliff. (U. S.) 311, 15 Fed. Cas. No. 8,514.

See 10 Cent. Dig. tit. "Constitutional Law," § 411.

A supplement to a charter conferring a new right or enlarging without imposing an additional burden is a mere license and may be revoked at pleasure. Philadelphia, etc., Ferry Pass. R. Co.'s Appeal, 102 Pa. St. 123.

Merely diminishing emoluments by an improvement which does not destroy or impair the power of exercising the franchise is not an impairment of the original contract. *In re* Hamilton Ave., 14 Barb. (N. Y.) 405.

An act declared that in the event of insolvency of banking associations the directors thereof shall be liable in their individual capacity, in the first instance, to the full amount of such insolvent association's indebtedness. Under the former law the directors were made personally responsible for the debts of the institution after exhausting its effects. It was held in an action against directors on a bill of exchange bearing date after said act went into effect that the act was not subject to the objection that it impairs the obligation of contracts. Falconer *v.* Campbell, 2 McLean (U. S.) 195, 8 Fed. Cas. No. 4,620.

An act which authorizes the auditor of state to wind up and dissolve insurance companies by suit in equity whenever he is of the opinion, upon examination of the affairs of a company, that its condition is such as to render its further continuance in business hazardous to the insured is not unconstitutional, as impairing the obligation of a contract. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; Ward *v.* Farwell, 97 Ill. 593.

An act which imposes on insurance companies the necessity of suspending business at any time when their assets are less than the amount of their outstanding policies, and four per cent thereof, does not bear toward companies chartered by the state the character of an act impairing the obligation of contracts between either the state and the company or the policy-holder and the company, which had to suspend under the legislative condition. Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084.

Statutes declaring a liability of directors

tion.[52] The remedy for enforcing a forfeiture may be changed by the legislature after the granting of a charter, but new causes for forfeiture cannot be created;[53] and a subsequent act declaring a total forfeiture for that which under the original act was only a partial forfeiture is void.[54] The legislature may remit forfeiture of the charter of a corporation either in whole or in part;[55] but if forfeiture proceedings are commenced and later discontinued on condition that the corporation do certain things, the proceedings can be resumed only on breach of the condition.[56]

(B) *Charter to Operate Lottery.* The legislature has power to repeal the grant of a lottery franchise, even though rights have been acquired and liabilities incurred upon the faith of the grant, such grant being within the governmental and not the contractual powers of the state.[57]

(VIII) *PROVIDING FOR SETTLEMENT OF AFFAIRS OF INSOLVENT CORPORATION.* The legislature can at all times make provision for the settlement of the affairs of an insolvent corporation, in order to distribute its assets among its creditors, and without impairing the obligation of any contract,[58] even if there was no such provision in the original charter.[59]

C. Contracts of Private Corporations — 1. IN GENERAL. Questions concerning impairment of the obligation of contracts of private corporations are of two classes: (1) Those which arise in connection with the peculiar attributes and incidents of corporate existence; and (2) those which are also raised in a consideration of the impairment of contracts of individuals.[60] Contracts are made by private corporations with the state, by means of charters and franchises.[61]

of banking corporations for the payment of circulating notes issued in excess of the statutory limit, and authorizing the receiver of a bank in liquidation to maintain action after the forfeiture of the charter, were held not to impair the obligation of the contract entered into by the incorporators under the charter. Robinson *v.* Lane, 19 Ga. 337.

52. Benson *v.* New York, 10 Barb. (N. Y.) 223; Chincleclamouche Lumber, etc., Co. *v.* Com., 100 Pa. St. 438, a corporation not having organized or begun work.

53. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Aurora, etc., Turnpike Co. *v.* Holthouse, 7 Ind. 59.

54. People *v.* Jackson, etc., Plank-Road Co., 9 Mich. 285.

55. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

56. Long *v.* Farmers' Bank, 1 Pa. L. J. Rep. 284, 2 Pa. L. J. 230.

57. Com. *v.* Douglass, 100 Ky. 116, 15 Ky. L. Rep. 581, 24 S. W. 233, 66 Am. St. Rep. 328; Gregory *v.* Shelby College, 2 Metc. (Ky.) 589; Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367; Mississippi Art, etc., Soc. *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079 [*affirming* 1 Ky. L. Rep. 146]; Phalen *v.* Virginia, 8 How. (U. S.) 163, 12 L. ed. 1030. *Contra*, Boyd *v.* State, 46 Ala. 329; Kellum *v.* State, 66 Ind. 588; Loring *v.* Marsh, 2 Cliff. (U. S.) 311, 15 Fed. Cas. No. 8,514; Louisiana State Lottery Co. *v.* Fitzpatrick, 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541. See *supra*, IX, B, 5, a, (I), (B).

58. *Illinois.*— Ward *v.* Farwell, 97 Ill. 593.
Kentucky.— Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. (Ky.) 165.
Louisiana.— Haynes *v.* Carter, 9 La. Ann. 265.
Maine.— Savings Inst. *v.* Makin, 23 Me. 360.
Mississippi.— Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439. In Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513, it was held that although an act prescribing the mode of proceeding against incorporated banks for a violation of their franchise, and authorizing an injunction against the bank to restrain it from collecting its debts, if considered alone, would be unconstitutional, because retroactive, it was valid when taken in connection with other parts of the act which provide for the collection and preservation of the debts for the benefit of creditors.
New York.— Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588; People *v.* Tibbets, 4 Cow. (N. Y.) 384.
Virginia.— Robinson *v.* Gardiner, 18 Gratt. (Va.) 509.
United States.— Chicago L. Ins. Co. *v.* Needles, 113 U. S. 574, 5 S. Ct. 681, 28 L. ed. 1084; Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. L. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33, 42 Conn. 583.
See 10 Cent. Dig. tit. "Constitutional Law," § 413.

59. Haynes *v.* Carter, 9 La. Ann. 265.

60. The principles which relate to the impairment of contracts of individuals apply in general to contracts of private corporations. See *infra*, IX, E.

61. As to charters and franchises of private corporations as contracts and laws impairing the obligation thereof see *supra*, IX, C, 3.

Contracts are also made by such corporations with their shareholders or stockholders,[62] and with third persons.[63]

2. Stock-Holders' Contracts — a. Effect on Minority Stock-Holder of Change in Corporate Powers or Purposes. The state cannot bind a non-assenting minority stock-holder by any alteration of the charter which materially or essentially changes the powers, organization, or purposes of the corporation,[64] unless it has reserved the power to alter or amend the charter.[65] If the alteration works no such fundamental change, but takes the form of a grant of additional powers and privileges or a more adequate means of effectuating the corporate objects it is constitutional.[66]

b. Stock-Holders' Liability For Debts of Corporation. The state may impose upon stock-holders of an existing corporation a personal liability for the debts of

62. A contractual relation exists between the corporation and the stock-holders.

Connecticut.— New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56.

Indiana.— Marks *v.* Junction R. Co., 13 Ind. 387; McCray *v.* Junction R. Co., 9 Ind. 359.

Kentucky.— Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.) 69.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

Missouri.— Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

New Jersey.—Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455 [*reversing* 22 N. J. Eq. 130].

Ohio.— Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369.

See 10 Cent. Dig. tit. "Constitutional Law," § 461.

63. As to contracts with third persons see *supra*, IX, C, 3.

64. *Indiana.*— Marks *v.* Junction R. Co., 13 Ind. 387; McCray *v.* Junction R. Co., 9 Ind. 359.

Louisiana.— State *v.* Accommodation Bank, 26 La. Ann. 288.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

Missouri.— Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

New Jersey.— Schwarzwaelder *v.* German Mut. F. Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769 [*affirming* 58 N. J. Eq. 319, 43 Atl. 587]; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455 [*reversing* 22 N. J. Eq. 130]; Clifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Kean *v.* Johnson, 9 N. J. Eq. 401.

Pennsylvania.— Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

United States.— Tucker *v.* Russell, 82 Fed. 263; Knoxville *v.* Knoxville, etc., R. Co., 22 Fed. 758; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78, 17 Fed. Cas. No. 9,891.

But the stock-holder may be barred by laches. McCray *v.* Junction R. Co., 9 Ind. 359; Bryan *v.* Board of Education, 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Knoxville *v.* Knoxville, etc., R. Co., 22 Fed. 758. Where a material change has resulted a dissenting stock-holder is released from his stock subscription. Marks *v.* Junction R. Co., 13 Ind. 387; McCray *v.* Junction R. Co., 9 Ind. 359; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517; Indiana, etc., Turnpike Road Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

65. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225; Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.) 29; Grobe *v.* Erie County Mut. Ins. Co., 169 N. Y. 613, 62 N. E. 1096 [*affirming* 39 N. Y. App. Div. 183, 57 N. Y. Suppl. 290 (*affirming* 24 Misc. (N. Y.) 462, 53 N. Y. Suppl. 628)]; White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559; Houston *v.* Jefferson College, 63 Pa. St. 428. But see Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, to the effect that the right to make changes is not unlimited.

66. *Connecticut.*— New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56.

Kentucky.— Bryan *v.* Board of Education, 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276; Covington *v.* Covington, etc., Bridge, 10 Bush (Ky.) 69; Shelby County Judge *v.* Shelby R. Co., 5 Bush (Ky.) 225.

Mississippi.— New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517.

New Jersey.— Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.

Pennsylvania.— Houston *v.* Jefferson College, 63 Pa. St. 428; Burton's Appeal, 57 Pa. St. 213; Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

United States.— Bryan *v.* Board of Education, 151 U. S. 639, 14 S. Ct. 465, 38 L. ed. 297; Tucker *v.* Russell, 82 Fed. 263.

See 10 Cent. Dig. tit. "Constitutional Law," § 461 *et seq.*

Taxation of stock.— A charter provision that the corporation shall pay a tax of a certain per cent on each share of capital stock, which shall be in lieu of all other taxes, is a contract which the state impairs by imposing a tax on the holders of the stock. Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558. But see De Pauw *v.* New Albany, 22 Ind. 204, which holds that the right to impose and the duty to pay taxes do not rest upon contract.

The state cannot deprive stock-holders in insurance companies of an accrued right to sue for a share of the surplus. Greeff *v.*

the corporation subsequently contracted,[67] but not for debts previously incurred.[68] Conversely the state cannot exempt stock-holders from an existing liability for corporate debts already contracted;[69] but can do so as to debts incurred in future.[70] The remedy by which a corporation or its creditors can avail them-

Equitable L. Assur. Soc., 40 N. Y. App. Div. 180, 57 N. Y. Suppl. 871 [*reversing* 24 Misc. (N. Y.) 96, 52 N. Y. Suppl. 503].

67. *Illinois.*— Fogg *v.* Sidwell, 8 Ill. App. 551; Shufeldt *v.* Carver, 8 Ill. App. 545.

Maine.— Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Stanley *v.* Stanley, 26 Me. 191.

Minnesota.— Straw, etc., Mfg. Co. *v.* L. D. Kilbourne Boot, etc., Co., 80 Minn. 125, 83 N. W. 36. An existing personal liability may be increased. Allen *v.* Walsh, 25 Minn. 543.

New York.— Hogmayer *v.* Alten, 36 Misc. (N. Y.) 59, 72 N. Y. Suppl. 623.

Wisconsin.— Sleeper *v.* Goodwin, 67 Wis. 577, 31 N. W. 335.

United States.—Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163. And *compare* Steacy *v.* Little Rock, etc., R. Co., 5 Dill. (U. S.) 348, 22 Fed. Cas. No. 13,329.

Contra, Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 18 N. W. 356; Ireland *v.* Palestine, etc., Turnpike Co., 19 Ohio St. 369.

See 10 Cent. Dig. tit. "Constitutional Law," § 461 *et seq.*

A portion of such liability may be imposed where the state has reserved the right to alter or amend the charter or general law under which the corporation was organized or the power to prescribe the extent of stock-holders' liability (Weidenger *v.* Spruance, 101 Ill. 278; South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585; *In re* Gibson, 21 N. Y. 9; *In re* Reciprocity Bank, 29 Barb. (N. Y.) 369, 17 How. Pr. (N. Y.) 323) notwithstanding an exemption in the act of incorporation or articles of association (Close *v.* Noye, 2 Misc. (N. Y.) 226, 23 N. Y. Suppl. 751, 52 N. Y. St. 271; Sherman *v.* Smith, 1 Black (U. S.) 587, 17 L. ed. 163).

If a corporation is formed to engage in business in another state where stock-holders are individually liable for corporate debts, and does business there, the stock-holders can be held to a personal liability without regard to the laws of the state of incorporation. Pinney *v.* Nelson, 183 U. S. 144, 22 S. Ct. 52, 46 L. ed. 125.

Stock-holders of a corporation organized after the enactment of a law imposing personal liability voluntarily assume such liability. U. S. Trust Co. *v.* U. S. Fire Ins. Co., 18 N. Y. 199, 8 Abb. Pr. (N. Y.) 192 [*affirming* 6 Abb. Pr. (N. Y.) 385].

When the charter renders stock-holders subject to liability for corporate debts to the amount of their individual subscriptions, the state may subsequently impose liability to that extent. Gridley *v.* Barnes, 103 Ill. 211.

68. Hathon *v.* Towle, 46 Me. 302; Carroll *v.* Hinkley, 46 Me. 81; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 18 N. W. 356; Steacy *v.* Little Rock, etc., R. Co., 5 Dill. (U. S.) 348, 22 Fed. Cas. No. 13,329.

Unpaid stock subscriptions.— A law making corporators of existing corporations personally liable for corporate debts to the amount of their subscriptions until the capital is fully paid in, and forbidding the corporation to commence business until this is done, is constitutional. Weidenger *v.* Spruance, 101 Ill. 278. An original subscriber to stock can be made liable for unpaid subscriptions to stock which he has already assigned. Marr *v.* West Tennessee Bank, 4 Lea (Tenn.) 578.

A purchaser of stock assumes the statutory liability of a stock-holder for an indebtedness contracted before the corporate stock was fully paid in. White, etc., Co. *v.* Jones, 45 N. Y. App. Div. 241, 61 N. Y. Suppl. 21.

Validating stock subscription.— If a charter has become null and void by force of the act of incorporation, the original subscriptions also become void and cannot be revised by any act of the state. Greencastle, etc., Turnpike Co. *v.* Davidson, 39 Pa. St. 435.

69. *Alabama.*—McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Michigan.— Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 18 N. W. 356.

Missouri.— Provident Sav. Inst. *v.* Jackson Place Skating, etc., Rink, 52 Mo. 552; St. Louis Railway Supplies Mfg. Co. *v.* Harbine, 2 Mo. App. 134. But see Jerman *v.* Benton, 79 Mo. 148, where a provision of the state constitution imposing personal liability was not self-executing, and no law had been passed to give it effect until after the debt in question had been incurred.

New York.— Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87; Close *v.* Noye, 4 Misc. (N. Y.) 616, 26 N. Y. Suppl. 93, 58 N. Y. St. 115, although the legislature had reserved a right to amend the charter.

Pennsylvania.— Witmer *v.* Schlatter, 2 Rawle (Pa.) 359.

Tennessee.— Shields *v.* Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509.

Vermont.— Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176.

United States.— Ochiltree *v.* Iowa R. Contracting Co., 21 Wall. (U. S.) 249, 22 L. ed. 546; Hathorn *v.* Calef, 2 Wall. (U. S.) 10, 17 L. ed. 776.

Contra, Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

See 10 Cent. Dig. tit. "Constitutional Law," § 464.

70. Richardson *v.* Akin, 87 Ill. 138; Ber-Wind White Coal Min. Co. *v.* Ewart, 11 Misc. (N. Y.) 490, 32 N. Y. Suppl. 716, 64 N. Y. St. 458 (reserved power of repeal); Conant

selves of the personal liability of stock-holders[71] or the manner of compelling payment of stock subscriptions[72] can be changed without impairing the obligation of contracts.[73]

3. Contracts With Third Persons — a. In General. Questions of impairment of the obligation of contracts between a corporation and third parties arise in a variety of forms,[74] but are all governed by the same general principle that while remedies may be altered[75] contractual rights must be left intact,[76] unless the state

v. Van Schaick, 24 Barb. (N. Y.) 87; Ochiltree *v.* Iowa R. Contracting Co., 21 Wall. (U. S.) 249, 22 L. ed. 546.

71. *Idaho.*—Sparks *v.* Tower Payette Ditch Co., 2 Ida. 1030, 29 Pac. 134.

Illinois.— Smith *v.* Bryan, 34 Ill. 364.

Louisiana.— Citizens' Bank *v.* Deynoodt, 25 La. Ann. 628.

Maine.—Cummings *v.* Maxwell, 45 Me. 190.

Massachusetts.— Com. *v.* Cochituate Bank, 3 Allen (Mass.) 42.

New York.— Hirshfield *v.* Boff, 145 N. Y. 84, 39 N. E. 817, 64 N. Y. St. 535; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457; Walker *v.* Crain, 17 Barb. (N. Y.) 119; Herkimer County Bank *v.* Furman, 17 Barb. (N. Y.) 116.

United States.— Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515, 10 S. Ct. 589, 33 L. ed. 994; Fourth Nat. Bank *v.* Franklyn, 120 U. S. 747, 7 S. Ct. 757, 30 L. ed. 825.

See 10 Cent. Dig. tit. "Constitutional Law," § 465.

If a statute provides for the enforcement of stock-holders' liability by a receiver for the benefit of the corporation and its creditors, and deprives the creditors of the right to proceed against the stock-holders, it impairs the obligation of contracts within the meaning of the constitution. Woodworth *v.* Bowles, 61 Kan. 569, 60 Pac. 331; Webster *v.* Bowers, 104 Fed. 627; Evans *v.* Nellis, 101 Fed. 920; Demeritt *v.* Exchange Bank, Brunn. Col. Cas. (U. S.) 598, 7 Fed. Cas. No. 3,780, 2 Law Rep. 606. But see Leathers *v.* Shipbuilders' Bank, 40 Me. 386; Story *v.* Furman, 25 N. Y. 214; Persons *v.* Gardiner, 26 Misc. (N. Y.) 663, 56 N. Y. Suppl. 822.

72. *Ex p.* Northeast, etc., R. Co., 37 Ala. 679; Merchants' Ins. Co. *v.* Hill, 12 Mo. App. 148; Yadkin Nav. Co. *v.* Benton, 9 N. C. 10.

73. An additional remedy can be given. Tutwiler *v.* Tuskaloosa Coal, etc., Co., 89 Ala. 391, 7 So. 398; Sparks *v.* Lower Payette Ditch Co., 2 Ida. 1030, 29 Pac. 134; Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Merchants' Ins. Co. *v.* Hill, 86 Mo. 466.

74. **A defense provided in a contract cannot be taken away** by act of the state. Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93. But a statutory requirement of notice of forfeiture of an insurance policy, imposed after the policy was issued, may be removed. Rosenplenter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473 [*affirming* 91 Fed. 728].

A law prohibiting corporations from transferring notes, etc., does not impair the obligation of contracts existing between a corporation and its debtors. Bowlley *v.* Kline, (Ind. 1901) 60 N. E. 712; Hyde *v.* Planters' Bank, 8 Rob. (La.) 416.

Assent of mortgage bondholders to a compromise can be inferred without impairing contractual obligations, provided they have been given an opportunity to dissent and have failed to take advantage of it. Mather *v.* Cincinnati Railway Tunnel Co., 2 Ohio Cir. Dec. 161; Gilfillan *v.* Union Canal Co., 109 U. S. 401, 3 S. Ct. 304, 27 L. ed. 977.

In jurisdictions where no constitutional proviso exists against impairing the obligation of contracts the bondholders' assent can be compelled. Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020.

Legislative authority to make a particular contract does not take it out of the constitutional protection. Slaughter *v.* Mobile County, 73 Ala. 134.

Provision of a mortgage cannot be impaired.— *Kentucky.*— Gregory *v.* Shelby College, 2 Metc. (Ky.) 589.

New Jersey.— Randolph *v.* Middleton, 26 N. J. Eq. 543.

New York.— People *v.* Cook, 110 N. Y. 443, 18 N. Y. St. 100, 18 N. E. 113.

Vermont.— Fletcher *v.* Rutland, etc., R. Co., 39 Vt. 633.

United States.— The Allianca, 73 Fed. 452, 19 C. C. A. 528.

Suspension of specie payments by a bank and extension of time for such payments cannot be legalized by the state. Godfrey *v.* Terry, 97 U. S. 171, 24 L. ed. 944.

For creditors' rights in stock-holders' liability see *supra*, IX, C, 2, b.

75. Creditors can be forbidden to garnish debtors of the corporation. Danley *v.* State Bank, 15 Ark. 16.

Some remedy must be left.— Reed *v.* Penrose, 2 Grant (Pa.) 472; State *v.* State Bank, 1 S. C. 63.

If the state constitution forbids impairment of remedies, remedies must be left intact. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255; Western Nat. Bank *v.* Rackless, 96 Fed. 70; Martin *v.* Somerville Water Power Co., 3 Wall. Jr. (U. S.) 206, 16 Fed. Cas. No. 9,165, 5 Am. L. Reg. 400, 37 Hunt. Mer. Mag. 64, 27 How. Pr. (N. Y.) 161, 13 Leg. Int. (Pa.) 332.

76. Contracts void at common law are not within the constitutional protection. Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

has in some manner expressly reserved to itself a power to modify or repeal the charter.[77]

b. Insolvency Laws and Regulation of Priority of Claims. The state, in regulating the priority of claims against solvent and insolvent corporations, cannot give preferences which will impair the obligation of existing contracts.[78] Claims arising after the passage of the law are not impaired.[79] If the law gives an apparent but not actual priority and furnishes a more effective means of reaching the corporate assets it is not within the constitutional prohibition.[80]

c. Regulation of Corporate Business. The legislature may prescribe the conditions under which a foreign corporation will be permitted to do business within the state or may exclude it altogether without impairing the obligation of contracts between the corporation and third parties or stock-holders, within the meaning of the constitution.[81] As an exercise of the police power it may change freight rates and fares charged by a corporation doing business as a common carrier, without giving the stock-holders or creditors of the corporation legal cause for complaint.[82] So the legislature may provide that notes and mortgages of associations shall not be negotiable except on the order of the circuit court or a judge thereof.[83]

d. Terminating Corporate Existence. The dissolution of a corporation or

77. Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716 [*reversing* 44 S. W. 693]; *In re* Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550. But see People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 493, 7 Am. St. Rep. 684, 2 L. R. A. 255 [*affirming* 45 Hun (N. Y.) 519].

78. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314; State *v.* Tennessee Bank, 5 Baxt. (Tenn.) 1; Giles *v.* Stanton, 86 Tex. 620, 26 S. W. 615, 1050 [*reversing* (Tex. Civ. App. 1893) 24 S. W. 556]; Giles *v.* East Line, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 1111; Martin *v.* Somerville Water Power Co., 3 Wall. Jr. (U. S.) 206, 16 Fed. Cas. No. 9,165, 5 Am. L. Reg. 400, 27 How. Pr. (N. Y.) 161, 37 Hunt. Mer. Mag. 64, 13 Leg. Int. (Pa.) 332.

The state cannot prefer its own claims.— Barings *v.* Dabney, 19 Wall. (U. S.) 1, 22 L. ed. 90; Curran *v.* Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705. And *compare* Campbell *v.* Texas, etc., R. Co., 2 Woods (U. S.) 263, 4 Fed. Cas. No. 2,369, where state subrogated others to its rights.

An insolvent corporation may be discharged from its debts without releasing stock-holders who are personally liable for those debts. Willis *v.* Mahon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281.

79. Ellerbe *v.* United Masonic Ben. Assoc., 114 Mo. 501, 21 S. W. 843; Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. 257.

80. *Arkansas.*—McCreary *v.* State, 27 Ark. 425.

Louisiana.— Mudge *v.* New Orleans Exch., etc., Co., 10 Rob. (La.) 460.

Missouri.— *In re* Life Assoc. of America, 91 Mo. 177, 3 S. W. 833.

New Jersey.— Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395; Potts *v.* Trenton Water Power Co., 9 N. J. Eq. 592.

New York.— Atty.-Gen. *v.* North American L. Ins. Co., 82 N. Y. 172.

81. Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192; Bedford *v.* Eastern Bldg., etc., Assoc., 181 U. S. 227, 21 S. Ct. 597, 45 L. ed. 834.

A tax on gross receipts of foreign corporation does not impair previous stock subscriptions. Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 17 Ky. L. Rep. 887, 32 S. W. 952, 56 Am. St. Rep. 367, 31 L. R. A. 41.

But if the corporation has already been permitted to do business in the state, such a law is unconstitutional if it impairs contracts existing at the time of its enactment. American Bldg., etc., Assoc. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493; Bedford *v.* Eastern Bldg., etc., Assoc., 181 U. S. 227, 21 S. Ct. 597, 45 L. ed. 834.

82. Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 384; Moneypenny *v.* Sixth Ave. R. Co., 7 Rob. (N. Y.) 328, 19 N. Y. St. 574, 35 How. Pr. (N. Y.) 452; Tilley *v.* Savannah, etc., R. Co., 4 Woods (U. S.) 427, 5 Fed. 641. And see Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 27 Am. Dec. 700.

83. Bowlby *v.* Kline, 28 Ind. App. 659, 63 N. E. 723, holding such a provision to be a valid police regulation and not unconstitutional as impairing the obligation of existing notes and mortgages.

Receipt of dues by insolvent building and loan association.— An act making it a felony for officers of a building and loan association to receive dues owing it after knowledge that it is insolvent does not impair the obligation of contracts, in violation of U. S. Const. art. 1, § 10. State *v.* Missouri Guarantee Sav., etc., Assoc., 167 Mo. 489, 67 S. W. 215.

the repeal of its charter does not impair the obligation of contracts of the corporation, provided the contracts are left intact and effective remedies are given or preserved.[84] The corporate existence may be continued for a certain time after the expiration or forfeiture of the charter, for the purpose of suing, being sued, and settling its affairs.[85]

D. Contracts of Individuals — 1. In General — a. Rule Stated. There must be a "contract."[86] When the transactions of individuals do not amount to a "contract" in the special signification of that word, as it is used in the constitutional clause forbidding laws that impair the obligation of contracts, the protection of that clause cannot be invoked to invalidate legislative acts relating to them. Passing over miscellaneous instances, where the question was of the existence of a "contract" that might be impaired,[87] recurring examples are

84. *Alabama.*—Mobile, etc., R. Co. *v.* State, 29 Ala. 573.

Maine.— Power to repeal charter reserved by state. Read *v.* Frankfort Bank, 23 Me. 318.

Massachusetts.— Reserved power to repeal. Thornton *v.* Marginal Freight R. Co., 123 Mass. 32.

Mississippi.— Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

New Hampshire.— Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435.

Pennsylvania.— Houston *v.* Jefferson College, 63 Pa. St. 428. And see Com. *v.* Hibernia Fire Engine Co., 10 Phila. (Pa.) 393, 32 Leg. Int. (Pa.) 40.

South Carolina.— State *v.* State Bank, 1 S. C. 63.

United States.— Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945, 12 Alb. L. J. 354, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33, 42 Conn. 583; Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 15 Am. L. Reg. N. S. 346.

See 10 Cent. Dig. tit. "Constitutional Law," § 472.

The effect of repeal or modification of a charter under a reserved power is to excuse the performance of executory contracts, so far as they are rendered impossible of performance. Macon, etc., R. Co. *v.* Sharp, 85 Ga. 1, 11 S. E. 442.

85. Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135. Or a trustee may be appointed for such purposes. Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513; Lothrop *v.* Stedman, 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519, 12 Alb. L. J. 354, 15 Am. Leg. Reg. N. S. 346, 4 Ins. L. J. 829, 22 Int. Rev. Rec. 33, 42 Conn. 583. And see Stein *v.* Indianapolis, etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353, where an act provided for the incorporation and continuance of certain associations with authority to sue in the corporate name on debts due the associations.

Liabilities to a corporation can be revived after the expiration or forfeiture of its charter. Bleakney *v.* Farmers', etc., Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635. *Contra,* Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8; Greencastle, etc., Turnpike, etc., Co. *v.* Davidson, 39 Pa. St. 435.

Whether a corporate organization be invalid, because of failure to comply with the terms of a valid law, or because the organization was under an invalid law, there is no impairment of the obligation of any contract by subsequent legislation permitting such corporation to become a corporation *de jure.* Deitch *v.* Staub, 115 Fed. 309, 53 C. C. A. 137.

86. Mass. Stat. (1893), c. 471, authorized a city to build its own waterworks, after submission to a vote of the people, notwithstanding the previous grant of a franchise to plaintiff. After a vote of the city to supply itself with water without buying the works of plaintiff, Mass. Stat. (1894), c. 474, was passed, obliging the city to purchase plaintiff's waterworks before proceeding to supply itself with water, if plaintiff within a certain time notified the mayor of the city of its desire to sell. It was held that such latter act is not a violation of U. S. Const. art. I, § 10, prohibiting an act impairing the obligation of contracts, because of the contract for water existing between the plaintiff and the city, as it simply gave plaintiff the option of selling its property on the terms mentioned. Newburyport Water Co. *v.* Newburyport, 113 Fed. 677.

87. *California.*— *In re* Perkins, 2 Cal. 424.

Illinois.—Arnold *v.* Alden, 173 Ill. 229, 50 N. E. 704.

Louisiana.—Hyde *v.* Planters' Bank, 8 Rob. (La.) 416.

New York.—Matter of Protestant Episcopal Public School, 58 Barb. (N. Y.) 161, 40 How. Pr. (N. Y.) 139.

Pennsylvania.— Baird *v.* Rice, 63 Pa. St. 489.

South Carolina.— Dunham *v.* Elford, 13 Rich. Eq. (S. C.) 190, 94 Am. Dec. 162.

United States.— Bryan *v.* Board of Education, 151 U. S. 639, 14 S. Ct. 465, 38 L. ed. 297 [*affirming* 90 Ky. 322, 12 Ky. L. Rep. 12, 13 S. W. 276].

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

For various nondescript state regulations which have been held not to be contracts within the meaning of the constitution see the following cases:

Alabama.— See Ware *v.* Owens, 42 Ala.

found of certain definite contentions in this regard, shown by the courts to be erroneous.[88]

b. Rule Applied — (I) *Marriage.* The most important of these contentions is the assertion that the marriage relation constitutes a contract which the legislature is forbidden to impair. Cases to that effect can indeed be found;[89] but the almost unanimous authority is to the contrary,[90] with its necessary corollaries, that the state may regulate the marriage status, together with the rights and duties involved in it,[91] and that the obligation of no contract is impaired by even the most stringent divorce legislation.[92]

(II) *Judgments.* So also as to judgments. As they derive none of their strength from the acts of individuals, they are not contracts that must be kept inviolate, although the remedy for their enforcement be *ex contractu.* It has been held therefore that no law touching judgments is invalid,[93] unless it affects

212, 94 Am. Dec. 672; Boyd *v.* Harrison, 36 Ala. 533.

Connecticut.— State *v.* New Haven, etc., Co., 43 Conn. 351.

Indiana.— Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

Kentucky.— Amy *v.* Smith, 1 Litt. (Ky.) 326.

Louisiana.— State *v.* New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168; State *v.* New Orleans, 32 La. Ann. 709; Perrault *v.* Perrault, 32 La. Ann. 635.

Maine.— Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

North Carolina.— Washington Toll Bridge Co. *v.* Beaufort, 81 N. C. 491.

Tennessee.— Parker *v.* Savage, 6 Lea (Tenn.) 406; Craighead *v.* State Bank, Meigs (Tenn.) 199.

Wisconsin.— Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

United States.— Neilson *v.* Kilgore, 145 U. S. 487, 12 S. Ct. 943, 36 L. ed. 786; Lobrano *v.* Nelligan, 9 Wall. (U. S.) 295, 19 L. ed. 694; Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

88. See *infra,* IX, D, 1, b, *et seq.*

89. See Ponder *v.* Graham, 4 Fla. 23; Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Bryson *v.* Campbell, 12 Mo. 498; State *v.* Fry, 4 Mo. 120.

90. *Alabama.* — Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739.

Indiana.— Noel *v.* Ewing, 9 Ind. 37.

Maine.— Adams *v.* Palmer, 51 Me. 480.

Mississippi.— Carson *v.* Carson, 40 Miss. 349.

Oregon. — Rugh *v.* Ottenheimer, 6 Oreg. 231, 25 Am. Rep. 513.

United States.— Hunt *v.* Hunt, 97 U. S. Appendix clxv, 24 L. ed. 1109; Georgia *v.* Tutty, 41 Fed. 753, 7 L. R. A. 50; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 370.

See 10 Cent. Dig. tit. "Constitutional Law, § 418.

91. *Connecticut.*— Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Maine.— Lewiston *v.* North Yarmouth, 5 Me. 66.

New York.—White *v.* White, 5 Barb. (N. Y.) 474, 4 How. Pr. (N. Y.) 102; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295; Benedict *v.* Seymour, 11 How. Pr. (N. Y.) 176.

North Carolina. — Holliday *v.* McMillan, 79 N. C. 315. But see Wesson *v.* Johnson, 66 N. C. 189.

Ohio.— Baughman *v.* Baughman, 7 Ohio S. & C. Pl. Dec. 433.

United States.— Georgia *v.* Tutty, 41 Fed. 753, 7 L. R. A. 50; Starr *v.* Hamilton, Deady (U. S.) 268, 22 Fed. Cas. No. 13,314.

92. *Indiana.*— Tolen *v.* Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743.

Kentucky.— Cabell *v.* Cabell, 1 Metc. (Ky.) 319; Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Maguire *v.* Maguire, 7 Dana (Ky.) 181.

Maine.— Opinion of Justices, 16 Me. 479. But in Sherburne *v.* Sherburne, 6 Me. 210, a statute authorizing a divorce for desertion was construed not to refer to a desertion occurring before the passage of the statute.

Massachusetts.—Wales *v.* Wales, 119 Mass. 89.

Mississippi.— Carson *v.* Carson, 40 Miss. 349.

Pennsylvania.— Cronise *v.* Cronise, 54 Pa. St. 255.

South Carolina.— Grant *v.* Grant, 12 S. C. 29, 32 Am. Rep. 506.

Washington.— Maynard *v.* Hill, 2 Wash. Terr. 321, 5 Pac. 717; Maynard *v.* Valentine, 2 Wash. Terr. 3, 3 Pac. 195.

United States.— Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

See 10 Cent. Dig. tit. "Constitutional Law," § 418.

93. *Georgia.*— McAfee *v.* Covington, 71 Ga. 272, 51 Am. Rep. 263.

Louisiana.— State *v.* New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168.

Texas.— Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

West Virginia.— Peerce *v.* Kitzmiller, 19 W. Va. 564.

injuriously a contract upon which the judgment is founded, which it may conceivably do.[94]

(III) *Invalid Agreements.* If the parties intend a contract, but the law for one reason or another affixes no resulting obligation, no question of impairment can arise, there being no contract to impair.[95]

2. Impairment of Obligation — a. In General. It may be said in general that a law which does not strike at the vitality of a contract either by altering its terms or preventing its preservation and enforcement does not impair its obligation.[96]

b. Annulment of Valid Contract. The most palpable and direct form of legislative impairment is in a law which effectually abrogates a valid contract. Such laws are undoubtedly unconstitutional.[97]

c. Material Alteration. Legislation that materially alters the character of the obligation is certainly bad.[98] Thus laws may be invalid that change the dimen-

Wyoming.— Wyoming Nat. Bank *v.* Brown, 9 Wyo. 153, 61 Pac. 465, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 935.

United States.—Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900.

94. Grant *v.* Grant, 12 S. C. 29, 32 Am. Rep. 506; Bettman *v.* Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

95. *Alabama.*— Hale *v.* Huston, 44 Ala. 134, 4 Am. Rep. 124.

Oregon.— Chapman *v.* State, 5 Oreg. 432.

South Carolina.— Hardin *v.* Trimmier, 27 S. C. 110, 3 S. E. 46.

Tennessee.— Snider *v.* Brown, (Tenn. Ch. 1898) 48 S. W. 377.

United States.— Bethell *v.* Demaret, 10 Wall. (U. S.) 537, 19 L. ed. 1007.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

96. See in illustration of this rule the following cases:

Georgia.— Baker *v.* Herndon, 17 Ga. 568, a statute making that a contract which by a different construction would not have been one.

Iowa.— Harlan *v.* Sigler, Morr. (Iowa) 39, making a valid obligation assignable.

Kentucky.— Ford *v.* Hale, 1 T. B. Mon. (Ky.) 23, making a valid obligation assignable.

Massachusetts.— Reed *v.* Fullum, 2 Pick. (Mass.) 158; Locke *v.* Dane, 9 Mass. 360, both cases of a new assignment of jail limits which were held to be valid as to bondsmen of prisoners.

New York.— Holmes *v.* Lansing, 3 Johns. Cas. (N. Y.) 73, enlarging jail liberties.

North Carolina.— A code provision supporting agreements to take a less sum in full discharge of debts was held to be valid in Koonce *v.* Russell, 103 N. C. 179, 9 S. E. 316.

Pennsylvania.— Baird *v.* Rice, 63 Pa. St. 489, authorizing the erection of a municipal building on a public square.

Virginia.— Yuille *v.* Wimbish, 77 Va. 308, a code provision that a creditor may compound or compromise with a joint contractor or coöbligor, and that the rights of contribution should not be affected by such compounding or compromise.

United States.— Leger *v.* Rice, 15 Fed. Cas. No. 8,210, 4 Chic. Leg. N. 7, 8 Phila. (Pa.) 167, 28 Leg. Int. (Pa.) 309, an act modifying the beneficial use of a public square.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

No unconstitutional impairment of the obligation of a contract is made by the provision of Pa. act of April 27, 1855, § 7, conclusively presuming a release and extinguishment of any irredeemable ground-rent on which no payment or demand for payment has been made for twenty-one years, and of whose existence no acknowledgment has been made during that period, even though such provision is applicable to a ground-rent reserved before the passage of the act, as the further provision that "this section shall not go into effect until three years from the passage of this act" gave a reasonable time to the owners of such ground-rents for preserving their rights. Wilson *v.* Iseminger, 185 U. S. 55, 22 S. Ct. 573, 46 L. ed. 804 [*affirming* 187 Pa. St. 108, 41 Atl. 38].

97. *Alabama.*— Roach *v.* Gunter, 44 Ala. 209, 4 Am. Rep. 132; Mays *v.* Williams, 27 Ala. 267.

Florida.— Forcheimer *v.* Holly, 14 Fla. 239.

Georgia.— Branch *v.* Baker, 53 Ga. 502.

Louisiana.— Henderson *v.* Merchants' Mut. Ins. Co., 25 La. Ann. 343.

Maryland.— Berrett *v.* Oliver, 7 Gill & J. (Md.) 191.

North Carolina.— Harrison *v.* Styres, 74 N. C. 290.

United States.— Delmas *v.* Merchants Mut. Ins. Co., 14 Wall. (U. S.) 661, 20 L. ed. 757.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

98. See for illustration the following cases:

Alabama.— Powell *v.* Knighton, 43 Ala. 626; Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703; Powell *v.* Boon, 43 Ala. 459; Houston *v.* Deloach, 43 Ala. 364, 94 Am. Dec. 689.

Arkansas.— Woodruff *v.* State, 3 Ark. 285.

sions of the liability, as for example the amount of the liability[99] or the length of its existence.[1]

d. Added Conditions or Duties. Whether the state may impose added conditions or duties upon individuals with regard to their contracts depends upon the nature of such requirements; if they amount to a change of the obligation itself they are of course ineffectual;[2] but an obligation cannot be said to be impaired by a statute which merely imposes an additional duty on the owner in order that he may preserve it; therefore recording acts and acts of kindred nature are constitutional.[3]

e. Changing Nature of Estates. The nature of an estate may, it seems, be vitally altered without any transgression of the constitutional prohibition under consideration, so far at least as the owner of it is concerned.[4]

f. Matters of Discharge. A most important aspect of an executory contract is the matter of its discharge. A change in the place of performance is vital, when the obligation is thus made more onerous[5] or the value of its fulfilment lessened;[6] otherwise it is permissible.[7] The time for performance is generally not subject to alteration.[8] Of more difficulty are matters relating to the manner

California.— Brown *v.* Lattimore, 17 Cal. 93.

Iowa.— Madera *v.* Jones, Morr. (Iowa) 204.

Mississippi.— Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439.

New York.— Randall *v.* Sackett, 77 N. Y. 480 [*affirming* 56 How. Pr. (N. Y.) 225].

Virginia.— Finley *v.* Brent, 87 Va. 103, 12 S. E. 228, 11 L. R. A. 214.

United States.— Fielden *v.* Labens, 6 Blatchf. (U. S.) 524, 9 Fed. Cas. No. 4,773.

See 10 Cent. Dig. tit. "Constitutional Law," § 429 *et seq.*

99. Steen *v.* Finley, 25 Miss. 535; Hannum *v.* State Bank, 1 Coldw. (Tenn.) 398.

1. Greencastle, etc., Plank Road Co. *v.* Davidson, 39 Pa. St. 435; Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856; Farmers' Bank *v.* Gunnell, 26 Gratt. (Va.) 131. See also Latrobe *v.* Western Tel. Co., 74 Md. 232, 21 Atl. 788; Coles *v.* Celluloid Mfg. Co., 39 N. J. L. 326.

2. Robinson *v.* Magee, 9 Cal. 81, 70 Am. Dec. 638; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; King *v.* Cassidy, 36 Tex. 531. But see Bowlley *v.* Kline, (Ind. App. 1901) 60 N. E. 712, where an act was held to be valid as to past obligations, which declared that notes belonging to a loan and building association should not be negotiable except on an order of the circuit court.

3. *California.*— Stafford *v.* Lick, 7 Cal. 479.

Kansas.— Myers *v.* Wheelock, 60 Kan. 747, 57 Pac. 956.

Louisiana.— Vance *v.* Vance, 32 La. Ann. 186; Rochereau *v.* Delacroix, 26 La. Ann. 584; Nelson's Succession, 24 La. Ann. 25.

Maine.— Bird *v.* Keller, 77 Me. 270.

Mississippi.— Tarpley *v.* Hamer, 9 Sm. & M. (Miss.) 310.

New York.— Varick *v.* Briggs, 6 Paige (N. Y.) 323.

Ohio.— Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643.

South Carolina.— Miles *v.* King, 5 S. C. 146.

United States.— Vance *v.* Vance, 108 U. S. 514, 2 S. Ct. 854, 27 L. ed. 808; Jackson *v.* Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679.

See 10 Cent. Dig. tit. "Constitutional Law," § 441.

4. *Indiana.*— Doe *v.* Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732, an act authorizing the sale of land of infant heirs. In Wiseman *v.* Beckwith, 90 Ind. 185, a statute diminishing the title of a vendor was held to be void in so far as it affected an executory contract for the sale of the land.

New Hampshire.— Stevenson *v.* Cofferin, 20 N. H. 150; Miller *v.* Dennett, 6 N. H. 109.

New York.— Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; Clarke *v.* Van Surlay, 15 Wend. (N. Y.) 436.

Ohio.— In Gilpin *v.* Williams, 25 Ohio St. 283.

United States.— Blagge *v.* Miles, 1 Story (U. S.) 426, 3 Fed. Cas. No. 1,479, 4 Law Rep. 256.

See 10 Cent. Dig. tit. "Constitutional Law," § 442.

A change may be made in the manner of disposing of an estate; thus a statute prescribing a mode for the conveyance of her real property by a married woman is valid. Warfield *v.* Ravesies, 38 Ala. 518.

N. Y. Laws (1899), c. 76, amending N. Y. Laws (1896), c. 908, § 230, relating to taxable transfers of property, and providing for a tax on remainders and reversions which had vested before June 30, 1885, on their coming into actual possession or enjoyment, is unconstitutional, because impairing the obligations of contracts. *In re* Pell, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540 [*reversing* 60 N. Y. App. Div. 286, 70 N. Y. Suppl. 196].

5. King *v.* Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112.

6. Old Dominion Bank *v.* McVeigh, 20 Gratt. (Va.) 457.

7. Houston *v.* Jefferson College, 63 Pa. St. 428.

8. Randolph *v.* Middleton, 26 N. J. Eq. 543; Com. *v.* Isenberg, 4 Pa. Dist. 579, 8 Kulp (Pa.) 116; Golden *v.* Prince, 3 Wash.

of discharge. If the parties expressly designate the medium of payment this must be regarded.[9] While the cases do not deny the inviolability of an implied agreement, they assume that when parties do not specify a medium, they intend the debt to be solvable in whatever may be legal tender under the law at the time of performance;[10] but there can be no implication that parties agree to accept an unusual and insufficient medium of payment.[11]

g. Alteration of Remedy. The statement is common that the state may regulate at will the remedy for the enforcement of an existing contract. Decisions prove the correctness of the assertion so far as regards the formal details of remedy.[12] Mere changes in the rules of evidence are unobjectionable.[13] Statutes of limitation are valid if they leave a reasonable time for the assertion of the right before it shall become barred.[14] And the added efficiency of a new remedy cannot be combated.[15] But the mere fact that legislation has a remedial complexion will not save it, when its effect is the impairment of the obligation of a contract. This is very evident, but it is necessary to be stated as a limiting proviso

(U. S.) 313, 10 Fed. Cas. No. 5,509, 5 Hall L. J. 502. In Waters *v.* Bates, 44 Pa. St. 473, where a defendant was given an additional period to pay his money and enforce the contract, it was held that he at least could not object to such leniency.

9. Opinion of Justices, 49 Mo. 216.

10. *Alabama.*— Troy *v.* Bland, 58 Ala. 197.
California.— Belloc *v.* Davis, 38 Cal. 242.
Georgia.— Jones *v.* Harker, 37 Ga. 503.
Illinois.— Black *v.* Lusk, 69 Ill. 70.
Iowa.— Wilson *v.* Triblecock, 23 Iowa 331; Hintrager *v.* Bates, 18 Iowa 174.
New Hampshire.— George *v.* Concord, 45 N. H. 434.
New York.— Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400; Meyer *v.* Roosevelt, 25 How. Pr. (N. Y.) 97.
Pennsylvania.— Shollenberger *v.* Brinton, 52 Pa. St. 9; Hepburn *v.* Watts, 28 Leg. Int. (Pa.) 333.
South Carolina.— O'Neil *v.* McKewn, 1 S. C. 147.
Tennessee.— Johnson *v.* Ivey, 4 Coldw. (Tenn.) 608, 94 Am. Dec. 206.
United States.— Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287.
Contra, Griswold *v.* Hepburn, 2 Duv. (Ky.) 20; Dean *v.* Carnahan, 7 Mart. N. S. (La.) 258; Martin *v.* Martin, 20 N. J. Eq. 421; Hepburn *v.* Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513.
See 10 Cent. Dig. tit. "Constitutional Law," § 453 *et seq.*

A Mississippi act was held valid which provided that contracts for the payment of money made between May 1, 1862, and May 1, 1865, were presumed to refer to "Confederate money," unless the contrary appeared on the face of the contract. Cowan *v.* McCutchen, 43 Miss. 207. See also Prince William School Bd. *v.* Stuart, 80 Va. 64.

11. Peay *v.* Ramsey, 21 Ark. 91; Dundas *v.* Bowler, 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141, 7 Law Rep. 343, 2 West. L. J. 27. It was asserted, however, in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529, that the prohibition against the states making any laws impairing the obligation of contracts does not restrain the states from enabling debtors to discharge their debts by the tender of property of no real value, because such a subject is expressly provided for in that nothing but gold and silver coin are made a tender in payments for debts.

12. *Alabama.*— Abbett *v.* Page, 92 Ala. 571, 9 So. 332.
Delaware.— Cook *v.* Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185.
Illinois.— McNamara *v.* People, 183 Ill. 164, 55 N. E. 625.
Indiana.— Graham *v.* State, 7 Ind. 470, 65 Am. Dec. 745.
Louisiana.— Hyde *v.* Planters' Bank, 8 Rob. (La.) 416.
Maine.— Kingley *v.* Cousins, 47 Me. 91.
Minnesota.— Levering *v.* Washington, 3 Minn. 323.
New Hampshire.— Philbrick *v.* Philbrick, 39 N. H. 468.
New York.— Swan *v.* Mutual Reserve Fund L. Assoc., 155. N. Y. 9, 49 N. E. 258 [*affirming* 20 N. Y. App. Div. 255, 46 N. Y. Suppl. 841 (*reversing* 17 Misc. (N. Y.) 722, 41 N. Y. Suppl. 444)].
Pennsylvania.— Headley *v.* Ettling, 1 Phila. (Pa.) 39, 7 Leg. Int. (Pa.) 39.
Rhode Island.— Island Sav. Bank *v.* Galvin, 19 R. I. 569, 36 Atl. 1125, 20 R. I. 347, 39 Atl. 196; Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.
South Carolina.— Sims *v.* Steadman, 62 S. C. 300, 40 S. E. 677.
West Virginia.— Ruffner *v.* Hewitt, 14 W. Va. 737; Fleming *v.* Holt, 12 W. Va. 143.
See 10 Cent. Dig. tit. "Constitutional Law," § 465 *et seq.*

13. Joy *v.* Thompson, 1 Dougl. (Mich.) 373; Robeson *v.* Brown, 63 N. C. 554; Harris *v.* Harsch, 29 Oreg. 562, 46 Pac. 141.

14. Hill *v.* Gregory, 64 Ark. 317, 42 S. W. 408; Stephens *v.* St. Louis Nat. Bank, 43 Mo. 385; Clay *v.* Iseminger, 190 Pa. St. 586, 42 Atl. 1039.

15. Van Metre *v.* Wolf, 27 Iowa 341. See also Woods *v.* Soucy, 166 Ill. 407, 47 N. E. 67; Bryson *v.* McCrary, 102 Ind. 1, 1 N. E. 55.

to the stereotyped formula that remedies are always subject to alteration. A legal obligation which cannot be enforced is worthless; therefore a statute, the practical effect of which is to prevent enforcement, is invalid.[16] And if a law makes a material subtraction from the efficiency of the remedy in force it may work an impairment,[17] as for instance where the security upon which a creditor places legal reliance is sensibly diminished.[18] It is evident too that the character of the contract itself may be materially changed by a law professing to act upon the remedy.[19]

h. Interest. The obligation to pay interest on money due by contract, be it express or implied from the presumed intention of the parties (in view of the law upon the subject when the contract was made), is apparently a part of the obligation of the contract. State laws therefore cannot change the rate of interest[20] or remit it altogether.[21] But the allowance of interest upon a judgment as well as the rate of it is probably within the control of the legislature, even with regard to past contracts.[22]

16. *Iowa.*— Jordan *v.* Wimer, 45 Iowa 65.
Missouri.— Cranor *v.* School Dist. No. 2, 151 Mo. 119, 52 S. W. 232.
New York.— Greeff *v.* Equitable L. Assur. Soc., 40 N. Y. App. Div. 180, 57 N. Y. Suppl. 871 [*reversing* 24 Misc. (N. Y.) 96, 52 N. Y. Suppl. 503].
South Carolina.— Hayes *v.* Clinkscales, 9 S. C. 441; Dunham *v.* Elford, 13 Rich. Eq. (S. C.) 190, 94 Am. Dec. 162.
Texas.— Texas-Mexican R. Co. *v.* Carr, (Tex. 1889) 12 S. W. 90 (recording act); Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.
Vermont.— Richardson *v.* Cook, 37 Vt. 599, 88 Am. Dec. 622.
See 10 Cent. Dig. tit. "Constitutional Law," § 465 *et seq.*

17. For illustrations see the following cases:
Georgia.— Gunn *v.* Hendry, 43 Ga. 556.
Kansas.— Paris *v.* Nordburg, 6 Kan. App. 260, 51 Pac. 799.
Mississippi.— Leak *v.* Cook, 52 Miss. 799.
North Carolina.— Latham *v.* Whitehurst, 69 N. C. 33.
Ohio.— Mather *v.* Cincinnati R. Tunnel Co., 3 Ohio Cir. Ct. 284, 2 Ohio Cir. Dec. 161.
Oregon.— State *v.* Sears, 29 Oreg. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808.
Pennsylvania.— Caldwell *v.* Railroad Co., 25 Leg. Int. (Pa.) 332.
South Dakota.— Hollister *v.* Donahoe, 11 S. D. 497, 78 N. W. 959.
Washington.—Swinburne *v.* Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932.
United States.— Heath, etc., Mfg. Co. *v.* Union Oil, etc., Co., 83 Fed. 776.
See 10 Cent. Dig. tit. "Constitutional Law," § 465 *et seq.*

18. Voltz *v.* Rawles, 85 Ind. 198; Martin *v.* Prather, 82 Ind. 557; Parkham *v.* Vandeventer, 82 Ind. 544; Patton *v.* Asheville, 109 N. C. 685, 14 S. E. 92; Lefever *v.* Witmer, 10 Pa. St. 505; Bouknight *v.* Epting, 11 S. C. 71.

19. *Georgia.*—Abercrombie *v.* Baxter, 44 Ga. 36.
Illinois.—Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387.
Louisiana.— Frey *v.* Hebenstreit, I Rob. (La.) 561.
Mississippi.— Hazard *v.* Illinois Cent. R. Co., 67 Miss. 32, 7 So. 280.
United States.— Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93.
See 10 Cent. Dig. tit. "Constitutional Law," § 465 *et seq.*

20. *Arkansas.*— Woodruff *v.* State, 3 Ark. 285.
Connecticut.— Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.
Florida.— Myrick *v.* Battle, 5 Fla. 345.
Minnesota.— State *v.* Foley, 30 Minn. 350, 15 N. W. 375.
Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.
Washington.— Union Sav. Bank, etc., Co. *v.* Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359.
See 10 Cent. Dig. tit. "Constitutional Law," § 445.
But perhaps the rate of interest that redemptioners of land sold on foreclosure of a mortgage are required to pay is subject to change. See to that effect Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; Connecticut Mut. L. Ins. Co. *v.* Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. ed. 648. *Contra,* Hillebert *v.* Porter, 28 Minn. 496, 11 N. W. 84 [*disapproving* Heyward *v.* Judd, 4 Minn. 483; Stone *v.* Bassett, 4 Minn. 298].

21. Pretlow *v.* Bailey, 29 Gratt. (Va.) 212; Cecil *v.* Deyerle, 28 Gratt. (Va.) 775; Roberts *v.* Cocke, 28 Gratt. (Va.) 207. *Contra,* Harmanson *v.* Wilson, 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074, 14 Am. L. Reg. N. S. 627.

22. Fleming *v.* Holt, 12 W. Va. 143; Wyoming Nat. Bank *v.* Brown, 9 Wyo. 153, 61 Pac. 465; Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925. But in Butler *v.* Rockwell, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611, it was held

i. Governmental Regulations. It is observable that individuals must necessarily contract with full knowledge that the legislature may draw at any time from the vast reservoir of power, defined and undefined, intrusted to it.[23] Legislation which can properly be referred to this great fund of authority, however nearly it may affect the contract in question, is not invalid. But to describe the legitimate scope for the exercise of such governmental power would be to set forth the various subject-matter of the numerous cases illustrating the fact.[24]

j. Law in Force. It is remarkable that courts have been called upon to affirm the obvious truth that a law in force at a time when a contract is made cannot impair the obligation of that contract.[25]

k. Validating Invalid Agreement. Only less remarkable is the frequent necessity for deciding that a law is valid which gives binding force to a voluntary agreement void[26] or unenforceable[27] when made. An act validating usurious

to be ineffectual where a reduction in the rate of interest after judgment had been entered.

23. Valid exercise of police power.— The fact that defendant had entered into a contract for the construction of his tenement-house before the taking effect of the Tenement-House Act (Laws (1901), c. 334), regulating their erection, did not relieve him from liability to its provisions, on the ground that the act impaired the obligation of his contract, it being a valid exercise of police power. New York *v.* Herdje, 68 N. Y. App. Div. 370, 74 N. Y. Suppl. 104.

24. For illustrations of such governmental power see the following cases:

Alabama.— Crosby *v.* Montgomery, 108 Ala. 498, 18 So. 723; Blann *v.* State, 39 Ala. 353, 84 Am. Dec. 788.

Colorado.— Day *v.* Madden, 9 Colo. App. 464, 48 Pac. 1053.

Connecticut.— Barlow *v.* Gregory, 31 Conn. 261; Reynolds *v.* Geary, 26 Conn. 179; Starr *v.* Pease, 8 Conn. 541.

Indiana.— Currier *v.* Elliott, 141 Ind. 394, 39 N. E. 554; Taylor *v.* Stockwell, 66 Ind. 505.

Louisiana.— Guillotte *v.* New Orleans, 12 La. Ann. 432.

Maine.— Cottrill *v.* Myrick, 12 Me. 222.

Massachusetts.—Atty.-Gen. *v.* Williams, 174 Mass. 476, 55 N. E. 77; Brown *v.* Penobscot Bank, 8 Mass. 445.

New York.— New York *v.* Herdje, 68 N. Y. App. Div. 370, 74 N. Y. Suppl. 104; Powers *v.* Shepard, 49 Barb. (N. Y.) 418 [*reversing* 45 Barb. (N. Y.) 524, 1 Abb. Pr. N. S. (N. Y.) 129]; Lindenmuller *v.* People, 33 Barb. (N. Y.) 548; Le Couteulx *v.* Erie County, 7 Barb. (N. Y.) 249; Matter of Mulligan, 4 Misc. (N. Y.) 361, 24 N. Y. Suppl. 321, 53 N. Y. St. 846; People *v.* Phyfe, 20 N. Y. Suppl. 461, 48 N. Y. St. 350; Coates *v.* New York, 7 Cow. (N. Y.) 585; New York *v.* Slack, 3 Wheel Crim. (N. Y.) 237.

Ohio.— Loring *v.* State, 16 Ohio 590; Tarvin *v.* Broughton, 8 Ohio Dec. (Reprint) 451, 8 Cinc. L. Bul. 21.

Pennsylvania.— Myers *v.* Irwin, 2 Serg. & R. (Pa.) 368; Com. *v.* Wilson, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484; *In re* Girard Ave., 10 Phila. (Pa.) 145, 31 Leg. Int. (Pa.) 164.

South Carolina.— Hardin *v.* Trimmier, 27 S. C. 110, 3 S. E. 46.

Tennessee.— Knoxville Corp. *v.* Bird, 12 Lea (Tenn.) 121, 47 Am. Rep. 326.

Virginia.— Savage's Case, 84 Va. 619, 5 S. E. 565.

Washington.— Woodward *v.* Winehill, 14 Wash. 394, 44 Pac. 860.

United States.— Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823; Western Union Tel. Co. *v.* James, 162 U. S. 650, 16 S. Ct. 934, 40 L. ed. 1105; Deming *v.* U. S., 1 Ct. Cl. 190.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

25. *Georgia.*— Roby *v.* Boswell, 23 Ga. 51.

Illinois.— Parrott *v.* Kumpf, 102 Ill. 423.

Indiana.— Barrett *v.* Millikan, 156 Ind. 510, 60 N. E. 310; Churchman *v.* Martin, 54 Ind. 380.

Kentucky.— Elliott *v.* Gibson, 10 B. Mon. (Ky.) 438.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227.

Ohio.— Oyler *v.* Scanlan, 33 Ohio St. 308; Nimmons *v.* Westfall, 33 Ohio St. 213.

Pennsylvania.— Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472; Felts' Appeal, (Pa. 1889) 17 Atl. 195.

See 10 Cent. Dig. tit. "Constitutional Law," § 414 *et seq.*

26. McMahon *v.* Boden, 39 Conn. 316; Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Lewis *v.* McElvain, 16 Ohio 347 [*disregarding* an opinion expressed in Johnson *v.* Bentley, 16 Ohio 97]; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458.

27. *Indiana.*— Stein *v.* Indianapolis Bldg., etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353.

Massachusetts.— Rogers *v.* Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710.

Montana.— Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446.

New York.— Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188.

loans,[28] or an act perfecting defective conveyances,[29] may be mentioned as examples of this class of legislation.

l. Enforcing a Moral Duty. Finally statutes are constitutional which come to the aid of an equitable principle, enforcing a moral duty for the assertion of which there is no legal provision; as for instance statutes providing for the reimbursement of taxes in certain cases,[30] or betterment laws, allowing for the value of improvements made in good faith by certain occupants of land.[31]

E. Remedies on Contracts of Individuals and Private Corporations — 1. Legislative Contract in General — a. As to Subsequent Contracts. Legislation as to remedies is constitutional as regards contracts subsequently entered into.[32]

b. As to Prior Contracts. There is a distinction between laws affecting the contract itself[33] and laws affecting the remedy thereon.[34] The legislature has the power to change the remedy on an existing contract,[35] if in so doing it does not go too far. Therefore a statute regulating matters of procedure and the mode of pursuing an existing remedy with relation to past as well as future contracts is constitutional, provided that no new burdens and restrictions which would mate-

Rhode Island.— Stokes *v.* Rodman, 5 R. I. 405.

Tennessee.— Swope *v.* Jordan, 107 Tenn. 166, 64 S. W. 52.

See 10 Cent. Dig. tit. "Constitutional Law," § 432 *et seq.*

28. *Connecticut.*— Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Allen, 28 Conn. 97.

Illinois.— Drake *v.* Latham, 50 Ill. 270; Parmelee *v.* Lawrence, 48 Ill. 331.

Indiana.— Pattison *v.* Jenkins, 33 Ind. 87; Klingensmith *v.* Reed, 31 Ind. 389; Andrews *v.* Russell, 7 Blackf. (Ind.) 474.

Maryland.— Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Wilson *v.* Hardesty, 1 Md. Ch. 66.

Virginia.— Danville *v.* Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

Contra, Gilliland *v.* Phillips, 1 S. C. 152.

See 10 Cent. Dig. tit. "Constitutional Law," § 432 *et seq.*

29. *Indiana.*— Burget *v.* Merritt, 155 Ind. 143, 57 N. E. 714; Davis *v.* State Bank, 7 Ind. 316.

Iowa.— Brinton *v.* Seevers, 12 Iowa 389.

Kentucky.— Thornton *v.* McGrath, 1 Duv. (Ky.) 349. But see Pearce *v.* Patton, 7 B. Mon. (Ky.) 162, 45 Am. Dec. 61.

Ohio.— Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387; Purcell *v.* Goshorn, 2 Disn. (Ohio) 90.

Pennsylvania.— Jones' Appeal, 57 Pa. St. 369; Menges *v.* Wertman, 1 Pa. St. 218; Tate *v.* Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546.

United States.— Gross *v.* U. S. Mortgage Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. ed. 795; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876.

See 10 Cent. Dig. tit. "Constitutional Law," § 444.

30. Claypoole *v.* King, 21 Kan. 602; Coles *v.* Washington County, 35 Minn. 124, 27 N. W. 497.

31. *Massachusetts.*— Bacon *v.* Callender, 6 Mass. 303.

South Carolina.— Lumb *v.* Pinckney, 21 S. C. 471.

Texas.— Cabill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

Vermont.— Brown *v.* Storm, 4 Vt. 37.

Wisconsin.— Pacquette *v.* Pickness, 19 Wis. 219.

United States.— Griswold *v.* Bragg, 48 Fed. 519; Albee *v.* May, 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134.

Contra, Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

See 10 Cent. Dig. tit. "Constitutional Law," § 446.

32. McGannon *v.* Michigan Millers' Mut. F. Ins. Co., 127 Mich. 636, 87 N. W. 61, 89 Am. St. Rep. 501, 54 L. R. A. 739. See also Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342.

33. To hold that a contract made under an old law is to be governed by subsequent legislation would be to construe such legislation as valid and not void, as impairing the obligations of contracts previously made. Kendall *v.* Fader, 99 Ill. App. 104 [*affirmed* in 196 Ill. 221, 65 N. E. 318, 89 Am. St. Rep. 317].

A statute requiring sales under deeds of trust to be made on a certain day of the month is unconstitutional, as applied to a deed executed before the passage and providing for sale "at any time" after default. Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090.

34. The remedies which the law provides to enforce a contract do not constitute a part of the contract itself, and are within the control of the legislature. Kendall *v.* Fader, 99 Ill. App. 104 [*affirmed* in 196 Ill. 221, 65 N. E. 318, 89 Am. St. Rep. 317].

35. A good example of this is the abolition of imprisonment for debt. Statutes tak-

rially impair the value and benefit of the contract are imposed,[36] and in general a statute not operating directly on the contract but merely modifying the nature and extent of the remedy for its enforcement is not unconstitutional.[37] But although such laws are generally held not to be unconstitutional they may become so if they impair or destroy a right.[38] Therefore an alteration by law of an existing legal remedy for the enforcement of a contract to such an extent as materially to affect the rights which the parties had at the time the contract was entered into is unconstitutional.[39] And it is essential that whatever changes are made a remedy be left as substantial as that in existence when the contract was made, for the remedy being necessarily inseparable from the obligation, any law which clogs it with conditions and restrictions which materially impair its efficiency, and which did not exist when the contract was made, impairs the obligation.[40]

ing from a creditor the right to hold the body of the debtor are almost universally held to be constitutional. See *infra*, IX, E, 12.

36. *Alabama.*— Since the law does not suppose parties to contract with reference to the remedy, it is competent for the legislature to change the time when the courts shall be held, and thus expedite or delay the remedy. Rathbone *v.* Bradford, 1 Ala. 312.

Kentucky.— A bond dated before the passage of the statute giving the summary remedy by petition and summons may be enforced under such statute, since the statute has reference only to the mode of enforcing the contract, and not to its nature. Grubbs *v.* Harris, 1 Bibb (Ky.) 567.

Louisiana.— Baldwin *v.* Bennett, 6 Rob. (La.) 309; State *v.* Bermudez, 12 La. 352.

Mississippi.— Briscoe *v.* Anketell, 28 Miss. 361, 61 Am. Dec. 553.

New Jersey.— Rader *v.* Southeasterly Road Dist., 36 N. J. L. 273.

New York.— Van Rensselaer *v.* Read, 26 N. Y. 558.

Pennsylvania.— Huntzinger *v.* Brock, 3 Grant (Pa.) 243; Umbenhauer *v.* Miller, 1 Woodw. (Pa.) 69.

Texas.— Ward *v.* Hubbard, 62 Tex. 559.

United States.— Tennessee *v.* Sneed, 96 U. S. 69, 24 L. ed. 610; U. S. *v.* Conway, Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849.

37. *Alabama.*— Bloodgood *v.* Cammack, 5 Stew. & P. (Ala.) 276.

Delaware.— Maxwell *v.* Devalinger, 2 Pennew. (Del.) 504, 47 Atl. 381.

Georgia.— Cutts *v.* Hardee, 38 Ga. 350; Carey *v.* Giles, 9 Ga. 253.

Indiana.— Heagy *v.* State, 85 Ind. 260; State *v.* Bennett, 24 Ind. 383.

Iowa.— Watts *v.* Everett, 47 Iowa 269.

Kentucky.—Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. (Ky.) 282.

New York.— Conkey *v.* Hart, 14 N. Y. 22; James *v.* Stull, 9 Barb. (N. Y.) 482.

Pennsylvania.— Williams' Appeal, 72 Pa. St. 214; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

Utah.— Kirkman *v.* Bird, 22 Utah 100, 61 Pac. 338, 83 Am. St. Rep. 774, 58 L. R. A. 669.

United States.— Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900; Gordon *v.* South Fork Canal Co., 1 McAll. (U. S.) 513, 11 Fed. Cas. No. 5,621 [*reversed* in 6 Wall. (U. S.) 561, 18 L. ed. 894].

See 10 Cent. Dig. tit. "Constitutional Law," § 474.

It is sometimes said that the law of the remedy is no part of the contract. Templeton *v.* Horne, 82 Ill. 491; Wood *v.* Child, 20 Ill. 209; Ray *v.* Cannon, 2 Mart. N. S. (La.) 26. And see, generally, CONTRACTS.

38. Paschal *v.* Perez, 7 Tex. 348.

39. *Alabama.*— Adams *v.* Creen, 100 Ala. 218, 14 So. 54; Limestone County Com'rs Ct. *v.* Rather, 48 Ala. 433. And see Martin *v.* Hewitt, 44 Ala. 418.

Arkansas.— McCreary *v.* State, 27 Ark. 425; Woodruff *v.* Scruggs, 27 Ark. 26, 11 Am. Rep. 777.

California.— Smith *v.* Morse, 2 Cal. 524.

Kansas.— Watkins *v.* Glenn, 55 Kan. 417, 40 Pac. 316.

Kentucky.— Lapsley *v.* Brashears, 4 Litt. (Ky.) 47.

Mississippi.— Commercial Bank *v.* Chambers, 8 Sm. & M. (Miss.) 9; Nevitt *v.* Port Gibson Bank, 6 Sm. & M. (Miss.) 513.

South Carolina.— Cochran *v.* Darcy, 5 S. C. 125.

Tennessee.— Webster *v.* Rose, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583.

Texas.— McLane *v.* Paschal, 62 Tex. 102; Helm *v.* Pridgen, 1 Tex. App. Civ. Cas. § 643.

Virginia.— Roberts *v.* Cocke, 28 Gratt. (Va.) 207.

United States.— Walker *v.* Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Burton *v.* Koshkonong, 4 Fed. 373; Gordon *v.* South Fork Canal Co., 1 McAll. (U. S.) 513, 10 Fed. Cas. No. 5,621 [*reversed* in 6 Wall. (U. S.) 561, 18 L. ed. 894]; Martin *v.* Somerville Water-Power Co., 3 Wall. Jr. (U. S.) 206, 16 Fed. Cas. No. 9,165, 5 Am. L. Reg. 400, 27 How. Pr. (N. Y.) 161, 37 Hunt. Mer. Mag. 64, 13 Leg. Int. (Pa.) 332.

See 10 Cent. Dig. tit. "Constitutional Law," § 474.

40. *Arkansas.*— Riggs *v.* Martin, 5 Ark. 506, 41 Am. Dec. 103.

Louisiana.— State *v.* New Orleans, 34 La. Ann. 1149; Robert *v.* Coco, 25 La. Ann. 199.

Mississippi.— Lessley *v.* Phipps, 49 Miss. 790.

2. DEPRIVATION OF REMEDIES. It follows *a fortiori* from what has been said that in general the legislature cannot extinguish the remedy altogether.[41] Thus for instance statutes providing that persons aiding the Rebellion should be barred from the collection of their debts are held to impair the obligation of contracts.[42]

3. CUMULATIVE REMEDIES. The creation of an additional remedy to enforce existing contracts does not impair the obligation of contracts, and a statute providing for such an additional remedy is almost uniformly held constitutional.[43]

New Jersey.— Baldwin *v.* Newark, 38 N. J. L. 158.

New York.— People *v.* Carpenter, 46 Barb. (N. Y.) 619; Neass *v.* Mercer, 15 Barb. (N. Y.) 318.

Pennsylvania.— Thompson *v.* Com., 81 Pa. St. 314.

Wisconsin.— Von Baumbach *v.* Bade, 9 Wis. 559, 76 Am. Dec. 283.

United States.— Western Nat. Bank *v.* Reckless, 96 Fed. 70. In Webster *v.* Bowers, 104 Fed. 627, it was held that Kan. Laws (1898), c. 10, which provide for the enforcement of stock-holders' liability by a receiver for the benefit of all the creditors alike does not, as to prior contracts, supersede the provisions of the earlier law, which gave a creditor a right to enforce the liability of any particular stock-holder for his own benefit.

See 10 Cent. Dig. tit. "Constitutional Law," § 474.

Statutes which, abolishing one remedy, yet leave another sufficiently substantial have been held constitutional. Paschall *v.* Whitsett, 11 Ala. 472; Watts *v.* Everett, 47 Iowa 269; Stocking *v.* Hunt, 3 Den. (N. Y.) 274.

41. *California.*— Scarborough *v.* Dugan, 10 Cal. 305.

Illinois.— Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Kentucky.— Commonwealth Bank *v.* Patton, 4 J. J. Marsh. (Ky.) 190.

New Jersey.— Scaine *v.* Belleville Tp., 39 N. J. L. 526.

Wisconsin.— The legislature cannot declare that certain facts shall be a defense to actions on previously existing contracts. Cornell *v.* Hichens, 11 Wis. 353; Johnson *v.* Bond, Hempst. (U. S.) 533, 13 Fed. Cas. No. 7,374.

See 10 Cent. Dig. tit. "Constitutional Law," § 475.

Remedy on contract against sound morals. —A remedy on a contract which is against sound morals, natural justice, and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot, for any purpose, survive its repeal. Buckner *v.* Street, 1 Dill. (U. S.) 248, 4 Fed. Cas. No. 2,098, 13 Int. Rev. Rec. 114, 7 Nat. Bankr. Reg. 255; Osborn *v.* Nicholson, 1 Dill. (U. S.) 219, 18 Fed. Cas. No. 10,595, 6 Am. L. Rev. 572, 13 Int. Rev. Rec. 106. And see Sydnor *v.* Palmer, 32 Wis. 406. In French *v.* Tumlin, 9 Fed. Cas. No. 5,104, 10 Am. L. Reg. N. S. 641, 6 Am. L. Rev. 367, 14 Int. Rev. Rec. 140, it was held that a provision of the Georgia constitution that the courts shall have no jurisdiction to enforce a debt, the consideration of which was a slave or slaves, or the hire thereof, was void as imposing the obligation of contracts so far as it related to contracts made before the emancipation proclamation.

Statutes forbidding the maintenance of actions for liquors.— The general language of the act of 1851, "for the suppression of drinking houses and tippling shops," must be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors, or their value, as were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act. If it forbade the maintenance of any action for liquors or their value, the act would be unconstitutional. Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639. An act providing that no action shall be maintained in any court in the state for liquors sold in any other state with intent to enable any person to violate the act is not unconstitutional, as impairing the obligation of a contract, although the sale may have been valid under the laws of such other state. Reynolds *v.* Geary, 26 Conn. 179; Davis *v.* Bronson, 6 Iowa 410; Barrett *v.* Delano, (Me. 1888) 14 Atl. 288.

Subrogation.— It has been held in Maine that a statute limiting the liability of railroad corporations for fire communicated from a locomotive, to the excess of the injury of the property-owner over the net amount of insurance recovered, and which provides that if the insurance is not so recovered the policy shall be assigned to the railroad corporation which may sue thereon does not impair the obligation of a contract of insurance previously made because the liability of the railroad corporation was theretofore a statutory liability and could therefore be limited by statute and a contract between others could not keep it alive. The rights which a property-owner whose property was damaged by fire had against the railroad were not contractual rights, and could therefore be varied by statute, and the insurance company could not stand in a better position than such owner. Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

42. Vernon *v.* Henson, 24 Ark. 242; Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

43. *Indiana.*— Maynes *v.* Moore, 16 Ind. 116.

Louisiana.— State *v.* New Orleans, etc., R. Co., 42 La. Ann. 550, 7 So. 606.

New York.— Litchfield *v.* Vernon, 41 N. Y. 123.

4. Remedies to Enforce Particular Contracts — a. Bonds. The obligors on a bond have no vested right in the state of law existing at the date of the bond. A new rule of law affecting the remedy on such bonds will apply to bonds existing at the date of its passage.[44]

b. Leases. Statutes giving a more efficient or speedy remedy for the enforcement of leases are not unconstitutional;[45] nor are legislative enactments restricting the remedy in existence at the time the lease was made, provided a sufficient remedy is left to the parties.[46]

c. Liens and Mortgages — (i) *In General.* The legislature may by statute modify the existing law as to mechanics' liens and the manner of their enforcement.[47] And minor details of the law relating to the remedy of mortgagees by foreclosure may be changed,[48] as for instance the length of time required by law for advertising mortgagees' sales;[49] but no substantial rights of the mortgagee to

North Carolina.— Brown *v.* Brittain, 84 N. C. 552.

Tennessee.— Hope *v.* Johnson, 2 Yerg. (Tenn.) 123.

Virginia.— Winn *v.* Bowles, 6 Munf. (Va.) 23.

Wisconsin.— Paine *v.* Woodworth, 15 Wis. 298.

United States.— New Orleans, etc., R. Co. *v.* Louisiana, 157 U. S. 219, 15 S. Ct. 581, 39 L. ed. 679. An act of a state legislature which gives a remedy on a contract which was prohibited at the time it was made is constitutional. U. S. *v.* Samperyac, Hempst. (U. S.) 118, 27 Fed. Cas. No. 16,216*a*; Milne *v.* Huber, 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617.

See 10 Cent. Dig. tit. "Constitutional Law," § 476.

Authorizing attachment on claim not due. — An act authorizing an attachment on a claim not due does not contravene the provision of the constitution that the legislature shall pass no law impairing the obligation of contracts. Mosher *v.* Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384.

The Maryland statute which authorized the commissioners of the city of Washington to resell lots of which the purchase-money was not paid within a certain time after it ought to have been was held not to impair a contract previously made by the commissioners for the sale of those lots, but merely to give a new remedy. Stoddart *v.* Smith, 5 Binn. (Pa.) 355.

44. Winslow *v.* People, 117 Ill. 152, 7 N. E. 135.

45. Woods *v.* Soucy, 166 Ill. 407, 47 N. E. 67.

An act furnishing a more speedy remedy to punish the wrong of a forcible detention, or to enforce the contract of the tenant by causing him to surrender, is not unconstitutional as impairing the obligation of a contract, although the contract of tenancy was made before the passage of the act. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123, 128.

Remedies for condition broken.— The statute of 1805, enacting that all the provisions of the statute of 1787 relative to the remedies of a landlord for condition broken by his lessee shall be construed to extend as well to grants or leases in fee reserving rents as to leases for life and years, any law, usage, or custom to the contrary notwithstanding, does not impair the binding force of grants and conveyances to which it is extended, since it enlarges the remedy for the enforcement of the grant. Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104, 154 note.

46. Conkey *v.* Hart, 14 N. Y. 22; Van Rensselaer *v.* Snyder, 13 N. Y. 299; Guild *v.* Rogers, 8 Barb. (N. Y.) 502; Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508.

N. Y. Stat. (1846), c. 274, abolishing distress for rent, is effectual to take away the right to resort to the legal process of distress, under a lease providing that the lessor might distrain, sue, or resort to any other legal remedy. Conkey *v.* Hart, 14 N. Y. 22; Van Rensselaer *v.* Snyder, 13 N. Y. 299.

47. *Alabama.*— Osborn *v.* D. Johnson Wall-Paper Co., 99 Ala. 309, 13 So. 776.

Colorado.— Woodbury *v.* Grimes, 1 Colo. 100.

Illinois.— Templeton *v.* Horne, 82 Ill. 491.

Pennsylvania.— Evans *v.* Montgomery, 4 Watts & S. (Pa.) 218; Mehl *v.* Carey, 21 Pa. Co. Ct. 275.

United States.— Livingston *v.* Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751.

See 10 Cent. Dig. tit. "Constitutional Law," § 480.

48. Chapin *v.* Billings, 91 Ill. 539.

N. J. Acts (1880), p. 255, providing that in foreclosure proceedings thereafter commenced no personal decree for deficiency shall be taken, applies to mortgages given before the date of its passage, and is not, so far as cases in which there is a remedy at law are concerned, unconstitutional, as depriving a party of any remedy for enforcing a contract which existed when the contract was made, because a more efficacious remedy of the same sort at law remains; and the legislature may, without infringing the prohibition of the constitution, take away one of two or more equally efficacious remedies of the same sort. Newark Sav. Inst. *v.* Forman, 33 N. J. Eq. 436.

49. Thus the period of advertising mortgagees' sales may be reduced. The law in

the enforcement of his security can be taken away,[50] as by laws which delay the foreclosure proceedings on which the mortgagee relied in taking the mortgage,[51] subject the mortgagee's estate to new conditions of redemption,[52] or deprive the mortgagee of the right to take possession of his security at the agreed time.[53]

(II) *Requiring Enforcement of Security Before Action on Debt Secured.* A statute requiring the holder of a mortgage to foreclose the mortgage before suing on the note secured has been held unconstitutional.[54]

5. Rights of Action and Defenses. It is competent for a state legislature to give a right of action on contracts which were prohibited at the time they were made; and such a statute does not impair the obligation of contracts, but merely gives a right of action.[55] Except, however, in certain instances it is not

force at the time of the execution of a mortgage to the school fund required the county auditor to give sixty days' notice of sales for the non-payment of the principal or interest of the loans. By subsequent legislation, three weeks' notice was made sufficient. It was held that the law reducing the time of notice related only to the remedy and did not impair the obligation of the contract. Webb *v.* Moore, 25 Ind. 4. N. Y. Acts (1842), c. 277, reducing from twenty-four to twelve weeks the duration of advertising required to foreclose a mortgage, and applying to all mortgages, whether executed before or after its passage, is not unconstitutional, as impairing the obligation of contracts. James *v.* Andrews, Seld. Notes (N. Y.) 9. But see International Bldg., etc., Assoc. *v.* Hardy, 86 Tex. 610, 26 S. W. 497, 40 Am. St. Rep. 870, 24 L. R. A. 284, holding that the act of March 21, 1889, prescribing the time and place of sale of all land thereafter to be sold under power conferred by trust deed, and requiring notice to be given "as now required in judicial sales," and requiring the sales to be made at public vendue on specified dates, is unconstitutional, in so far as it applies to trust deeds executed before its enactment, and in which the manner of sale prescribed differs from that prescribed by the act. In Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090, it was held that a statute requiring sales under deeds of trust to be made on a certain day of the month was unconstitutional as applied to a deed executed before its passage, and providing for a sale "at any time" after default.

50. O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458; Oatman *v.* Bond, 15 Wis. 20.

51. Me. Laws (1887), c. 129, provide that where a debtor has mortgaged land to secure the performance of a collateral agreement other than to pay money, and foreclosure proceedings have been commenced, and the time of redemption has not expired, a creditor having attached the mortgagor's interest may file a bill to ascertain if the conditions of the mortgage have been broken, and, if such be the fact, a decree may be entered enabling the creditor, by fulfilling such requirements as the court may impose, to hold the property for the satisfaction of his claim, and that pending such proceedings the right of redemption shall not expire by any attempted foreclosure of the mortgage. The laws in force theretofore defined the mode of foreclosure of mortgages, and the time within which the mortgagor may redeem. It was held that the law was void as to mortgages executed before it was enacted, as impairing the obligation of contracts. Phinney *v.* Phinney, 81 Me. 450, 17 Atl. 405, 10 Am. St. Rep. 266, 4 L. R. A. 348.

52. N. J. Pub. Laws (1881), p. 184, providing that, where a debt is secured by bond and mortgage, the first proceeding to collect it shall be by foreclosure of the mortgage, and that the foreclosure and sale shall be opened, and the property subject to redemption on payment of the decree, if a judgment shall, after foreclosure, be recovered on the bond for the balance of the debt, is unconstitutional, in that it subjects a mortgage to new conditions of redemption which did not exist when it was executed. Coddington *v.* Bispham, 36 N. J. Eq. 574.

53. Blackwood *v.* Van Vleet, 11 Mich. 252; Mundy *v.* Monroe, 1 Mich. 68; Boice *v.* Boice, 27 Minn. 371, 7 N. W. 687.

Contracts entered into after the act is passed are not impaired.— The Ohio act of May 4, 1885, making it a misdemeanor for one who has sold and delivered personal property to be paid for on instalments to retake the same without tendering or refunding to the purchaser the money so paid, after deducting therefrom a reasonable compensation for the use of such property, is not unconstitutional, as impairing the obligation of contracts made after its passage. Weil *v.* State, 3 Ohio Cir. Ct. 657 [*affirmed* in 46 Ohio St. 450, 21 N. E. 643].

54. Wilkinson *v.* Rutherford, 49 N. J. L. 241, 8 Atl. 507; Baldwin *v.* Flagg, 43 N. J. L. 495. *Contra*, Swift *v.* Fletcher, 6 Minn. 550.

55. Police Jury *v.* McDonogh, 7 Mart. (La.) 8; Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446; Milne *v.* Huber, 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617.

Mass. Stat. (1817), c. 186, § 5, which authorizes towns that have incurred expense for the support of paupers to maintain an action against them for reimbursement, is valid so far only as it applies to expenses thus incurred after the statute created the obligation. Medford *v.* Learned, 16 Mass. 215.

competent for the state legislature to give a defense to actions on previously existing contracts.[56]

6. Insolvency Laws[57] — a. In General. A state bankrupt or insolvent law which discharges a debt contracted subsequently to the passage of the law is constitutional and effective as to citizens of that state.[58] Such a law, however, purporting to discharge a debtor from all liability for any debt contracted before such law was passed on his surrendering his property in the manner it prescribes is void, as it impairs the obligation of the contract;[59] and this latter proposition is true, even though there was a similar law in force at the time the contract was entered into, provided the new law renders it substantially easier for the debtor to obtain his discharge.[60] If, however, the new law makes it harder for the debtor to get a discharge it is not unconstitutional and is applicable to contracts entered into before its passage.[61] And if an insolvency law is altogether repealed, the rights of an insolvent are not impaired within the meaning of the constitu-

56. Cornell *v.* Hichens, 11 Wis. 353.

A defense provided by law, such as usury or illegality, which would be available to avoid a contract may be abrogated by statute without impairing the obligations of contracts. Sparks *v.* Clapper, 30 Ind. 204 (usury); Wood *v.* Kennedy, 19 Ind. 68 (usury); Hill *v.* Smith, Morr. (Iowa) 70 (illegality of consideration).

A statute allowing the defense of want of consideration to be made to a sealed instrument executed in another state, where the seal was conclusive, does not impair the obligation of the contract, but pertains to the remedy only. Williams *v.* Haines, 27 Iowa 251, 1 Am. Rep. 268.

A statute providing that a surety in a suit brought against him may set up any defense of which the principal may have availed himself, although construed as retrospective, is not unconstitutional, as impairing the obligation of contracts, as it relates entirely to the remedy. Flagg *v.* Locke, 74 Vt. 320, 52 Atl. 424.

As to statute of limitations see *infra,* IX, E, 14, d.

But not every law that abrogates defenses is constitutional.— The Mo. Act of Jan. 26, 1864, § 22, amending the charter of a corporation, and making certificates of indebtedness issued by it, and executed in a certain manner, conclusive evidence of facts therein stated, is unconstitutional so far as it is retrospective in operation, since it deprives the company of any defense it might have in an action on the contract, when the contract was entered into. Hope Mut. Ins. Co. *v.* Flynn, 38 Mo. 483, 90 Am. Dec. 438.

57. As to insolvent laws generally see Insolvency.

58. *Alabama.*— Wilson *v.* Matthews, 32 Ala. 332.

Iowa.— Hawley *v.* Hunt, 27 Iowa 303, 1 Am. Rep. 273.

Kentucky.— Blair *v.* Williams, 4 Litt. (Ky.) 34.

Maryland.—Frey *v.* Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581.

Massachusetts.— Betts *v.* Bagley, 12 Pick. (Mass.) 572; Walsh *v.* Farand, 13 Mass. 19; Blanchard *v.* Russell, 13 Mass. 1, 7 Am. Dec. 106.

New York.— Donnelly *v.* Corbett, 7 N. Y. 500; Sebring *v.* Mersereau, 9 Cow. (N. Y.) 344; Jacques *v.* Marquand, 6 Cow. (N. Y.) 497; Mather *v.* Bush, 16 Johns. (N. Y.) 233, 4 City Hall Rec. (N. Y.) 97, 8 Am. Dec. 313.

Ohio.— Smith *v.* Parsons, 1 Ohio 236, 13 Am. Dec. 608.

Pennsylvania.— Eckstein *v.* Shoemaker, 3 Whart. (Pa.) 15.

United States.— Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Shaw *v.* Robbins, 12 Wheat. (U. S.) 369, 6 L. ed. 660; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Sloane *v.* Chiniquy, 22 Fed. 213.

See 10 Cent. Dig. tit. "Constitutional Law," § 484 *et seq.*

59. *Connecticut.*— Boardman *v.* De Forest, 5 Conn. 1; Medbury *v.* Hopkins, 3 Conn. 472; Hammett *v.* Anderson, 3 Conn. 304; Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.

Louisiana.— Ray *v.* Cannon, 2 Mart. N. S. (La.) 26.

Maine.— Schwartz *v.* Drinkwater, 70 Me. 409.

Massachusetts.— Kimberly *v.* Ely, 6 Pick. (Mass.) 440.

New Jersey.— Olden *v.* Hallet, 5 N. J. L. 466; Vanuxem *v.* Hazlehursts, 4 N. J. L. 192, 7 Am. Dec. 582.

New York.— Roosevelt *v.* Cebra, 17 Johns. (N. Y.) 108; Hicks *v.* Hotchkiss, 7 Johns. Ch. (N. Y.) 297, 11 Am. Dec. 472.

Texas.— Shelton *v.* Wade, 14 Tex. 52; Beers *v.* Rhea, 5 Tex. 349.

Contra, Hemstead *v.* Reed, 6 Conn. 480; Farmers', etc., Bank *v.* Smith, 3 Serg. & R. (Pa.) 63; Adams *v.* Storey, 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66, 16 Hall L. J. 474.

See 10 Cent. Dig. tit. "Constitutional Law," § 484 *et seq.*

60. *In re* Wendell, 19 Johns. (N. Y.) 153.

61. Porter *v.* Imus, 79 Cal. 183, 21 Pac. 729; Pomeroy *v.* Gregory, 66 Cal. 572, 574, 6 Pac. 492, 493; Hundley *v.* Chaney, 65 Cal. 363, 4 Pac. 238.

tional inhibition.[62] A statute suspending the remedy of creditors for a long time is unconstitutional,[63] but provision for a reasonable delay is held not to impair the obligation of contracts.[64]

b. Discharge as Against Creditors Accepting[65] a Dividend. A statute barring the claims of creditors who receive a dividend from the property of the insolvent in accordance with the terms of the act is not unconstitutional.[66]

c. Regulating Payment of Secured Claims. A state may by statute regulate the payment of secured claims which are in existence at the time the statute is passed.[67]

d. Providing For Appointment of Receiver.[68] A receiver of a corporation may be appointed if necessary without impairing the obligation of contracts made by the debtors of the corporation.[69]

62. Eckstein *v.* Shoemaker, 3 Whart. (Pa.) 15.

63. Northern Bank *v.* Squires, 8 La. Ann. 318, 58 Am. Dec. 682; U. S. Bank *v.* Frederickson, 2 Fed. Cas. No. 945.

64. Rasch *v.* His Creditors, 3 Rob. (La.) 407; Chiapella *v.* Lanusse, 10 Mart. (La.) 448; Tennessee Bank *v.* Horn, 17 How. (U. S.) 157, 15 L. ed. 70.

The provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States. The law, by giving this priority, does not impair the obligation of contracts. Mather *v.* Nesbit, 4 McCrary (U. S.) 505, 13 Fed. 872.

Statute limiting time afforded for proof.— It is competent for the legislature to pass a law requiring a creditor of an insolvent estate to prove his claim before the commissioners within the time and according to the method prescribed by the act, or be forever barred, unless he shall find property of the intestate not accounted for by the administrator before distribution; the act not taking away all remedy from the creditor, but confining him to a specific one. Lightfoot *v.* Cole, 1 Wis. 26.

65. **Requiring creditors to express dissent from proceedings.**— The legislature has the power to require a creditor of an embarrassed corporation or individual to indicate his dissent from measures deemed essential to the common welfare of all concerned, or to suffer the penalty of being held to an assent, as such requirement does not impair the obligation of the contract between the debtor and creditor. Union Canal Co. *v.* Gilfillin, 93 Pa. St. 95.

66. Alexander *v.* Gibson, 1 Nott & M. (S. C.) 480; Keating *v.* Vaughn, 61 Tex. 518; Downes *v.* Parshall, 3 Wyo. 425, 26 Pac. 994.

67. The insolvent act of 1853, section 19, provides that, if any creditor shall present a claim against any insolvent estate, who has a mortgage security or a lien on the property, the commissioners shall inquire into the cash value of the security, and report the same to the court, and that, unless such creditor shall elect to relinquish such security or lien, he shall be entitled to a dividend only upon the excess of such claim above the value of such security. The act of 1861 provided that the provisions of such section 19 should extend "to any and all securities by mortgage or otherwise, held by any creditor for any claim presented by him against any estate in settlement under the provisions of said act." It was held that the acts were not unconstitutional, as impairing a vested right of the creditor to a full dividend in the assigned estate. Mechanics', etc., Bank's Appeal, 31 Conn. 63. In Story *v.* Furman, 25 N. Y. 214, it was held that the state could regulate the manner of enforcement of stock-holders' liability to creditors of the corporation without impairing the obligation of the stock-holders' or creditors' contracts.

68. As to receivers generally see RECEIVERS.

69. Hall *v.* Carey, 5 Ga. 239. In Persons *v.* Gardiner, 26 Misc. (N. Y.) 663, 56 N. Y. Suppl. 822, it was held that a certain act of the legislature making bank stock-holders individually liable for the debts of the bank to the extent of the par value of the stock merely gave the creditors of an insolvent bank the right to one suit against all stock-holders by one creditor for the benefit of himself and all the other creditors. A subsequent law amending the above act by providing that a suit against the stock-holders of an insolvent bank should be prosecuted only in the name of the receiver of such bank was not as against the stock-holders void, as impairing the obligation of existing contracts.

Receivership in case of mortgage.— On a bill brought by an ordinary creditor the appointing of a receiver of chattel property held by a mortgagee in possession, except in case of necessity to secure the rights of other parties, is to impair the obligations of the contract between the mortgagee and mortgagor, and is beyond the constitutional powers both of the court and of the legislature. Patten *v.* Accessory Transit Co., 4 Abb. Pr. (N. Y.) 235, 13 How. Pr. (N. Y.) 502.

e. Providing For Dissolution of Attachment[70] on Making Assignment For Creditors. Inasmuch as an attachment is merely a matter of remedy and not part of the contract between the parties, a law providing for the dissolution of attachments on making an assignment for creditors does not impair the obligation of contracts whether the contracts were made before[71] or after the act was passed.[72]

f. Acts Invalidating Transfers Made in Contemplation of Insolvency. It is a common provision of insolvency laws that conveyances made within a limited time before the commencement of the proceedings in insolvency, a preference being knowingly given and received, shall be void. Such a provision is not unconstitutional as to conveyances made after its passage, even though the conveyances are to non-residents of the state passing the law.[73]

g. Discharge as Against Non-Resident Creditor. Because of the constitutional provision a discharge under a state insolvent law does not bar the claims of non-residents.[74]

h. Preference of Creditors. There is a conflict of authority as to whether one class of existing debts may be given a preference over other existing debts by act of the state legislature.[75]

7. Lien Laws[76] — a. In General. A lien created by act of the parties, as for

70. Dissolution of attachment generally see ATTACHMENT, 4 Cyc. 769 *et seq.*

71. Bigelow *v.* Pritchard, 21 Pick. (Mass.) 169; Baldwin *v.* Buswell, 52 Vt. 57. And see Columbia Bank *v.* Overstreet, 10 Bush (Ky.) 148.

Attachment not dissolved.— An attachment of a non-resident debtor's property made prior to the going into effect of Me. Laws (1891), c. 109, subjecting non-residents having property in Maine to the provisions of the insolvent law, was not dissolved by proceedings in insolvency under that act, instituted within four months after the attachment. Chipman *v.* Peabody, 88 Me. 282, 34 Atl. 77; Peabody *v.* Stetson, 88 Me. 273, 34 Atl. 74. And see Eau Claire Nat. Bank *v.* Macaulay, 101 Wis. 304, 77 N. W. 176; Peninsular Lead, etc., Works *v.* Union Oil, etc., Co., 100 Wis. 488, 76 N. W. 359, 69 Am. St. Rep. 934, 42 L. R. A. 331.

72. Wendell *v.* Lebon, 30 Minn. 234, 15 N. W. 109; Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491; Sloane *v.* Chiniquy, 22 Fed. 213.

73. Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773 [*affirming* 69 Md. 320, 14 Atl. 468, 17 Atl. 1101]; Knower *v.* Haines, 24 Blatchf. (U. S.) 488, 31 Fed. 513.

74. Chipman *v.* Peabody, 88 Me. 282, 34 Atl. 77; Owens *v.* Bowie, 2 Md. 457; Whitney *v.* Whiting, 35 N. H. 457; McMillan *v.* McNeill, 4 Wheat. (U. S.) 209, 4 L. ed. 552.

Discharge as against non-resident creditors generally see INSOLVENCY.

75. That statutes providing for such preferences are constitutional and valid see Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342 (subsequent contracts); Cass County *v.* Jack, 49 Mo. 196; Harness *v.* Green, 20 Mo. 316; Luther *v.* Saylor, 8 Mo. App. 424; Ilgenfritz *v.* Ilgenfritz, 5 Watts (Pa.) 158; Deichman's Appeal, 2 Whart. (Pa.) 395, 30 Am. Dec. 271; Hoffa *v.* Person, 1 Pa. Super. Ct. 357; Umbenhauer *v.* Miller, 1 Woodw. (Pa.) 69; Mather *v.* Nesbit, 4 McCrary (U. S.) 505, 13 Fed. 872. See also U. S. *v.* Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304, where it was held that the provisions of the bankrupt law which gave the United States priority of payment out of the effects of the bankrupt was a valid exercise of the powers conferred on congress by the constitution of the United States.

Contra.— The provision of the act of 1853, in regard to payment of debts of insolvent estates, that "all other claims or demands against said estate shall be paid *pro rata*," does not impair the lien of an execution placed in the hands of the sheriff in the lifetime of defendant. Kimball *v.* Jenkins, 11 Fla. 111, 89 Am. Dec. 237. The legislature cannot, after the creation of a debt, interfere to disturb the relation between creditor and debtor, or the relative rank of creditors *inter sese*. Two creditors, who stood equal originally, having an equal right to be paid, must forever remain equal, notwithstanding any legislative act apparently sanctioning a different doctrine. Atchafalaya R., etc., Co. *v.* Bean, 3 Rob. (La.) 414. Where there are two classes of creditors with already existing debts, a legislative act could not, by transfer or appropriation of a debtor's property, give to one class a preference, to the exclusion of the other class, to such a degree as to give to one class an immediate and annual source of payment, and postpone to the other all payment for possibly a period of forty years. It is no more in the power of law-makers than of debtors to effect an unequal distribution of the debtor's estate by making an application or transfer thereof among creditors already existing. Sun Mut. Ins. Co. *v.* Board of Liquidation, 24 Fed. 4.

76. See, generally, LIENS; MECHANICS' LIENS.

instance a mortgage lien, cannot in general be abrogated or impaired by act of the legislature, for such an act would be within the inhibition of the constitution against the impairment of the obligation of contracts;[77] but a lien created by operation of law may be modified or abolished, for it is but a part of the remedy.[78]

b. Mechanics' and Laborers' Liens. Statutes giving to subcontractors or materialmen a lien on the property are valid as to building contracts entered into after such statutes have been enacted.[79] And where there is a contract between a landowner and a builder for the erection of a building on the owner's land, a mechanic's lien law subsequently enacted giving to subcontractors and materialmen who have sold on credit to the builder a lien on the property is generally held to be constitutional.[80] These decisions sometimes go on the theory that a lien law is

77. Sabatier *v.* His Creditors, 6 Mart. N. S. (La.) 585; Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Walker *v.* Mississippi Valley, etc., R. Co., 29 Fed. Cas. No. 17,079, 2 Centr. L. J. 481.

An act undertaking to restore an attachment already dissolved, and where the property had been conveyed to a *bona fide* purchaser, is unconstitutional and void. Ridlon *v.* Cressey, 65 Me. 128.

Assessment for public improvement.— A law which provides that the lien on land of an assessment for a public improvement shall take precedence of a mortgage thereon, executed before its passage, is not unconstitutional as depriving the mortgagee of a vested right. Murphy *v.* Beard, 138 Ind. 560, 38 N. E. 33.

Mortgages made subsequent to act are not impaired.— A law giving a laborer a lien on crops prior to all other liens does not "impair the obligation of the contract" of a chattel mortgage taken after the law went into effect. Sitton *v.* Dubois, 14 Wash. 624, 45 Pac. 303.

When, by the terms of a contract and the law which entered into and formed a part of it, no lien for a solicitor's fee was allowed, the allowance of such a lien authorized by a law subsequently enacted is illegal. Kendall *v.* Fader, 99 Ill. App. 104 [*affirmed* in 199 Ill. 294, 65 N. E. 318].

78. *Colorado.*— Woodbury *v.* Grimes, 1 Colo. 100.

Illinois.— Templeton *v.* Horne, 82 Ill. 491.

Maine.— Frost *v.* Ilsley, 54 Me. 345; Bangor *v.* Goding, 35 Me. 73, 56 Am. Dec. 688.

Michigan.— Hanes *v.* Wadey, 73 Mich. 178, 41 N. W. 222, 2 L. R. A. 498.

Minnesota.— Bailey *v.* Mason, 4 Minn. 546.

New York.— Watson *v.* New York Cent. R. Co., 47 N. Y. 157.

North Dakota.— Craig *v.* Herzman, 9 N. D. 140, 81 N. W. 288.

Pennsylvania.— Evans *v.* Montgomery, 4 Watts & S. (Pa.) 218.

Virginia.— Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306.

Contra, Ryan *v.* Wessels, 15 Iowa, 145, holding that while the legislature may suspend the enforcement of a lien created by a judgment it cannot discharge such lien absolutely.

See 10 Cent. Dig. tit. "Constitutional Law," § 494.

79. *California.*— Kellogg *v.* Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588.

Indiana.—Barrett *v.* Milliken, 156 Ind. 510, 60 N. E. 310, 83 Am. St. Rep. 220.

Kentucky.— Montgomery *v.* Allen, 107 Ky. 298, 21 Ky. L. Rep. 1001, 53 S. W. 813.

Michigan.—McHugh *v.* Gault, 86 Mich. 135, 48 N. W. 869.

Montana.— Merrigan *v.* English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

North Dakota.— Garr *v.* Clements, 4 N. D. 559, 62 N. W. 640.

Ohio.— Scioto Valley R. Co. *v.* Cronin, 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315.

Rhode Island.— Gurney *v.* Walsham, 16 R. I. 698, 19 Atl. 323.

Washington.— Spokane Mfg., etc., Co. *v.* McChesney, 1 Wash. 609, 21 Pac. 198.

See 10 Cent. Dig. tit. "Constitutional Law," § 495.

80. *California.*— Davies-Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860.

Nebraska.—Colpetzer *v.* Trinity Church, 24 Nebr. 113, 37 N. W. 931.

New York.— Hauptman *v.* Catlin, 3 E. D. Smith (N. Y.) 666; Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739; Sullivan *v.* Brewster, 1 E. D. Smith (N. Y.) 681, 8 How. Pr. (N. Y.) 207; Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625.

Ohio.— Gimbert *v.* Heinsath, 11 Ohio Cir. Ct. 339, 5 Ohio Cir. Dec. 176.

Pennsylvania.— Best *v.* Baumgardner, 122 Pa. St. 17, 15 Atl. 691, 1 L. R. A. 356.

South Dakota.— Albright *v.* Smith, 3 S. D. 631, 54 N. W. 816, 2 S. D. 577, 51 N. W. 590.

United States.— Gordon *v.* South Fork Canal Co., 1 McAll. (U. S.) 513, 10 Fed. Cas. No. 5,621.

See 10 Cent. Dig. tit. "Constitutional Law," § 495.

But see the following cases:

Colorado.—Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259.

Illinois.— Andrews, etc., Co. *v.* Atwood, 167 Ill. 249, 47 N. E. 387. In Kinney *v.* Sherman, 28 Ill. 520, it was held that the legislature could not give a lien for the work completed before the passage of the act giving the lien.

Minnesota.— O'Neil *v.* St. Olaf's School, 26 Minn. 329, 4 N. W. 47.

in effect only an assignment to the lienor of the amount due the principal contractor,[81] and the cases are for the most part agreed that the landowner cannot on account of such liens be obliged to pay more than the original contract price.[82]

8. Appraisal Laws. Appraisal laws, or laws providing that property of the debtor shall not be sold on execution or by foreclosure for less than a certain value to be ascertained by appraisal are unconstitutional when applied to previously existing contracts. This is true whether they relate to sales under mortgages[83] or execution sales,[84] as a party to a contract has a constitutional right to execution without appraisal if no appraisal was required by the statutes in force at the time of the making of the contract. Where, however, an appraisal law is merely changed[85] or suspended[86] there is no impairment of contracts.

9. Scaling Laws. Where a contract was made during the Civil war for the payment of Confederate currency, it was held after the war was over that the true rule was to allow the recovery in lawful money of the United States of a sum equal in value to the Confederate currency contracted for at the time the contract

Pennsylvania.—Schell *v.* Michener, 2 Wkly. Notes Cas. (Pa.) 379.

Wisconsin.— Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385.

See 10 Cent. Dig. tit. "Constitutional Law," § 495.

Effect of subsequently enacted lien laws on prior mortgages.— An act giving a lien to laborers in the employ of corporations does not affect the liens of recorded encumbrances antedating the act. Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105. A statute providing that a lien for supplies furnished mining and other companies should take precedence over prior mortgages was held to be unconstitutional in Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 29 C. C. A. 1. So also in Yeatman *v.* Foster County, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797. An act providing that a prior mortgage on land should not extend to buildings erected thereon until mechanics' liens on such buildings were discharged was held to be unconstitutional in Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777. *Contra,* Wimberly *v.* Mayberry, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305. An alteration and enlargement of the remedy for enforcing a mechanic's lien after a sale under foreclosure of a mortgage on the premises subject to the lien, by providing, in addition to the right under the former statute to sell the building on the lien claim and remove it from the land, that the court, for the best interests of all the parties, might require the land and improvements to be sold together and the proceeds distributed so as to secure the prior mortgage or other lien priority in the land, and to the mechanic's lien priority upon the building, does not impair the obligation of the contract with the mortgagee or the purchaser on foreclosure. Red River Valley Nat. Bank *v.* Craig, 181 U. S. 548, 21 S. Ct. 703, 45 L. ed. 994 [*affirming* 9 N. D. 140, 81 N. W. 288]. And see Sutton *v.* Consolidated Apex Min. Co., 15 S. D. 410, 89 N. W. 1020, 14 S. D. 33, 84 N. W. 211.

81. Hauptman *v.* Catlin, 3 E. D. Smith (N. Y.) 666; Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739; Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625.

82. Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259; Doughty *v.* Devlin, 1 E. D. Smith (N. Y.) 625; Albright *v.* Smith, 3 S. D. 631, 54 N. W. 816; Hall *v.* Banks, 79 Wis. 229, 48 N. W. 385. But in Colpetzer *v.* Trinity Church, 24 Nebr. 113, 37 N. W. 931, it was held that the mechanic's lien for materials furnished after the statute was passed was good against the landowner regardless of the state of accounts between him and the building contractor.

83. Robards *v.* Brown, 40 Ark. 423 [*overruling* Turner *v.* Watkins, 31 Ark. 429]; Lancaster Sav. Institution *v.* Reigart, 2 Pa. L. J. Rep. 238, 3 Pa. L. J. 515; Gantly *v.* Ewing, 3 How. (U. S.) 707, 11 L. ed. 794.

84. *Indiana.*— Rawley *v.* Hooker, 21 Ind. 144.

Iowa.— Olmstead *v.* Kellogg, 47 Iowa 460; Rosier *v.* Hale, 10 Iowa 470, 77 Am. Dec. 127.

Michigan.—Williard *v.* Longstreet, 2 Dougl. (Mich.) 172.

Missouri.— Baily *v.* Gentry, 1 Mo. 164, 13 Am. Dec. 484.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 9 N. W. 555.

United States.— McCracken *v.* Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Moore *v.* Fowler, Hempst. (U. S.) 536, 17 Fed. Cas. No. 9,761.

See 10 Cent. Dig. tit. "Constitutional Law," § 496.

But see the following cases holding that a statute suspending a sale on execution for less than a certain proportion of the appraised value is not unconstitutional in respect to antecedent contracts. Chadwick *v.* Moore, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267; U. S. *v.* Conway, Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849.

85. Jones *v.* Davis, 6 Nebr. 33.

86. Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79; Baker *v.* Roberts, 14 Ind. 552; Mahon *v.* Traber, 14 Ind. 525; Smith *v.* Doggett, 14 Ind. 442; Phelps-Bigelow Windmill Co. *v.* North American Trust Co., 62 Kan.

was made,[87] and statutes embodying this rule were held constitutional;[88] but statutes providing that the recovery should be the fair value of the contract as estimated by the jury from the consideration given were held to be unconstitutional because they ignored the agreement of the parties and substituted something else in its place.[89]

10. Exemption Laws[90] — a. In General. Laws materially extending exemptions from attachment or execution are, so far as they relate to previously contracted debts, unconstitutional, as impairing the obligation of contracts by destroying the remedy in material respects.[91]

b. Homesteads.[92] A constitutional or statutory provision establishing a home

529, 64 Pac. 63; Weber *v.* Gorsuch, 24 La. Ann. 615.

87. Effinger *v.* Kenney, 115 U. S. 566, 6 S. Ct. 179, 29 L. ed. 495.

88. Cutts *v.* Hardee, 38 Ga. 350; Taylor *v.* Flint, 35 Ga. 124; Holt *v.* Patterson, 74 N. C. 650; King *v.* Wilmington, etc., R. Co., 66 N. C. 277; Harmon *v.* Wallace, 2 S. C. 208; Neely *v.* McFadden, 2 S. C. 169; Pharis *v.* Dice, 21 Gratt. (Va.) 303. But see Leach *v.* Smith, 25 Ark. 246; Woodruff *v.* Tilly, 25 Ark. 309.

89. Effinger *v.* Kenney, 115 U. S. 566, 6 S. Ct. 179, 29 L. ed. 495. In an action upon a contract for wood sold during the war, at a price payable in Confederate currency, an instruction of the court to the jury that the plaintiff was entitled to recover the value of the wood without reference to the value of the currency stipulated was erroneous. Wilmington, etc., R. Co. *v.* King, 91 U. S. 3, 23 L. ed. 186. See, however, Herbert *v.* Easton, 43 Ala. 547; Fath *v.* Bliss, 43 Ala. 512; Kirkland *v.* Molton, 41 Ala. 548; Cutts *v.* Hardee, 38 Ga. 350; Taylor *v.* Flint, 35 Ga. 124; Slaughter *v.* Culpepper, 35 Ga. 25; King *v.* Wilmington, etc., R. Co., 66 N. C. 277.

90. As to exemptions generally see Exemptions.

91. *California.*—Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 515.

Georgia.— Forsyth *v.* Marbury, R. M. Charlt. (Ga.) 324.

Iowa.— Willard *v.* Sturm, 96 Iowa 555, 65 N. W. 847.

Louisiana.— New Orleans Canal, etc., Co. *v.* New Orleans, 30 La. Ann. 1371.

Mississippi.— Lessley *v.* Phipps, 49 Miss. 790. And see Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 9 N. W. 555.

New York.—Danks *v.* Quackenbush, 1 N. Y. 129 [*affirming* 1 Den. (N. Y.) 128].

Pennsylvania.— Penrose *v.* Erie Canal Co., 56 Pa. St. 46, 93 Am. Dec. 778; Neff's Appeal, 21 Pa. St. 243.

South Carolina.— State *v.* State Bank, 1 S. C. 63.

Tennessee.— Haunum *v.* McInturf, 6 Baxt. (Tenn.) 225.

Virginia.— *In re* Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

United States.— Edwards *v.* Kearzey, 96 U. S. 595, 24 L. ed. 793; Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

Materiality of exemption.—In Kirkman *v.* Bird, 22 Utah 100, 61 Pac. 338, 83 Am. St. Rep. 774, 58 L. R. A. 669, it was held that a statute so amending the former law as to garnishment that all earnings of heads of families by personal services within sixty days should be exempt instead of one half only as provided by the law in force at the time the contract was made and judgment rendered was constitutional.

Proceeds of life-insurance policies.— A law providing that the proceeds of a life-insurance policy payable to executors and administrators of a deceased person shall not be liable for his debts is unconstitutional with reference to antecedent policies and antecedent debts. Rice *v.* Smith, 72 Miss. 42, 16 So. 417; Skinner *v.* Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; *In re* Heilbron, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

Exemption laws formerly held constitutional.— *Alabama.*— Sneider *v.* Heidelberger, 45 Ala. 126.

Georgia.— Hardeman *v.* Downer, 39 Ga. 425.

Michigan.— Rockwell *v.* Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246.

Minnesota.— Grimes *v.* Bryne, 2 Minn. 89.

Mississippi.— Stephenson *v.* Osborne, 41 Miss. 119, 90 Am. Dec. 358.

New York.— Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103.

North Carolina.— Hill *v.* Kessler, 63 N. C. 437.

Construing particular statutory or constitutional provisions relating to exemptions see *In re* Mercer, 4 Harr. (Del.) 248; Lockhart *v.* Tinley, 15 Ga. 496. The N. C. Const. of 1868, granting a debtor an exemption of five hundred dollars in personal property, is not in that particular an impairment of the obligation of a preëxisting debt, for it did not increase the exemption, but merely provided it as a substitute for the exemption law of 1867, which permitted the debtor to select the specified articles, not exceeding five hundred dollars in value. State *v.* Rhyne, 80 N. C. 183; Earle *v.* Hardie, 80 N. C. 177.

A law enlarging the remedy is invalid.— Reardon *v.* Searcy, 2 Bibb (Ky.) 202.

92. As to homesteads generally see Homesteads.

stead exemption is within the federal prohibition of laws impairing the obligation of contracts in so far as it relates to debts contracted before its adoption.[93] The same is true of a provision enlarging a homestead exemption;[94] but a law taking away such an exemption does not in general impair the obligation of any contract, and is therefore constitutional.[95]

c. Rents and Profits During Redemption Period. The rights for which a mortgagee has contracted cannot constitutionally be taken from him. Therefore if the law at the time the mortgage was made allowed the mortgagee to have the rents and profits during the redemption period in case the mortgagor should exercise his right to redeem, a statute providing that the mortgagor might during such period occupy the premises rent free would be void.[96] So also a statute taking from the purchaser at a subsequent foreclosure sale the right which at the time the mortgage was made he would have had to the rents and profits during the redemption period would be unconstitutional because reducing the mortgagee's security.[97] It has been held otherwise as to a statutory provision for rents and profits during the period of redemption from an execution sale.[98]

11. Redemption Laws. A statute extending the time for redemption of premises sold under mortgage, as applied to mortgages executed before its passage,

93. *Alabama.*— Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727.

Georgia.— Jones *v.* Brandon, 48 Ga. 593.

Iowa.— Foster *v.* Byrne, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22.

Kentucky.— Kibbey *v.* Jones, 7 Bush (Ky.) 243.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41.

Minnesota.— Dunn *v.* Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

North Carolina.— Earle *v.* Hardie, 80 N. C. 177.

South Carolina.— Charles *v.* Charles, 13 S. C. 385; Douglass *v.* Craig, 13 S. C. 371; Bull *v.* Rowe, 13 S. C. 355; *Ex p.* Hewett, 5 S. C. 409; Cochran *v.* Darcy, 5 S. C. 125; Shelor *v.* Mason, 2 S. C. 233.

Tennessee.— Hannum *v.* McInturf, 6 Baxt. (Tenn.) 225, 11 Heisk. (Tenn.) 48 note.

Texas.— McLane *v.* Paschal, 62 Tex. 102.

Washington.— Canadian, etc., Mortg., etc., Co. *v.* Blake, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946.

United States.— Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

See 10 Cent. Dig. tit. "Constitutional Law," § 499.

94. Gheen *v.* Summey, 80 N. C. 187; Norton *v.* Bradham, 21 S. C. 375.

The Mississippi exemption law of 1865, increasing the homestead exemption from one hundred and sixty acres of land, not exceeding fifteen hundred dollars in value, to two hundred and forty acres, regardless of value, is, when applied to debts created before its passage, in violation of that clause in the United States constitution which prohibits a state from passing laws impairing the obligation of contracts. Lessley *v.* Phipps, 49 Miss. 790.

95. Reardon *v.* Searcy, 2 Bibb (Ky.) 202; Leak *v.* Gay, 107 N. C. 468, 12 S. E. 312. But see Bridgman *v.* Wilcut, 4 Greene (Iowa) 563, holding that since exemptions under the homestead law in force at the date of a contract enter into and become a part of the contract, exemption rights acquired thereby cannot be impaired by a subsequent repeal of the homestead law. See also the following cases where homestead exemption was held constitutional: Root *v.* McGrew, 3 Kan. 215; Cusic *v.* Douglas, 3 Kan. 123, 87 Am. Dec. 458; Allen *v.* Shields, 72 N. C. 504; Garrett *v.* Chesire, 69 N. C. 396, 12 Am. Dec. 647; Poe *v.* Hardie, 65 N. C. 447; Hill *v.* Kessler, 63 N. C. 437; Howze *v.* Howze, 2 S. C. 229; *In re* Kennedy, 2 S. C. 216. But see Herbert *v.* Easton, 43 Ala. 547; Falt *v.* Bliss, 43 Ala. 512; Kirtland *v.* Molton, 41 Ala. 548; Cutts *v.* Hardee, 38 Ga. 350; Taylor *v.* Flint, 35 Ga. 124; Slaughter *v.* Culpepper, 35 Ga. 25; King *v.* Wilmington, etc., R. Co., 66 N. C. 277.

96. Travellers' Ins. Co. *v.* Brouse, 83 Ind. 62.

97. Greenfield *v.* Dorris, 1 Sneed (Tenn.) 548.

Mortgagor allowed to keep possession on payment of interest.— A statute conferring on the mortgagor the right to possession during the redemption period but requiring him to pay interest has been held to be valid. Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233; Stone *v.* Bassett, 4 Minn. 298.

98. Davis *v.* Rupe, 114 Ind. 588, 17 N. E. 163.

Rights of purchaser from mortgagor.— By the law in force when the defendant became the purchaser of the equity of redemption in mortgaged property, the mortgagee was liable for rents and profits during the redemption period. By a statute passed immediately before foreclosure the occupant was made liable for rents and profits. It was held that the rights of the parties were governed by the new statute in force at the time of foreclosure, and that such statute was not un-

impairs the obligation of the contract and is unconstitutional,[99] but a law which lessens the mortgagor's right to redeem is held not to be unconstitutional;[1] and a statute by which the time for redeeming property from a judicial sale is prolonged has also been held to be objectionable,[2] but on this point there are opposing authorities.[3]

12. Relief From Imprisonment For Debt. Statutes abolishing imprisonment for debt, as to existing contracts, impair only the creditor's remedy, and not the obligation of the contract; hence they are not unconstitutional.[4]

13. Suspension of Rights of Action and Remedies — a. In General. Statutes such as were passed by many state legislatures at the time of the Civil war suspending the rights of creditors for a definite and reasonable time are not unconstitutional, whether they suspend the right of action[5] or make dilatory the

constitutional with reference to defendant. Edwards *v.* Johnson, 105 Ind. 594, 5 N. E. 716.

99. *Alabama.*— Bugbee *v.* Howard, 32 Ala. 713.

Florida.— State *v.* Bradshaw, 39 Fla. 137, 22 So. 296.

Iowa.— Malony *v.* Fortune, 14 Iowa 417.

Kansas.— Paris *v.* Nordburg, 6 Kan. App. 260, 51 Pac. 799.

Kentucky.— Collins *v.* Collins, 79 Ky. 88.

Minnesota.— Heyward *v.* Judd, 4 Minn. 483; Stone v. Bassett, 4 Minn. 298.

Montana.— State *v.* Gilliam, 18 Mont. 94, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556.

New Jersey.— Coddington *v.* Bispham, 36 N. J. Eq. 574.

Oregon.— State *v.* Sears, 29 Oreg. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808.

South Dakota.— Hollister *v.* Donahoe, 11 S. D. 497, 78 N. W. 959.

Wisconsin.— Northwestern Mut. L. Ins. Co. *v.* Neeves, 46 Wis. 147, 49 N. W. 832.

United States.— Barnitz *v.* Beverly, 163 U. S. 118, 16 S. Ct. 1042, 41 L. ed. 93 [*reversing* 55 Kan. 466, 42 Pac. 725, 49 Am. St. Rep. 257, 31 L. R. A. 74]; Howard *v.* Bugbee, 24 How. (U. S.) 461, 16 L. ed. 753.

See 10 Cent. Dig. tit. "Constitutional Law," § 501.

A state law passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts. McCracken *v.* Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Bronson *v.* Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143.

1. Butler *v.* Palmer, 1 Hill (N. Y.) 324.

A law which takes away the right of a mortgagor to have the realty appraised and adds limitations to the right to redeem is not an impairment of the obligations of a contract, within the meaning of the state and federal constitutions. Holland *v.* Dickerson, 41 Iowa 367; Detroit State Sav. Bank *v.* Matthews, 123 Mich. 56, 81 N. W. 918; Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826.

2. Moore *v.* Martin, 38 Cal. 428; Edwards *v.* Johnson, 105 Ind. 594, 5 N. E. 716; Iglehart *v.* Wolfin, 20 Ind. 32; Scobey *v.* Gibson, 17 Ind. 572, 79 Am. Dec. 490.

3. Iverson *v.* Shorter, 9 Ala. 713; Templeton *v.* Horne, 82 Ill. 491; Gault's Appeal, 33 Pa. St. 94.

4. *Arkansas.*— Newton *v.* Tibbatts, 7 Ark. 150.

Connecticut.— Taylor *v.* Keeler, 30 Conn. 324.

Indiana.— Fisher *v.* Lacky, 6 Blackf. (Ind.) 373.

Louisiana.— Ray *v.* Cannon, 2 Mart. N. S. (La.) 26.

Maine.— Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

Michigan.— Bronson *v.* Newberry, 2 Dougl. (Mich.) 38.

Mississippi.— Brown *v.* Dillahunty, 4 Sm. & M. (Miss.) 713, 43 Am. Dec. 499.

New York.— Donnelly *v.* Corbett, 7 N. Y. 500.

South Carolina.— Ware *v.* Miller, 9 S. C. 13.

Tennessee.— Woodfin *v.* Hooper, 4 Humphr. (Tenn.) 13.

United States.— Vial *v.* Penniman, 103 U. S. 714, 26 L. ed. 602 [*affirming* 11 R. I. 333]; Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Lee *v.* Gamble, 3 Cranch C. C. (U. S.) 374, 15 Fed. Cas. No. 8,189; Gray *v.* Munroe, 1 McLean (U. S.) 528, 10 Fed. Cas. No. 5,724; Beers *v.* Haughton, 1 McLean (U. S.) 226, 3 Fed. Cas. No. 1,230 [*affirmed* in 9 Pet. (U. S.) 329, 9 L. ed. 145].

See 10 Cent. Dig. tit. "Constitutional Law," § 502. But see Starr *v.* Robinson, 1 D. Chipm. (Vt.) 257, 6 Am. Dec. 732, holding that an act of the legislature of Vermont, releasing the body of a debtor from imprisonment, and directing that the bond which he had given to the sheriff for the prison liberties, and which the sheriff had assigned to the creditor, should be discharged was void.

5. Grimball *v.* Ross, T. U. P. Charlt. (Ga.) 175; Coxe *v.* Martin, 44 Pa. St. 322. In Breitenbach *v.* Bush, 44 Pa. St. 313, 84 Am. Dec. 442, it was held that a stay of civil

remedy;[6] but if the suspension prescribed is indefinite in duration such acts are declared invalid,[7] and many courts have held that acts suspending the creditors' remedies or any of them impaired the obligation of contracts and are unconstitutional.[8] Where the contract of the parties stipulates for a remedy by act of the party without involving the assistance of legal process, it is a substantial part of the contract, and an act suspending such remedy for a stated time is obnoxious to the constitutional provision.[9]

b. Extending Time to Answer. A statute providing that defendants shall have a longer time for answering than theretofore is constitutional provided the time limited is reasonable.[10]

c. Postponing Trial. Acts by which trials are postponed for a reasonable time are valid, and not obnoxious to the constitutional provision against impairing the obligation of contracts.[11]

d. Statute of Limitations[12] — (i) *In General.* Statutes of limitations affect

process against any person in the service of the state or the United States for the term of such service and thirty days thereafter was constitutional; for the stay was for a definite and limited time, being under the act of congress for three years, and under the act of assembly for thirty days thereafter.

The act of Missouri, which provides for the exemption from civil suits, of persons in the military service of the state, until thirty days after their discharge, is valid and constitutional, where the contract was entered into after its passage, and the defendant can plead the act in defense. Bruns *v.* Crawford, 34 Mo. 330.

6. *Kentucky.*— Barkley *v.* Glover, 4 Metc. (Ky.) 44; Johnson *v.* Higgins, 3 Metc. (Ky.) 566.

Louisiana.— State *v.* Judge Third Judicial Dist., 2 Rob. (La.) 307; Frey *v.* Hebenstreit, 1 Rob. (La.) 561. The act of Dec. 18, 1814, suspending judicial proceedings from that date until May 1, following, at the period of the British invasion of Louisiana, was not unconstitutional. The object of the statute was to prevent the ill administration of justice, and while beneficial to parties litigant was conducive to the public safety. Johnson *v.* Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675.

New York.— Wolfkiel *v.* Mason, 16 Abb. Pr. (N. Y.) 221.

Pennsylvania.— Coxe *v.* Martin, 44 Pa. St. 322.

United States.— U. S. *v.* Conway, Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849.

See 10 Cent. Dig. tit. "Constitutional Law," § 503.

The statute providing that all actions against persons shown to be in the actual military service of the United States shall stand continued during such actual service does not impair contracts upon which such actions are founded, because the application of the statute is solely to the remedy. McCormick *v.* Rusch, 15 Iowa 127, 83 Am. Dec. 401; Lindsey *v.* Burbridge, 11 Mo. 545; Edmonson *v.* Ferguson, 11 Mo. 344.

7. In Burt *v.* Williams, 24 Ark. 91, it was held that a law providing that all suits should be continued until after the ratification of peace between the United States and the Confederate states was unconstitutional. The same conclusion was reached in Clark *v.* Martin, 3 Grant (Pa.) 393; Canfield *v.* Hunter, 30 Tex. 712; Luter *v.* Hunter, 30 Tex. 688, 98 Am. Dec. 494.

8. *California.*—People *v.* Hayes, 4 Cal. 127.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228.

Kentucky.— Terrill *v.* Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500.

Mississippi.—Hill *v.* Boyland, 40 Miss. 618; Coffman *v.* Kentucky Bank, 40 Miss. 29, 90 Am. Dec. 311.

New York.— Wood *v.* New York, 34 How. Pr. (N. Y.) 501.

North Carolina.— Johnson *v.* Winslow, 64 N. C. 27; Jacobs *v.* Smallwood, 63 N. C. 112, 13 Fed. Cas. No. 7,163; Barnes *v.* Barnes, 53 N. C. 366.

South Carolina.— Goggans *v.* Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23; Wood *v.* Wood, 14 Rich. (S. C.) 148.

See 10 Cent. Dig. tit. "Constitutional Law," § 503.

9. Hunt *v.* Thomas, 3 Phila. (Pa.) 121, 15 Leg. Int. (Pa.) 133.

In a deed of trust to secure a debt, a provision for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and a law forbidding sales under such deeds for a limited time is therefore unconstitutional. Taylor *v.* Stearns, 18 Gratt. (Va.) 244.

10. Holloway *v.* Sherman, 12 Iowa 282, 79 Am. Dec. 537 (a statutory provision that defendants might have nine months to answer); Starkweather *v.* Hawes, 10 Wis. 125; Von Baumbach *v.* Bade, 9 Wis. 559, 76 Am. Dec. 283.

11. *Ex p.* Pollard, 40 Ala. 77 (the statute providing for a delay of two terms before trial); Dours *v.* Cazentre, McGloin (La.) 251.

12. As to statutes of limitations generally see LIMITATIONS OF ACTIONS.

the remedy merely and are not within the scope of the inhibition against laws impairing the obligation of contracts,[13] unless they entirely take away the remedy, or so encumber it with conditions as to render it impracticable;[14] and a state may therefore pass a new statute of limitations or modify a former statute.

(II) *Change of Statute of Limitations.* When the statute of limitations has once run the weight of authority holds that a change in the law cannot deprive the party in whose favor it has run of his defense. This is true of property in the possession of one who by virtue of the statute has acquired title thereto,[15] and is probably true in all cases,[16] although a distinction has been drawn between the application of the statute in regard to the enforcement of property

13. *Arkansas.*— Hill *v.* Gregory, 64 Ark. 317, 42 S. W. 408.

California.— Billings *v.* Hall, 7 Cal. 1.

Georgia.— McKenny *v.* Compton, 18 Ga. 170; Griffin *v.* McKenzie, 7 Ga. 163, 50 Am. Dec. 389.

Indiana.— Winston *v.* McCormick, 1 Ind. 56; Blackford *v.* Peltier, 1 Blackf. (Ind.) 36.

Kentucky.— Lewis *v.* Harbin, 5 B. Mon. (Ky.) 564.

Massachusetts.— Loring *v.* Alline, 9 Cush. (Mass.) 68.

Missouri.— Cranor *v.* School Dist., 81 Mo. App. 152.

New Hampshire.— Gilman *v.* Cutts, 23 N. H. 376.

New York.— Rexford *v.* Knight, 11 N. Y. 308.

Pennsylvania.— Clay *v.* Iseminger, 190 Pa. St. 580, 42 Atl. 1039; Biddle *v.* Hooven, 120 Pa. St. 221, 13 Atl. 927.

South Carolina.— Henry *v.* Henry, 31 S. C. 1, 9 S. E. 726.

United States.—MacFarland *v.* Jackson, 137 U. S. 258, 11 S. Ct. 79, 34 L. ed. 664 [*affirming* 105 N. Y. 681, 13 N. E. 931]; Wheeler *v.* Jackson, 137 U. S. 245, 11 S. Ct. 76, 34 L. ed. 659.

See 10 Cent. Dig. tit. "Constitutional Law," § 506.

A state may prescribe a limitation of two years for actions on judgments obtained in other states prior to the passage of the act. Alabama Bank *v.* Dalton, 9 How. (U. S.) 522, 13 L. ed. 242; Barker *v.* Jackson, 1 Paine (U. S.) 559, 2 Fed. Cas. No. 989.

14. Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Friedman *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723; State *v.* Vincennes University, 5 Ind. 77.

A statute shortening the time within which an action may be brought on an existing obligation, where the time within which it might have been brought under the preëxisting statute had not run, but which by the new statute is barred at the time of its passage, and which does not provide a reasonable time after its passage within which an action may be commenced is unconstitutional as to such causes of action, as violating the obligation of contracts. Cranon *v.* Century County School Dist. No. 2, 151 Mo. 119, 52 S. W. 232.

15. *Arkansas.*— Couch *v.* McKee, 6 Ark. 484.

California.— Billings *v.* Hill, 7 Cal. 1.

Florida.— Bradford *v.* Shine, 13 Fla. 393, 7 Am. Rep. 239.

Illinois.— McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385.

Indiana.— Stipp *v.* Brown, 2 Ind. 647.

Iowa.— Thompson *v.* Read, 41 Iowa 48.

Maine.— Atkinson *v.* Dunlap, 50 Me. 111.

Massachusetts.— Wright *v.* Oakley, 5 Metc. (Mass.) 400; Holden *v.* James, 11 Mass. 396, 6 Am. Dec. 174.

Mississippi.— Hicks *v.* Steigleman, 49 Miss. 377; Davis *v.* Minor, 2 How. (Miss.) 183, 28 Am. Dec. 325.

Nebraska.— Horbach *v.* Miller, 4 Nebr. 31.

New Hampshire.— Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131; Woard *v.* Winneck, 3 N. H. 473, 14 Am. Dec. 384.

New York.— Gallupoille Reformed Church *v.* Schoolcraft, 65 N. Y. 134.

Oregon.— Pitman *v.* Bump, 5 Oreg. 17.

Pennsylvania.— Bagg's Appeal, 43 Pa. St. 512, 82 Am. Dec. 583.

Rhode Island.— Union Sav. Bank *v.* Taber, 13 R. I. 683.

Tennessee.— Tennessee Coal, etc., R. Co. *v.* McDowell, 100 Tenn. 565, 47 S. W. 153; Yancy *v.* Yancy, 5 Heisk. (Tenn.) 353, 3 Am. Rep. 5; Girdner *v.* Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700.

Vermont.— Wires *v.* Farn, 25 Vt. 41; Briggs *v.* Hubbard, 19 Vt. 86.

Wisconsin.— Pleasants *v.* Rohrer, 17 Wis. 577; Knox *v.* Cleveland, 13 Wis. 245.

United States.— Bickness *v.* Comstock, 113 U. S. 149, 28 L. ed. 962; Brent *v.* Chapman, 5 Cranch (U. S.) 358, 3 L. ed. 125.

See 10 Cent. Dig. tit. "Constitutional Law," § 506.

16. Where the statute of limitations has given a complete defense to a chose in action so that the claim is barred the claim cannot be revived by subsequent legislation.

Alabama.— Goodman *v.* Munks, 8 Port. (Ala.) 84.

Illinois.— Board of Education *v.* Blodgett, 155 Ill. 441, 40 N. E. 1025, 46 Am. St. Rep. 348, 31 L. R. A. 70.

Kentucky.— McCracken Co. *v.* Mercantile Trust Co., 84 Ky. 344, 8 Ky. L. Rep. 314, 1 S. W. 585.

Louisiana.— Harrison *v.* Stacy, 6 Rob. (La.) 15.

Missouri.— McMerty *v.* Morrison, 62 Mo. 140.

New Hampshire.— Rockport *v.* Walden, 54

rights and the enforcement of claims. In the enforcement of claims it has been held that the debtor cannot acquire any vested right to avoid paying his honest debts.[17]

(III) *FIXING TIME FOR SUIT.* Since statutes of limitations pertain to the remedy and not to the essence of contracts, an act extending the time for commencing suits is valid.[18]

(IV) *REDUCING TIME FOR SUIT.* So too an act shortening the period of limitations applying to both past and future contracts is not unconstitutional, where it provides for ample time for bringing actions on such past contracts.[19] But where it reduces the time for bringing suit to such an extent as to be unreasonable,[20] and *a fortiori* where no opportunity is left for an action to be brought,[21] it is unconstitutional as impairing the obligation of contracts.

e. Extending Time For Review. Acts extending the time for appeal or writs of error are held to be constitutional.[22]

14. ACTIONS AND PROCEEDINGS THEREIN — a. In General. The legislature may constitutionally regulate the procedure in courts of justice in relation to past as well as future contracts.[23]

N. H. 167, 20 Am. Rep. 131; Gilman *v.* Cutts, 23 N. H. 376.

Oklahoma.— Fuller, etc., Co. *v.* Johnson, 8 Okla. 601, 58 Pac. 745.

Texas.— Mellinger *v.* Houston, 68 Tex. 36, 3 S. W. 249.

Washington.— Seattle *v.* De Wolfe, 17 Wash. 349, 49 Pac. 553.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871; Brown *v.* Parker, 28 Wis. 21.

United States.— Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495.

See 10 Cent. Dig. tit. "Constitutional Law," § 506.

17. Where the statute of limitations has given a defense to a chose in action the defense can be taken away by subsequent legislation.

Alabama.— Jones *v.* Jones, 18 Ala. 248.

Georgia.— Cox *v.* Berry, 13 Ga. 306.

Illinois.— Drury *v.* Henderson, 143 Ill. 320, 32 N. E. 186.

Texas.— Lands *v.* Obert, 78 Tex. 33, 14 S. W. 297.

West Virginia.— Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270.

United States.— Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483.

See 10 Cent. Dig. tit. "Constitutional Law," § 506.

18. Edwards *v.* McCaddon, 20 Iowa 520; Sturm *v.* Fleming, 31 W. Va. 701, 8 S. E. 263.

19. *Georgia.*— George *v.* Gardner, 49 Ga. 441; Kimbro *v.* Fulton Bank, 49 Ga. 419; Davison *v.* Lawrence, 49 Ga. 335.

Iowa.— Maltby *v.* Cooper, Morr. (Iowa) 59.

Kentucky.— Lewis *v.* Harbin, 5 B. Mon. (Ky.) 564.

Maine.— Sampson *v.* Sampson, 63 Me. 328.

Maryland.— State *v.* Jones, 21 Md. 432.

Massachusetts.— Smith *v.* Morrison, 22 Pick. (Mass.) 430; Call *v.* Hagger, 8 Mass. 423.

Minnesota.—Archambau *v.* Green, 21 Minn. 520 [*distinguishing* Heyward *v.* Judd, 4 Minn. 483].

Mississippi.— Briscoe *v.* Anketell, 28 Miss. 361, 61 Am. Dec. 553.

Missouri.— Stephens *v.* St. Louis Nat. Bank, 43 Mo. 385.

New York.— Wheeler *v.* Jackson, 41 Hun (N. Y.) 410; Guillotel *v.* New York, 55 How. Pr. (N. Y.) 114.

Washington.— Herrick *v.* Niesz, 16 Wash. 74, 47 Pac. 414.

United States.— Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365. And see Samples *v.* Bank, 1 Woods (U. S.) 523, 21 Fed. Cas. No. 12,278.

See 10 Cent. Dig. tit. "Constitutional Law," § 509.

20. A statute limiting action on bond to six months was held unconstitutional in Wilkinson *v.* Lemassina, 51 N. J. L. 61; Morris *v.* Carter, 46 N. J. L. 260. A limitation of thirty days was held unconstitutional in Berry *v.* Ransdall, 4 Metc. (Ky.) 292. At the time certain bonds were issued the holders thereof had twenty years in which to bring an action, but by the act of April 3, 1872, the time was afterward changed to six years, the statute giving one year in which to bring actions on bonds issued before its passage. It was held that the act, as applied to bonds issued before its passage, was unconstitutional, as impairing the obligation of contracts. Pereles *v.* Watertown, 6 Biss. (U. S.) 79, 19 Fed. Cas. No. 10,980.

21. Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197; Lockport First Nat. Bank *v.* Bissell, 7 N. Y. Suppl. 53, 24 N. Y. St. 909; Johnson *v.* Bond, Hempst. (U. S.) 533, 13 Fed. Cas. No. 7,374.

22. Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381; Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563. And see Burch *v.* Newbury, 4 How. Pr. (N. Y.) 145.

23. Johnson *v.* Koockogey, 23 Ga. 183; Ralston *v.* Lothian, 18 Ind. 303; Hoa *v.*

b. Requiring Payment of Taxes as Condition Precedent to Action. It has been held that an act requiring the due payment of taxes on a debt as a condition precedent to maintaining an action thereon is unconstitutional as to prior contracts because impairing their obligation. The result of failure to pay duly might under such a statute bring about an entire deprivation of remedy.[24]

c. Jurisdiction of Courts. An act transferring the jurisdiction of one court to another is not unconstitutional as impairing the obligation of contracts, because it is merely a regulation of the tribunal to enforce the contract, not a regulation of the contract itself.[25] And statutes providing for the suspension[26] or abolition[27] of certain courts may be unobjectionable; but a provision that no court shall have jurisdiction of a certain kind of contract is of course bad.[28]

d. Prohibiting Waiver of Process. It has been held that a statute providing that acceptance of service and waiver of process should not in any action be authorized by the contract sued on does not impair the obligation of contracts made before its passage and containing stipulations for such acceptance of service and waiver of process.[29]

e. Parties. Statutes which change the rule as to parties necessary to the determination of a controversy may take effect upon prior as well as subsequent contracts, as the remedy only is affected. Acts providing that assignees of choses in action may sue in their own names come within this class, as do provisions as to the joinder of parties defendant.[30]

Lefranc, 18 La. Ann. 393; Toffey *v.* Atcheson, 42 N. J. Eq. 182, 6 Atl. 885.

24. See also Kimbro *v.* Fulton Bank, 49 Ga. 419; Gardner *v.* Jeter, 49 Ga. 195; Mitchell *v.* Cothrans, 49 Ga. 125; Vanduzer *v.* Heard, 47 Ga. 624; Macon, etc., R. Co. *v.* Little, 45 Ga. 370; Shaw *v.* Robinson, 23 Ky. L. Rep. 998, 64 S. W. 620; Walker *v.* Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357 [*overruling* 43 Ga. 538]; Lathrop *v.* Brown, 1 Woods (U. S.) 474, 14 Fed. Cas. No. 8,108, 10 Am. L. Reg. N. S. 638, 6 Am. L. Rev. 367. *Contra*, Welborn *v.* Akin, 44 Ga. 420; Walker *v.* Whitehead, 43 Ga. 538; Garrett *v.* Cordell, 43 Ga. 366.

25. *Michigan.*— Scott *v.* Smart, 1 Mich. 295.

Missouri.— State *v.* Slevin, 16 Mo. App. 541.

New Hampshire.— Sanders *v.* Hillsborough Ins. Co., 44 N. H. 238.

North Carolina.— Horne *v.* State, 84 N. C. 362; State *v.* Barringer, 61 N. C. 554.

Ohio.— South End Bank *v.* McGuffey, 1 Ohio Cir. Ct. 88.

Pennsylvania.— McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189.

Texas.— Mexican Nat. R. Co. *v.* Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

See 10 Cent. Dig. tit. "Constitutional Law," § 513.

26. Johnson *v.* Higgins, 3 Metc. (Ky.) 566.

As to stay laws see *supra*, IX, E, 13.

27. Newkirk *v.* Chapron, 17 Ill. 344.

28. French *v.* Tumlin, 9 Fed. Cas. No. 5,104, 10 Am. L. Reg. N. S. 641, 6 Am. L. Rev. 367, 14 Int. Rev. Rec. 140.

29. Worsham *v.* Stevens, 66 Tex. 89, 17 S. W. 404. But see Lyon *v.* Akin, 78 N. C. 258.

An agreement in such contract that judgment might also be confessed for a stated attorney's fees, in addition to the amount due thereon, is a promise to pay such a fee, and it may be recovered by ordinary legal process. Worsham *v.* Stevens, 66 Tex. 89, 17 S. W. 404.

Modification of provisions for the confession of judgment.— In Beeson *v.* Beeson, 1 Harr. (Del.) 466, it was held that a statute making it the duty of a prothonotary to confess judgment did not impair the obligation of a contract providing that any attorney should appear and confess judgment.

30. *Iowa.*— Harlan *v.* Sigler, Morr. (Iowa) 39.

Maine.— Augusta Bank *v.* Augusta, 49 Me. 507.

Michigan.— Waldron *v.* Harring, 28 Mich. 493.

Minnesota.— Tompkins *v.* Forrestal, 54 Minn. 119, 55 N. W. 813.

Mississippi.— McMillan *v.* Sprague, 4 How. (Miss.) 647, 35 Am. Dec. 412.

New York.— Van Rensselaer *v.* Ball, 19 N. Y. 100; Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278.

North Carolina.— Justice *v.* Eddings, 75 N. C. 581.

United States.—A statute of the state of Alabama, directing that promissory notes previously given to a cashier of a bank may be sued and collected in the name of the bank, does not impair the obligation of contracts and is not unconstitutional. Crawford *v.* Mobile Branch Bank, 7 How. (U. S.) 279, 12 L. ed. 700. And see Palyart *v.* Goulding, Brunn. Col. Cas. (U. S.) 2, 18 Fed. Cas. No. 10,701, 3 N. C. 133.

See 10 Cent. Dig. tit. "Constitutional Law," § 516. But see Tate *v.* Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221.

f. Set-Offs. As a general rule a law providing for the set-off of mutual debts does not impair the obligation of contracts for the original contract remains unaffected, although the defendant is allowed to maintain in the same action his cross suit against the plaintiff.[31]

g. Evidence. A law which establishes a rule of evidence respecting certain past transactions cannot be said to impair the obligation of contracts. Laws which change the rules of evidence relate to the remedy only.[32] But a statute which, although expressed in terms of evidence, materially affects a contract by taking away a vested right is unconstitutional.[33]

h. Competency of Witness. Laws removing the disqualifications of witnesses and allowing them to testify are not unconstitutional as impairing the obligations of contracts.[34] And an act having the effect of disqualifying witnesses has been properly held to be within the power of the legislature.[35]

i. Judgment and Lien Thereof. The lien of a judgment is a qualified right, given by law, and may be taken away by law; and when the law is repealed upon which the lien depends the lien is destroyed by the repeal.[36]

15. Execution — a. Mode of Levying. Execution pertains to the remedy, and the manner of levying, it may be modified by legislative act. Statutes thus modi-

31. Vermont State Bank *v.* Porter, 5 Day (Conn.) 316, 5 Am. Dec. 157; Great Western Stock Co. *v.* Saas, 1 Cinc. Super. Ct. 21 [*affirmed* in 24 Ohio St. 542]; Blount *v.* Windley, 95 U. S. 173, 24 L. ed. 424.

32. *Alabama.*— Herbert *v.* Easton, 43 Ala. 547.

Delaware.— Stockwell *v.* Robinson, 9 Houst. (Del.) 313, 32 Atl. 528.

Kansas.— Myers *v.* Wheelock, 60 Kan. 747, 57 Pac. 956.

Maine.— Fales *v.* Wadsworth, 23 Me. 553.

Massachusetts.— Kempton *v.* Saunders, 130 Mass. 236.

New Hampshire.— Rich *v.* Flanders, 39 N. H. 304.

North Carolina.— Tabor *v.* Ward, 83 N. C. 291.

Oregon.— Harris *v.* Harsch, 29 Oreg. 562, 46 Pac. 141.

Pennsylvania.—Foster *v.* Gray, 22 Pa. St. 9.

Wisconsin.— Ehle *v.* Brown, 31 Wis. 405.

See 10 Cent. Dig. tit. "Constitutional Law," § 519.

33. Hart *v.* Ross, 64 Ala. 96; Saunders *v.* Carroll, 14 La. Ann. 27; Davis *v.* Supreme Lodge, K. of H., 165 N. Y. 159, 58 N. E. 891, 31 N. Y. Civ. Proc. 298.

An act which makes certain evidence conclusive of indebtedness, and thus deprives the defendant of a defense which he might have, and which was legal when the contract sued on was made, is unconstitutional. Hope Mut. Ins. Co. *v.* Flynn, 38 Mo. 483, 90 Am. Dec. 438.

The portion of the constitution of Georgia of 1868 which declares void all contracts made in aid of the Rebellion, and throws the burden of proof on the plaintiff to show that the bills sued on had never been used in aid of the Rebellion, if only the defendant will swear that he has reason to believe that they were so used, is tantamount to destroying the contract on the simple oath of the defendant as to his belief, and is therefore unconstitutional. Marsh *v.* Burroughs, 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112, 10 Am. L. Reg. N. S. 718. *Contra,* Edwards *v.* Dixon, 53 Ga. 334.

34. Wormley *v.* Hamburg, 40 Iowa 22; Little *v.* Gibson, 39 N. H. 505; Rich *v.* Flanders, 39 N. H. 304.

An act allowing a party or person interested to testify is not unconstitutional, as impairing the obligation of contracts. Walthall *v.* Walthall, 42 Ala. 450.

35. O'Bryan *v.* Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595.

36. *Alabama.*— Martin *v.* Hewitt, 44 Ala. 418; Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696.

Delaware.— Maxwell *v.* Devalinger, 2 Pennew. (Del.) 504, 47 Atl. 381.

Indiana.— Gimbel *v.* Stolte, 59 Ind. 446.

Louisiana.— Orleans *v.* Holmes, 13 La. Ann. 502. See also State *v.* Police Jury, 32 La. Ann. 884.

Minnesota.—Dana *v.* Porter, 14 Minn. 478; Wetherhill *v.* Stone, 12 Minn. 579; Burwell *v.* Tullis, 12 Minn. 572.

North Carolina.— Whitehead *v.* Latham, 83 N. C. 232; Parker *v.* Shannonhouse, 61 N. C. 209.

South Carolina.— Moore *v.* Holland, 16 S. C. 15.

Virginia.— In Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306, it was held that a judgment lien already perfected could not be taken away.

Washington.— In Palmer *v.* Laberee, 23 Wash. 409, 63 Pac. 216, it was held that the legislative intent was to deprive a judgment creditor of all remedy — either common law or statutory — in the matter of revival of judgments, and that the legislation must therefore be declared void.

See 10 Cent. Dig. tit. "Constitutional Law," § 521.

fying the mode of levying whether enlarging or restricting a creditor's rights are constitutional.[37] But an act repealing the only adequate existing judgment without providing some other reasonable mode of enforcement in its place is unconstitutional.[38]

b. Stay of. An act suspending the enforcement of a judgment for a limited time is unconstitutional as applied to judgments rendered before its passage,[39] and in some cases after its passage;[40] and such a statute is not saved from unconstitutionality by the fact that a condition is annexed to the suspension, as for instance that the defendant must give bond[41] or that a certain proportion of the creditors must assent to the delay.[42]

c. Fees and Costs. Statutes regulating costs and fees affect generally the remedy only, and are therefore not unconstitutional as impairing the obligation of contracts.[43]

37. *Connecticut.*— Mather *v.* Chapman, 6 Conn. 54.

Illinois.— William *v.* Waldo, 4 Ill. 264 [*followed* in Delahay *v.* McConnel, 5 Ill. 156].

Iowa.— Coriell *v.* Ham, 4 Greene (Iowa) 455, 61 Am. Dec. 134.

Louisiana.— Carnes *v.* Red River Parish, 29 La. Ann. 608; Scott *v.* Duke, 3 La. Ann. 253.

New York.— Kelly *v.* Brownlow, 54 N. Y. Super. Ct. 129.

Vermont.— Pratt *v.* Jones, 25 Vt. 303; Bell *v.* Roberts, 12 Vt. 582.

Wisconsin.— Selsby *v.* Redlon, 19 Wis. 17.

See 10 Cent. Dig. tit. "Constitutional Law," § 522.

An act directing sales on credit under decrees in chancery longer than the law allowed at the date of the contracts between the respective parties was held to be constitutional. Austin *v.* Andrews, Dall. (Tex.) 447; Garland *v.* Brown, 23 Gratt. (Va.) 173. *Contra*, January *v.* January, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211.

It has been held that the execution laws in force at the time of the execution of a bond or mortgage become a part of the contract and consequently cannot be changed so as to impair the obligation thereof. Stockwell *v.* Kemp, 4 McLean (U. S.) 80, 23 Fed. Cas. No. 13,465; Rue *v.* Decker, 3 McLean (U. S.) 575, 20 Fed. Cas. No. 12,112.

38. Brooks *v.* Memphis, 4 Fed. Cas. No. 1,954, 3 Centr. L. J. 356.

39. *Alabama.*— Hudspeth *v.* Davis, 41 Ala. 389.

Indiana.— Strong *v.* Daniel, 5 Ind. 348; Dormire *v.* Cogly, 8 Blackf. (Ind.) 177.

Kentucky.— A law passed after a contract is made extending the term of replevin on a judgment rendered on such contract impairs the obligation of the contract and violates the constitution of the United States. Stephenson *v.* Barnett, 7 T. B. Mon. (Ky.) 50; Grayson *v.* Lilly, 7 T. B. Mon. (Ky.) 6; McKinney *v.* Carroll, 5 T. B. Mon. (Ky.) 96; Lapsley *v.* Brashears, 4 Litt. (Ky.) 47; Blair *v.* Williams, 4 Litt. (Ky.) 34.

Missouri.— Stevens *v.* Andrews, 31 Mo. 205; Bumgardner *v.* Howard County Cir. Ct., 4 Mo. 50; Brown *v.* Ward, 1 Mo. 209.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 9 N. W. 555.

North Carolina.— Miller *v.* Gibson, 63 N. C. 635; Berry *v.* Haines, 4 N. C. 311; Jones *v.* Crittenden, 4 N. C. 55, 6 Am. Dec. 531.

Pennsylvania.— White *v.* Crawford, 84 Pa. St. 433; Lewis *v.* Lewis, 47 Pa. St. 127; Billmeyer *v.* Evans, 40 Pa. St. 324; Chaffee *v.* Michaels, 31 Pa. St. 282.

Tennessee.— Webster *v.* Rose, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583.

See 10 Cent. Dig. tit. "Constitutional Law," § 523.

Statutes providing that there shall be no stay valid.— Pierce *v.* Mills, 21 Ind. 27. For authorities holding that stay laws such as were passed in favor of soldiers during the Civil war are constitutional, see *supra*, IX, E, 13.

40. The North Carolina act of May 11, 1861, § 7, providing that all mortgages and deeds in trust for the benefit of creditors hereafter executed, whether registered or not, and all judgments confessed during the continuance of this act, shall be utterly void, is unconstitutional, as declaring that a debtor should not pay his debt. Lyon *v.* Akin, 78 N. C. 258.

41. Ashurst *v.* Phillips, 43 Ala. 158; *Ex p.* Woods, 40 Ala. 77.

42. Bunn *v.* Gorgas, 41 Pa. St. 441; Miller *v.* Ripka, 4 Phila. (Pa.) 309, 18 Leg. Int. (Pa.) 197, 9 Am. L. Reg. 561.

Reasonable stay.— A local statute, which suspends for a reasonable time execution of a judgment on a previous contract, is not prohibited by the tenth section of the first article of the constitution of the United States. Chadwick *v.* Moore, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267.

43. Todd *v.* Neal, 49 Ala. 266. In Snider *v.* Brown, (Tenn. Ch. 1898) 48 S. W. 377, it was held that a statute requiring a party foreclosing a mortgage by advertisement to make and file for record, within ten days after such foreclosure, an affidavit of the amount paid for disbursements, including attorney's fees, is not unconstitutional with reference to a subsequent mortgage on the ground that the mortgagee's right to retain

d. Setting Aside Judgment. As no obligation is impaired by the giving of a right decision, statutes providing for the correction of a judgment by appeal, since they pertain merely to the remedy, are constitutional;[44] but in accordance with the law that a defense once perfect by virtue of the statute of limitations cannot be taken away, it is generally held that legislation giving the right to reopen a prior judgment which could not otherwise be reconsidered is unconstitutional.[45]

X. RETROSPECTIVE AND EX POST FACTO LAWS AND BILLS OF ATTAINDER.

A. Retrospective Laws — 1. DEFINITION. A retrospective law is a law which retrospects or looks back; a law which contemplates or affects an act done or a right accrued before its passage.[46] The term, however, has been technically used to indicate laws having reference to civil matters in distinction from *ex post facto* laws.[47]

2. VALIDITY IN ABSENCE OF CONSTITUTIONAL PROHIBITION. There is no prohibition

the stipulated attorney's fees was a contract right, or on the ground that the mortgagee's rights are hampered by new conditions.

The Alabama statute of 1827, authorizing executions to be issued for costs against the plaintiffs in other executions, when the officer returns that the defendants in such executions have no property, is constitutional, although it apply to judgments rendered before as well as after the passing of the statute. Anonymous, 2 Stew. (Ala.) 228.

Ind. Acts (1891), p. 323, amending Ind. Acts (1889), c. 118, and providing that a contractor may maintain a suit to foreclose his lien on abutting property, and may collect therein an attorney's fee, does not impair the obligation of contracts within the prohibition of U. S. Const. art. 1, § 10, although construed to apply to an assessment levied before its passage. Dowell *v.* Talbot Paving Co., 138 Ind. 675, 38 N. E. 389; Lake Erie, etc., R. Co. *v.* Walters, 13 Ind. App. 275, 41 N. E. 465.

Iowa Laws (1880), c. 12, § 5, which limits to twenty-five dollars the amount of the attorney's fee to be taxed upon the foreclosure of school-fund mortgages, affects the remedy only, and may be construed as retroactive without being objectionable, as impairing the obligation of contracts. Kossuth County *v.* Wallace, 60 Iowa 508, 15 N. W. 305.

44. Todd *v.* Neal, 49 Ala. 266; Lovell *v.* Davis, 52 Mo. App. 342; Decatur First Nat. Bank *v.* Preston Nat. Bank, 85 Tex. 560, 22 S. W. 579.

Appeal from decision of commissioners.— The Vermont act of 1827, in regard to the laying out of new highways, provided for a petition by a given number of freeholders, after which the road commissioners should decide whether to lay out the proposed road. In case of a decision for petitioners, the costs were to be taxed against the towns interested. The acts of the commissioners were to be final, and not subject to appeal. It was held that the Vermont act of 1828, which allowed an appeal on the part of the towns, or persons aggrieved by reason of damages, from decisions of the commissioners made before the passage of the act, but where the roads were not laid, is unconstitutional in so far as it is retroactive. Hill *v.* Sunderland, 3 Vt. 507.

45. *Louisiana.*— New Orleans Canal, etc., Co. *v.* New Orleans, 30 La. Ann. 1371.

Maine.— Dyer *v.* Belfast, 88 Me. 140, 33 Atl. 790; Atkinson *v.* Dunlap, 50 Me. 111.

New York.— Burch *v.* Newbury, 10 N. Y. 374; Bay *v.* Gage, 36 Barb. (N. Y.) 447.

Pennsylvania.— Baggs' Appeal, 43 Pa. St. 512, 82 Am. Dec. 583; McCabe *v.* Emerson, 18 Pa. St. 111.

Vermont.— Hill *v.* Sunderland, 3 Vt. 507.

Virginia.— Marpole *v.* Cather, 78 Va. 239; Ratcliffe *v.* Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716.

West Virginia.— Arnold *v.* Kelley, 5 W. Va. 446.

But see *Ex p.* Norton, 44 Ala. 177; *Ex p.* Bibb, 44 Ala. 140; Bonner *v.* Martin, 40 Ga. 501; White *v.* Herndon, 40 Ga. 493, which cases hold that legislation allowing judgments to be reopened is constitutional.

See 10 Cent. Dig. tit. "Constitutional Law," § 525.

46. Burrill L. Dict.

"**Upon principle,** every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Per Story, J., in Society for Propagation, etc. *v.* Wheeler, 2 Gall. (U. S.) 105, 139, 22 Fed. Cas. No. 13,156.

47. A statute providing that no person should be entitled to the benefit of the provisions of the habeas corpus act, for the reason that the judgment and sentence was erroneous as to time or place of imprisonment, but that in such cases it should be the duty of the court to sentence such person for the proper time and place of confinement was held not unconstitutional as retrospective, since retrospective laws relate only to civil rights and remedies. *Ex p.* Bethurum, 66 Mo. 545. See also Rich *v.* Flanders, 39 N. H. 304; Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18.

in the constitution of the United States against retrospective laws as such,[48] nor in a large number of the state constitutions.[49] In the absence of such express provision, a law is not void because retrospective in action,[50] where it is not unconstitutional as an *ex post facto* law, as a law impairing the obligation of a contract, or by reason of its violating some constitutional provision not directed against retrospective laws as such.[51] *A fortiori* the constitution of a state will not be

For retrospective laws relating to crimes and penalties see *infra*, X, C.

48. Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

49. See cases cited in notes 50, 51, *infra*.

50. *Alabama.*— Bloodgood *v.* Cammack, 5 Stew. & P. (Ala.) 276.

Arkansas.— Green *v.* Abraham, 43 Ark. 420; Smith *v.* Van Gilder, 26 Ark. 527.

California.— Bensley *v.* Ellis, 39 Cal. 309.

Connecticut.— Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Allen, 28 Conn. 97; Richardson *v.* Monson, 23 Conn. 94; Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475; Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Georgia.— Baker *v.* Herndon, 17 Ga. 568.

Illinois.— Garrett *v.* Doe, 2 Ill. 335, 30 Am. Dec. 653.

Indiana.— Van Slyke *v.* Shryer, 98 Ind. 126; Muncie Nat. Bank *v.* Miller, 91 Ind. 441. *Compare* Cowley *v.* Rushville, 60 Ind. 327.

Iowa.— State *v.* Squires, 26 Iowa 340.

Kentucky.— Thornton *v.* McGrath, 1 Duv. (Ky.) 349; Taylor *v.* Farmers', etc., Bank, 4 Litt. (Ky.) 341.

Maine.— Oriental Bank *v.* Freeze, 18 Me. 109, 36 Am. Dec. 701.

Massachusetts.— *In re* Northampton, 158 Mass. 299, 33 N. E. 568.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318

New Jersey.— United New Jersey R., etc., Co. *v.* National Docks, etc., Co., 54 N. J. L. 180, 23 Atl. 686; State *v.* Scudder, 32 N. J. L. 203; Bonney *v.* Reed, 31 N. J. L. 133. See also Beach *v.* Woodhull, Pet. C. C. (U. S.) 2, 2 Fed. Cas. No. 1,154.

North Carolina.— Tabor *v.* Ward, 83 N. C. 291.

Ohio.— Butler *v.* Toledo, 5 Ohio St. 225. See also Cuyahoga Falls Real Estate Assoc. *v.* McCaughty, 2 Ohio St. 152; Lewis *v.* McElvain, 16 Ohio 347.

Pennsylvania.— Gault's Appeal, 33 Pa. St. 94; Beck *v.* Borough, 3 Lanc. L. Rev. 386.

Vermont.— Brown *v.* Storm, 4 Vt. 37.

United States.— Curtis *v.* Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Baeder *v.* Jennings, 40 Fed. 199.

See 10 Cent. Dig. tit. "Constitutional Law," § 526.

Statutes relating to assessments for local improvements have been held valid, although retrospective, in case of a levy of a tax for a new bridge to be apportioned on the assessment of the previous year (Kelsey *v.* Nevada, 18 Cal. 629), and of an assessment on abutting owners for a sewer already built (Cleveland *v.* Tripp, 13 R. I. 50). But see Craft *v.* Lofinck, 34 Kan. 365, 8 Pac. 359, where the people of a township voted to issue bonds to build a bridge, but before anything further was done a part of the territory was detached and placed in a new township. Bridges were built in both townships, the people in the detached territory no longer needing the bridge in the old territory. It was held that a statute afterward passed making the people of the detached territory liable to assist in paying the bonds was void.

Land damage acts, although retrospective, have been sustained in case of an award of damages to abutters for change in grade of streets (Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511), of an act extending time for appeal from an assessment of damages for taking property for public use (Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148), and of an act filling vacancies in a board of commissioners appointed to appraise damages (State *v.* National Docks, etc., R. Co., 54 N. J. L. 180, 23 Atl. 686).

Laws disqualifying persons from holding office by reason of having had charge of public moneys and not having been discharged (Taylor *v.* Governor, 1 Ark. 21; State *v.* Echeveria, 33 La. Ann. 709), or by reason of having voluntarily borne arms against the United States are valid, although retrospective (Privett *v.* Bickford, 26 Kan. 52, 40 Am. Rep. 301).

Statutes have been upheld authorizing divorces for things happening before their passage (Carson *v.* Carson, 40 Miss. 349), legitimatizing the issue of marriages otherwise void (Brown *v.* McGee, 12 Bush (Ky.) 428; Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214), making valid a void contract (Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239), and making valid a levy of execution on real estate void because the officer included in the return greater fees than the law allowed (Beach *v.* Walker, 6 Conn. 190), or providing that no estate in remainder shall be defeated by any deed of feoffment with livery of seizin (People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800).

51. *Alabama.*— Lovejoy *v.* Beeson, 121 Ala. 605, 25 So. 599.

Georgia.— Wilder *v.* Lumpkin, 4 Ga. 208.

Illinois.— Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553.

Iowa.— Tilton *v.* Swift, 40 Iowa 78; State *v.* Squires, 26 Iowa 340.

held invalid as retrospective.[52] Retrospective laws affecting the remedy only are more certain to be held constitutional than are retrospective laws in general.[53] And the same is true of a law which is merely explanatory of a prior law.[54]

3. Validity as Affected by Constitutional Prohibition — a. In General. Many of the state constitutions contain provisions against retrospective laws,[55] and in

Kentucky.— Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

Maryland.— Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Wilson *v.* Hardesty, 1 Md. Ch. 66.

Mississippi.— Reed *v.* Beall, 42 Miss. 472.

New Hampshire.— Rich *v.* Flanders, 39 N. H. 304.

New Jersey.— Baldwin *v.* Newark, 38 N. J. L. 158; Deegan *v.* Morrow, 31 N. J. L. 136.

New York.— Burch *v.* Newbury, 10 N. Y. 374; People *v.* Ulster County, 63 Barb. (N. Y.) 83; Bay *v.* Gage, 36 Barb. (N. Y.) 447; Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104; Isola *v.* Weber, 13 Misc. (N. Y.) 97, 34 N. Y. Suppl. 77, 68 N. Y. St. 32.

North Carolina.— Leak *v.* Gay, 107 N. C. 482, 468, 12 S. E. 315, 312.

Pennsylvania.— Bleakney *v.* Farmers', etc., Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635.

Tennessee.— Collins *v.* East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841; Wynne *v.* Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

United States.— Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Albee *v.* May, 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134; *In re* Kirkland, 14 Fed. Cas. No. 7,842, 12 Am. L. Reg. N. S. 300, 6 Am. L. T. Rep. 324.

See 10 Cent. Dig. tit. "Constitutional Law," § 526.

52. Myers *v.* Mitchell, 20 La. Ann. 533.

53. Statutes have been held constitutional because affecting only the remedy itself (Hine *v.* Belden, 27 Conn. 384; Farley *v.* Geisheker, 78 Iowa 453, 43 N. W. 279, 6 L. R. A. 533; Campbell *v.* Manderscheid, 74 Iowa 708, 39 N. W. 92; Drake *v.* Jordan, 73 Iowa 707, 36 N. W. 653; People *v.* Ulster County, 63 Barb. (N. Y.) 83; Shonk *v.* Brown, 61 Pa. St. 320), the procedure in enforcing it (Berry *v.* Clary, 77 Me. 482, 1 Atl. 360; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559), as merely limiting the time of the remedy (Clay *v.* Iseminger, 187 Pa. St. 108, 41 Atl. 38) substituting a new remedy (Commonwealth Bank *v.* Patton, 4 J. J. Marsh. (Ky.) 190; Murray *v.* Mattison, 63 Vt. 479, 21 Atl. 532; Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665), providing a further remedy for a right already existing (*In re* Smith, 10 Wend. (N. Y.) 449; Mackey *v.* Holmes, 52 Fed. 722), as an act providing that no order or decree by the supreme court in certain cases should be discharged on account of the want of jurisdiction in the court (Simmons *v.* Hanover, 23 Pick. (Mass.) 188), or an act providing for the revival of proceedings against the personal representatives of a deceased assignee (*In re* Grove, 64 Barb. (N. Y.) 526), even though the right protected was only a moral obligation (Bowen *v.* Phillips, 55 Ind. 226; Linn County *v.* Snyder, 45 Kan. 636, 26 Pac. 21, 26 Am. St. Rep. 742; Sedgwick County *v.* Bunker, 16 Kan. 498). But see Bradford *v.* Brooks, 2 Aik. (Vt.) 284, 16 Am. Dec. 715, where an act authorizing the judge of probate to extend the time limited by law for the exhibition and allowance of claims against a certain estate was held void on the ground that the claim was then dead, the time originally set having expired before the extension was granted. It has also been held that the legislature cannot by retrospective act make a party liable for damages for failure to perform a contract which at the time of its passage was void. Eno *v.* New York, 53 How. Pr. (N. Y.) 382.

54. Baker *v.* Herndon, 17 Ga. 568; Howard *v.* Savannah, 1 T. U. P. Charlt. (Ga.) 173. It has, however, been held that a subsequent legislative enactment explanatory of a previous law cannot retroact so as to affect the rights of parties under such previous law. McManning *v.* Farrar, 46 Mo. 376; Gordon *v.* Ingraham, 1 Grant (Pa.) 152.

55. *Georgia.*— See Holliday *v.* Atlanta, 96 Ga. 377, 23 S. E. 406; McCowan *v.* Davidson, 43 Ga. 480.

Kentucky.— See Shaw *v.* Robinson, 23 Ky. L. Rep. 998, 64 S. W. 620.

Louisiana.— La. Const. art. 46.

Missouri.— Mo. Const. art. 1, § 28; art. 2, §§ 15, 18; art. 12, § 19. See also Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Dolan, 93 Mo. 467, 6 S. W. 366; *Ex p.* Bethurum, 66 Mo. 545.

Montana.— Mont. Const. art. 15, § 13. See also Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446; State *v.* Dickerman, 16 Mont. 278, 40 Pac. 498.

North Carolina.— N. C. Const. art. 1, § 32. See also Young *v.* Henderson, 76 N. C. 420.

Ohio.— Ohio Const. art. 2, § 28. See also Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584; Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013; Peters *v.* McWilliams, 36 Ohio St. 155; Seeley *v.* Thomas, 31 Ohio St. 301; Gilpin *v.* Williams, 25 Ohio St. 283; Burgett *v.* Norris, 25 Obio St. 308; State *v.* Richland Tp., 20 Ohio St. 362; State *v.* Harris, 17 Ohio St. 608; Cameron *v.* Goebel, 20 Ohio Cir. Ct. 268.

some other states some clause in the bill of rights has been construed as prohibiting such laws.[56]

b. Laws Affecting Rights. Where retrospective laws are prohibited, acts taking away existing rights[57] or creating new obligations for past acts are generally held unconstitutional,[58] although acts merely regulating rights[59] or

Tennessee.— Tenn Const. art. 1, § 20. See also Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353; Chicago, etc., R. Co. *v.* Pounds, 11 Lea (Tenn.) 127; Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679.

See 10 Cent. Dig. tit. "Constitutional Law," § 530.

56. Colo. Bill of Rights, § 11; N. H. Bill of Rights, art. 23; Tex. Const. art. 1, § 16. See also Hewitt *v.* Colorado Springs Co., 5 Colo. 184; Lundin *v.* Kansas Pac. R. Co., 4 Colo. 433; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162; Simpson *v.* City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491; Willard *v.* Harvey, 24 N. H. 344; Dunbarton *v.* Franklin, 19 N. H. 257; Towle *v.* Eastern R. Co., 18 N. H. 547, 47 Am. Dec. 153; Clark *v.* Clark, 10 N. H. 380, 34 Am. Dec. 165; Bristol *v.* New Chester, 3 N. H. 524; Society for Propagation, etc. *v.* Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156; Mellinger *v.* Houston, 68 Tex. 36, 3 S. W. 249; De Cordova *v.* Galveston, 4 Tex. 470; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Sherwood *v.* Fleming, 25 Tex. Suppl. 408.

57. Cameron *v.* Goebel, 20 Ohio Cir. Ct. 268, 11 Ohio Cir. Dec. 118; De Cordova *v.* Galveston, 4 Tex. 470; Sherwood *v.* Fleming, 25 Tex. Suppl. 408. In Shaw *v.* Robinson, 23 Ky. L. Rep. 998, 64 S. W. 620, a statute providing that no action should be brought for recovery of land where the claimant relied alone on a patent from the commonwealth issued prior to 1820, against any person claiming such land by possession to a well-defined boundary under a title of record unless the claimant had actually paid legal taxes for at least three years prior to the suit, was held to be void so far as retroactive.

Exceptions.— But a statute providing that in suits on fire-insurance policies thereafter issued or renewed defendant should not deny that the property was at the time the policy was issued worth the full amount insured has been held valid. Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227. And so a statute to preclude the vesting of title by adverse possession in one holding under an unrecorded deed was held to bar a claimant whose deed was executed before the enactment of the statute. Snider *v.* Brown, (Tenn. Ch. 1898) 48 S. W. 377. Also the repeal of a law granting a pension is constitutional. Chalk *v.* Darden, 47 Tex. 438.

58. Towle *v.* Eastern R. Co., 18 N. H. 547, 47 Am. Dec. 153; State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68; Miller *v.* Hixson, 64 Ohio St. 39, 59 N. E. 749; State *v.* Board of Education, 12 Ohio Cir. Dec. 423; Society for Propagation, etc. *v.* Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156.

New obligations were held to render the statute void in the case of a statute passed in March to take effect previous to January providing for returns by liquor-dealers of all liquors sold by them (McCowan *v.* Davidson, 43 Ga. 480), of a statute authorizing the board of education of a township to pay the board of education of a special school district set off and created therein a sum equal to the equitable share due the latter from the township school fund (Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584; State *v.* Board of Education, 12 Ohio Cir. Dec. 423), and of a statute allowing the jury to determine after the fact whether a particular railroad charge was excessive (Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679).

Marriage and divorce.— A retrospective act making certain facts equivalent to a contract of marriage is void (Dunbarton *v.* Franklin, 19 N. H. 257), as is a statute making facts happening before its passage cause for divorce (Clark *v.* Clark, 10 N. H. 380, 34 Am. Dec. 165. *Contra*, Jones *v.* Jones, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645).

59. As merely regulating rights a special statute appointing a new trustee, where the former trustee had died and the court was suspended (Hindman *v.* Piper, 50 Mo. 292), a general retrospective act enabling foreign corporations thereafter filing certificates to enforce contracts made while the law provided that contracts made before filing should be void, although the constitution prohibited any special act in aid of corporations or individuals (Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446), an act authorizing the reduction of the deposit accounts of insolvent savings banks so as to divide the losses equitably among the depositors (Simpson *v.* City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491), a statute allowing after-acquired property to pass by a will made prior to its enactment (Loveren *v.* Lamprey, 22 N. H. 434), an act forming a new town from parts of two existing towns and providing that certain portions of the property of the old towns shall belong to the new town (Bristol *v.* New Chester, 3 N. H. 524), an act prohibiting an action on any contract by certain classes unless certain formalities are complied with (Hartzell *v.* Warren, 11 Ohio Cir. Ct. 269, 1 Ohio Cir. Dec. 183), and a statute affecting the liquor laws where the constitution ex-

changing their form are held not to be included within the constitutional prohibition.[60]

c. Laws Affecting Remedies. Constitutional prohibitions against retrospective laws are generally held not to apply to acts which affect procedure only,[61] which merely add a remedy for an already existing right,[62] or limit the time of the remedy.[63] Retrospective laws affecting remedies are invalid, however, where the

pressly authorized legislation against the liquor traffic (Heck *v.* State, 44 Ohio St. 536, 9 N. E. 305) have all been held valid.

60. Thus a statute providing that in a suit to recover land a defendant who has *bona fide* possession of such under an adverse claim of title may set off the value of *bona fide* improvements and that if they exceed the mesne profits he may recover the excess is constitutional. Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. 132; Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934. So a statute providing for the settlement of old land claims which enacted that a claimant who did not make his entry within a certain time should lose claim to that particular land, but entitling him to satisfaction of his claim in land has been held valid. Huntsman *v.* Randolph, 5 Hayw. (Tenn.) 263. And so an act providing for the lease or sale of estates tail without the consent of the remainder-men. Gilpin *v.* Williams, 25 Ohio St. 283.

Statutes relating to government are valid although retrospective. Thus a statute providing that citizens of the second class shall elect a treasurer for two years, and with an emergency clause providing that it should go into effect on the first Tuesday of April was held valid, although the statute was not signed till April 17. Sipe *v.* People, 26 Colo. 127, 56 Pac. 571. So a statute providing that when by extension of the limits of a city a portion of the territory of any school district adjacent has been incorporated therein the inhabitants of the remaining part of the district have the right to be annexed has been upheld. Litson *v.* Smith, 68 Mo. App. 397. And a statute providing for the formation of a government of its own by any city of one hundred thousand inhabitants and declaring that the courts shall take judicial notice of the population in accordance with the last enumeration is constitutional. State *v.* Doland, 93 Mo. 467, 6 S. W. 366.

61. Fisher *v.* Hervey, 6 Colo. 16; Willard *v.* Harvey, 24 N. H. 344; Rairden *v.* Holden, 15 Ohio St. 207; De Cordova *v.* Galveston, 4 Tex. 470; Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063.

Illustrations.— A statute authorizing the court to grant further time to file additional appeal-bonds (South End Bank *v.* McGuffey, 1 Ohio Cir. Dec. 53), a statute forbidding injunctions in case of error or irregularity in certain proceedings pending at the passage of the act and providing a special remedy (Miller *v.* Graham, 17 Ohio St. 1), a statute providing that when, upon an appeal from the probate court, final judgment shall be rendered against the appellant in the district court, the court may, after notice, enter judgment against the sureties on the appeal-bond (Youst *v.* Willis, 5 Okla. 413, 49 Pac. 1014), and a statute providing that failure to submit an issue shall not be ground for reversal unless requested in writing by the party complaining (Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063) have all been held valid. But see *In re* Kennett, 24 N. H. 139, where a statute changing the ground of the action or nature of the defense was said to be unconstitutional. See also Pickering *v.* Pickering, 19 N. H. 389, where a statute giving plaintiff the right, independent of leave of court, to file separate replications in all cases to each of several defendants was held invalid.

62. Fisher *v.* Dabbs, 6 Yerg. (Tenn.) 119; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Illustrations.— A statute requiring return to a board of equalization of mileage of all cars in the state for the purpose of assessment, although applied to mileage before its passage (American Refrigerator Transit Co. *v.* Adams, 28 Colo. 119, 63 Pac. 410), a statute authorizing a judgment debtor who is surety only to revive the judgment after it has become dormant (Peters *v.* McWilliams, 36 Ohio St. 155), a statute authorizing county commissioners to maintain the action therein provided for for the removal of obstructions in public highways (Little Miami R. Co. *v.* Greene County Com'rs, 31 Ohio St. 338. See also Seeley *v.* Thomas, 31 Ohio St. 301), a statute authorizing an administrator *de bonis non* to bring action on the bond of a former executor, when prior to the act such suit had to be brought by creditors, legatees, etc. (Rairden *v.* Holden, 15 Ohio St. 207), and a statute providing that suit by an injured party for personal injuries shall not abate by the death of the party (Missouri, etc., R. Co. *v.* Settle, 19 Tex. Civ. App. 357, 47 S. W. 825) have all been held constitutional. But see Tucker *v.* Burns, 2 Swan (Tenn.) 35.

Moral right.— The right existing although only a moral right was held sufficient to support the legislation. State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698 (void school bonds); Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521; New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233. *Contra*, Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584.

63. *Georgia.*—Du Bignon *v.* Brunswick, 106 Ga. 317, 32 S. E. 102.

Kentucky.—Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563.

remedy is wholly taken away[64] or where a bar to a remedy is removed after such bar has become operative.[65]

d. Laws Affecting Taxation. Statutes authorizing the collection of back taxes[66] and statutes remitting taxes have been held valid.[67] A tax imposed to pay a prior indebtedness[68] or based on a prior[69] or changed assessment is not objectionable as being retrospective.[70] But a tax imposed on an object heretofore untaxable to pay a prior indebtedness is void.[71]

4. CONSTRUCTION. Statutes not expressly made retrospective in terms[72] are other-

Missouri.— Bruns *v.* Crawford, 34 Mo. 330.

New Hampshire.— Willard *v.* Harvey, 24 N. H. 344.

Ohio.— Bartol *v.* Eckert, 50 Ohio St. 31, 33 N. E. 294.

Texas.— De Cordova *v.* Galveston, 4 Tex. 470.

United States.— Camphell *v.* Iron-Silver Min. Co., 83 Fed. 643, 27 C. C. A. 646.

See 10 Cent. Dig. tit. "Constitutional Law," § 534.

64. Lundin *v.* Kansas Pac. R. Co., 4 Colo. 433; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162; Willard *v.* Harvey, 24 N. H. 344; Howard *v.* Hildreth, 18 N. H. 105. See also Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197.

65. Hewitt *v.* Colorado Springs Co., 5 Colo. 184; Mellinger *v.* Houston, 68 Tex. 36, 3 S. W. 249.

66. *Louisiana.*— New Orleans *v.* New Orleans, etc., R. Co., 35 La. Ann. 679.

Missouri.— State *v.* Heman, 7 Mo. App. 420.

North Carolina.— State *v.* Bell, 61 N. C. 76.

Ohio.— Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013; Wade *v.* Kimberly, 5 Ohio Cir. Ct. 33.

United States.— Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240.

See 10 Cent. Dig. tit. "Constitutional Law," § 532.

Interest on delinquent taxes.—A state may provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced, without conflicting with any provisions of the federal constitution. League *v.* State, 184 U. S. 156, 22 S. Ct. 475, 46 L. ed. 478 [*affirming* 93 Tex. 553, 57 S. W. 34].

Penalty for omissions.— A statute imposing a penalty for prior omissions by owners of taxable property was held void in Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013; Erie County *v.* Walker, 10 Ohio Dec. (Reprint) 558, 22 Cinc. L. Bul. 106.

67. Whited *v.* Lavis, 25 La. Ann. 568. But see Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584, holding that a statute providing that if a tax blank erroneous in form has been sent to any person, who filled out the same, and thus paid taxes on property which should not have been listed, it shall be deemed to have been an involuntary payment, and giving such person a right of action to recover said payment is offensive to the constitution.

An act releasing all druggists liable for taxes under certain prior revenue laws making them liquor-dealers, and who were not in fact using the druggist license as a blind, but were in good faith selling liquors as medicine, from all liability for those years, was held valid. Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353.

68. Bassett *v.* Barbin, 11 La. Ann. 672 (judgment against school directors); State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23 (township indebtedness); State *v.* Richland Tp., 20 Ohio St. 362; State *v.* Harris, 17 Ohio St. 608 (bounties to volunteers); Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67, 22 L. ed. 825 (a state statute authorizing county courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads theretofore contracted to be built).

69. Frellsen *v.* Mahan, 21 La. Ann. 79.

70. State *v.* Manhattan Silver-Min. Co., 4 Nev. 318; State *v.* Bell, 61 N. C. 76. *A fortiori* when there is no constitutional prohibition against retrospective laws. State *v.* Scudder, 32 N. J. L. 203.

71. Holliday *v.* Atlanta, 96 Ga. 377, 23 S. E. 406; Covington First Nat. Bank *v.* Covington, 103 Fed. 523. In Young *v.* Henderson, 76 N. C. 420, it was held that a tax levied on all merchandise purchased for twelve months prior was unconstitutional. See also Grand Rapids *v.* Lake Shore, etc., R. Co., (Mich. 1902) 89 N. W. 932, holding that an act which attempts to make certain railroads liable to a city for the payment of special assessments made prior thereto, and for which before its passage they were not so liable, is unconstitutional.

72. *California.*— People *v.* Hays, 4 Cal. 127.

Georgia.— Bond *v.* Munro, 28 Ga. 597.

Illinois.— Porter *v.* Glenn, 87 Ill. App. 106.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825.

New Hampshire.— *In re* Kennett, 24 N. H. 139.

New York.— Sayre *v.* Wisner, 8 Wend. (N. Y.) 661; Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

Tennessee.— Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A.

wise construed if possible; and where retrospective are construed as narrowly as possible.[73]

B. Curative Acts — 1. Definition. A curative act is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law.[74]

2. Validity — a. In General. In general statutes curing defects in acts done or authorizing the exercise of powers which act retrospectively are valid, provided the legislature originally had authority to confer the powers or authorize the acts.[75]

b. Acts of Executors and Other Trustees. The legislature may legalize conveyances made by executors, administrators, guardians, or persons in similar positions of trust, which are irregular because of some omission or lack of power on the part of such trustee.[76]

c. Elections of Public Officers. Statutes curing irregularities in a prior election have been held valid.[77]

d. Judicial Proceedings. The legislature may cure judicial acts which are void through irregularity in procedure,[78] or in the time or place of the sitting of the court,[79] provided a party is deprived of no substantial right thereby.[80] But

796; Chicago, etc., R. Co. *v.* Pounds, 11 Lea (Tenn.) 127.

See 10 Cent. Dig. tit. "Constitutional Law," § 535.

73. Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Hedger *v.* Rennaker, 3 Metc. (Ky.) 255.

74. See Tilton *v.* Swift, 40 Iowa 78; State *v.* Squires, 26 Iowa 340; and cases cited *infra*, note 75 *et seq.*

75. *Arkansas.*— Green *v.* Abraham, 43 Ark. 420; Mayers *v.* Byrne, 19 Ark. 308.

Indiana.— Walpole *v.* Elliott, 18 Ind. 258, 81 Am. Dec. 358.

Iowa.— Tilton *v.* Swift, 40 Iowa 78; State *v.* Squires, 26 Iowa 340.

Michigan.— People *v.* Saginaw County, 26 Mich. 22.

New York.— Guest *v.* Brooklyn, 8 Hun (N. Y.) 97.

North Carolina.— Spivey *v.* Rose, 120 N. C. 163, 26 S. E. 701.

Ohio.— Bernier *v.* Becker, 37 Ohio St. 72; Burgett *v.* Norris, 25 Ohio St. 308.

Tennessee.— U. S. Saving, etc., Co. *v.* Miller, (Tenn. Ch. 1897) 47 S. W. 17.

Wisconsin.— Freiberg *v.* Singer, 90 Wis. 608, 63 N. W. 754; Johnson *v.* Hill, 90 Wis. 19, 62 N. W. 930.

United States.— Thompson *v.* Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177.

See 10 Cent. Dig. tit. "Constitutional Law," § 536.

Where the general railroad law authorized the construction of street railways with the approval of the railroad commission, and a road was built without such consent, a retrospective statute authorizing such road was held valid, since the legislature could originally have given the franchise without the consent of the railroad commission. Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081 [*affirming* 25 N. Y. App. Div. 329, 49 N. Y. Suppl. 713].

76. *Iowa.*— Smith *v.* Callaghan, 66 Iowa 552, 24 N. W. 50.

Kansas.— Sanders *v.* Greenstreet, 23 Kan. 425.

Kentucky.—Boyce *v.* Sinclair, 3 Bush (Ky.) 261.

Massachusetts.— Weed *v.* Donovan, 114 Mass. 181; Sohier *v.* Massachusetts General Hospital, 3 Cush. (Mass.) 483.

New Jersey.— Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 114.

Tennessee.—State *v.* Butler, 15 Lea (Tenn.) 113.

See 10 Cent. Dig. tit. "Constitutional Law," § 543.

77. Lovejoy *v.* Beeson, 121 Ala. 605, 25 So. 599; Gardner *v.* Haney, 86 Ind. 17; Eastman *v.* McCarten, 70 N. H. 23, 45 Atl. 1081; Com. *v.* Hoff, 1 Woodw. (Pa.) 464.

78. Wharton *v.* Cunningham, 46 Ala. 590 (deficiency in bill of exceptions); Norton *v.* Pettibone, 7 Conn. 319, 18 Am. Dec. 116 (officer omitting to state fact in his return of execution); Beach *v.* Walker, 6 Conn. 190 (officer embracing too great fees in his return of execution); Van Slyke *v.* Shryer, 98 Ind. 126; Muncie Nat. Bank *v.* Miller, 91 Ind. 441 (summons not served because waived in writing); Wallace *v.* Feely, 10 Daly (N. Y.) 331 (irregular foreclosure sale); Lane *v.* Nelson, 79 Pa. St. 407. But see Yeatman *v.* Day, 79 Ky. 186, where it was held that no validity could be given to a bill of exceptions void because not seasonably reduced to writing. And see Gaines *v.* Catron, 1 Humphr. (Tenn.) 514, where an act making valid certain certificates of probate after the deed had been rejected for the insufficiency of the probate was held unconstitutional.

79. Walpole *v.* Elliott, 18 Ind. 258, 81 Am. Dec. 358 (irregular time of sitting); Tilton *v.* Swift, 40 Iowa 78 (irregular time and place of sitting).

80. If there was absolute lack of notice of the judicial proceedings to the losing party, they have been held incurable by statute. Wells County *v.* Fahlor, 132 Ind. 426, 31

where the court in which the proceedings were had possessed no jurisdiction its acts cannot be validated.[81]

e. Proceedings of Municipalities — (i) *In General.* A statute is valid which ratifies the action of a municipality or its officers (which action is void because informal or in excess of powers) in doing some act,[82] making some contract,[83] contracting some debt,[84] or making some conveyance,[85] provided the legislature could originally have conferred such power or have dispensed with such formality.[86]

(ii) *Bonds.* Bonds issued by a municipality in excess of its authority may be validated by subsequent legislative action.[87] This, however, does not apply when there is a constitutional prohibition against such issue which still remains at the date of the validating act.[88]

(iii) *Contracts or Subscriptions in Aid of Corporations.* A statute making valid bonds or subscriptions by a municipality in aid of a railroad which are void because irregular or unauthorized is constitutional,[89] unless the legislature

N. E. 1112; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; Fahlor *v.* Wells County, 101 Ind. 167; Willis *v.* Hodson, 79 Md. 327, 29 Atl. 604.

Action resulting from fraud cannot be cured by a subsequent statute. White Mountains R. Co. *v.* White Mountains R. Co., 50 N. H. 50.

81. Martin *v.* Hewitt, 44 Ala. 418; Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656; Maxwell *v.* Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; Griffin *v.* Cunningham, 20 Gratt. (Va.) 31.

82. *Connecticut.*— Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475.

Indiana.— Gardner *v.* Haney, 86 Ind. 17.

Iowa.— Allen *v.* Armstrong, 16 Iowa 508.

Kansas.— Mason *v.* Spencer, 35 Kan. 512, 11 Pac. 402.

Minnesota.— Wilson *v.* Buckman, 13 Minn. 441; Comer *v.* Folsom, 13 Minn. 219; Kunkle *v.* Franklin, 13 Minn. 127, 97 Am. Dec. 226.

New Jersey.—Walter *v.* Union, 33 N. J. L. 350.

New York.— People *v.* McDonald, 69 N. Y. 362.

North Carolina.— Belo *v.* Forsythe County, 76 N. C. 489.

Ohio.— Kumler *v.* Silsbee, 38 Ohio St. 425.

Pennsylvania.— Com. *v.* Hoff, 1 Woodw. (Pa.) 464.

Texas.— Morris *v.* State, 62 Tex. 728.

See 10 Cent. Dig. tit. "Constitutional Law," § 537.

83. Fox *v.* Kendall, 97 Ill. 72 (support of paupers); Brown *v.* New York, 63 N. Y. 239; Wetmore *v.* Law, 34 Barb. (N. Y.) 515; People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. (N. Y.) 109; Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105 (contract exempting street railway from paving streets); Com. *v.* Marshall, 69 Pa. St. 328; Northampton County *v.* Stier, 31 Leg. Int. (Pa.) 125 (contract for boarding prisoners); Single *v.* Marathon County, 38 Wis. 363. But in Hasbrouck *v.* Milwaukee, 13 Wis. 37, 80 Am. Dec. 718, it was held that a contract made by a municipal corporation, void for want of authority to make it, cannot be made valid by subsequent legislation, unless at the request or with the assent of the corporation subsequently acted on or confirmed by them.

84. Bartholomew *v.* Harwinton, 33 Conn. 408; State *v.* Miller, 66 Mo. 328; Wrought Iron Bridge Co. *v.* Attica, 119 N. Y. 204, 23 N. E. 542, 28 N. Y. St. 973; Cole *v.* State, 102 N. Y. 48, 6 N. E. 277; People *v.* New York, 3 Misc. (N. Y.) 131, 23 N. Y. Suppl. 1060; Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

85. Thompson *v.* Thompson, 52 Cal. 154; State *v.* Sickler, 9 Ind. 67; Barton County *v.* Walser, 47 Mo. 189.

86. Strosser *v.* Ft. Wayne, 100 Ind. 443; Fisk *v.* Kenosha, 26 Wis. 23.

87. Black *v.* Cohen, 52 Ga. 621; Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 24 N. Y. St. 6, 4 L. R. A. 685; Rogers *v.* Stephens, 86 N. Y. 623 [*affirming* 21 Hun (N. Y.) 44]; Hardenbergh *v.* Van Keuren, 4 Abb. N. Cas. (N. Y.) 43; Duke *v.* Williamsburg County, 21 S. C. 414; Nolan County *v.* State, 83 Tex. 182, 17 S. W. 823. But see Shawnee *v.* Carter, 2 Kan. 115.

88. Horton *v.* Thompson, 71 N. Y. 513 [*reversing* 7 Hun (N. Y.) 452]; Quaker City Nat. Bank *v.* Nolan County, 66 Fed. 883, 14 C. C. A. 157 [*affirming* 59 Fed. 660]; Folsom *v.* Ninety-Six Tp., 59 Fed. 67.

89. *Connecticut.*—Bridgeport *v.* Housatonuc R. Co., 15 Conn. 475.

Georgia.— Bass *v.* Columbus, 30 Ga. 845.

Iowa.— McMillen *v.* Boyles, 6 Iowa 304.

Maryland.— O'Brian *v.* Baltimore County, 51 Md. 15.

Missouri.—Hannibal, etc., R. Co. *v.* Marion County, 36 Mo. 294.

New York.— Williams *v.* Duanesburgh, 66 N. Y. 129; People *v.* Mitchell, 35 N. Y. 551; Rogers *v.* Rochester, etc., R. Co., 21 Hun (N. Y.) 44; Rogers *v.* Smith, 5 Hun (N. Y.) 475.

Virginia.— Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942; Redd *v.* Henry County, 31 Gratt. (Va.) 695.

United States.— Confarr *v.* Santa Anna Tp., 116 U. S. 366, 6 S. Ct. 418, 29 L. ed. 636; Anderson *v.* Santa Anna Tp., 116 U. S. 356, 6 S. Ct. 413, 29 L. ed. 633; Thompson *v.*

which passed the statute had no power under any circumstances to authorize the bonds or subscriptions.[90]

(iv) *Levy and Assessment of Taxes.* Statutes curing irregularities in the assessment of taxes are generally valid,[91] provided the tax levied was not originally unconstitutional.[92] In some jurisdictions it is held that where the body levying the tax had no jurisdiction its acts cannot be validated;[93] and in other jurisdictions it is held that a tax-sale under a void assessment cannot be made valid without compensation to the original owner.[94]

(v) *Public Improvements.* Where a local improvement has been made by a municipality without authority a statute validating it is constitutional,[95] and it is generally held that a statute making valid an assessment for such improvement[96]

Perrine, 103 U. S. 806, 26 L. ed. 612; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

Contra, Gaddis *v.* Richland County, 92 Ill. 119; Richland County *v.* People, 3 Ill. App. 210; Deland *v.* Platte County, 54 Fed. 823.

See 10 Cent. Dig. tit. "Constitutional Law," § 541.

90. Ellis *v.* Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811.

91. *California.*— People *v.* Goldtree, 44 Cal. 323.

Connecticut.— Atkins *v.* Nichols, 51 Conn. 513.

Indiana.— Musselman *v.* Logansport, 29 Ind. 533.

Iowa.—Iowa R. Land Co. *v.* Soper, 39 Iowa 112; Boardman *v.* Beckwith, 18 Iowa 292.

Kentucky.— Marion County *v.* Louisville, etc., R. Co., 91 Ky. 388, 12 Ky. L. Rep. 961, 15 S. W. 1061.

Michigan.— Daniels *v.* Watertown Tp., 61 Mich. 514, 28 N. W. 673.

New Jersey.— A statute providing that no suit should be prosecuted to set aside any assessment on a tax whose want of authority was cured by such statute was held valid although retrospective. Bonney *v.* Reed, 31 N. J. L. 133.

New York.—Chamberlain *v.* Taylor, 36 Hun (N. Y.) 24.

Vermont.— Smith *v.* Hard, 59 Vt. 13, 8 Atl. 317; Bellows *v.* Weeks, 41 Vt. 590. But see Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321.

Wisconsin.— Dean *v.* Borchsenius, 30 Wis. 236.

See 10 Cent. Dig. tit. "Constitutional Law," § 538.

92. Daniels *v.* Watertown Tp., 61 Mich. 514, 28 N. W. 673; Peckham *v.* Newark, 43 N. J. L. 576; Dean *v.* Borchsenius, 30 Wis. 236.

93. People *v.* Goldtree, 44 Cal. 323; Hopkins *v.* Mason, 61 Barb. (N. Y.) 469. But see Marion County *v.* Louisville, etc., R. Co., 91 Ky. 388, 12 Ky. L. Rep. 961, 15 S. W. 1061; Bonney *v.* Reed, 31 N. J. L. 133; Hewitt's Appeal, 88 Pa. St. 55.

94. Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240; Dingey *v.* Paxton, 69 Miss. 1038 (an act providing that lands already sold to the state for taxes should be redeemable for a certain limited period, after which no suit should be brought by the owner for their recovery); Cromwell *v.* McLean, 123 N. Y. 474, 25 N. E. 932, 34 N. Y. St. 85 [*affirming* 52 Hun (N. Y.) 614, 5 N. Y. Suppl. 474, 25 N. Y. St. 103]; Ziegler *v.* Flack, 54 N. Y. Super. Ct. 69 (sale for interest as well as amount of assessment). But see Chamberlain *v.* Taylor, 36 Hun (N. Y.) 24.

95. *Indiana.*— Ellingham *v.* Wells County, 107 Ind. 600, 8 N. E. 9; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1.

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; Bennett *v.* Fisher, 26 Iowa 497 (illegal delegation by supervisors to subordinates).

Maryland.— O'Brian *v.* Baltimore County Com'rs, 51 Md. 15.

Massachusetts.— Spaulding *v.* Nourse, 143 Mass. 490, 10 N. E. 179, altering highway.

New York.— Tifft *v.* Buffalo, 82 N. Y. 204, repairs on turnpike.

Pennsylvania.—Rubright *v.* Pittsburgh, 147 Pa. St. 355, 23 Atl. 579; Gray *v.* Pittsburgh, 147 Pa. St. 354, 29 Wkly. Notes Cas. (Pa.) 364, 23 Atl. 395; Donley *v.* Pittsburgh, 147 Pa. St. 348, 29 Wkly. Notes Cas. (Pa.) 362, 23 Atl. 394, 30 Am. St. Rep. 738; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Contra, La Societe Francaise D'Epargne *v.* Fishel, (Cal. 1886) 10 Pac. 395; Fanning *v.* Schammel, 68 Cal. 428, 9 Pac. 427, street contract.

See 10 Cent. Dig. tit. "Constitutional Law," § 539.

96. *Iowa.*— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

New Jersey.— De Witt *v.* Elizabeth, 56 N. J. L. 119, 27 Atl. 801; Mutual Ben. L. Ins. Co. *v.* Elizabeth, 42 N. J. L. 235 (bonds issued for debt for illegal improvement of streets); State *v.* Newark, 32 N. J. L. 453.

New York.— Tifft *v.* Buffalo, 82 N. Y. 204; Hatzung *v.* Syracuse, 92 Hun (N. Y.) 203, 36 N. Y. Suppl. 521, 71 N. Y. St. 552; Matter of Cullen, 53 Hun (N. Y.) 534, 6 N. Y. Suppl. 625, 26 N. Y. St. 156; Mann *v.* Utica, 44 How. Pr. (N. Y.) 334.

Pennsylvania.—Rubright *v.* Pittsburgh, 147 Pa. St. 355, 23 Atl. 579; Gray *v.* Pittsburgh, 147 Pa. St. 354, 29 Wkly. Notes Cas. (Pa.) 364, 23 Atl. 395; Donley *v.* Pittsburg, 147

is constitutional, although there are jurisdictions where such a statute is regarded as unconstitutional.[97]

f. Transactions Between Private Persons — (I) *In General.* Where a transaction between private persons is invalid because of some omission or informality affecting the public alone, the legislature may by subsequent statute waive the public objection and validate the transaction.[98]

(II) *Deeds* — (A) *In General.* Deeds defective because of the omission of some statutory requirement may generally be cured by a later statute,[99] provided no vested rights of innocent third parties are thereby infringed.[1] There are decisions, however, holding that where the original deed was void it cannot later be made valid by such statute.[2]

(B) *Acknowledgment.* Statutes validating defective acknowledgments are in general constitutional,[3] but such a statute is invalid where it would divest the title acquired before its passage of a third person not a party to the deed upon which the defective acknowledgment was made.[4]

(C) *Execution Under Powers.* Conveyances under powers granted by persons under a disability may be made valid by subsequent legislation.[5]

Pa. St. 348, 29 Wkly. Notes Cas. (Pa.) 362, 23 Atl. 394; Shenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Wisconsin.— May *v.* Holdridge, 23 Wis. 93.

United States.—Jarecki Mfg. Co. *v.* Toledo, 53 Fed. 329.

See 10 Cent. Dig. tit. "Constitutional Law," § 539.

97. La Societe Francaise D'Epargne *v.* Fishel, (Cal. 1886) 10 Pac. 395; Fanning *v.* Schammel, 68 Cal. 428, 9 Pac. 427; Evans *v.* Denver, 26 Colo. 193, 57 Pac. 696; St. Louis *v.* Clemens, 52 Mo. 133.

98. Thus where marriages had been performed by persons without authority statutes legalizing them have been held valid. Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121; Cooke *v.* Cooke, 61 N. C. 583.

Mortgage of railroad franchise.— Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477.

Unstamped documents.— A statute providing that all unstamped bonds drawn previous to the repeal of the stamp act should be good and valid as if they had been properly stamped is constitutional, as it merely surrenders a right of the state. State *v.* Norwood, 12 Md. 195.

99. *Arkansas.*— Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426.

Illinois.— U. S. Mortgage Co. *v.* Gross, 93 Ill. 483.

Maryland.— Dulany *v.* Tilghman, 6 Gill & J. (Md.) 461.

Minnesota.— Wistar *v.* Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241; Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95.

Ohio.— Smith *v.* Turpin, 20 Ohio St. 478 [*following* Goshorn *v.* Purcell, 11 Ohio St. 641]; Cuyahoga Falls Real Estate Assoc. *v.* McCaughy, 2 Ohio St. 152.

United States.— Leland *v.* Wilkinson, 10 Pet. (U. S.) 294, 9 L. ed. 430.

See 10 Cent. Dig. tit. "Constitutional Law," § 547.

Defects in release of dower were held cured in Sidway *v.* Lawson, 58 Ark. 117, 23 S. W. 648; Johnson *v.* Richardson, 44 Ark. 365.

Lack of power to receive.— A statute validating the title to land given to an incorporated church before its incorporation was held valid in Central Baptist Church *v.* Manchester, 21 R. I. 357, 43 Atl. 845.

1. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; Deininger *v.* McConnel, 41 Ill. 227; Leland *v.* Wilkinson, 10 Pet. (U. S.) 294, 9 L. ed. 430.

2. Routsong *v.* Wolf, 35 Mo. 174 (deed by insane person); Miller *v.* Hine, 13 Ohio St. 565 [*following* Goshorn *v.* Purcell, 11 Ohio St. 641]; Good *v.* Zercher, 12 Ohio 364 (deed by married woman); Orton *v.* Noonan, 23 Wis. 102.

3. *Arkansas.*— Cupp *v.* Welch, 50 Ark. 294, 7 S. W. 139.

Florida.— Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Indiana.— Maxey *v.* Wise, 25 Ind. 1, failure of notary to affix his seal.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

Ohio.— Barton *v.* Morris, 15 Ohio 408.

Pennsylvania.— Journeay *v.* Gibson, 56 Pa. St. 57; Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516.

See 10 Cent. Dig. tit. "Constitutional Law," § 548; and ACKNOWLEDGMENTS, 1 Cyc. 609.

But see Alabama L. Ins., etc., Co. *v.* Boykin, 38 Ala. 510. And see Good *v.* Zercher, 12 Ohio 364, where a statute rendering valid acknowledgments omitting to state that the deed was read, or contents known, to the wife, was held unconstitutional as to deeds executed by married women under a prior act requiring such deeds to be read or the contents made known.

4. Gatewood *v.* Hart, 58 Mo. 261; Green *v.* Drinker, 7 Watts & S. (Pa.) 440.

5. Dentzel *v.* Waldie, 30 Cal. 138; Randall *v.* Kreiger, 23 Wall. (U. S.) 137, 23 L. ed.

(D) *Registration.* Deeds or probates void because of lack of registration or defective registration may be made valid by subsequent legislation.[6]

C. Ex Post Facto Laws — 1. Definition. An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict.[7]

124; Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

6. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043; Spivey *v.* Rose, 120 N. C. 163, 26 S. E. 701; Barrett *v.* Barrett, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226; Green *v.* Goodall, 1 Coldw. (Tenn.) 404; Hughes *v.* Cannon, 2 Humphr. (Tenn.) 589. But see Garnett *v.* Stockton, 7 Humphr. (Tenn.) 84, where an act making valid a certificate of probate of a deed after decree rendered in a court of chancery was held void.

7. *Arkansas.*— Taylor *v.* Governor, 1 Ark. 21.

Colorado.—Garvey *v.* People, 6 Colo. 559, 45 Am. Rep. 531.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Georgia.— Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717.

Indiana.— Martindale *v.* Moore, 3 Blackf. (Ind.) 275; Strong *v.* State, 1 Blackf. (Ind.) 193.

Louisiana.— State *v.* Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454.

Massachusetts.— Jacquins *v.* Com., 9 Cush. (Mass.) 279.

Minnesota.— State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

Mississippi.— Lindzey *v.* State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; *Ex p.* Bethurum, 66 Mo. 545.

Nebraska.— Marion *v.* State, 16 Nebr. 349, 20 N. W. 289.

New York.— People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 56 N. Y. St. 456, 9 N. Y. Crim. 24, 37 Am. St. Rep. 572, 23 L. R. A. 830; Hartung *v.* People, 22 N. Y. 95; Burch *v.* Newbury, 10 N. Y. 374; Gotcheus *v.* Matheson, 40 How. Pr. (N. Y.) 97; Green *v.* Shumway, 36 How. Pr. (N. Y.) 5; Shepard *v.* People, 23 How. Pr. (N. Y.) 337 [*reversed* in 25 N. Y. 406, 24 How. Pr. (N. Y.) 388].

North Dakota.— State *v.* Rooney, (N. D. 1903) 95 N. W. 513.

Pennsylvania.— Com. *v.* Duffy, 96 Pa. St. 506, 42 Am. Rep. 554; Com. *v.* Lewis, 6 Binn. (Pa.) 266.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

Virginia.— Danville *v.* Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

Washington.— Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029.

Wyoming.— *In re* Wright, 3 Wyo. 478, 27 Pac. 565 31 Am. St. Rep. 94, 13 L. R. A. 748.

United States.— Duncan *v.* Missouri, 152 U. S. 377, 14 S. Ct. 570, 38 L. ed. 485; Kring *v.* Missouri, 107 U. S. 221, 2 S. Ct. 443, 27 L. ed. 506; Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; U. S. *v.* Hall, 2 Wash. (U. S.) 366, 26 Fed. Cas. No. 15,285.

See 10 Cent. Dig. tit. "Constitutional Law," § 550.

Other definitions are: One which inflicts a punishment for doing an act, innocent at the time of its commission. Lindzey *v.* State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 56 N. Y. St. 456, 9 N. Y. Crim. 24, 37 Am. St. Rep. 572, 23 L. R. A. 830; Bennett *v.* Boggs, Baldw. (U. S.) 60, 3 Fed. Cas. No. 1,319. See also Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

One which imposes punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. Burgess *v.* Salmon, 97 U. S. 381, 24 L. ed. 1104; Carpenter *v.* Pennsylvania, 17 How. (U. S.) 456, 15 L. ed. 127. See also Green *v.* Shumway, 39 N. Y. 418.

One which, in relation to an offense or its consequences, alters the situation of a party to his disadvantage.

Colorado.— Garvey *v.* People, 6 Colo. 559, 45 Am. Rep. 531.

Louisiana.— State *v.* Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454.

Massachusetts.— Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154.

Nebraska.— Marion *v.* State, 16 Nebr. 349, 20 N. W. 289.

New York.— People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774.

United States.— Thompson *v.* Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061; Duncan *v.* Missouri, 152 U. S. 377, 14 S. Ct. 570, 38 L. ed. 485; *In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835; Kring *v.* Missouri, 107 U. S. 221, 2 S. Ct. 443, 27 L. ed. 506; U. S. *v.* Hall, 2 Wash. (U. S.) 366, 26 Fed. Cas. No. 15,285.

One which renders an act punishable in a manner in which it was not punishable when committed.

Missouri.—State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; State *v.* Willis, 66 Mo. 131.

New Jersey.— Suydam *v.* New-Brunswick Bank, 3 N. J. Eq. 114.

New York.— Shepherd *v.* People, 25 N. Y. 406; Hartung *v.* People, 22 N. Y. 95; People *v.* Hayes, 70 Hun (N. Y.) 111, 24 N. Y. Suppl. 194, 54 N. Y. St. 184, 10 N. Y. Crim. 476.

2. CONSTITUTIONALITY. An *ex post facto* law is unconstitutional, whether passed by congress[8] or by a state.[9] But a law which is *ex post facto* as to certain offenses is not therefore wholly void, but may be valid as to all offenses committed after the date when it becomes a law.[10]

3. APPLICATION TO CIVIL RIGHTS OR REMEDIES. It is a well-settled principle of construction, which is established by a long line of cases, that the constitutional prohibition against the passage of *ex post facto* laws applies only to penal or criminal matters.[11] Laws which affect civil rights[12] or which regulate civil

Pennsylvania.— Com. *v.* Taylor, 2 Kulp (Pa.) 364.

United States.— Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

8. U. S. Const. art. 1, § 9.

9. U. S. Const. art. 1, § 10.

10. *Illinois.*— Wilson *v.* Ohio, etc., R. Co., 64 Ill. 542, 16 Am. Rep. 565.

Kentucky.— Hoke *v.* Com., 79 Ky. 567.

Louisiana.— State *v.* Isabel, 40 La. Ann. 340, 4 So. 1.

Massachusetts.—Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Flaherty *v.* Thomas, 12 Allen (Mass.) 428.

North Carolina.— State *v.* Bond, 49 N. C. 9.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.— Jaehne *v.* New York, 128 U. S. 189, 9 S. Ct. 70, 32 L. ed. 398 [*affirming* 35 Fed. 357]; Burgess *v.* Salmon, 97 U. S. 381, 24 L. ed. 1104.

Where past offenses only are to be punished under a law it is wholly void. *Ex p.* Jackson, 45 Ark. 158; State *v.* Heighland, 41 Mo. 388; *In re* Murphy, etc., Test Oath Cases, 41 Mo. 339; Com. *v.* Wasson, 12 Pittsb. Leg. J. (Pa.) 434; *Ex p.* Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *In re* Baxter, 2 Fed. Cas. No. 1,118, 5 Am. L. Reg. N. S. 159 note.

11. *Alabama.*— Washington *v.* State, 75 Ala. 582, 51 Am. Rep. 479.

Arkansas.— Taylor *v.* Governor, 1 Ark. 21.

California.— Foster *v.* Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; *In re* Perkins, 2 Cal. 424.

Maryland.—Anderson *v.* Baker, 23 Md. 531; Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Wilson *v.* Hardesty, 1 Md. Ch. 66.

Massachusetts.—Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Locke *v.* Dane, 9 Mass. 360.

Missouri.— State *v.* Adams, 44 Mo. 570; State *v.* Neal, 42 Mo. 119; *In re* Murphy, etc., Test Oath Cases, 41 Mo. 339; State *v.* Woodson, 41 Mo. 227; Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

New York.— Gotcheus *v.* Matheson, 58 Barb. (N. Y.) 152, 40 How. Pr. (N. Y.) 97.

Ohio.— France *v.* State, 57 Ohio St. 1, 47 N. E. 1041.

Virginia.— Danville *v.* Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

Washington.— Fox *v.* Territory, 2 Wash. Terr. 297, 5 Pac. 603.

West Virginia.—Randolph *v.* Good, 3 W. Va. 551; *Ex p.* Stratton, 1 W. Va. 305.

United States.— Hawker *v.* People, 170 U. S. 189, 18 S. Ct. 573, 42 L. ed. 1002; Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; *In re* Chae Chan Ping, 13 Sawy. (U. S.) 486, 36 Fed. 431; *In re* Murphy, Woolw. (U. S.) 141, 17 Fed. Cas. No. 9,947.

See 10 Cent. Dig. tit. "Constitutional Law," § 551.

Damages in an action for death by a wrongful act of defendant are not of a penal character, and a law increasing such damages in consequence of an act done before its passage is not *ex post facto*. Isola *v.* Weber, 13 Misc. (N. Y.) 97, 34 N. Y. Suppl. 77, 68 N. Y. St. 32.

12. *Alabama.*— Bloodgood *v.* Cammack, 5 Stew. & P. (Ala.) 276; Aldridge *v.* Tuscumbia, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

Arkansas.— State *v.* Kline, 23 Ark. 587.

Georgia.— Welborn *v.* Akin, 44 Ga. 420; Baker *v.* Herndon, 17 Ga. 568; Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717; Wilder *v.* Lumpkins, 4 Ga. 208; White *v.* Wayne, T. U. P. Charlt. (Ga.) 94.

Illinois.— Ward *v.* Farwell, 97 Ill. 593; Guard *v.* Rowan, 3 Ill. 499; Coles *v.* Madison, 1 Ill. 154, 12 Am. Dec. 161.

Kansas.— State *v.* Mugler, 29 Kan. 252, 44 Am. Rep. 634.

Kentucky.— Com. *v.* Bailey, 81 Ky. 395; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Fisher *v.* Cockerill, 5 T. B. Mon. (Ky.) 129.

Louisiana.— New Orleans *v.* Poutz, 14 La. Ann. 853; New Orleans *v.* Cordeviolle, 13 La. Ann. 268; Le Breton *v.* Morgan, 4 Mart. N. S. (La.) 138.

Maryland.— Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694.

Massachusetts.— Andrews *v.* Worcester County Mut. F. Ins. Co., 5 Allen (Mass.) 65; Locke *v.* Dane, 9 Mass. 360.

Missouri.— State *v.* Dolan, 93 Mo. 467, 6 S. W. 366.

New Jersey.— Moore *v.* State, 43 N. J. L. 203, 39 Am. Rep. 558; Bonney *v.* Reed, 31 N. J. L. 133; Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 114.

New York.— Southwick *v.* Southwick, 49 N. Y. 510; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Bay *v.* Gage, 36 Barb. (N. Y.) 447; Van Rensselaer *v.* Smith, 27 Barb. (N. Y.) 104.

Ohio.— Butler *v.* Toledo, 5 Ohio St. 225.

remedies[13] are not within the rule which prohibits the passage of *ex post facto* laws.

4. Laws Creating Offenses. A law which creates a new offense, or makes an act punishable which could not have been punished at all when committed, is an *ex post facto* law as to acts committed before its passage;[14] but a law imposing a punishment upon future offenses is not an *ex post facto* law.[15]

5. Laws Increasing Punishment — a. In General. A law increasing the punishment for a certain offense is *ex post facto* in so far as it applies to offenses committed before its enactment.[16] So too a law which imposes a new punishment

Pennsylvania.— Weister *v.* Hade, 52 Pa. St. 474; Evans *v.* Montgomery, 4 Watts & S. (Pa.) 218; Bambaugh *v.* Bambaugh, 11 Serg. & R. (Pa.) 191.

Rhode Island.— State *v.* Paul, 5 R. I. 185.

South Carolina.— Callahan *v.* Callahan, 36 S. C. 454, 15 S. E. 727; Byrne *v.* Stewart, 3 Desauss. (S. C.) 466.

Texas.— De Cordova *v.* Galveston, 4 Tex. 470.

West Virginia.— *Ex p.* Quarrier, 4 W. Va. 210.

United States.— Locke *v.* New Orleans, 4 Wall. (U. S.) 172, 18 L. ed. 334; Carpenter *v.* Pennsylvania, 17 How. (U. S.) 456, 15 L. ed. 127; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 28 Fed. Cas. No. 16,857; Evans *v.* Robinson, Brunn. Col. Cas. (U. S.) 400, 8 Fed. Cas. No. 4,571; Minge *v.* Gilmour, Brunn. Col. Cas. (U. S.) 383, 17 Fed. Cas. No. 9,631; Schenck *v.* Peay, 1 Dill. (U. S.) 267, 21 Fed. Cas. No. 12,451, 2 Am. L. T. Rep. (U. S. Cts.) 112, 1 Chic. Leg. N. 363, 10 Int. Rev. Rec. 54, 11 Int. Rev. Rec. 22; Albee *v.* May, 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134; Schenck *v.* Peay, Woolw. (U. S.) 175, 21 Fed. Cas. No. 12,450, 2 Am. L. T. Rep. (U. S. Cts.) 111, 1 Chic. Leg. N. 363, 10 Int. Rev. Rec. 54, 11 Int. Rev. Rec. 12.

See 10 Cent. Dig. tit. "Constitutional Law," § 551.

13. *Alabama.*— Walthall *v.* Walthall, 42 Ala. 450.

Connecticut.—Calder *v.* Bull, 2 Root (Conn.) 50.

Georgia.— Bonner *v.* Martin, 40 Ga. 501; White *v.* Herndon, 40 Ga. 493; Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488.

Louisiana.— Police Jury *v.* McDonogh, 7 Mart. (La.) 8.

Maine.— Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

Massachusetts.— George *v.* Reed, 101 Mass. 378; Bemis *v.* Clark, 11 Pick. (Mass.) 452.

Michigan.— Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384.

Missouri.— State *v.* Dolan, 93 Mo. 467, 6 S. W. 366.

Pennsylvania.— Evans *v.* Montgomery, 4 Watts & S. (Pa.) 218.

United States.— U. S. Bank *v.* Longworth, 1 McLean (U. S.) 35, 2 Fed. Cas. No. 923.

See 10 Cent. Dig. tit. "Constitutional Law," § 564.

14. *Illinois.*— Newlan *v.* Aurora, 14 Ill. 364.

Massachusetts.— Jacquins *v.* Com., 9 Cush. (Mass.) 279.

North Carolina.— State *v.* Bond, 49 N. C. 9.

Pennsylvania.— Com. *v.* Wasson, 12 Pittsb. Leg. J. (Pa.) 434.

South Carolina.— State *v.* Solomons, 3 Hill (S. C.) 96.

Texas.—Johnson *v.* State, 16 Tex. App. 402.

United States.— Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

See 10 Cent. Dig. tit. "Constitutional Law," § 571.

A law changing the name of an offense may be an *ex post facto* law. Johnson *v.* State, 16 Tex. App. 402.

Where an act is criminal when done, but there is no provision as to its punishment, a law which provides punishment is *ex post facto* as to that act. Com. *v.* Edwards, 9 Dana (Ky.) 447. So where there was no court which had jurisdiction of the offense, a subsequent law giving jurisdiction has been held *ex post facto*. U. S. *v.* Starr, Hempst. (U. S.) 419, 27 Fed. Cas. No. 16,379.

15. *California.*— Cohen *v.* Wright, 22 Cal. 293.

Louisiana.— State *v.* Isabel, 4 La. Ann. 340, 4 So. 1.

Massachusetts.— Flaherty *v.* Thomas, 12 Allen (Mass.) 428.

New York.— Barker *v.* People, 20 Johns. (N. Y.) 457.

Rhode Island.— State *v.* Keeran, 5 R. I. 497; State *v.* Paul, 5 R. I. 185.

Washington.— Fox *v.* Territory, 2 Wash. Terr. 297, 5 Pac. 603.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

But see *Ex p.* Jackson, 45 Ark. 158, where a statute making "any act injurious to the public health, or public morals," etc., a misdemeanor, was held to be *ex post facto*, as it did not designate what acts were included, and left to the tribunal trying the cause, at a time subsequent to the commission of the act, the discretion to decide whether or not it was a crime.

16. *Indiana.*— Strong *v.* State, 1 Blackf. (Ind.) 193.

Massachusetts.—Murphy *v.* Com., 172 Mass.

in addition to that to which the offense was subject at the time it was committed is *ex post facto*.[17] It has also been held that imprisonment as the result of a failure to pay a fine or give security cannot be imposed or increased as to offenses committed before the passage of the law.[18]

b. Change in Kind. Laws which change the kind of punishment are *ex post facto* as to prior offenses, unless the new punishment is clearly a mitigation of the former penalty.[19] Laws are not *ex post facto* if they improve the situation[20] of

264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Flaherty *v.* Thomas, 12 Allen (Mass.) 428; Jacquins *v.* Com., 9 Cush. (Mass.) 279.

New York.— People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68, 14 N. Y. St. 829; Shepherd *v.* People, 25 N. Y. 406; Hartung *v.* People, 22 N. Y. 95; Burch *v.* Newbury, 10 N. Y. 374.

North Carolina.— State *v.* Kent, 65 N. C. 311.

Pennsylvania.— Com. *v.* Lewis, 6 Binn. (Pa.) 266.

United States.— Jaehne *v.* New York, 128 U. S. 189, 9 S. Ct. 70, 32 L. ed. 398; Kring *v.* Missouri, 107 U. S. 221, 2 S. Ct. 443, 27 L. ed. 506; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

See 10 Cent. Dig. tit. "Constitutional Law," § 586.

Indeterminate sentence laws, providing that prisoners shall be sentenced to a term of not less than a minimum nor more than a maximum number of years, the length of the term between such limits to depend upon the behavior of the prisoner, have been held to be *ex post facto* as to offenses committed while a prior law was in force which left the length of imprisonment to the discretion of the court imposing sentence. Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; People *v.* Dane, 81 Mich. 36, 45 N. W. 655. But such a law is valid as to past offenses. Davis *v.* State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; Hicks *v.* State, 150 Ind. 293, 50 N. E. 27; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. See also *In re* Murphy, 87 Fed. 549.

17. Thus a law deferring execution for a year has been held *ex post facto* as adding imprisonment to the death penalty. Hartung *v.* People, 22 N. Y. 95; Kuckler *v.* People, 5 Park. Crim. (N. Y.) 212. So a law shortening the time is an increase in severity by bringing death nearer. *In re* Tyson, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472; Hartung *v.* People, 22 N. Y. 95.

A change in the place of imprisonment prior to the execution is an additional punishment. People *v.* McNulty, (Cal. 1891) 28 Pac. 816.

Solitary confinement, keeping the prisoner ignorant of the time of his execution, or any other change calculated to add terror to the death penalty, makes the law *ex post facto* as to past offenses. People *v.* McNulty, (Cal. 1891) 28 Pac. 816; *In re* Savage, 134 U. S. 176, 10 S. Ct. 389, 33 L. ed. 842; *In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835. But a law providing that execution should take place before sunrise and out of public view does not infringe any rights of the prisoner. Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734. And a law making changes in the treatment of the prisoner does not impose any additional hardship. *In re* Tyson, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472.

18. Dinckerlocker *v.* Marsh, 75 Ind. 548; Lynn *v.* State, 84 Md. 67, 35 Atl. 21; *Ex p.* Hunt, 28 Tex. App. 361, 13 S. W. 145. But see State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076; State *v.* Bunker, 7 S. D. 639, 65 N. W. 33.

An increase of costs on conviction of an offense has been regarded as the imposition of an additional punishment. Caldwell *v.* State, 55 Ala. 133. But a statute imposing additional costs in an action to abate a liquor nuisance has been held not to be an *ex post facto* law. Farley *v.* Geisheker, 78 Iowa 453, 43 N. W. 279, 6 L. R. A. 533; Campbell *v.* Manderscheid, 74 Iowa 708, 39 N. W. 92; Drake *v.* Jordan, 73 Iowa 707, 36 N. W. 653.

19. *In re* Petty, 22 Kan. 477; Ratzky *v.* People, 29 N. Y. 124; Shepherd *v.* People, 25 N. Y. 406; Hartung *v.* People, 22 N. Y. 95; Roberts *v.* State, 2 Overt. (Tenn.) 423; Murray *v.* State, 1 Tex. App. 417.

Mitigation of punishment.— The punishment has been held to be mitigated by a change from death to life imprisonment (Com. *v.* Gardner, 11 Gray (Mass.) 438; Com. *v.* Wyman, 12 Cush. (Mass.) 237; McGuire *v.* State, 76 Miss. 504, 25 So. 495. *Contra*, Marion *v.* State, 16 Nebr. 349, 20 N. W. 289; Shepherd *v.* People, 25 N. Y. 406; Murray *v.* State, 1 Tex. App. 417), from death to whipping, fine, and imprisonment (State *v.* Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741), from whipping to imprisonment (Strong *v.* State, 1 Blackf. (Ind.) 193), from whipping and imprisonment to imprisonment (State *v.* Kent, 65 N. C. 311), from fine and imprisonment to fine or imprisonment (Dolan *v.* Thomas, 12 Allen (Mass.) 421), from imprisonment to fine or imprisonment (Turner *v.* State, 40 Ala. 21. *Contra*, State *v.* McDonald, 20 Minn. 136), and by a decrease in the minimum punishment leaving the maximum unchanged (People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 56 N. Y. St. 456, 37 Am. St. Rep. 572, 23 L. R. A. 830. *Contra*, State *v.* Daley, 29 Conn. 272).

20. *Indiana.*— Dinckerlocker *v.* Marsh, 75 Ind. 548.

Massachusetts.— Murphy *v.* Com., 172 Mass.

the party by reducing the amount of punishment. The same is true of laws which grant amnesty.[21]

6. Laws Depriving Accused of Substantial Right or Immunity — a. Laws Affecting Rights — (I) *In General.* A law which deprives an accused person of some substantial right or immunity possessed by him before its passage is *ex post facto* as to prior offenses.[22]

(II) *Changing Rules of Evidence.* Laws which make conviction easier by changing the rules of evidence, so that less or different evidence is required to convict are *ex post facto* as to prior offenses.[23]

b. Laws Affecting Remedies. But where the law affects the procedure merely, and does not deprive the accused of any substantial protection, it is not *ex post*

264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Dolan *v.* Thomas, 12 Allen (Mass.) 421. See also *In re* Storti, 180 Mass. 57, 61 N. E. 759.

Nebraska.— Hair *v.* State, 16 Nebr. 601, 21 N. W. 464; State *v.* Wish, 15 Nebr. 448, 19 N. W. 686.

New Hampshire.— State *v.* Arlin, 39 N. H. 179.

New York.— People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 56 N. Y. St. 456, 37 Am. St. Rep. 572, 23 L. R. A. 830.

Texas.— McInturf *v.* State, 20 Tex. App. 335.

Wisconsin.— Keene *v.* State, 3 Pinn. (Wis.) 99, 3 Chandl. (Wis.) 109.

21. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600.

22. State *v.* Fourchy, 106 La. 743, 31 So. 325; People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774.

The accused is deprived of a substantial right or immunity by a law providing that nine jurors out of twelve may give a verdict (State *v.* Ardoin, 51 La. Ann. 169, 24 So. 802 [*overruling* State *v.* Caldwell, 50 La. Ann. 666, 23 So. 869, 69 Am. St. Rep. 465, 41 L. R. A. 718; State *v.* Carter, 33 La. Ann. 1214]), a law providing for trial before a single justice of offenses previously tried by a jury (State *v.* Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472), a law reducing the number of jurors from twelve to eight (Thompson *v.* Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. ed. 1061), a law changing the effect of a plea of guilty (Garvey *v.* People, 6 Colo. 559, 45 Am. Rep. 531; Kring *v.* Missouri, 107 U. S. 221, 2 S. Ct. 443, 27 L. ed. 506), a law authorizing conviction of an offense included in that charged (Lovett *v.* State, 33 Fla. 389, 14 So. 837; State *v.* Johnson, 81 Mo. 60), a law punishing offenses that have been pardoned or making void convictions valid (State *v.* Keith, 63 N. C. 140; *In re* Murphy, Woolw. (U. S.) 141, 17 Fed. Cas. No. 9,947), or a law repealing a statute of limitation which protected the offender from punishment (Moore *v.* State, 43 N. J. L. 203, 39 Am. Rep. 558; State *v.* Sneed, 25 Tex. Suppl. 66). But where the statutory period had not expired before the passage of the statute, it was held not to be an *ex post facto* law as to the offense in question. Com. *v.* Duffy, 96 Pa. St. 506, 42 Am. Rep. 554.

23. Hart *v.* State, 40 Ala. 32, 88 Am. Dec. 752 (abolition of requirement of previous law that the testimony of an accomplice must be corroborated); State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241 (allowing marriage to be proved by indirect evidence in prosecutions for polygamy); Valesco *v.* State, 9 Tex. App. 76; Hannahan *v.* State, 7 Tex. App. 664; Calloway *v.* State, 7 Tex. App. 585; Calder *v.* Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

Admission of evidence of a past offense upon a trial for an offense occurring after the passage of the law was held not to give the law an *ex post facto* operation. Cadwell *v.* State, 17 Conn. 467.

Changes in the law as to the admissibility of evidence without lessening the requirements for conviction are not *ex post facto*, as a law permitting the seduced female to testify in a trial for seduction where such evidence had been forbidden by a former law (Robinson *v.* State, 84 Ind. 452), a law providing that in all questions affecting the credibility of a witness his general moral character may be given in evidence (Mrous *v.* State, 31 Tex. Crim. 597, 21 S. W. 764, 37 Am. St. Rep. 834), a law changing the previous rule so as to allow undisputed specimens of handwriting to be brought in for comparison with disputed specimens (Thompson *v.* Missouri, 171 U. S. 380, 18 S. Ct. 922, 43 L. ed. 204), or a law making competent to testify a person who was not a competent witness at the time the offense was committed (Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262).

Statute requiring production of evidence.— A law which provides that in civil suits under the revenue laws the court may require defendant to produce any books and papers which may tend to prove any allegation made by the government and if such books are not produced shall take the allegation as confessed was held *ex post facto* as to a suit for a penalty or forfeiture. U. S. *v.* Hughes, 8 Ben. (U. S.) 29, 3 Fed. Cas. No. 15,416, 11 Alb. L. J. 199, 2 Am. L. T. Rep. N. S. 300, 21 Int. Rev. Rec. 84. But as to books and papers relating to business since the passage of the act the same law was held valid. U. S. *v.* Distillery No. 28, 6 Biss. (U. S.) 483, 3 Fed. Cas. No. 14,966, 2 Centr. L. J. 749, 8 Chic. Leg. N. 57, 21 Int. Rev. Rec. 366.

facto.[24] Thus a law reducing the number of grand jurors,[25] a law changing the qualifications, method of selection, and method of impaneling jurors,[26] a law reducing the number of peremptory challenges allowed to an accused,[27] a law providing that one who before must have been indicted as an accessory, but punished as if a principal, may be indicted for the crime itself,[28] a law making valid a void complaint for violation of a municipal ordinance,[29] a law authorizing an amendment of the indictment in cases of misnomer,[30] a law changing the place of trial,[31] a law dividing a county into judicial districts, and providing that the jury before which an offense is tried shall be selected entirely from that district,[32] a law repealing a law which provided that juries should be judges of the law as well as of the facts,[33] a law doing away with a jury trial upon offenses against municipal ordinances, and providing an appeal to the mayor, with the aldermen sitting as a jury,[34] a law requiring the defense of insanity to be set up by special plea,[35] a law giving the prosecution the right to open and close,[36] a law giving the jury the right to determine the amount of punishment,[37] a law authorizing the supreme court to correct the judgment, where there is an error in the sentence but no error in the trial,[38] or a law reducing the number of judges or otherwise changing the court which decides questions of law[39] is not *ex post facto* as to offenses com-

24. State *v.* Fourchy, 106 La. 743, 31 So. 325; People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774; U. S. Bank *v.* Longworth, 1 McLean (U. S.) 35, 2 Fed. Cas. No. 923.

Affording new protection.—A law which instead of taking away a protection affords the offender a protection which he did not have before is not *ex post facto*. State *v.* Richardson, 47 S. C. 166, 25 S. E. 220.

Appeal.— In Mallett *v.* North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. ed. 1015, a statute giving the prosecution the right to appeal to the supreme court from a judgment of the presiding justice granting a new trial was held not an *ex post facto* law.

Extradition.—A treaty which provides that an offender may be given up to the authorities of the country where the crime was committed is not an *ex post facto* law, although an offender could not have been so surrendered at the time of the offense. *In re* De Giacomo, 12 Blatchf. (U. S.) 391, 7 Fed. Cas. No. 3,747, 21 Int. Rev. Rec. 25.

25. State *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76; State *v.* Carrington, 15 Utah 480, 50 Pac. 526.

26. Jesse *v.* State, 20 Ga. 156; Rafe *v.* State, 20 Ga. 60; State *v.* Cook, 52 La. Ann. 114, 26 So. 751; Perry *v.* Com., 3 Gratt. (Va.) 632.

A law raising the qualifications for jurors is not an *ex post facto* law. Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075.

Time of challenge.— A law reducing the time within which defendant under a prior law might make his challenge to the men from whom the jury was to be drawn is not *ex post facto*. State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

27. South *v.* State, 86 Ala. 617, 6 So. 52; Mathis *v.* State, 31 Fla. 291, 12 So. 681.

Increasing state's challenges.—A law is not *ex post facto* because it increases the number of peremptory challenges given to the state. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Walston *v.* Com., 16 B. Mon. (Ky.) 15; State *v.* Ryan, 13 Minn. 370.

28. Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

29. Com. *v.* Bean, Thacher Crim. Cas. (Mass.) 85.

A law doing away with technical requirements as to the indictment has been held *ex post facto* as to a void indictment which it purported to make valid. State *v.* Fleming, 66 Me. 142, 22 Am. Rep. 552.

30. State *v.* Manning, 14 Tex. 402.

31. Cook *v.* U. S., 139 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906; Gut *v.* Minnesota, 9 Wall. (U. S.) 35, 19 L. ed. 573.

The repeal of a law giving either party to a criminal examination the right to change the venue upon an affidavit of prejudice in the presiding justice is not an *ex post facto* law. People *v.* McDonald, 5 Wyo. 526, 42 Pac. 15, 29 L. R. A. 834.

32. Potter *v.* State, 42 Ark. 29.

33. Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.

34. Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

35. Perry *v.* State, 87 Ala. 30, 6 So. 425.

36. People *v.* Mortimer, 46 Cal. 114.

37. Holt *v.* State, 2 Tex. 363.

38. Jacquins *v.* Com., 9 Cush. (Mass.) 279.

A law authorizing the correction of the judgment of the court before which relief is sought upon habeas corpus proceedings was sustained in *Ex p.* Bethurum, 66 Mo. 545.

39. State *v.* Thompson, 140 Mo. 408, 42 S. W. 949; State *v.* Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; State *v.* Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829.

mitted before its passage. So where the offense is already punishable in one court, a law is not *ex post facto* which makes it punishable in another court.[40]

c. Presentment by Indictment or Information. Upon the question whether the right to a presentment by a grand jury is such a substantial right that a law providing for presentment either by indictment or information is *ex post facto* as to prior offenses the authorities are in conflict. Some hold that such laws are *ex post facto*,[41] others that they are not.[42]

7. Laws Imposing Civil Disabilities and Forfeitures — a. In General. A law whose object is the punishment of past offenses is unconstitutional as an *ex post facto* law, although the penalty is merely a civil disability, such as a disqualification from practising a profession,[43] from prosecuting or defending a civil action,[44] or a forfeiture of property by civil process.[45]

b. Protection of Public. Where the purpose of a statute is to protect the

40. Com. *v.* Phillips, 11 Pick. (Mass.) 28; State *v.* Littlefield, 93 N. C. 614; State *v.* Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; State *v.* Sullivan, 14 Rich. (S. C.) 281; State *v.* Welch, 65 Vt. 50, 25 Atl. 900.

And this is true even though the jurisdiction of the other court is taken away. State *v.* Littlefield, 93 N. C. 614; State *v.* Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181.

41. People *v.* Tisdale, 57 Cal. 104; State *v.* Kingsly, 10 Mont. 537, 26 Pac. 1066; State *v.* Rock, 20 Utah 28, 57 Pac. 532; McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152. But see People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257; State *v.* Carrington, 15 Utah 480, 50 Pac. 526; State *v.* Hoyt, 4 Wash. 818, 30 Pac. 1060; Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029.

42. *California.*— People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257. But see People *v.* Tisdale, 57 Cal. 104.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. See also State *v.* Thompson, 141 Mo. 408, 42 S. W. 949.

Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526. But see State *v.* Rock, 20 Utah 38, 57 Pac. 532.

Washington.— State *v.* Hoyt, 4 Wash. 818, 30 Pac. 1060; Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029. But see McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

Wyoming.— *In re* Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

43. Thus statutes imposing a test oath of past loyalty to the United States or to the state upon persons engaged in the practice of a profession, and disqualifying from practice all persons who refused to take the oath, have been held unconstitutional as *ex post facto*, being designated to punish past offenses. State *v.* Adams, 44 Mo. 570; State *v.* Heighland, 41 Mo. 388; *In re* Murphy, etc., Test Oath Cases, 41 Mo. 339; Com. *v.* Wasson, 12 Pittsb. Leg. J. (Pa.) 434; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366, 32 How. Pr. (N. Y.) 241 (oath of attorneys practising in the District of Columbia); Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356 (oath of persons in the ministry); *In re* Baxter, 2 Fed. Cas. No. 1,118, 5 Am. L. Reg. N. S. 159 note.

To disbar an attorney for acts for which when committed he could have been disbarred only after trial and conviction in a criminal court is to impose a punishment to which he was not liable when the acts were committed. State *v.* Fourchy, 106 La. Ann. 743, 31 So. 325.

44. Lynch *v.* Hoffman, 7 W. Va. 553, 578; Ross *v.* Jenkins, 7 W. Va. 284; Kyle *v.* Jenkins, 6 W. Va. 371; Pierce *v.* Carskadon, 16 Wall. (U. S.) 234, 21 L. ed. 276. So a statute allowing participation or aid in rebellion to be set up in a civil suit against plaintiff or defendant, as a bar to the prosecution or defense of the suit, has been held an *ex post facto* law as to persons who, as citizens of the state, had the right to prosecute or defend before the law was passed. Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

But while the Civil war was actually going on such statutes were upheld in part as being in the exercise of the war power. State *v.* Garesche, 36 Mo. 256; Beirne *v.* Brown, 4 W. Va. 72. And an oath referring only to acts done since the passage of the statute has been held unobjectionable. *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293.

45. Thus a statute making void existing judgments based upon the sale or purchase of slaves (McNealy *v.* Gregory, 13 Fla. 417), a statute forfeiting property in a slave because of an illegal attempt at manumission (Spencer *v.* Amy, R. M. Charlt. (Ga.) 178), a statute providing for a civil action for failure to ring or whistle at railroad crossings, one half of the penalty to the informant, and one half to the state (Wilson *v.* Ohio, etc., R. Co., 64 Ill. 542, 16 Am. Rep. 565), a statute providing for assessment of property which the owner has failed to list (Hoke *v.* Com., 79 Ky. 567), a statute making it a misdemeanor for certain banking associations to issue bills or notes on time or interest (Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309), a statute increasing the tax on tobacco and punishing its evasion (Burgess *v.* Salmon, 97 U. S. 38, 24 L. ed. 1104), or a statute forfeiting property for evasion of the tax on it

public from unfit persons, it is constitutional, although it disqualifies a person, by reason of past acts, from continuing in the practice of his profession,[46] from remaining in his business,[47] from voting,[48] or from holding office.[49] And similarly a law which provides that a person against whom a divorce is granted for adultery may be prohibited from marrying again is valid.[50]

c. Taxation. A statute authorizing suits for taxes for a period before the passage of the statute is not *ex post facto*.[51]

8. HABITUAL CRIMINAL LAWS. A law providing that an offender who has been convicted of several previous offenses may be punished as an habitual criminal, thus receiving a more severe sentence for his latest offense than he would have received but for his previous offenses, is not an *ex post facto* law as to such previous offenses, since the punishment is imposed upon the later offense.[52]

(U. S. *v.* Hughes, 8 Ben. (U. S.) 29, 26 Fed. Cas. No. 15,416, 11 Alb. L. J. 199, 2 Am. L. T. Rep. N. S. 300, 21 Int. Rev. Rec. 84) is unconstitutional as punishing past offenses.

46. Hawker *v.* New York, 170 U. S. 189, 18 S. Ct. 573, 42 L. ed. 1004, where it appeared that defendant, a physician, after having been convicted and served a sentence for criminal malpractice, again entered into the practice of medicine. Subsequently a law was passed disqualifying from practice persons convicted of crime. Defendant was prosecuted, convicted, and sentenced for violation of this latter statute, and brought the case to the supreme court of the United States, contending that the statute punished his former offense of criminal malpractice by taking away his right to practise his profession, and was therefore an *ex post facto* law. It was held that the statute was not an *ex post facto* law, as the legislature had power to debar unfit persons from the practice of medicine.

A fortiori where the party is only a candidate for admission to a profession, he cannot claim that he is punished, although the law relates to past offenses. Fox *v.* Territory, 2 Wash. Terr. 297, 5 Pac. 603.

Future offenses.— A provision for removing physicians from practice which relates to future offenses only is not an *ex post facto* law. France *v.* State, 57 Ohio St. 1, 47 N. E. 104.

47. Foster *v.* Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194, where a municipal ordinance providing that no person who had been convicted of a felony, or who had carried on the business of selling liquor in places of amusement where females were employed, should receive a license to sell liquor was held not an *ex post facto* law, although retrospective, as it did not punish, but simply furnished a standard to measure the fitness of individuals to conduct a business. See also Gray *v.* Connecticut, 159 U. S. 74, 15 S. Ct. 985, 40 L. ed. 80.

48. *Alabama.*— Washington *v.* State, 75 Ala. 582, 51 Am. Rep. 479.

Maryland.— Anderson *v.* Baker, 23 Md. 531.

Missouri.—State *v.* Neal, 42 Mo. 119; *In re* Murphy, etc., Test Oath Cases, 41 Mo. 339; State *v.* Woodson, 41 Mo. 227; Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

New York.— Gotcheus *v.* Matheson, 58 Barb. (N. Y.) 152, 40 How. Pr. (N. Y.) 97.

West Virginia.— Randolph *v.* Good, 3 W. Va. 551.

49. Taylor *v.* Governor, 1 Ark. 21; *Ex p.* Stratton, 1 W. Va. 305. See also Barker *v.* People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, 20 Johns. (N. Y.) 457.

But a statute requiring delegates at a state constitutional convention to take an oath of past loyalty has been held to be an *ex post facto* law. Green *v.* Shumway, 39 N. Y. 418.

Office in quasi-public corporation.— It has been held to be within the power of the legislature to take steps to remove officers of a quasi-public corporation who failed to take the oath of loyalty. State *v.* Adams, 44 Mo. 570.

50. Elliott *v.* Elliott, 38 Md. 357; Dickinson *v.* Dickinson, 7 N. C. 327, 9 Am. Dec. 608.

51. People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521. See also State *v.* Bell, 61 N. C. 76, where the law taxed the business of citizens for the whole current year in which the law was passed, and punished refusal to give an account of such business. And see State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; Sharpleigh *v.* Surdam, 1 Flipp. (U. S.) 472, 21 Fed. Cas. No. 12,711, 11 West. Jur. 203. But see Hoke *v.* Com., 79 Ky. 567; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309.

52. *California.*— *Ex p.* Gutierrez, 45 Cal. 429.

Maine.— State *v.* Woods, 68 Me. 409.

Massachusetts.— Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648; Com. *v.* Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; Plumbly *v.* Com., 2 Metc. (Mass.) 413; Com. *v.* Phillips, 11 Pick. (Mass.) 28; *In re* Ross, 2 Pick. (Mass.) 165.

Michigan.— *In re* Miller, 110 Mich. 676, 68 N. W. 990, 64 Am. St. Rep. 376, 34 L. R. A. 398.

New York.— People *v.* Butler, 3 Cow. (N. Y.) 347.

Ohio.— Blackburn *v.* State, 50 Ohio St. 428, 26 N. E. 18; *In re* Kline, 6 Ohio Cir. Ct. 215.

9. Punishment of Offenders — a. Immunity Under Laws Repealing Former Statutes. Where an offense is made punishable under a new statute, which repeals former laws either expressly or by implication,[53] it sometimes happens that one who committed the offense before the new law went into effect cannot be convicted under either the old law or the new, since the old law has been repealed and the new law is *ex post facto* and void as to that offense,[54] and therefore an offender convicted of having committed the offense before the passage of the later statute must be discharged.[55]

b. Punishment Under Saving Clause. The offender may, however, be punished if the new law provides that as to offenses committed before it goes into effect the old law shall remain in force,[56] or that the offender may choose between the new punishment and the old.[57] And where the old law is so continued in force, and upon a bill of exceptions, appeal, or habeas corpus proceedings, it appears that the only error was in the sentence, the court, if so authorized by statute, may order the prisoner to be remanded for sentence under the old law.[58]

10. Construction. Laws which would be *ex post facto* if applied to offenses

Virginia.— Rand *v.* Com., 9 Gratt. (Va.) 738.

United States.— McDonald *v.* Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. ed. 542.

See 10 Cent. Dig. tit. "Constitutional Law," § 575.

But where the law provided that a prisoner convicted of an offense might be sentenced to a term of imprisonment beginning at the date of the expiration of a term which he was then serving, it was held *ex post facto* as to an offense committed under a law that provided that the term should begin at the date of the sentence, because in the case at hand it increased the punishment. Hannahan *v.* State, 7 Tex. App. 664.

53. New laws changing the penalty or the nature of the offense often repeal the old law by implication. State *v.* McDonald, 20 Minn. 136; Lindzey *v.* State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308 (change in language describing the offense from "unlawfully and maliciously with intent thereby to defraud" to "wilfully and wantonly"); Roberts *v.* State, 2 Overt. (Tenn.) 423; *In re* Medley, 134 U. S. 160, 174, 10 S. Ct. 384, 33 L. ed. 835. But where the new law applies only to future offenses the old law is not by implication repealed. Murphy *v.* Massachusetts, 177 U. S. 155, 20 S. Ct. 639, 44 L. ed. 711. So where a new law was in the very words of the old, except that it reduced the punishment, the new law is obviously intended to continue the old law and does not repeal it. Hair *v.* State, 16 Nebr. 601, 21 N. W. 464; State *v.* Wish, 15 Nebr. 448, 19 N. W. 686. It has also been held that unless the language describing the offense was changed the old law was not repealed by the new. Dawson *v.* State, 6 Tex. 347. So where the new statute is not merely inoperative as to past offenses, but is wholly void, it does not repeal the old law. People *v.* McNulty, (Cal. 1891) 28 Pac. 816.

54. *Massachusetts.*— Flaherty *v.* Thomas, 12 Allen (Mass.) 428.

Minnesota.— State *v.* McDonald, 20 Minn. 136.

Mississippi.— Lindzey *v.* State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674.

New York.— Ratzky *v.* People, 29 N. Y. 124; Hartung *v.* People, 26 N. Y. 167; Shepherd *v.* People, 25 N. Y. 406.

North Carolina.— State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308.

Tennessee.— Roberts *v.* State, 2 Overt. (Tenn.) 423.

55. Flaherty *v.* Thomas, 12 Allen (Mass.) 428; Hartung *v.* People, 26 N. Y. 167; *In re* Savage, 134 U. S. 176, 10 S. Ct. 389, 33 L. ed. 842; *In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 385.

A person accused of such offense may have the indicement quashed upon demurrer (State *v.* McDonald, 20 Minn. 136), or upon a plea in abatement (State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308).

56. People *v.* Nolan, 115 N. Y. 660, 21 N. E. 1060, 24 N. Y. St. 588; People *v.* Maxwell, 83 Hun (N. Y.) 157, 31 N. Y. Suppl. 564, 64 N. Y. St. 154. A law providing that "the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed" has been held to be a general saving clause, making all acts increasing punishment prospective only in operation, and keeping the former laws in force. People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

57. McInturf *v.* State, 20 Tex. App. 335. See also Hair *v.* State, 16 Nebr. 601, 21 N. W. 464; State *v.* Wish, 15 Nebr. 448, 19 N. W. 686; Dawson *v.* State, 6 Tex. 347.

58. Jaquins *v.* Com., 9 Cush. (Mass.) 279; Ratzky *v.* People, 29 N. Y. 124; Murphy *v.* Massachusetts, 177 U. S. 155, 20 S. Ct. 639, 44 L. ed. 711. See also *in re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835.

occurring before their passage will if possible be construed as having only a prospective effect.[59]

D. Bills of Attainder — 1. Definition. A bill of attainder is a legislative act which inflicts punishment without a judicial trial.[60]

2. Constitutionality. The constitution of the United States prohibits the passage of bills of attainder either by congress[61] or by the states.[62]

3. Laws Imposing Civil Disabilities. Laws imposing civil disabilities or forfeitures as a punishment for past acts have been held to be bills of attainder, since they impose such disabilities without a judicial trial;[63] but laws which do not proceed upon the idea of punishment have been held not to be bills of attainder, although imposing disabilities upon persons without judicial trial.[64] A law which expatriates or banishes a citizen by reason of race or color is a bill of attainder.[65]

XI. PRIVILEGES OR IMMUNITIES AND CLASS LEGISLATION.

A. Prohibitory Clauses. The federal constitution secures to the citizens of each state "all the privileges and immunities of citizens in the several states,"[66] and prohibits any state making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States."[67] Many of the states have similar provisions in their constitutions.[68]

59. *Massachusetts.*— Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Flaherty *v.* Thomas, 12 Allen (Mass.) 428.

New York.— Ratzky *v.* People, 29 N. Y. 124; Shepherd *v.* People, 25 N. Y. 406.

Texas.— Murray *v.* State, 1 Tex. App. 417.

Virginia.— Morgan *v.* Com., 98 Va. 812, 35 S. E. 448.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.— Jachne *v.* New York, 128 U. S. 189, 9 S. Ct. 70, 32 L. ed. 398.

Statutes have been construed as making no changes where they laid down a rule of evidence (State *v.* Gay, 18 Mont. 51, 44 Pac. 411) or continued in force an act already applying to the offense (*Ex p.* Larkin, 1 Okla. 53, 25 Pac. 745, 11 L. R. A. 418. See also Hair *v.* State, 16 Nebr. 601, 21 N. W. 464; State *v.* Wish, 15 Nebr. 448, 19 N. W. 686).

60. Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356. See also Gaines *v.* Buford, 1 Dana (Ky.) 481; McNeil *v.* Bright, 4 Mass. 282; Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cooper *v.* Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

Another definition is: "Such special legislation as inflicts capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings." Gotcheus *v.* Matheson, 40 How. Pr. (N. Y.) 97.

Bills of attainder include only laws punishing for treason or felony. Gotcheus *v.* Matheson, 40 How. Pr. (N. Y.) 102; *Ex p.* Law, 15 Fed. Cas. No. 8,126, 6 Am. L. Reg. N. S. 410 note, 35 Ga. 285. But see Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

Ex post facto character.— Bills of attainder are *ex post facto* laws, because passed after the offense which is punished. Oshorne *v.* Huger, 1 Bay (S. C.) 179.

61. U. S. Const. art. 1, § 9.

62. U. S. Const. art. 1, § 10.

63. *Kansas.*— Boyd *v.* Mills, 53 Kan. 594, 37 Pac. 16, 42 Am. St. Rep. 306, 25 L. R. A. 486.

Kentucky.— Burkett *v.* McCarty, 10 Bush (Ky.) 758; Norris *v.* Doniphan, 4 Metc. (Ky.) 385.

Louisiana.— State *v.* Fourchy, 106 La. 743, 31 So. 325.

Missouri.— State *v.* Heighland, 41 Mo. 388; Murphy, etc., Test Oath Cases, 41 Mo. 339.

West Virginia.— Lynch *v.* Hoffman, 7 W. Va. 553; Kyle *v.* Jenkins, 6 W. Va. 371.

United States.— Pierce *v.* Carskadon, 16 Wall. (U. S.) 234, 21 L. ed. 276; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

64. Anderson *v.* Baker, 23 Md. 531; State *v.* Neal, 42 Mo. 119; Blair *v.* Ridgeley, 41 Mo. 63, 97 Am. Dec. 248; State *v.* Staten, 6 Coldw. (Tenn.) 233; Randolph *v.* Good, 3 W. Va. 551.

65. *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437.

66. U. S. Const. art. 4, § 2.

67. U. S. Const. Amendm. 14, § 1.

68. For the history of the words "privileges and immunities" see *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

For a definition of "privileges and immunities" see *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed.

B. Scope of Prohibitions — 1. Original Provison. The word "citizen" as used in the federal constitution, article 4, section 2, does not include a person held in slavery,[69] a free negro who was born of parents brought here as slaves,[70] a resident of the Indian country,[71] or any artificial persons, such as corporations.[72] The privileges and immunities referred to therein are confined to those privileges and immunities which a state grants its own citizens. In short this provision prohibits the states from denying to a citizen of another state within the territories any of the privileges and immunities enjoyed by its own citizens by virtue of their being citizens.[73]

2. Amendment. The privileges and immunities secured by the fourteenth amendment are those which belong to citizenship of the United States as such, and which arise out of the nature and essential character of the national govern-

449; Corfield *v.* Coryell, 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

For a definition of "citizen" see *infra*, XI, B, 1.

69. Amy *v.* Smith, 1 Litt. (Ky.) 326; State *v.* Hannah, 10 La. Ann. 131.

70. Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691.

71. Sutton *v.* Hays, 17 Ark. 462.

72. *Alabama.*—American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Delaware.— Caldwell *v.* Armour, 1 Pennew. (Del.) 545, 43 Atl. 517; Baltimore, etc., Tel. Co. *v.* Delaware, etc., Tel., etc., Co., 7 Houst. (Del.) 269, 31 Atl. 714.

Georgia.—See Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491.

Illinois.— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Kentucky.— Phœnix Ins. Co. *v.* Com., 5 Bush (Ky.) 68, 96 Am. Dec. 331; Woodward *v.* Com., 9 Ky. L. Rep. 670, 7 S. W. 613.

Michigan.— Home Ins. Co. *v.* Davis, 29 Mich. 238.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552].

New Jersey.— Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

New York.— Duquesne Club *v.* Penn Bank, 35 Hun (N. Y.) 390; People *v.* Imlay, 20 Barb. (N. Y.) 68.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— *In re* Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct. 141, 42 Wkly. Notes Cas. (Pa.) 402.

Vermont.— Cook *v.* Howland, 74 Vt. 393, 52 Atl. 973; Hawley *v.* Hurd, 72 Vt. 122, 47 Atl. 401, 82 Am. St. Rep. 922, 52 L. R. A. 195.

United States.— Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552 [*affirming* 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227]; Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Warren Mfg. Co. *v.* Etna Ins. Co., 2 Paine (U. S.) 501, 29 Fed. Cas. No. 17,206; Insurance Co. *v.* New Orleans, 1 Woods (U. S.) 85, 13 Fed. Cas. No. 7,052; Berry *v.* Mobile L. Ins. Co., 3 Fed. Cas. No. 1,358, 1 Tex. L. J. 157.

See 10 Cent. Dig. tit. "Constitutional Law," § 627.

73. *Kentucky.*—Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

Maryland.— Ward *v.* Morris, 4 Harr. & M. (Md.) 330.

Utah.— State *v.* Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

United States.— Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

See 10 Cent. Dig. tit. "Constitutional Law," § 625.

It applies to persons only, not to things.— Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338; Slaughter *v.* Com., 13 Gratt. (Va.) 767, holding that U. S. Const. art. 4, § 2, applies to citizens as natural persons and not as members, officers, or agents of a corporation.

It does not give the states the right to make laws or confer privileges which shall have extraterritorial force.— Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

The legitimacy of a foreign-born child is not affected by it. Miller *v.* Miller, 18 Hun (N. Y.) 507. See also Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

Special privileges enjoyed by citizens in their own states are not secured by it in other states. Austin *v.* State, 10 Mo. 591 (holding the word "privileges" does not include any political or municipal privileges and therefore does not include the right to sell spirituous liquor); Lemmon *v.* People, 20 N. Y. 562; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Conner *v.* Elliott, 18 How. (U. S.) 591, 15 L. ed. 497 (community interests given by marriage contract).

ment, the provisions of its constitution or its laws, and treaties made in pursuance thereof;[74] and does not protect the rights belonging to a person by virtue of his state citizenship.[75]

C. Application of Prohibitions — 1. Grants of Special Privileges or Immunities — a. In General. These provisions do not prevent the states acting for the public welfare from prescribing any qualifications to the pursuits of business or pleasure not inconsistent with the rule that equality of right must be preserved: in other words, that any citizen may lawfully do what is permitted to another. Such qualifications applying to all of a class do not grant exclusive privileges to any person or corporation.[76]

b. To Whom Made — (i) *Residents of Territories and Reservations.* These prohibitions do not prevent congress from giving residents of unorganized territories and Indian reservations privileges and immunities not accorded non-residents therein.[77]

(ii) *Municipalities.* These constitutional provisions apply to municipalities, so that a city charter cannot exempt the city from a liability to which all other cities remain subject;[78] but a statute may provide that all transitory actions against municipal corporations of a certain class shall be brought in the counties in which such corporations are situated,[79] and may make it a condition precedent to recovery for injuries that notice of the same be given the city within a certain number of days, although similar causes when brought against individuals are not similarly restricted.[80] An act which exempts certain

74. Dauphin *v.* Key, 1 MacArthur & M. (D. C.) 203; Coger *v.* Northwestern Union Packet Co., 37 Iowa 145; People *v.* Gallagher, 11 Abb. N. Cas. (N. Y.) 187; U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673; *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Live-Stock Dealers', etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15 Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 3 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20; U. S. *v.* Anthony, 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459, 5 Chic. Leg. N. 462, 493, 17 Int. Rev. Rec. 197, 30 Leg. Int. (Pa.) 266, 5 Leg. Op. 63, 20 Pittsb. Leg. J. (Pa.) 199; U. S. *v.* Rathbone, 2 Paine (U. S.) 578, 27 Fed. Cas. No. 16,121; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173; U. S. *v.* Hall, 26 Fed. Cas. No. 15,282, 3 Chic. Leg. N. 260, 13 Int. Rev. Rec. 181. See also Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599; Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929.

75. *District of Columbia.*— Dauphin *v.* Key, 1 MacArthur & M. (D. C.) 203.

Maryland.— Short *v.* State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404.

Utah.— State *v.* Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33; State *v.* Holden, 14 Utah 71, 46 Pac. 756.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

United States.— *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; U. S. *v.* Anthony, 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459, 5 Chic. Leg. N. 462, 493, 17 Int. Rev. Rec. 197, 30 Leg. Int. (Pa.) 266, 5 Leg. Op. 63, 20 Pittsb. Leg. J. (Pa.) 199; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 70.

See 10 Cent. Dig. tit. "Constitutional Law," § 625.

It protects against the action of their own as well as of other states in which they may happen to be. Live-Stock Dealers', etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15 Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 3 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20.

76. *Alabama.*— Matter of Dorsey, 7 Port. (Ala.) 293.

Illinois.— Munn *v.* People, 69 Ill. 80.

Iowa.— Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602.

Minnesota.— Sanborn *v.* Rice County Com'rs, 9 Minn. 273.

New Jersey.— Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

New York.— People *v.* Long Island R. Co., 60 How. Pr. (N. Y.) 395.

United States.— Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679.

77. McFadden *v.* Blocker, 3 Indian Terr. 224, 54 S. W. 873.

78. Hincks *v.* Milwaukee, 46 Wis. 559, 1 N. W. 230, 32 Am. Rep. 735; Durkee *v.* Janesville, 28 Wis. 464, 9 Am. Rep. 500.

79. Czarnowsky *v.* Rochester, 55 N. Y. App. Div. 388, 66 N. Y. Suppl. 931.

80. Preston *v.* Louisville, 84 Ky. 118; Covington *v.* Hoadley, 83 Ky. 444 (action to recover erroneously collected taxes); Nichols *v.* Minneapolis, 30 Minn. 545, 16 N. W. 410; Madden *v.* Lancaster County, 65 Fed.

counties from its operation while all other counties are subject to it would be unconstitutional.[81]

c. Nature of Franchise or Privilege — (i) *In General* — (A) *Exclusive.* Where the public interest seems to make it desirable the state may, unless restrained by its constitution,[82] grant special or exclusive privileges or immunities, monopolies, and franchises to persons or corporations.[83] Accordingly it has been held that the sale of trading stamps,[84] the removal of carcasses from the street,[85] and the maintenance of a slaughter-house[86] are suitable objects for exclusive grants. And where some public service is done in return or where it is for the public interest the federal constitution does not apply. Therefore the state legislature may grant exclusive bridge privileges within a certain length of shore where the public interest is thereby furthered,[87] exclusive ferry franchises,[88] to certain lessees of ferries a right to acquire by condemnation additional facilities,[89] exclusive street-railroad franchises,[90] exclusive franchises to build conduits or subways for the use of all electrical companies,[91] exclusive telegraph privileges between certain points,[92] and exclusive gas[93] and water-supply privileges.[94] But it has been held that the legislature cannot grant an exclusive right to use the streets for the purpose of laying pipes;[95] nor under the constitution of some states can it grant a toll-road franchise to a certain designated association only.[96] The state legislature may provide a commission for the supervision of all banks;[97] but cannot confine

188, 12 C. C. A. 566 (an action for failure to keep a highway, etc., in repair).

81. Burkholtz *v.* State, 16 Lea (Tenn.) 71. And see State *v.* Pond, 93 Mo. 606, 6 S. W. 469, holding that the mere fact that a law is not accepted in all the counties will not invalidate it.

82. Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809; Washington Toll-Bridge Co. *v.* Beaufort, 81 N. C. 491; McRee *v.* Wilmington, etc., R. Co., 47 N. C. 186.

83. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. Thus a grant of the exclusive right to supply the state common schools with text-books of a specified character and price is constitutional. State *v.* Blue, 122 Ind. 600, 23 N. E. 963; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; Bancroft *v.* Thayer, 5 Sawy. (U. S.) 502, 2 Fed. Cas. No. 835, 8 Am. L. Rec. 257, 11 Chic. Leg. N. 304, 25 Int. Rev. Rec. 305, 8 Reporter 39. See Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

84. Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512; Humes *v.* Ft. Smith, 93 Fed. 857.

85. River Rendering Co. *v.* Behr, 7 Mo. App. 345.

86. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. *Contra*, Howell *v.* Butchers' Union Slaughterhouse, etc., Co., 36 La. Ann. 63; Live-Stock Dealers', etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15 Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 3 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20.

87. Fortain *v.* Smith, 114 Cal. 494, 46 Pac. 381.

88. Burlington, etc., Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536 (a ten years' franchise); Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. And see Evans *v.* Hughes County, 6 Dak. 102, 50 N. W. 720.

89. *In re* Union Ferry Co., 98 N. Y. 139 [*reversing* 32 Hun (N. Y.) 82].

90. Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Chicago Gen. R. Co. *v.* Chicago City R. Co., 62 Ill. App. 502.

91. Western Union Tel. Co. *v.* New York City, 38 Fed. 552, 3 L. R. A. 449.

92. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

93. Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138; State *v.* Milwaukee Gaslight Co., 29 Wis. 454, 9 Am. Rep. 598 (holding a law not unconstitutional because it might create a monopoly and prevent competition); Louisville Gas Co. *v.* Citizens' Gas Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. ed. 510 [*reversing* 81 Ky. 263]. *Contra*, St. Louis Gaslight Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52, under a provision of the state constitution.

94. Freeport Water Works Co. *v.* Prager, 3 Pa. Co. Ct. 371, the court saying that the act did not pretend to grant an irrevocable franchise.

95. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

96. State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155, holding that an attempt by statute to grant a franchise to maintain a toll-road to a certain designated person for a longer time than was allowed any one else is repugnant to Nev. Const. art. 8, § 1, prohibiting the passing of any special act in any manner relating to corporate powers except for municipal purposes.

97. People *v.* San Francisco, 100 Cal. 105, 34 Pac. 492, holding such legislation not a

the right to carry on certain branches of such banking business to associations except in small towns.[98]

(B) *Conditional.* For a similar reason where the state legislature considers it for the benefit of the public they may place conditions on the carrying on of certain kinds of business[99] and the exercise of certain professions.[1] Such conditions, however, must apply to all of a class described, and the classification must not be unreasonable, unnatural, or arbitrary.[2]

(II) *Eminent Domain.* The state legislature may grant the right of eminent domain in aid of property devoted to the public use.[3]

(III) *Exemptions From Operation of Law.* The legislature may grant exemptions from the operation of certain laws. As for example, the exemption of the property of certain institutions from attachment, injunction, or execution before final judgment in any action;[4] the exemption of municipalities from liability for injuries resulting from defects in the streets or other similar property;[5] the exemption of certain persons from arrest and imprisonment for debt;[6] the exemption from forfeiture for non-compliance with a law;[7] the exemption from giving security for costs;[8] the exemption from making affidavit of fitness to be a sole surety on a bond;[9] the exemption from the death penalty;[10] the exemption of certain property from taxation;[11] the exemption from public service;[12] the

violation of Cal. Const. art. 4, § 25, which prohibited the granting of any special or exclusive right, privilege, or immunity.

98. State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

99. Johnson *v.* Johnson, 88 Ky. 275, 10 Ky. L. Rep. 860, 11 S. W. 5 (conditions upon which a company may act as guardian); Coleman *v.* Parrott, 11 Ky. L. Rep. 947, 13 S. W. 525 (conditions on which a company may act as administrator without other security or other fiduciary); Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403 (conditions on a corporation becoming a surety on a bond); Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217 [*affirming* 29 Hun (N. Y.) 391, a condition on a foreign insurance company doing business within the city].

1. State *v.* Randolph, 23 Oreg. 74, 31 Pac. 201, 37 Am. St. Rep. 655, 17 L. R. A. 470, conditions on the practice of medicine.

2. Saddler *v.* People, 188 Ill. 243, 58 N. E. 906; Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 79 Am. St. Rep. 238, 52 L. R. A. 287; Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 [*affirming* 59 Ill. App. 470]; State *v.* Donaldson, 41 Minn. 74, 42 N. W. 781; Hall *v.* Kleeman, 6 Ohio S. & C. Pl. Dec. 323, 4 Ohio N. P. 201. See Waterloo Turnpike Road Co. *v.* Cole, 51 Cal. 381.

3. Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; Stewart *v.* Great Northern R. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; Luxton *v.* North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. ed. 808. And see, generally, Eminent Domain.

4. Chesapeake Bank *v.* Baltimore First Nat. Bank, 40 Md. 269, 17 Am. Rep. 601, exemption granted to any national bank or its property.

5. Williams *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 531, exemption granted to taxing districts.

6. *In re* Oberg, 21 Oreg. 406, 28 Pac. 130, 14 L. R. A. 577, exemption of officers and seamen of sea-going vessels or ships.

7. Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.) 562, 1 N. Y. Suppl. 174, 16 N. Y. St. 14; Bailey *v.* New York Arcade R. Co., 1 N. Y. Suppl. 304, 16 N. Y. St. 1007, exemption from forfeiture for failure to construct within the time specified by law, granted to a railroad company.

8. Jones *v.* Shiawassee Cir. Judge, 105 Mich. 664, 63 N. W. 976, holding that a statute providing that in actions for labor performed the court shall not order security for costs where the plaintiff makes affidavit that he has a meritorious cause of action and is unable to procure such security is valid.

9. King *v.* Poney Gold Min. Co., 24 Mont. 470, 62 Pac. 783, holding that a statute authorizing surety companies to become sole surety on bonds without an affidavit showing qualifications is not repugnant to Mont. Const. art. 5, § 26.

10. *Ex p.* Walker, 28 Tex. App. 246, 13 S. W. 861, exemption of persons under seventeen years of age.

11. Leicht *v.* Burlington, 73 Iowa 29, 34 N. W. 494 (city lots used for agricultural and horticultural purposes); Portland *v.* Portland Water Co., 67 Me. 135 (property owned by a water company furnishing water for public and municipal purposes free of cost).

Property owned by educational institutions may be exempted from taxation. Northwestern University *v.* People, 80 Ill. 333, 22 Am. Rep. 187 (holding that such property must be used directly in aid of educational purposes); Indianapolis *v.* Sturdevant, 24 Ind. 391.

A fixed bonus in commutation of all taxes is not unconstitutional in Alabama. Daughdrill *v.* Alabama L. Ins., etc., Co., 31 Ala. 91.

12. State *v.* Womble, 112 N. C. 862, 17 S. E. 491, 19 L. R. A. 827, exemption of the

exemption from the observance of the Sunday laws;[13] and the exemption of a railroad company from certain general regulations as to carriers,[14] or from a general railroad act of the state;[15] but not the appointment of a receiver on failure to perform some requirement.[16] The courts have held also that the legislature may grant exemptions from personal liability to corporate officers, on the ground that the legislature might have put it in the corporate charter originally and therefore may grant it afterward.[17] Such exemptions, however, must apply to all alike who are of the classes and in the situation included;[18] and the state cannot grant such exemptions where the exempted party does no public service in return therefor.[19] Hence as a rule a private corporation cannot be exempted from the operation of usury laws.[20]

(iv) *Public Aid.* The states may also provide public aid for certain purposes.[21]

(v) *Sale of Convict Labor.* On the ground that it is for a public service an act providing for the collection of fines upon free negroes convicted of a criminal offense by directing them to be hired out was held to be constitutional.[22]

(vi) *Use of State Property.* Where the states have proprietary title, these federal prohibitions do not forbid the state to make exclusive grants of such property. Hence unless prohibited by the state constitution[23] the states may grant exclusive rights to appropriate a limited amount of state land,[24] may lease state

officers, servants, and employees of a railroad from work on the public roads.

Exemption from jury duty.— Hall *v.* Judge Grand Rapids Super. Ct., 88 Mich. 438, 50 N. W. 289 (exemption of the members of the state troops); McGunnegle *v.* State, 6 Mo. 367 (exemption of the members of the fire companies); Neely *v.* State, 4 Lea (Tenn.) 316 [*overruling* Hawkins *v.* Small, 7 Baxt. (Tenn.) 193]. And see Green *v.* State, 15 Lea (Tenn.) 708, holding that an exemption from jury service of fifteen per cent of the people who shall join the militia was void.

13. *Ex p.* Koser, 60 Cal. 177 (exemption of keepers of hotels, boarding-houses, barber-shops, baths, etc.); Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577 (exemption of those who observe Saturday).

14. Galena, etc., R. Co. *v.* Dill, 22 Ill. 265.

15. Bohmer *v.* Haffen, 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 [*affirming* 22 Misc. (N. Y.) 565, 50 N. Y. Suppl. 857].

16. *In re* Delaware Bay, etc., R. Co., (N. J. 1887) 11 Atl. 261, exemption from appointment of a receiver on failure to run trains for ten days.

17. Niagara Bridge Works *v.* Jose, 59 N. H. 81.

18. *Alabama.*— Horst *v.* Moses, 48 Ala. 129.

California.— Lassen County *v.* Cone, 72 Cal. 387, 14 Pac. 100.

Massachusetts.— Simonds *v.* Simonds, 103 Mass. 572, 4 Am. Rep. 576.

Missouri.— State *v.* Thomas, 138 Mo. 95, 39 S. W. 481; State *v.* Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231.

Ohio.— Williams *v.* Donough, 65 Ohio St. 499, 63 N. E. 84, 56 L. R. A. 766.

Tennessee.— Daly *v.* State, 13 Lea (Tenn.) 228.

19. *In re* Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489; Barbour *v.* Louisville Bd. Trade, 82 Ky. 645; Daly *v.* State, 13 Lea (Tenn.) 228.

20. Simpson *v.* Kentucky Citizens' Bldg., etc., Assoc., 101 Ky. 496, 19 Ky. L. Rep. 1176, 41 S. W. 570, 42 S. W. 834; Gordon *v.* Winchester Bldg., etc., Fund Assoc., 12 Bush (Ky.) 110, 23 Am. Rep. 713; Mack *v.* Workingmen's Bldg., etc., Assoc., 5 Ky. L. Rep. 520; Citizens' Security, etc., Co. *v.* Uhler, 48 Md. 455; Mykrantz *v.* Globe Bldg., etc., Assoc., 19 Ohio Cir. Ct. 51, 10 Ohio Cir. Dec. 250; Smoot *v.* People's Perpetual Loan, etc., Assoc., 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589, holding it in conflict with the Virginia Bill of Rights, art. 1, § 6, which prohibits exclusive or separate privileges. *Compare* Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375; Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318; Hazen *v.* Union Bank, 1 Sneed (Tenn.) 115.

21. Kentucky Union R. Co. *v.* Bourbon County, 85 Ky. 98, 8 Ky. L. Rep. 881, 2 S. W. 687 (a subscription to aid a corporation); Lamarque *v.* New Orleans, McGloin (La.) 28 (a statute giving cities authority to support and maintain public markets); Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541 (holding that an act authorizing a certain county to issue bonds for building a bridge at a certain place does not conflict with Tenn. Const. art. 11, § 8, prohibiting the passage of laws granting special privileges); Lauderdale County *v.* Fargason, 7 Lea (Tenn.) 153 (a county subscription to aid a railroad).

22. State *v.* Manuel, 20 N. C. 144.

23. State *v.* Post, 55 N. J. L. 264, 26 Atl. 683; Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

24. Patterson *v.* Trabue, 3 J. J. Marsh. (Ky.) 598.

land,[25] may grant rights in navigable waters,[26] or may grant exclusive rights to maintain a wharf along the banks of navigable waters.[27]

2. Denial of Privileges and Immunities — a. In General. By the better interpretation of article 4, section 2, of the federal constitution, the right of ingress and egress was secured to free persons of color[28] and to citizens generally,[29] but not to the importation or exportation of slaves.[30] This provision secures to the citizens of each state the right to acquire and hold property in the same manner as a citizen of the state where the property is situated.[31] A state may provide that a widow shall not be entitled to an interest in lands conveyed by the husband when a wife at the time of conveyance was a non-resident of the state;[32] but statutes making invalid a devise or bequest because the beneficiary is a citizen of another state,[33] prohibiting the holding of slaves in the territory of the Louisiana Purchase,[34] and excluding all non-resident persons from being trustees[35] are unconstitutional. The privileges and immunities within the meaning of the fourteenth amendment include the right of ingress and egress from state to state and to the national capital,[36] the right to protection by the government,[37] the right to protection on the high seas and in foreign countries,[38] the right to the enjoyment of life and liberty, to acquire and possess property of every kind, and to pursue happiness and safety,[39] the right to act as sureties on bonds regardless of the pursuit of a certain business,[40] and the right to display the national flag;[41] but they do not include the right to be secure in one's house,[42] the right to attend the public schools of the state,[43] the right to share the property belonging to the people of the state,[44] the right to trial by jury in a state court for a state offense,[45] the

25. McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447.

26. McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447; Wooley *v.* Campbell, 37 N. J. L. 163, granting a right of fishery over, and of taking oysters from, tidal land.

27. New Orleans *v.* New Orleans, etc., R. Co., 27 La. Ann. 414; Stevens *v.* Walker, 15 La. Ann. 577; Martin *v.* O'Brien, 34 Miss. 21. And see Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938; Roberts *v.* Brooks, 71 Fed. 914.

28. Smith *v.* Moody, 26 Ind. 299; The Cynosure, 1 Sprague (U. S.) 88, 6 Fed. Cas. No. 3,529, 7 Law Rep. 226, where a statute prohibiting the ingress of free negroes as members of a ship's crew was held unconstitutional. *Compare* Pendleton *v.* State, 6 Ark. 509; Hatwood *v.* State, 18 Ind. 492 (a statute prohibiting the ingress of negroes); State *v.* Claiborne, Meigs (Tenn.) 331.

29. Joseph *v.* Randolph, 71 Ala. 499, 46 Am. Rep. 347 (holding that an act requiring the payment of a license-tax by any person employing or engaging laborers for the purpose of removing them from the state is unconstitutional); Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449 (holding that a statute discriminating against traders, etc., of other states is unconstitutional as a deprivation of privileges and immunities). See also Williams *v.* Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685.

30. Allen *v.* Sarah, 2 Harr. (Del.) 434; Com. *v.* Griffin, 3 B. Mon. (Ky.) 208.

31. Ward *v.* Morris, 4 Harr. & M. (Md.) 330.

32. Buffington *v.* Grosvenor, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282. See also Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

33. Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly N. P. (Pa.) 346, Haz. Reg. (Pa.) 305.

34. Scott *v.* Sandford, 19 How. (U. S.) 393, 19 L. ed. 691.

35. Roby *v.* Smith, 131 Ind. 342, 30 N. E. 1093, 31 Am. St. Rep. 439, 15 L. R. A. 792; Shirk *v.* La Fayette, 52 Fed. 857; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

36. Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173. And see Williams *v.* Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685.

37. McCready *v.* Com., 27 Gratt. (Va.) 985.

38. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

39. McCready *v.* Com., 27 Gratt. (Va.) 985.

40. Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. 470, where a statute prohibited liquor-sellers the right to act as sureties on certain bonds.

41. Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181, holding that a statute prohibiting the display of the national flag for advertising purposes was repugnant to U. S. Const. Amendm. 14.

42. U. S. *v.* Crosby, 1 Hughes (U. S.) 448, 25 Fed. Cas. No. 14,893.

43. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; People *v.* Gallagher, 11 Abb. N. Cas. (N. Y.) 187.

44. McCready *v.* Com., 27 Gratt. (Va.) 985.

45. Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 48 L. ed. 597; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678.

right to practise law,[46] or the right of suffrage;[47] nor do they include public offices or their emoluments.[48] The fourteenth amendment does not extend to the states the operation of the fourth and fifth amendments,[49] which latter amendments are limited in their operations to the federal government.[50]

b. Foreign Corporations and Non-Residents. A corporation not being a citizen within the meaning of the federal constitution[51] it follows that a state may prohibit such corporations from doing business within its boundaries or may grant such privilege on conditions it deems best.[52] So too it may require a license from non-residents for the exercise of certain privileges.[53]

c. Exercise of Police Power — (i) *In General.* Nothing in either of these provisions takes away from the states the power to legislate for the general public benefit, that is, to exercise its police power.[54] Hence a state may constitutionally regulate the manner of the payment of wages,[55] and the *res* of the payment,[56] and the hours of labor;[57] may place conditions or restrictions on the exercise of

46. *In re* Taylor, 48 Md. 28, 30 Am. Rep. 451; Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Philbrook *v.* Newman, 85 Fed. 139, holding that a judgment of the state court disbarring an attorney did not deprive him of any privilege or immunity secured by the federal constitution.

47. Gouger *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644; Minor *v.* Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627, both of which held that the right of suffrage was not given a woman by the fourteenth amendment.

48. People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785; Hennepin County Com'rs *v.* Jones, 18 Minn. 199.

49. State *v.* Atkinson, 41 S. C. 551, 19 S. E. 691; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

50. Weimer *v.* Bunbury, 30 Mich. 201; *In re* Fitzpatrick, 16 R. I. 60, 11 Atl. 773.

51. See *supra*, XI, B, 1.

52. *Alabama.*—American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

Florida.— State *v.* Board of Ins. Com'rs, 37 Fla. 564, 20 So. 772, 33 L. R. A. 288.

Iowa.— Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872.

Kentucky.— Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

Missouri.— State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243.

New York.— People *v.* Granite State Provident Assoc., 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510; New York City Fire Dept. *v.* Wright, 3 E. D. Smith (N. Y.) 453; New York City Fire Dept. *v.* Noble, 3 E. D. Smith (N. Y.) 440.

North Carolina.— Faison *v.* Grandy, 126 N. C. 827, 36 S. E. 276.

Pennsylvania.— Com. *v.* Vrooman, 164 Pa. St. 306, 35 Wkly. Notes Cas. (Pa.) 97, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250.

Vermont.— Cook *v.* Howland, 74 Vt. 393, 52 Atl. 973.

Virginia.— Slaughter *v.* Com., 13 Gratt. (Va.) 767.

Wisconsin.— Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

United States.—Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493.

See 10 Cent. Dig. tit. "Constitutional Law," § 634.

53. *In re* Eberle, 98 Fed. 295, holding that a statute requiring the payment of a license by non-residents for the privilege of hunting game within the state, when no such payment is required of residents, was not repugnant to U. S. Const. art. 4, § 2, or to U. S. Const. Amendm. 14, § 1.

54. Des Moines *v.* Keller, (Iowa 1902) 88 N. W. 827 (requiring bicycles on the street after dark to be equipped with a sufficient light); People *v.* Japinga, 115 Mich. 22, 73 N. W. 111 (prohibiting any person from permitting a minor to be in a saloon unless accompanied by the parent); Giozza *v.* Tiernan, 148 U. S. 657, 662, 13 S. Ct. 721, 37 L. ed. 599; *In re* Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

As to police power generally see *supra*, VI.

55. Johnson *v.* Goodyear Min. Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338; Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344 (a provision for weekly payment); State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385 (a provision for ascertaining the amount of labor for which wages are to be paid). But see Harding *v.* People, 160 Ill. 459, 43 N. E. 624, 52 Am. St. Rep. 344, 32 L. R. A. 445, holding that a statute requiring coal-mine owners paying their employees by weight to weigh all coal mined is unconstitutional because made to apply only to mines from which the coal is shipped by water or rail.

56. State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

57. People *v.* Lochner, 73 N. Y. App. Div. 120, 76 N. Y. Suppl. 396; People *v.* Warren, 77 Hun (N. Y.) 120, 28 N. Y. Suppl. 303, 59 N. Y. St. 857; Holden *v.* Hardy, 14 Utah 71,

the professions of medicine and surgery,[58] such as requiring a governmental examination[59] and a medical school or college diploma;[60] may place conditions or restrictions on the exercise of the profession of dentistry;[61] may place conditions or restrictions upon the maintenance of certain kinds of business, as of a master plumber,[62] of railroad engineers,[63] of one who maintains a public warehouse,[64] of one who maintains a laundry,[65] of one who maintains a saloon,[66] of one who maintains an opium den,[67] of one who maintains a slaughter-house,[68]

46 Pac. 756. *Compare* State *v.* Norton, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 183, holding that an ordinance providing that a contractor constructing public works shall pay not less than one dollar and fifty cents per day for common labor and limiting the hours of such labor to eight hours a day conflicts with U. S. Const. Amendm. 14, § 1.

58. Harding *v.* People, 10 Colo. 387, 15 Pac. 727; State *v.* Randolph, 23 Oreg. 74, 31 Pac. 201, 37 Am. St. Rep. 655, 17 L. R. A. 470.

The requirement of exhibiting a license before practising is valid. Com. *v.* Finn, 11 Pa. Super. Ct. 620.

59. *Iowa.*— State *v.* Bair, 112 Iowa 466, 84 N. W. 532, 51 L. R. A. 776.

Montana.— Craig *v.* Board of Medical Examiners, 12 Mont. 203, 29 Pac. 532 [*following* Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623].

Oregon.— State *v.* Randolph, 23 Oreg. 74, 31 Pac. 201, 37 Am. St. Rep. 655, 17 L. R. A. 470.

Pennsylvania.— *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860.

Washington.— State *v.* Carey, 4 Wash. 424, 30 Pac. 729.

Wisconsin.—State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

United States.— Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623, a leading case.

See 10 Cent. Dig. tit. "Constitutional Law," § 629.

60. *Iowa.*— State *v.* Bair, 112 Iowa 466, 84 N. W. 432, 51 L. R. A. 776.

Kentucky.— Driscoll *v.* Com., 93 Ky. 393, 14 Ky. L. Rep. 376, 20 S. W. 431, 703.

Michigan.— People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Oregon.— State *v.* Randall, 23 Oreg. 74, 31 Pac. 201, 37 Am. St. Rep. 655, 17 L. R. A. 470.

Wisconsin.— State *v.* Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

See 10 Cent. Dig. tit. "Constitutional Law," § 629.

The requirement, as an alternative, of a specified number of years practice is valid. Driscoll *v.* Com., 93 Ky. 393, 14 Ky. L. Rep. 376, 20 S. W. 431, 703; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888; Craig *v.* Board of Medical Examiners, 12 Mont. 203, 29 Pac. 532; People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

The requirement of a residence of a specified number of years within the state is valid. State *v.* Green, 112 Ind. 462, 14 N. E. 352. See also France *v.* State, 57 Ohio St. 1, 47 N. E. 1041, holding that a statute prohibiting physicians residing in another state from practising in this state except when called in consultation does not conflict with U. S. Const. Amendm. 14, § 1, or with U. S. Const. art. 4, § 2.

Revocation of the license for gross misconduct is not repugnant to the constitution. State Bd. Health *v.* Ray, 22 R. I. 538, 48 Atl. 802.

61. Thus the requirement of a diploma from a school or college of dentistry is valid. State *v.* Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306.

An exemption from an act regulating the practice of dentistry may be valid. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119, exemption of *bona fide* students acting in pursuance of clinical advantages under the direct supervision of a preceptor or a licensed dentist.

62. The requirement of a governmental examination of such plumber is valid. People *v.* City Prison, 81 Hun (N. Y.) 434, 30 N. Y. Suppl. 1095, 63 N. Y. St. 283.

63. Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508, holding that a statute requiring an examination and licensing of all railroad engineers is valid.

64. Munn *v.* People, 69 Ill. 80, holding a statute requiring a license to be constitutional.

65. The requirement of a license is valid. *Ex p.* Moynier, 65 Cal. 33, 2 Pac. 728; State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.

A prohibition from doing business between certain hours is valid. *Ex p.* Moynier, 65 Cal. 33, 2 Pac. 728.

But a prohibition from maintaining a pay laundry within the town limits is not valid. *In re* Stockton Laundry, 26 Fed. 611, holding it so unreasonable, unnecessary, and injurious a prohibition of a necessary and harmless trade that it is repugnant to U. S. Const. Amendm. 14.

66. People *v.* Japinga, 115 Mich. 222, 73 N. W. 111; Whitney *v.* Grand Rapids Tp. Bd., 71 Mich. 234, 39 N. W. 40, prohibiting the maintaining of saloons within certain limits.

67. State *v.* Lee, 137 Mo. 143, 38 S. W. 583.

68. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. See also Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 [*affirming* 39 Fed. 641].

of one who maintains an establishment for fat-rendering, bone-boiling, etc.,[69] or of one who maintains a dairy stable within the city limits;[70] may regulate the mode of mortgaging;[71] may prohibit and regulate the sale of certain goods,[72] provided such regulations do not impose special burdens on goods manufactured outside of a certain district;[73] may prohibit and regulate the sale of intoxicating liquors,[74] the right to sell such liquors not being a privilege or immunity within the constitutional meaning,[75] as by prohibiting the sale of the same except in a prescribed manner or under certain conditions,[76] but may not prohibit the mere keeping of liquor in one's possession;[77] may prohibit and regulate the importation of diseased animals,[78] but such regulations must not amount to a practical exclusion

69. Prohibition within certain limits is valid. People *v.* Rosenberg, 67 Hun (N. Y.) 52, 22 N. Y. Suppl. 56, 51 N. Y. St. 189.

70. St. Louis *v.* Fisher, 167 Mo. 654, 67 S. W. 872.

71. Zumpfe *v.* Gentry, 153 Ind. 219, 54 N. E. 805. See also Hilliard *v.* Enders, 196 Pa. St. 587, 46 Atl. 839, holding that a statute providing for recording assignments for the benefit of creditors made by persons residing out of the state is not repugnant to U. S. Const. art. 4, § 2, although it benefits only residents and does not avail a non-resident proceeding by foreign attachment within the state.

72. Mangan *v.* State, 76 Ala. 60 (holding constitutional an act prohibiting the sale of any "cotton in the seed" in certain districts); State *v.* Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696 (holding constitutional a law requiring that all sales in less than the usual bulk of cotton in the seed shall be in writing signed by all parties and docketed with the nearest justice of the peace for public inspection, this act applying only to certain localities); McCann *v.* Com., 198 Pa. St. 509, 48 Atl. 470 (holding a statute prohibiting the sale of oleomargarine made in imitation of butter valid).

73. Graffty *v.* Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; Burnell *v.* Clark, 20 Pa. Co. Ct. 100; Minnesota *v.* Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 [*affirming* 39 Fed. 641].

74. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138; Soehl *v.* State, 39 Nebr. 659, 58 N. W. 196; Shannon *v.* State, 39 Nebr. 658, 58 N. W. 196; Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194.

75. *California.*— *Ex p.* Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418.

Kansas.— State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688.

Missouri.—Austin *v.* State, 10 Mo. 591.

New Jersey.— Hoboken *v.* Goodman, (N. J. 1902) 51 Atl. 1092.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

United States.— Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599; Crowley *v.* Christensen, 137 U. S. 36, 11 S. Ct. 13, 34 L. ed. 620; Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929; Jacobs Pharmacy Co. *v.* Atlanta, 89 Fed. 244; Cantini *v.* Tillman, 54 Fed. 969; *In re* Hoover, 30 Fed. 51.

See 10 Cent. Dig. tit. "Constitutional Law," § 631.

76. *Georgia.*— Deal *v.* Singletary, 105 Ga. 466, 30 S. E. 765; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

Illinois.— Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580; Strauss *v.* Galesburg, 89 Ill. App. 504, holding that a law was constitutional which prohibited such sales of intoxicating liquors without license and providing for the granting of two different kinds of licenses.

Kansas.— *In re* Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688, only druggists allowed to sell.

Maryland.— Trageser *v.* Gray, 73 Md. 250, 20 Atl. 905, 25 Am. St. Rep. 587, 9 L. R. A. 780.

South Carolina.— State *v.* Aikin, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410]; State *v.* Berlin, 21 S. C. 292, 53 Am. Rep. 677.

Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

United States.—Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205 (allowing act to apply to sale of liquors already manufactured); Jacobs Pharmacy *v.* Atlanta, 89 Fed. 244; Cantini *v.* Tillman, 54 Fed. 969; *In re* Hoover, 30 Fed. 51; Kansas *v.* Bradley, 26 Fed. 289.

But see State *v.* Deschamp, 53 Ark. 490, 14 S. W. 653.

See 10 Cent. Dig. tit. "Constitutional Law," § 631.

77. State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, holding that a statute prohibiting any person without a license from keeping in his possession for another spirituous liquors is repugnant to U. S. Const. Amendm. 14.

78. State *v.* Rasmussen, (Ida. 1900) 59 Pac. 933, 52 L. R. A. 78 (holding that an act of quarantine against the importation of diseased sheep is not repugnant to Ida. Const. art. 1, § 8, or to U. S. Const. art. 4, § 2); Kimmish *v.* Ball, 129 U. S. 217, 9 S. Ct. 277, 32 L. ed. 695 (holding that a quarantine statute applying to Texas cattle is not repugnant to U. S. Const. art. 4, § 2). See also Reid *v.* Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. ed. 92 [*affirming* 29 Colo. 333, 68 Pac. 228].

of healthy animals of other states;[79] may prohibit the exercise on Sunday of certain kinds of business;[80] may regulate the employment of pilots;[81] may prohibit the wasteful use of natural gas;[82] may regulate the use of soft coal by factories within a certain distance of any city;[83] and may make game and fish laws.[84]

(11) *Licenses and Privileges.* Under the police power the states may require licenses and charge for the granting of the same.[85] Thus a license may be required from certain classes of persons for the sale of goods,[86] or for the pursuit of certain avocations,[87] and from persons selling certain kinds of goods, as intoxicating liquors.[88] And such licenses may be granted only to male inhabitants,[89] to citizens of good moral character,[90] or to physicians.[91] In some states the sale of carrier's tickets without the carrier's authority to sell may be prohibited.[92] There must, however, be no discrimination between residents and non-

79. State *v.* Duckworth, (Ida. 1897) 51 Pac. 456, 39 L. R. A. 365; Hoffman *v.* Harvey, 128 Ind. 600, 28 N. E. 93 [*following* State *v.* Klein, 126 Ind. 68, 25 N. E. 873].

80. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; State *v.* Judge, 39 La. Ann. 132, 1 So. 437; People *v.* Butling, 13 Misc. (N. Y.) 587, 35 N. Y. Suppl. 19, 69 N. Y. St. 215 (a statute prohibiting the working as a barber on Sunday). See also State *v.* Fernandez, 39 La. Ann. 538, 2 So. 233.

81. Thompson *v.* Spraigue, 69 Ga. 409, 47 Am. Rep. 760, holding that a statute requiring masters of vessels bound to ports in this state, except coasters between Georgia ports and ports in Florida and South Carolina, to accept the services of the first licensed pilot offering is not repugnant to U. S. Const. art. 4, § 2, par. 1; or to U. S. Const. Amendm. 14, § 1.

82. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

83. Brooklyn *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 462, 61 N. Y. Suppl. 33.

84. *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177; State *v.* Chapel, 64 Minn. 130, 66 N. W. 205, 58 Am. St. Rep. 524, 32 L. R. A. 131; State *v.* Medbury, 3 R. I. 138. See also Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793.

A landowner killing game birds on his own land does not have such a property in the dead animals as will render a statute prohibiting the possession of such birds with intent to ship the same outside the state, as applied to him, a violation of the privileges and immunities granted by U. S. Const. Amendm. 14. People *v.* Van Pelt, (Mich. 1902) 90 N. W. 424.

85. See, generally, *supra*, VI.

86. *District of Columbia.*— District of Columbia *v.* Humason, 2 MacArthur (D. C.) 158, commercial agents.

Georgia.— Weaver *v.* State, 89 Ga. 639, 15 S. E. 840.

Iowa.— State *v.* Gouss, 85 Iowa 21, 51 N. W. 1147, itinerant vendors of drugs, etc.

Rhode Island.— State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339, itinerant vendors.

Vermont.— State *v.* Harrington, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100, itinerant vendors.

Virginia.— Speer *v.* Com., 23 Gratt. (Va.) 935, 14 Am. Rep. 164, merchant of goods.

United States.— Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186 [*affirming* 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685]; American Harrow Co. *v.* Shaffer, 68 Fed. 750.

See 10 Cent. Dig. tit. "Constitutional Law," § 632.

87. State *v.* Napier, 63 S. C. 60, 41 S. E. 13, holding a statute requiring a license of an emigrant agent to be constitutional.

88. State *v.* Gray, 61 Conn. 39, 22 Atl. 675; State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan, 25 Conn. 278; Decie *v.* Brown, 167 Mass. 290, 45 N. E. 765; Com. *v.* Blackington, 24 Pick. (Mass.) 352; Soehl *v.* State, 39 Nebr. 659, 58 N. W. 196; Shannon *v.* State, 39 Nebr. 658, 58 N. W. 196; Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194.

89. Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Blair *v.* Rutenfranz, 40 Ind. 318; Blair *v.* Kilpatrick, 40 Ind. 312.

90. *In re* Ruth, 32 Iowa 250; Trageser *v.* Gray, 73 Md. 250, 20 Atl. 905, 25 Am. St. Rep. 587, 9 L. R. A. 780; Kohn *v.* Melcher, 29 Fed. 433.

91. Sarrls *v.* Com., 83 Ky. 327, 7 Ky. L. Rep. 473. See also Gray *v.* Connecticut, 159 U. S. 74, 15 S. Ct. 985, 40 L. ed. 80, holding that the granting of a liquor license to a druggist may be left to the discretion of county commissioners without violating U. S. Const. Amendm. 14.

Authority to grant an exclusive contract to an individual to sell refreshments and liquors in a certain park is valid. State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

92. Burdick *v.* People, 149 Ill. 600, 611, 36 N. E. 948, 952, 41 Am. St. Rep. 329, 24 L. R. A. 152; Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238; State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; Com. *v.* Wilson, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484. *Contra*, Com. *v.* Keary, 198 Pa.

residents,[93] between citizens of one state and citizens of another,[94] or between products of one state and those of other states.[95]

d. Exercise of Taxing Power — (I) *In General.* The federal constitution, article 4, section 2, secures to the citizens of every other state the same right of acquiring and holding real and personal property and the same protection of the laws that is given to the citizens of the state making the laws. This means that the property of citizens of other states shall not be liable to any taxes which the property of citizens of the enacting state is not subject to. This does not, however, prevent a state from taxing all companies doing a certain kind of business;[96] from placing on foreign corporations a different tax from that placed on similar domestic corporations;[97] from placing a different tax on corporate stock owned by a non-resident than the tax on such stock owned by a resident;[98] from taxing the right to transfer property by will;[99] because in these cases the tax is on special privileges granted by the state, not on those privileges which are common to its citizens under its constitution and laws by virtue of their citizenship. So too a state may tax property brought into a state, owned by non-residents;[1] may tax live stock brought into the state to be grazed;[2] may tax all personal property

St. 500, 48 Atl. 472; Com. *v.* Keary, 14 Pa. Super. Ct. 583.

93. Braceville *v.* Doherty, 30 Ill. App. 645 (holding that a license-fee on non-resident peddlers only is invalid); McGraw *v.* Marion, 98 Ky. 673, 17 Ky. L. Rep. 1254, 34 S. W. 18, 47 L. R. A. 593 (holding that a license-tax on all transients selling goods of any kind within the city violates U. S. Const. art. 4, § 2); Fecheimer *v.* Louisville, 84 Ky. 306, 8 Ky. L. Rep. 310, 2 S. W. 65 (holding that the imposition of a license on a merchant of another state selling his goods by sample in the city which is not required of a resident violates U. S. Const. art. 4, § 2); McGuire *v.* Parker, 32 La. Ann. 832 (holding that a statute requiring transient agents from other states selling any merchandise within the state to pay a license-tax conflicts with the U. S. Const. art. 4 § 2); Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449. *Contra,* Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62.

94. McGraw *v.* Marion, 98 Ky. 673, 17 Ky. L. Rep. 1254, 34 S. W. 18, 47 L. R. A. 593; Fecheimer *v.* Louisville, 84 Ky. 306, 8 Ky. L. Rep. 310, 2 S. W. 65; Rash *v.* Halloway, 82 Ky. 674. And see Downham *v.* Alexandria, 10 Wall. (U. S.) 173, 19 L. ed. 929.

95. Cullman *v.* Arndt, 125 Ala. 581, 28 So. 70 (holding that an ordinance imposing a license or privilege tax on agencies of breweries of other states doing business in the city, but not imposing such burdens on agencies of domestic breweries, violates U. S. Const. art. 4, § 2); Angove *v.* State, 9 Ohio S. & C. Pl. Dec. 829 (holding that an ordinance requiring bill-posters to have a license before posting bills or distributing advertising matter is repugnant to U. S. Const. art. 4, § 2, in so far as it pertains to articles manufactured in another state); Mechanicsburg Borough *v.* Koons, 18 Pa. Super. Ct. 131 (holding that an ordinance requiring a license from any person doing business except persons selling to manufacturers or licensed merchants, or dealers residing or doing business in the borough, and persons selling their own produce, is repugnant to U. S. Const. art. 4, § 2, cl. 1); Booth *v.* Lloyd, 33 Fed. 593 (holding that a statute prohibiting the granting of a license to buy oysters to any one not having had a twelve-months' residence in the state is repugnant to U. S. Const. art. 4, § 2). See American Fertilizing Co. *v.* North Carolina Bd. Agriculture, 43 Fed. 609, 11 L. R. A. 179. And see Sydow *v.* Territory, (Ariz. 1894) 36 Pac. 214, holding that an act requiring dealers in wares and merchandise "except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under license or permission according to law" to pay a license-tax, does not conflict with U. S. Const. art. 4, § 2, so far as it covers merchants not dealing in the excepted articles.

96. Tatem *v.* Wright, 23 N. J. L. 429; Singer Mfg. Co. *v.* Wright, 33 Fed. 121.

97. Phœnix Ins. Co. *v.* Com., 5 Bush (Ky.) 68, 96 Am. Dec. 331; State *v.* Lathrop, 10 La. Ann. 398; Insurance Co. *v.* New Orleans, 1 Woods (U. S.) 85, 13 Fed. Cas. No. 7,052.

98. State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299.

99. See Orr *v.* Gilman, 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196, holding a transfer tax on the exercise of a power of appointment not to be repugnant to U. S. Const. Amendm. 14.

1. People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581 (foreign goods and merchandise imported to sell); Providence Sav. Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407 (a tax on shares in national banks).

2. Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

at the residence of the owner;[3] may tax non-resident persons and associations doing business within the state the same as if they were residents,[4] and may tax property benefited, to pay for the cost of street improvements.[5] But a tax payable by a domestic corporation on the stock of non-resident holders only,[6] a tax on auction sales only when carried on by non-resident auctioneers,[7] a tax on foreigners in their character as foreigners,[8] or an inheritance tax on residents which does not lie on non-residents[9] would be unconstitutional.

(II) *Determination and Charge.* The state may provide a special method of valuation for lands belonging to non-residents,[10] but cannot restrict to residents the right to deduct debts from the property on which personal taxes are assessed.[11] So too it may provide the manner of charging the assessment[12] and for notice to residents only in assessing omitted property.[13]

e. Personal Discrimination — (I) *By Reason of Race or Color*[14] — (A) *By State.* The fourteenth amendment of the federal constitution prohibits discrimination in the right to exercise the rights of citizens of the United States because of race or color; therefore the states may not exclude negroes on account of their race from becoming jurors;[15] nor may they prohibit colored people from using public conveyances which are other than merely local, although they may provide that negroes and white people shall travel in separate cars, provided that equal accommodations are provided for each race.[16] So too the states may provide that the white children and the black children shall be educated in separate schools, provided the rights and privileges are equal.[17] This amendment does not, however, protect the privileges and immunities guaranteed to a citizen by the laws of his state; hence the states may deny to negroes the privilege of using any public conveyance for local travel,[18] may exclude persons of color not taxed from

3. Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558 (the statute also providing that certain things should constitute personal property); Duer *v.* Small, 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116, 7 Am. L. Reg. 500, 17 How. Pr. (N. Y.) 201.

4. Duer *v.* Small, 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116, 7 Am. L. Reg. 500, 17 How. Pr. (N. Y.) 201.

5. Martin *v.* Wills, 157 Ind. 153, 60 N. E. 1021. See also Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707.

6. Oliver *v.* Washington Mills, 11 Allen (Mass.) 268; Union Nat. Bank *v.* Chicago, 3 Biss. (U. S.) 82, 24 Fed. Cas. No. 14,374, 6 Am. L. Rev. 166, 5 Am. L. T. 107, 3 Chic. Leg. N. 369, 14 Int. Rev. Rec. 77, 28 Leg. Int. (Pa.) 300.

7. Daniel *v.* Richmond, 78 Ky. 542.

8. Lin Sing *v.* Washburn, 20 Cal. 534, a tax on Chinese.

9. *In re* Mahoney, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155; *In re* Stanford, (Cal. 1898) 54 Pac. 259.

10. Redd *v.* St. Francis County, 17 Ark. 416.

11. Sprague *v.* Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

12. Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707, holding that provisions that an assessment for the construction of a ditch shall be a charge on the tax books against the lands of non-residents and that the assessment against resident landowners shall be enforced by proceedings in court are not repugnant to U. S. Const. art. 4, § 2.

13. Gallup *v.* Schmidt, 183 U. S. 300, 22 S. Ct. 162, 46 L. ed. 207 [*affirming* 154 Ind. 196, 56 N. E. 443].

14. See, generally, Civil Rights, 7 Cyc. 158.

15. Wilson *v.* State, 69 Ga. 224.

16. Chesapeake, etc., R. Co. *v.* Com., 21 Ky. L. Rep. 228, 51 S. W. 160; Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

17. *Indiana.*— Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

Mississippi.— Chrisman *v.* Brookhaven, 70 Miss. 477, 12 So. 458.

New York.— People *v.* Easton, 13 Abb. Pr. N. S. (N. Y.) 159.

Ohio.— State *v.* McCann, 21 Ohio St. 198.

West Virginia.— Martin *v.* Board of Education, 42 W. Va. 514, 26 S. E. 348.

See 10 Cent. Dig. tit. "Constitutional Law," § 644. But see Marshall *v.* Donovan, 10 Bush (Ky.) 681, holding that U. S. Const. Amendm. 14 does not annul a state statute providing for white schools only, the expense of such schools being paid by a tax on white people only, because that is a privilege pertaining to the citizenship of the state and not a fundamental right protected by the federal constitution.

A bequest of money to be used in the education of white children is not invalid on the ground that its enforcement would be a discrimination between white and colored children. Kinnaird *v.* Miller, 25 Gratt. (Va.) 107.

18. Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466.

the enumeration of the inhabitants in reorganizing the senate districts,[19] and may prohibit marriages between white and colored people.[20]

(B) *By Individual.* Inasmuch as this amendment applies only to state action, any discrimination made by an individual would not be repugnant to it.[21]

(II) *By Reason of Sex.* The fourteenth amendment of the federal constitution not prohibiting discrimination because of sex, a state may exclude women from the jury,[22] or deny them the right to take out a license to sell intoxicating liquors.[23]

f. Remedial Discrimination — (I) *In General.* The states, except as particularly restricted by the federal constitution, may regulate the remedies in their courts, but once having created a remedy or redress the right to that remedy or redress is a fundamental right protected by the federal constitution. Therefore the citizens of one state or of the United States have in the other states the same remedies as the citizens thereof, and are equally subject to the remedial laws thereof when they are found therein.[24] No state can deny the right to a citizen of another state to bring suit in any state court having jurisdiction,[25] although it is not a right, privilege, or immunity of a citizen of the United States or of a state to have a controversy in a state court prosecuted or defended by one form of action rather than by another.[26] The states may pass statutes confirming certain sales;[27] restricting to citizens of the state the right of commencing the process of foreign attachments;[28] requiring service by publication for a certain length of time;[29] giving a preference in certain proceedings to certain kinds of creditors,[30] but not to citizens or residents only of the state where a foreign corporation is being wound up;[31] restraining citizens from prosecuting certain kinds of suits begun in another state in order to evade the laws of the first state;[32] prohibiting actions between foreign corporations;[33] providing conditions for recovery

19. People *v.* Monroe County, 19 N. Y. Suppl. 978.

20. State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; Lonas *v.* State, 3 Heisk. (Tenn.) 287; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 370; *Ex p.* Francois, 3 Woods (U. S.) 367, 9 Fed. Cas. No. 5,047.

21. State *v.* Maryland Institute, 87 Md. 643, 41 Atl. 126, holding that the refusal of a private school to admit colored children as pupils is not repugnant to U. S. Const. Amendm. 14.

22. McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710, holding that the exclusion of women from the jury in a criminal trial of a man does not deprive the man of any privilege or immunity within the meaning of the constitution.

23. Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Blair *v.* Rutenfranz, 40 Ind. 318; Blair *v.* Kilpatrick, 40 Ind. 312.

24. Steed *v.* Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789; Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503. See also Nolensville Turnpike Co. *v.* Quinby, 8 Humphr. (Tenn.) 476.

25. Cofrode *v.* Wayne County Cir. Judge, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

26. State *v.* Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33; Iowa Cent. R. Co. *v.* Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. ed. 467; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678. See also Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

27. Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed. 787.

28. Kincaid *v.* Francis, Cooke (Tenn.) 49.

29. Morris *v.* Graham, 51 Fed. 53.

30. Brown's Case, 173 Mass. 498, 53 N. E. 998 (preference given to creditors who have furnished necessaries); Skinner *v.* Garnett Gold-Mining Co., 96 Fed. 735 (lien for wages given a preference). See also Paddack *v.* Staley, 24 Colo. 188, 49 Pac. 281.

31. Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432 (holding that a state has not power under U. S. Const. art. 4, § 2, to give its citizens or residents any preference in the administration of the assets of an insolvent or defunct foreign corporation doing business within the state); Maynard *v.* Granite State Provident Assoc., 92 Fed. 435, 34 C. C. A. 438 (holding that an act providing for the winding up in Michigan of insolvent foreign corporations which gives to Michigan citizens a preference in the assets in the state is repugnant to U. S. Const. art. 4, § 2).

32. Sweeny *v.* Hunter, 145 Pa. St. 363, 22 Atl. 653, 29 Wkly. Notes Cas. (Pa.) 133, 14 L. R. A. 594; Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538.

33. Anglo-American Provision Co. *v.* Davis Provision Co., 50 N. Y. App. Div. 273, 63 N. Y. Suppl. 987.

on contracts;[34] or suspending the privileges of all citizens of the state aiding in the rebellion of prosecuting and defending actions and judicial proceedings,[35] but such statute cannot be made to apply to citizens of other states.[36] But a statute making null and void sales of certain goods and providing that no action shall be brought on such sales made in any other state or country is unconstitutional.[37]

(11) *Against Non-Residents.* The states may, however, discriminate between residents and non-residents in the remedies granted.[38] Thus security of costs may be required of non-residents,[39] but a statute cannot make it a misdemeanor to send out of a state for purposes of collection notes given for certain things.[40]

g. Restricting Use of Common Property. Laws which the states may pass restricting the use of common property of the people of a state to its citizens does not deprive citizens of other states of any privilege or immunity within the federal constitution.[41] So too a state may make proper regulations as to the use of its highways.[42]

34. Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927 (contracts for the purchase and sale of the stocks of mining corporations on margins); Hewitt *v.* Charier, 16 Pick. (Mass.) 353 (recovery by physicians for service); Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552 (recovery on insurance policies).

35. See Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

36. Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

37. Reynold *v.* Geary, 26 Conn. 179; Opinion of Justices, 25 N. H. 537.

38. *Georgia.*— Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491, attachments.

Kansas.— Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911, attachments.

Maryland.— Campbell *v.* Morris, 3 Harr. & M. (Md.) 535, attachments.

Nebraska.— Olmstead *v.* Rivers, 9 Nebr. 234, 2 N. W. 366; Marsh *v.* Steele, 9 Nebr. 96, 1 N. W. 869, 31 Am. Rep. 406, attachment.

New York.— Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 20 N. Y. St. 741, 16 N. Y. Civ. Proc. 255, 2 L. R. A. 636 [*affirming* 56 N. Y. Super. Ct. 108, 1 N. Y. Suppl. 418, 16 N. Y. St. 871, 15 N. Y. Civ. Proc. 88]; Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423.

South Carolina.— Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192, 638 [*following* Cummings *v.* Wingo, 31 S. C. 427, 10 S. E. 107].

Vermont.— Hawley *v.* Hurd, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195.

United States.— Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 23 L. ed. 806, state statute of limitations.

See 10 Cent. Dig. tit. "Constitutional Law," § 646.

Issuance of a capias ad respondendum.— A statute requiring an affidavit of fraud in the issuance of a capias ad respondendum against a citizen of the state, but dispensing with such requirement against a non-resident is unconstitutional. Black *v.* Seal, 6 Houst. (Del.) 541.

39. *Kentucky.*— Paducah Hotel Co. *v.* Long, 92 Ky. 278, 13 Ky. L. Rep. 531, 17 S. W. 853.

Maryland.— Holt *v.* Tennallytown, etc., R. Co., 81 Md. 219, 31 Atl. 609; Haney *v.* Marshall, 9 Md. 194.

New York.— Venanzio *v.* Weir, 64 N. Y. App. Div. 483, 72 N. Y. Suppl. 234.

Pennsylvania.— Kilmer *v.* Groome, 19 Pa. Co. Ct. 339.

South Carolina.— Cummings *v.* Wingo, 31 S. C. 427, 10 S. E. 107.

40. *In re* Flukes, 157 Mo. 125, 57 S. W. 545, 80 Am. St. Rep. 619, 51 L. R. A. 176.

41. *Maine.*— State *v.* Tower, 84 Me. 444, 24 Atl. 898.

Massachusetts.— Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780; Haney *v.* Compton, 36 N. J. L. 507.

New York.— People *v.* Lowndes, 130 N. Y. 455, 29 N. E. 751, 42 N. Y. St. 360 [*reversing* 55 Hun (N. Y.) 469, 8 N. Y. Suppl. 908, 30 N. Y. St. 168].

Rhode Island.— Chambers *v.* Church. 14 R. I. 398, 51 Am. Rep. 410.

Virginia.— McCready *v.* Com., 27 Gratt. (Va.) 985.

United States.— McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248; Cornfield *v.* Coryell, 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

See 10 Cent. Dig. tit. "Constitutional Law," § 637. And see Magner *v.* People, 97 Ill. 320; Geer *v.* Connecticut, 161 U. S. 519, 10 S. Ct. 600, 40 L. ed. 793.

42. Des Moines *v.* Keller, 116 Iowa 648, 88 N. W. 827; State *v.* Aldrich, 70 N. H. 391, 47 Atl. 602, 85 Am. St. Rep. 631 (holding that a prohibition on bicycle riding on the sidewalks by persons over twelve years of age is constitutional under U. S. Const. Amendm. 14); Brimm *v.* Jones, 11 Utah 200, 39 Pac. 825, 29 L. R. A. 97 (holding that a law making any person driving herds of certain kinds of animals over a highway constructed on a hillside liable for damage done to the highway by such animals is not repugnant to U. S. Const. Amendm. 14, § 1).

h. Regulation of Crimes and Punishments. As the fourteenth amendment refers to the fundamental rights of the citizens of the United States and not to the privileges or immunities of the individual as a citizen of a state, it does not therefore apply to state statutes making certain acts crimes,[43] to modes of criminal prosecution in state courts,[44] or to modes of punishment to be inflicted by the state courts.[45]

3. Class Legislation — a. Definition and Nature. Class legislation, often called local or private legislation, consists of those laws which are limited in their operation to certain individuals or corporations or to certain districts of the territory of the state.[46] Although from its nature this species of legislation must cast extra burdens on some and relieve others from burdens, yet aside from state inhibitions it has been held to be constitutional when the line drawn between two persons or places is reasonable.[47] Most of the state constitutions, however, contain provisions prohibiting the enactment of special laws granting any special or exclusive privileges, immunities, or franchises, or the passage of any laws for the benefit of individuals inconsistent with the general laws of the land;[48] but even under these provisions laws are generally valid which make no exceptions to the persons falling within their operation.[49] So too such inhi-

See also Condon *v.* Maloney, 108 Tenn. 82, 65 S. W. 871.

43. Dabbs *v.* State, 39 Ark. 353, 43 Am. Rep. 275 (holding that an act making it a misdemeanor to sell any pistol except the "navy pistol" is not repugnant to U. S. Const. art. 4, § 2, or to U. S. Const. Amendm. 14, § 1); State *v.* Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600; Presser *v.* Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615. See also *Ex p.* Smith, 38 Cal. 702 (holding that an ordinance prohibiting the playing on musical instruments, or the presence of women in public drinking saloons after midnight, does not violate U. S. Const. Amendm. 14, § 1); Com. *v.* Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.

44. McNamara *v.* People, 83 Ill. 164, 55 N. E. 625 (holding that a provision by which, where a recognizance is taken in open court of record, it need not be signed by the persons entering into the same is not repugnant to U. S. Const. Amendm. 14); State *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. 820 (holding that a provision for prosecution by information or indictment in the discretion of the court is not repugnant to U. S. Const. Amendm. 14); State *v.* Brett, 16 Mont. 360, 40 Pac. 873 (holding that a provision allowing the filing of an information without preliminary examination is not repugnant to U. S. Const. Amendm. 14); Murphy *v.* Com., 177 U. S. 155, 20 S. Ct. 639, 44 L. ed. 711 [*affirming* 174 Mass. 369, 54 N. E. 860, 75 Am. St. Rep. 353, 48 L. R. A. 393]; Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (holding valid under U. S. Const. Amendm. 14, a prosecution on information and a trial by a jury of eight jurors in a state court); *In re* Mahon, 34 Fed. 525 (holding that a lawful arrest of a person unlawfully brought into the state by private persons is not in violation of U. S. Const. Amendm. 14).

A change of the personnel of the supreme court, after an appeal is taken and before it is heard, does not violate U. S. Const. Amendm. 14, § 1. State *v.* Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829.

45. *In re* Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519, death by electricity.

46. Kerrigan *v.* Force, 68 N. Y. 381; People *v.* Chautauqua County, 43 N. Y. 10, 16 (where it is said: "The word local, as applied to a bill, to an act, to a law, means such bill, act, or law as touches but a portion of the territory of the State, a part of its people, a fraction of the property of its citizens"); 1 Bl. Comm. 86. And see, generally, Class Legislation, 7 Cyc. 185.

47. See State *v.* Condon, 108 Tenn. 82, 65 S. W. 871, where it is said that the fact that an act does not show on its face the reason for the classification does not necessarily render it unreasonable or void.

48. Allardt *v.* People, 197 Ill. 501, 64 N. E. 533 (holding that an act prohibiting the buying and selling of any pass, which by virtue of the conditions expressed thereon is not transferable, is violative of a constitutional inhibition of the passage of any local or special law granting to any corporation or individual special privileges or immunities, as railroads are thereby empowered to make such buying and selling lawful, by omitting to express thereon non-transferable conditions); Morrison *v.* People, 196 Ill. 454, 63 N. E. 989; Hadley *v.* Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430; Williams *v.* Donough, 65 Ohio St. 499, 63 N. E. 84, 56 L. R. A. 766; State *v.* Cook, 107 Tenn. 499, 64 S. W. 720 (holding that a statute punishing the taking of a patent-right note which does not state on its face the purpose for which it was given does not violate a constitutional inhibition upon the legislature to pass laws for the benefit of individuals, inconsistent with the general laws of the land).

49. State *v.* McCubrey, 84 Minn. 439, 87 N. W. 1126; State *v.* Woodman, 26 Mont. 348, 67 Pac. 1118; Wenham *v.* State, (Nebr.

bitions do not as a rule refer to immunities which may be granted municipal corporations.[50]

b. Manner or Purpose of Classification — (i) *By Virtue of Particular Circumstances or Conditions.* Peculiar circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them, valid.[51]

(ii) *Convenience of Taxation.* Corporations, persons, business, and property may be classified for the purpose of taxation and the different classes may be assessed at different intervals of time,[52] by different boards of assessors,[53] for special benefits caused by improvements,[54] and for different privileges;[55] but such classification cannot be made for the purpose of taxing one class for the benefit of another class.[56] The classification of land for five successive years sold for taxes and bid in by the county is a valid classification for a statute divesting title to such land.[57]

(iii) *In Interest of Public Health and Safety.* Any law which preserves in any way the public health, safety, comfort, or morals by providing sanitary regulations[58] or Sunday laws;[59] by protecting employees from exposure to

1902) 91 N. W. 421; Edmondson *v.* Board of Education, 108 Tenn. 557, 69 S. W. 274, 58 L. R. A. 170. See also Smith *v.* Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; U. S. Heater Co. *v.* Iron Molders' Union, (Mich. 1902) 88 N. W. 889; Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

50. State Board of Health *v.* Diamond Mills Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019; Dallas *v.* Lentz, (Tex. Civ. App. 1902) 69 S. W. 166.

51. *Alabama.*— Williams *v.* State, 130 Ala. 31, 30 So. 336, convict.

California.— *In re* Yturburru, 134 Cal. 567, 66 Pac. 729 (making insane people liable for necessaries); Murphy *v.* Pacific Bank, 130 Cal. 542, 62 Pac. 1059 (stock-holders in banks); Lewis *v.* South Pac. C. R. Co., 66 Cal. 209, 5 Pac. 79 (action for damages against railroads).

Connecticut.— State *v.* Wordin, 56 Conn. 216, 14 Atl. 801, physicians.

Florida.— Love *v.* Sheffelin, 7 Fla. 40, attorneys.

Illinois.— People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456].

Indiana.— McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089.

Iowa.— Burk *v.* Putnam, 113 Iowa 232, 84 N. W. 1053, 86 Am. St. Rep. 372.

Louisiana.— State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L. R. A. 135, bakers.

Massachusetts.— Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58, veterans given a preference in appointments to government offices.

Michigan.— U. S. Heater Co. *v.* Iron Molders' Union, (Mich. 1902) 88 N. W. 889; People *v.* Japinga, 115 Mich. 222, 73 N. W. 111, minors in saloons.

Ohio.— State *v.* Hogan, 63 Ohio St. 202, 58 N. E. 572, 81 Am. St. Rep. 626, 52 L. R. A. 863, tramps.

Pennsylvania.— Read *v.* Clearfield County, 12 Pa. Super. Ct. 419.

South Carolina.— Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854, limiting the amount of soil that may be cultivated within the limits of a town.

Texas.— Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504. But see San Antonio, etc., R. Co. *v.* Wilson, (Tex. App. 1892) 19 S. W. 910.

See 10 Cent. Dig. tit. "Constitutional Law," § 650.

52. Central Iowa R. Co. *v.* Board of Sup'rs, 67 Iowa 199, 25 N. W. 128.

53. Sterling Gas Co. *v.* Higby, 134 Ill. 557, 25 N. E. 660.

54. Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508, tax for levees. See also Sears *v.* Boston St. Com'rs, 173 Mass. 350, 53 N. E. 876, sewerage tax.

55. *Iowa.*— Mt. Pleasant *v.* Clutch, 6 Iowa 546, tax on transient peddlers.

Louisiana.— Lafayette *v.* Cummins, 3 La. Ann. 673.

Ohio.— Little *v.* State, 8 Ohio Cir. Ct. 51, tax on vehicles.

Pennsylvania.— Harrisburg *v.* East Harrisburg Pass. R. Co., 4 Pa. Dist. 683, tax on vehicles.

Tennessee.— State *v.* Schlier, 3 Heisk. (Tenn.) 281, privilege tax on photographers.

See 10 Cent. Dig. tit. "Constitutional Law," § 667.

56. Ferguson *v.* Landram, 1 Bush (Ky.) 548; Philadelphia Firemen's Relief Assoc. *v.* Wood, 39 Pa. St. 73.

57. Baldwin *v.* Ely, 66 Wis. 171, 28 N. W. 392.

58. Abeel *v.* Clark, 84 Cal. 226, 24 Pac. 383 (a statute making scholars of public schools subject to vaccination); State *v.* Gardiner, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689 [*reversing* 7 Ohio S. & C. Pl. Dec. 61].

59. Bode *v.* State, 7 Gill (Md.) 326 (prohibition on the sale of liquor by tavern-keepers and retailers); Bohl *v.* State, 3 Tex.

dangers;[60] by regulating the medium of payment to employees,[61] provided, however, that such regulations operate upon all who employ labor, where like conditions exist;[62] by protecting persons or unions in their labels or forms of advertising;[63] by regulating the use of highways,[64] the operation of railroads,[65] or

App. 683 (prohibition on all sales within any city or town).

Prohibition of certain kinds of work on Sunday, but permitting a few to engage therein, may be constitutional. Liberman *v.* State, 26 Nebr. 464, 42 N. W. 419, 18 Am. St. Rep. 791; People *v.* Sheriff, 13 Misc. (N. Y.) 587, 35 N. Y. Suppl. 19, 69 N. Y. St. 215 (barbers); Breyer *v.* State, 102 Tenn. 103, 50 S. W. 769 (barbers). So too a statute making it a misdemeanor to work as a barber on Sunday is not class legislation, although there be no general Sunday law. *Ex p.* Northup, 41 Oreg. 489, 69 Pac. 445. *Compare* Tacoma *v.* Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68, barbers. See also Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401, holding unconstitutional a prohibition on barbers from keeping open bath-rooms.

60. *Indiana.*— Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492.

Michigan.— People *v.* Smith, 108 Mich. 527, 66 N. W. 382, 62 Am. St. Rep. 715, 32 L. R. A. 853, statute requiring safety appliances.

Minnesota.— State *v.* McMahon, 65 Minn. 453, 68 N. W. 77 (boiler inspection); State *v.* Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759 (protection of motormen on cars).

Missouri.— Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485.

Ohio.— State *v.* Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317 [*reversing* 31 Cinc. L. Bul. 220], protection of motormen on electric cars.

Pennsylvania.— Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 50 Am. St. Rep. 801, 29 L. R. A. 808.

See 10 Cent. Dig. tit. "Constitutional Law," § 654.

61. Shaffer *v.* Union Min. Co., 55 Md. 74.

Statutes forbidding assignment or attachment of wages are constitutional. Singer Mfg. Co. *v.* Fleming, 39 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210.

62. State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789 [*reversing* (Mo. 1892) 20 S. W. 332]; San Antonio, etc., R. Co. *v.* Wilson, (Tex. App. 1892) 19 S. W. 910; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

A statute applying only to mines, which ship their coal by rail or water, requiring the weighing of all coal mined, in determining the payment therefor, is on account of such classification unconstitutional. Harding *v.* People, 160 Ill. 459, 43 N. E. 624, 52 Am. St. Rep. 344, 32 L. R. A. 445.

Regulations of sale of goods to employees must be general. See Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492. If it applies only to mining and manufacturing corporations it will be held unconstitutional. Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; State *v.* Fire Creek Coal, etc., Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359.

An eight-hour law applying only to mining and manufacturing companies is unconstitutional because of such discrimination. *In re* Eight-Hour Law, 21 Colo. 29, 39 Pac. 328; Low *v.* Rees Printing Co., 41 Nebr. 127, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702, holding an eight-hour law applying to all classes of mechanics, servants, and laborers, but excepting those engaged in farm or domestic labor, unconstitutional because of the exception.

63. Cohn *v.* People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821; State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200; Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539; Perkins *v.* Heert, 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223.

64. Nagle *v.* Augusta, 5 Ga. 546 (regulation of the weight of loaded wagons); Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696 (certain streets appropriated to carriages only); Brimm *v.* Jones, 11 Utah 200, 39 Pac. 825, 29 L. R. A. 97 (regulation as to driving herds of cattle).

65. Requiring railroads to fence their tracks and making them liable for cattle killed by reason of neglect to fence is constitutional (Peoria, etc., R. Co. *v.* Duggan, 109 Ill. 537, 50 Am. Rep. 619; Missouri Pac. R. Co. *v.* Harrelson, 44 Kan. 253, 24 Pac. 465; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618); so too allowance of double damages has been upheld (Hamilton *v.* Missouri Pac. R. Co., 87 Mo. 85; Hines *v.* Missouri Pac. R. Co., 86 Mo. 629; Phillips *v.* Missouri Pac. R. Co., 86 Mo. 540; Meyers *v.* Union Trust Co., 82 Mo. 237; Humes *v.* Missouri Pac. R. Co., 82 Mo. 221, 52 Am. Rep. 369; Spealman *v.* Missouri Pac. R. Co., 71 Mo. 434; Cummings *v.* St. Louis, etc., R. Co., 70 Mo. 570; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618. *Contra*, Atchison, etc., R. Co. *v.* Baty, 6 Nebr. 37, 29 Am. Rep. 356).

Requirement that notices be posted as to whether trains are on time is constitutional. Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937; State *v.* Pennsylvania Co., 133 Ind. 700, 32 N. E. 822; State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

Authorizing a recovery of five thousand

the rates and prices to be charged by other corporations which do a public business or have special privileges, is valid if it affects all of the class.[66]

(IV) *Territorial Districts.* Legislation may constitutionally apply to certain territorial districts only, as for example to cities,[67] to a certain county or counties,[68] or to certain classes of the residents of the state;[69] but such legislation must apply to all persons who are similarly situated in that locality and to all parts of the state where like conditions exist.[70]

dollars in cases of death caused by the negligence of railroad corporations is not unconstitutional as class legislation. Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485; Carroll *v.* Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382. See also Schoolcraft *v.* Louisville, etc., R. Co., 92 Ky. 233, 13 Ky. L. Rep. 517, 17 S. W. 567, 14 L. R. A. 579. So too a statute providing that the presumption, in all cases where a party riding on a railway is injured, shall be against the company is constitutional. Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

66. Merritt *v.* Knife Falls Boom Corp., 34 Minn. 245, 25 N. W. 403; Budd *v.* People, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247; The John M. Welch, 9 Ben. (U. S.) 507, 13 Fed. Cas. No. 7,359, 24 Int. Rev. Rec. 207; The Ann Ryan, 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428 (lower rate for canal-boats). But see San Francisco *v.* Spring Valley Water Works, 53 Cal. 608 (holding unconstitutional an act establishing water-rates for corporations in San Francisco only); Stimson *v.* Muskegon Booming Co., 100 Mich. 347, 59 N. W. 142 (holding unconstitutional such an act because it applied to one particular corporation only).

67. State *v.* Berlin, 21 S. C. 292, 53 Am. Rep. 677 (holding valid a regulation on the sale of liquor in all cities); State *v.* Chester, 18 S. C. 464.

Provisions for different systems of law for different portions of a territory are valid. Chambers *v.* Fisk, 22 Tex. 504; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989, where the court said: "It is the right of every State to establish such courts as it sees fit, . . . provided it does not encroach upon the proper jurisdiction of the United States, . . . and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws."

68. Creekmore *v.* Com., 11 Ky. L. Rep. 566, 12 S. W. 628, liquor law applying to one county only.

The number of inhabitants in a county is a basis for a valid clasification. State *v.* Frazier, 36 Oreg. 178, 59 Pac. 5; State *v.* Condon, 108 Tenn. 82, 65 S. W. 871; Sutton *v.* State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; Woodward *v.* Brien, 14 Lea (Tenn.) 520.

Restrictions as to hunting in certain counties only are valid. Hayes *v.* Territory, 2 Wash. Terr. 286, 5 Pac. 927.

A statute may apply to a certain river only and contiguous land. Scott *v.* Willson, 3 N. H. 321.

If general in its terms, the fact that a statute applies to one county only of a state is immaterial. State *v.* Condon, 108 Tenn. 82, 65 S. W. 871.

69. Judy *v.* Thompson, 156 Ind. 533, 60 N. E. 270 (mortgagees); Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586 (freeholders); Hartzell *v.* Warren, 11 Ohio Cir. Ct. 269, 5 Ohio Cir. Dec. 183 (persons doing business as partners under a fictitious name); Redford *v.* Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650 (householders).

70. *California.*— Britton *v.* Board of Election Com'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.

Indiana.— State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

Massachusetts.— Holden *v.* James, 11 Mass. 396, 405, 6 Am. Dec. 174, where the court says: "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted."

Missouri.—Hannibal *v.* Missouri, etc., Telephone Co., 31 Mo. App. 23.

New York.— New York Sanitary Utilization Co. *v.* New York Public Health Dept., 32 Misc. (N. Y.) 577, 67 N. Y. Suppl. 324.

Ohio.— Palmer *v.* Tingle, 9 Ohio Cir. Ct. 708.

Pennsylvania.— York City School Dist. *v.* West Manchester School Dist., 8 Pa. Dist. 97; Greensburg School Dist. *v.* East Greensburg School Dist., 23 Pa. Co. Ct. 285.

South Carolina.— Sanders *v.* Venning, 38 S. C. 502, 17 S. E. 134; Utsey *v.* Hiott, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910. But see Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854.

Tennessee.— Sutton *v.* State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; Woodward *v.* Brien, 14 Lea (Tenn.) 520; State *v.* Burnett, 6 Heisk. (Tenn.) 186; Green *v.* Allen, 5 Humphr. (Tenn.) 170.

Texas.— San Antonio, etc., R. Co. *v.* Wilson, (Tex. App. 1892) 19 S. W. 910. But see Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504.

Wisconsin.— Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808.

(v) *Regulation of Crimes and Prosecutions.* Laws which regulate criminal prosecutions and proceedings or provide that acts done by certain classes of persons shall be crimes and state the punishment therefor are valid as applying to all of a class where the classification is based on a reasonable distinction;[71] and it is for the legislature and not for the courts to decide what is a reasonable distinction, the courts being able to hold a law unconstitutional only when the classification is based on purely arbitrary grounds.[72]

(vi) *Regulation of Trades and Avocations.* Laws intended to be promotive of the public interests, which affect persons pursuing certain professions or occupying certain positions;[73] which impose certain restrictions or regulations as to the manner or place of pursuing certain trades or kinds business,[74] unless they allow some to engage in a trade and prohibit others with like qualification of pro-

See 10 Cent. Dig. tit. "Constitutional Law," § 649.

71. *Arkansas.*— Bannon *v.* State, 49 Ark. 167, 4 S. W. 655.

Georgia.— Braddy *v.* Milledgeville, 74 Ga. 516, 58 Am. Rep. 443.

Massachusetts.—Com. *v.* Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.

Missouri.— State *v.* Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846.

North Carolina.— State *v.* Newsom, 27 N. C. 250.

West Virginia.— State *v.* Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600.

See 10 Cent. Dig. tit. "Constitutional Law," § 677. But see *In re* Langford, 57 Fed. 570.

A statute making certain acts subject to a special punishment in certain counties and different from that prescribed by the general law is unconstitutional. *In re* Jilz, 3 Mo. App. 243. *Compare* Com. *v.* Bowden, Thacher Crim. Cas. (Mass.) 9.

Laws of evidence and procedure may apply to one class and not to others. Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; *In re* Dolph, 17 Colo. 35, 28 Pac. 470; Com. *v.* Worcester, 3 Pick. (Mass.) 462.

72. Perry *v.* Keene, 56 N. H. 514; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; *In re* License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

73. *Alabama.*— Matter of Dorsey, 7 Port. (Ala.) 293, public office.

Florida.— Love *v.* Sheffelin, 7 Fla. 40, attorneys.

Illinois.— Williams *v.* People, 121 Ill. 84, 11 N. E. 881.

Iowa.— Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355, physicians.

Missouri.— State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

Washington.— State *v.* Carey, 4 Wash. 424, 30 Pac. 729 (physicians); Fox *v.* Territory, 2 Wash. Terr. 297, 5 Pac. 603.

See 10 Cent. Dig. tit. "Constitutional Law," § 651.

Laws exempting non-residents who are called into the state by professional duties are constitutional. State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32. *Compare* State *v.* Pennoyer, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709; State *v.* Hinman, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22.

Laws exempting surgeons of the United States army, navy, or marine hospital from certain services are constitutional. People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165; Scholle *v.* State, 90 Md. 729, 740, 46 Atl. 326, 50 L. R. A. 411.

74. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68.

Arkansas.— Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

California.— Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369; *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888.

Illinois.— Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Indiana.— Davis Coal Co. *v.* Pollard, 158 Ind. 607, 62 N. E. 492; Barrett *v.* Millikan, 156 Ind. 510, 60 N. E. 310, 83 Am. St. Rep. 220, mechanic's lien.

Kansas.— *In re* Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

Louisiana.— Gossigi *v.* New Orleans, 41 La. Ann. 522, 4 So. 534, markets.

Maine.— Pierce *v.* Kimball, 9 Me. 54, 23 Am. Dec. 537.

Massachusetts.— Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450, regulation of sales near camp-meetings.

Minnesota.— Stewart *v.* Great Northern R. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427, location of grain elevators.

New York.— People *v.* Walhridge, 6 Cow. (N. Y.) 512, prohibiting an attorney from purchasing a note with intent to sue thereon.

North Carolina.— State *v.* Stovall, 103 N. C. 416, 8 S. E. 900.

Ohio.— Hartzell *v.* Warren, 11 Ohio Cir. Ct. 269; Palmer *v.* Tingle, 9 Ohio Cir. Ct. 708.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941 (liquor); State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796 (insurance); Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353 (liquor).

See 10 Cent. Dig. tit. "Constitutional Law," § 651.

ficiency;[75] or which regulate the sale of certain goods,[76] are valid if they can by their operation prevent fraud or protect the public health, morals, or safty.

(VII) *Regulation of Interest Chargeable.* Different transactions for loans may be classified so as to procure different rates of interest for the different kinds of transactions.[77]

(VIII) *Regulation of Sale of Property.* Certain property may be exempted from sale by a federal law which by the laws of the state where situated is exempt,[78] or property which before was exempt may be subjected to sale for particular classes of claims.[79]

(IX) *Remedies.* A state may constitutionally make certain facts *prima facie* proof of other facts in certain classes of cases;[80] may prescribe the manner of

75. *Louisiana.*— State *v.* Dulaney, 43 La. Ann. 500, 9 So. 481; State *v.* Mahner, 43 La. Ann. 496, 9 So. 480.

New York.— People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34 [*reversing* 35 Hun (N. Y.) 528].

Ohio.— State *v.* Gardner, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689.

Pennsylvania.— Cohen *v.* Plymouth, 7 Kulp (Pa.) 101.

Washington.—Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147.

United States.— Live-Stock Dealers, etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15 Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 3 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20.

76. *Alabama.*— *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

California.— *Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527 (discrimination between persons regularly engaged and those not regularly engaged in a certain business); Foster *v.* Board of Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194 (discrimination between liquor-sellers employing female waitresses and those employing male waiters).

Illinois.— Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802, factors selling certain kinds of goods.

Indiana.— Martin *v.* Rosedale, 130 Ind. 109, 29 N. E. 410 (license required from itinerant merchants only); Thomasson *v.* State, 15 Ind. 449.

Iowa.— State *v.* Santee, 111 Iowa 1, 82 N. W. 445, 53 L. R. A. 763, petroleum.

Kentucky.— Stickrod *v.* Com., 86 Ky. 285, 9 Ky. L. Rep. 563, 5 S. W. 580 (liquor); Creekmore *v.* Com., 11 Ky. L. Rep. 566, 12 S. W. 628 (liquor).

Minnesota.— State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442 (commission merchants selling agricultural products and farm produce); State *v.* Chapel, 64 Minn. 130, 66 N. W. 205, 58 Am. St. Rep. 524, 32 L. R. A. 131 (game).

New York.— People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483, substitutes for butter.

Ohio.— *In re* Mosler, 8 Ohio Cir. Ct. 324, itinerant vendors making certain kinds of sales.

Pennsylvania.— Com. *v.* Brinton, 132 Pa. St. 69, 25 Wkly. Notes Cas. (Pa.) 277, 18 Atl. 1092 (itinerant vendor's license granted to physically disabled persons only); Com. *v.* Cole, 13 Pa. Co. Ct. 525, 24 Pittsb. Leg. J. N. S. 130 (peddlers).

Rhode Island.— State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344, adulterated milk. See also State *v.* Duggan, 15 R. I. 403, 6 Atl. 787.

Tennessee.— Robbins *v.* Taxing Dist., 13 Lea (Tenn.) 303.

United States.— Reeves *v.* Corning, 51 Fed. 774 (patent); *In re* Hoover, 30 Fed. 51 (sale of liquor).

See 10 Cent. Dig. tit. "Constitutional Law," §§ 658, 667. But see State *v.* Conlon, 65 Conn. 478, 33 Atl. 519, 48 Am. St. Rep. 227, 31 L. R. A. 55 (holding unconstitutional an act requiring a license from all itinerant peddlers except peddlers of farm and sea products); Kansas City *v.* Grush, 151 Mo. 128, 52 S. W. 286 (produce dealers); Sayre *v.* Phillips, 148 Pa. St. 482, 30 Wkly. Notes Cas. (Pa.) 196, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49 (holding unconstitutional a prohibitive license-tax which excepts from its operation residents).

77. *Alabama.*—Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58.

California.—Jackson *v.* Shawl, 29 Cal. 267.

Iowa.— Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689.

Minnesota.— Zenith Bldg., etc., Assoc. *v.* Heimbach, 77 Minn. 97, 79 N. W. 609.

Tennessee.—Caruthers *v.* Andrews, 2 Coldw. (Tenn.) 378.

78. Darling *v.* Berry, 4 McCrary (U. S.) 470, 13 Fed. 659, holding that the United States law exempting property that is exempt by the laws of the state where it is located is valid, although it will operate differently in different states.

79. McBride *v.* Reitz, 19 Kan. 123; Burrows *v.* Brooks, 113 Mich. 307, 71 N. W. 460; Rogers *v.* Brackett, 34 Minn. 279, 25 N. W. 601; Coleman *v.* Ballandi, 22 Minn. 144.

80. Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Thigpen *v.* Mississippi Cent. R. Co., 32 Miss. 347.

enforcing certain classes of actions by or against certain classes of persons;[81] may give a special remedy to certain classes,[82] although statutes giving the right to foreclose a mortgage without intervention of a court,[83] or the right to judgment by motion, have been held unconstitutional;[84] may take away certain remedies from certain classes;[85] and may regulate the venue of actions against certain classes,[86] and the time to sue and be sued may be extended or limited as to certain classes;[87] but exemption from the statute of limitation cannot be granted to certain persons,[88] although the right to sue certain kinds of corporations may be suspended for a certain length of time.[89] The state may also establish a system of judicature for a certain part of the state;[90] and by the weight of authority costs and attorneys' fees may be allowed in certain actions brought against certain persons,[91] although in some jurisdictions the opposite view is taken.[92] The

81. Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504; Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. Rep. 707, 3 L. R. A. 532.

82. *Alabama.*— *Ex p.* King, 102 Ala. 182, 15 So. 524, giving landlords the right to imprison for debt.

Indiana.— Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586, giving freeholders the right to appeal.

Minnesota.— Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437, struck juries.

Mississippi.— Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636.

Missouri.— Hamman *v.* General Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091, increasing the amount recoverable for death.

North Carolina.—Newbern Bank *v.* Taylor, 6 N. C. 266, summary mode of collecting debts.

See 10 Cent. Dig. tit. "Constitutional Law," § 673.

Giving special liens to certain classes or in certain instances is not unconstitutional. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667; Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863; Parks *v.* Parks, 12 Heisk. (Tenn.) 533.

83. Kentucky Trust Co. *v.* Lewis, 82 Ky. 579 [*overruling* Hahn *v.* Pindell, 3 Bush (Ky.) 189].

84. Smith *v.* Smith, 1 How. (Miss.) 102; State *v.* Burnett, 6 Heisk. (Tenn.) 186.

85. Lancaster County *v.* Trimble, 33 Nebr. 121, 49 N. W. 938, restricting counties from foreclosing tax liens acquired by them. But see Wally *v.* Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511.

86. Kingsbury *v.* Chatham R. Co., 66 N. C. 284. See Brown *v.* Haywood, 4 Heisk. (Tenn.) 357.

87. Lucas *v.* Kentucky Cent. R. Co., 12 Ky. L. Rep. 652, 14 S. W. 965; Dunbar *v.* Boston, etc., R. Corp., 181 Mass. 383, 63 N. E. 916; Cobb *v.* Bord, 40 Minn. 479, 42 N. W. 396. See Morgan *v.* Reed, 2 Head (Tenn.) 276.

88. Smith *v.* Marden, 80 Ky. 608, 4 Ky. L. Rep. 553; Bearce *v.* Fairview Tp., 9 Pa. Co. Ct. 342. See Mahone *v.* Central Bank, 17 Ga. 111.

89. Christie *v.* Life Indemnity, etc., Co., 82 Iowa 360, 48 N. W. 94.

90. Chambers *v.* Fisk, 22 Tex. 504.

91. *Arkansas.*—Dow *v.* Beidelman, 49 Ark. 455, 5 S. W. 718.

California.— Corwin *v.* Ward, 35 Cal. 195, 95 Am. Dec. 93.

Illinois.— Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491.

Indiana.— Duckwall *v.* Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797. See also Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471, exemption of a wife from costs in a divorce suit.

Iowa.— Gano *v.* Minneapolis, etc., R. Co., 114 Iowa 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L. R. A. 263; Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 340, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Minnesota.— Pfaender *v.* Chicago, etc., R. Co., 86 Minn. 218, 90 N. W. 393; Cameron *v.* Chicago, etc., R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553.

Missouri.— Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426.

Nebraska.— Farmers', etc., Ins. Co. *v.* Dobney, 62 Nebr. 213, 86 N. W. 1070; Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

New York.— Venangio *v.* Weir, 64 N. Y. App. Div. 483, 72 N. Y. Suppl. 234.

Tennessee.—Akling *v.* St. Louis, etc., Packet Co., (Tenn. 1898) 46 S. W. 24; Henley *v.* State, 98 Tenn. 655, 41 S. W. 352, 1104, 39 L. R. A. 126.

Texas.— Gulf, etc., R. Co. *v.* Ellis, 87 Tex. 19, 26 S. W. 985.

See 10 Cent. Dig. tit. "Constitutional Law," § 676.

92. *Alabama.*— South, etc., R. Co. *v.* Morris, 65 Ala. 193.

Michigan.—Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006; Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382, 38 N. W. 289.

Ohio.— Hocking Valley Coal Co. *v.* Rosser, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386.

Washington.— Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868, hold-

state cannot, however, except certain kinds of liens from the operation of a general homestead exemption act.[93]

XII. EQUAL PROTECTION OF THE LAWS.

A. Constitutional Guaranty — 1. In General. While slavery was abolished by the thirteenth amendment to the constitution of the United States the negro was left under all his former disabilities, and with no political rights except such as the various states might give him,[94] and with no exemption from an unfair exercise of the power of state control which might be exercised against him.[95] The fourteenth amendment, however, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[96]

2. Limitations and Scope. This amendment creates no new legal rights, but operates upon the legal rights existing at its adoption.[97] It applies to all instrumentalities and agencies employed by the state in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities;[98] but not to individual infringements of the rights guaranteed by it;[99] or to legislation by congress.[1] The word "person" as used therein includes a foreign subject while within the United States as well as a citizen of the United States, it being unnecessary to demand the benefit of this clause that the complainant be a citizen of the state or a resident therein.[2] So too private corporations are "persons" within the meaning of this amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws;[3] but a corporation is not a "citizen" within the meaning of

ing a statute giving attorney's fees in actions for killing stock invalid, as it is not a penalty and plaintiff does not have to pay them if he does not succeed in his action.

Wisconsin.— See Durkee *v.* Janesville, 28 Wis. 464, 9 Am. Rep. 500.

See 10 Cent. Dig. tit. "Constitutional Law," § 676.

93. Coleman *v.* Ballandi, 22 Minn. 144.

94. Marshall *v.* Donovan, 10 Bush (Ky.) 681.

95. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,260, 21 Int. Rev. Rec. 173.

The denial of equal accommodations in inns, public conveyances, and places of public amusement (forbidden by the act of congress of March 1, 1875) is not affected by the thirteenth amendment. *In re* Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835.

96. U. S. Const. Amendm. 14, § 1, cl. 4.

As to civil rights generally see Civil Rights, 7 Cyc. 158.

97. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

98. Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979; Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; Scott *v.* McNeal, 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. ed. 896; Yick Wo *v.* Hopkins, 118 U. S. 356, 373, 6 S. Ct. 1064, 30 L. ed. 220; Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; *Ex p.* Virginia, 100 U. S. 313, 339, 25 L. ed. 676; Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136; Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. N. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsb. Leg. J. (Pa.) 40, 8 Reporter 195, 13 West. Jur. 409.

The motive of the framers to discriminate against a certain class which does not appear from the language of the ordinance or statute will not make the enactment void or unconstitutional. Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145.

99. *In re* Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835.

1. *In re* Sing Lee, 54 Fed. 334.

2. State *v.* Montgomery, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386; Steed *v.* Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136; Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. N. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsb. Leg. J. 40, 8 Reporter 195, 13 West. Jur. 409.

3. Hargraves Mills *v.* Harden, 25 Misc. (N. Y.) 665, 56 N. Y. Suppl. 937; Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666; Covington, etc., Turnpike Road Co. *v.* Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 937, 31 L. ed.

this amendment,[4] and a state may prohibit it when organized in other states of the Union from transacting business within it,[5] or may prescribe the terms on which such business may be done.[6] When, however, a foreign-formed corporation has been regularly admitted to transact business within a state it is a person "within the jurisdiction" of that state, and within this amendment.[7] The words "within its jurisdiction" as used in this amendment include only those "persons" who are physically within the territorial jurisdiction of the state, the protection of whose laws they invoke,[8] and by "equal protection of the laws" is meant equal security under them to everyone, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness, and exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances.[9] Hence a statute bearing alike on all individuals of each class or on all districts in like conditions, with uniformity, does not deny the equal protection of the laws,[10] but such classification must not be arbitrary and without reason-

650; Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118 [*affirming* 18 Fed. 385]; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722; Northwestern Fertilizing Co. *v.* Hyde Park, 3 Biss. (U. S.) 480, 18 Fed. Cas. No. 10,336, 5 Chic. Leg. N. 313. *Compare* Central Pac. R. Co. *v.* State Bd. of Equalization, 60 Cal. 35.

4. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626 [*following* Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529]; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; La Fayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274. And see *supra*, XI.

5. Frazier *v.* Willcox, 4 Rob. (La.) 517, but until prohibited by a statute, contracts made within the state by such corporation will be enforced.

6. *Illinois.*— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal 55 Ill. 85, 8 Am. Rep. 626; Ducat *v.* Chicago, 48 Ill. 192, 95 Am. Dec. 529.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Iowa.— Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872.

Kentucky.— Com. *v.* Mobile, etc., R. Co., 23 Ky. L. Rep. 784 64 S. W. 451, 54 L. R. A. 916.

Michigan.— Shafer Iron Co. *v.* Iron Cir. Judge, 88 Mich. 464, 50 N. W. 389.

United States.— Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394 [*reversing* 114 Pa. St. 256, 6 Atl. 45].

See also State *v.* Cadigan, 73 Vt. 245, 50 Atl. 1079, 87 Am. St. Rep. 714, 57 L. R. A. 666; and *supra*, XI.

See 10 Cent. Dig. tit. "Constitutional Law," § 680.

7. Singer Mfg. Co. *v.* Wright, 33 Fed. 121.

A foreign corporation not regularly admitted by the state, although doing business therein, does not come within the fourteenth amendment. Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432; Philadelphia F. Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342.

8. State *v.* Travellers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220.

9. State *v.* Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314; State *v.* Griffin, 69 N. H. 1, 39 Atl. 260, 76 Am. St. Rep. 139, 41 L. R. A. 177; *In re* Grice, 79 Fed. 627 [*citing* Duncan *v.* Missouri, 152 U. S. 377, 14 S. Ct. 570, 38 L. ed. 485; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623; Hayes *v.* Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 578; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676; Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. N. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsb. Leg. J. (Pa.) 40, 8 Reporter 195, 13 West. Jur. 409, as authority for the proposition that this amendment was intended to exclude everything arbitrary or capricious in legislation affecting the rights of citizens].

10. *California.*— *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261.

Illinois.— Carthage *v.* Carlton, 99 Ill. App. 338.

Indiana.— Wilkin *v.* State, 113 Ind. 514, 16 N. E. 192; Eastman *v.* State, 109 Ind. 298, 10 N. E. 97, 58 Am. Rep. 400.

Michigan.— People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Nebraska.— Kountze *v.* Omaha, 63 Nebr. 52, 88 N. W. 117.

North Carolina.— Nanon *v.* Wilmington, etc., R. Co., 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415; State *v.* Call, 121 N. C. 643, 28 S. E. 517.

Tennessee.— State *v.* Condon, 108 Tenn. 82, 65 S. W. 871.

Texas.— See Rippy *v.* State, (Tex. Crim. 1902) 68 S. W. 687.

United States.— Clark *v.* Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. ed. 569; Gulf,

able grounds on which it may be based.[11] But a statute permitting a technical discrimination, which is in no sense unjust or oppressive, would not be repugnant to this provision.[12]

B. Infringement of Guaranty — 1. In General. Municipal regulations or statutes applying to certain localities only, and not to others, based on the practical necessities of administration in dealing with a population unequally distributed over the state, do not conflict with the fourteenth amendment. Thus a state or its agencies may prescribe different registration laws,[13] a right to punish as a crime or misdemeanor an act which is not punishable if done in another district,[14] a

etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 256, 41 L. ed. 666; St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751; Columbus Southern R. Co. *v.* Wright, 151 U. S. 470, 14 S. Ct. 396, 38 L. ed. 238; Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599; McPherson *v.* Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035; Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 237, 10 S. Ct. 533, 33 L. ed. 892; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 8 S. Ct. 1161, 32 L. ed. 107; Hayes *v.* Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 578; *In re* Kentucky R. Tax Cases, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414; Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145; New York *v.* Bennett, 113 Fed. 515; *In re* Stockton Laundry Case, 26 Fed. 611; Barthet *v.* New Orleans, 24 Fed. 563; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385.

See 10 Cent. Dig. tit. "Constitutional Law," § 679 *et seq.*

11. *Illinois.*— Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

Missouri.— State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.

Ohio.— Harmon *v.* State, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618.

South Carolina.— Goodale *v.* Sowell, 62 S. C. 516, 40 S. E. 970.

Tennessee.— Stratton *v.* Morris, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

Wisconsin.— Black *v.* State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853.

United States.— Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 22 S. Ct. 30, 46 L. ed. 92; Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666 [*approved* in Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037]; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; Fraser *v.* McConway, etc., Co., 82 Fed. 257; *In re* Ah Fong, 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102, 13 Am. L. Reg. N. S. 761, 3 Am. L. Rec. 403, 9 Am. L. Rev. 359, 1 Centr. L. J. 516, 7 Chic. Leg. N. 17, 20 Int. Rev. Rec. 112.

See 10 Cent. Dig. tit. "Constitutional Law," § 678 *et seq.*

A state shall not deny to any person or class of persons the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882; Wally *v.* Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; Vanzant *v.* Waddel, 2 Yerg. (Tenn.) 260; Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751; Missouri *v.* Lewis, 101 U. S. 22, 25 L. ed. 989.

As to class legislation generally see *supra*, XI, C, 3.

Classification cannot be defined by the existence of opinions or beliefs of an individual other than the one primarily affected. Middleton *v.* Middleton, 54 N. J. Eq. 692, 35 Atl. 1065, 55 Am. St. Rep. 602, 36 L. R. A. 221, where the different kinds of divorce given depended on the opinions of the consorts.

The right of transit through each state with every species of property known to the constitution exists for each citizen in every state either by virtue of the fourteenth amendment (*Ex p.* Archy, 9 Cal. 147; Julia *v.* McKinney, 3 Mo. 270) or by comity (Willard *v.* People, 5 Ill. 461; Rankin *v.* Lydia, 2 A. K. Marsh. (Ky.) 467). *Compare* People *v.* Lemmon, 5 Sandf. (N. Y.) 681.

12. Indiana, etc., Gas Co. *v.* State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761.

13. Mason *v.* Missouri, 179 U. S. 328, 21 S. Ct. 125, 45 L. ed. 214 [*affirming* 155 Mo. 486, 55 S. W. 636, and *citing* Chappell Chemical, etc., Co. *v.* Sulphur Mines Co., 172 U. S. 474, 19 S. Ct. 268, 43 L. ed. 520; Hayes *v.* Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 578; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989].

14. State *v.* Snow, 117 N. C. 774, 23 S. E. 322; State *v.* Barringer, 110 N. C. 525, 14 S. E. 781; State *v.* Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; State *v.* Stovell, 103 N. C. 416, 8 S. E. 900; State *v.* Joyner, 81 N. C. 534; State *v.* Berlin, 21 S. C. 292, 53 Am. Rep. 677; *In re* Ah Kit, 45 Fed. 793.

Making it a punishable offense to maintain a laundry within a city except in certain designated localities is not repugnant to this clause of the constitution. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727 [*overruling* in effect *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327]; *In re*

different rate of assessment for local improvements,[15] different requirements for applicants for liquor licenses,[16] different maximum rates to be charged by grain elevators,[17] a different rate of poundage for stock;[18] may regulate the rights to hunt game and catch fish;[19] may require that all children attending the public schools shall be vaccinated;[20] or may compel the performance of certain services under certain conditions without compensation.[21] But a state cannot permit a business which is not a nuisance or menace to the public health to be carried on in one district but not in another, when there is no more reason to prohibit it in the one than in the other;[22] exempt from the application of an anti-trust act, agricultural products or live stock while in the possession of the producer or raiser;[23] or require a certain certificate before a foreign corporation which has contracted to sell within the state goods manufactured without the state is permitted to sue upon the contract.[24] But classifying corporations according to their business[25] and subjecting them to different rules,[26] classifying legatees of a will according to the degree of relationship, for the purpose of charging an inheritance

Hong Wah, 82 Fed. 623; *In re* Sam Kee, 12 Sawy. (U. S.) 379, 31 Fed. 680; *In re* Stockton Laundry Case, 26 Fed. 611.

15. Burnett *v.* Com., 169 Mass. 417, 48 N. E. 758; Hilliard *v.* Asheville, 118 N. C. 845, 24 S. E. 738; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

16. U. S. *v.* Ronan, 33 Fed. 117, requirement of the written consent of ten of the nearest residents in unincorporated towns.

17. Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 682, 15 Am. St. Rep. 460, 5 L. R. A. 559].

18. Broadfoot *v.* Fayetteville, 121 N. C. 418, 28 S. E. 515, 61 Am. St. Rep. 668, 39 L. R. A. 245, a different rate for residents, non-residents, and non-residents distant more than one mile.

19. *Illinois.*— American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

Michigan.— People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696.

New Hampshire.— State *v.* Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314; State *v.* Roberts, 59 N. H. 484.

New York.— Lawton *v.* Steele, 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134; Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140.

South Carolina.— See State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.— Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 400, 40 L. ed. 793; McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248.

See 10 Cent. Dig. tit. "Constitutional Law," § 704.

20. Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251.

21. An attorney may be compelled to conduct without compensation the defense of one who is destitute of means and is accused of a crime, where such services are necessary to give the accused the constitutional guaranty of the right to appear and defend in person and by counsel.

California.— Lamont *v.* Solano County, 49 Cal. 158; Rowe *v.* Yuba County, 17 Cal. 61.

Illinois.— Vise *v.* Hamilton County, 19 Ill. 78.

Michigan.— Bacon *v.* Wayne County, 1 Mich. 461.

Pennsylvania.— Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

Washington.— Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

Compare Webb *v.* Baird, 6 Ind. 13.

22. New York Sanitary Utilization Co. *v.* New York City Health Dept., 61 N. Y. App. Div. 106, 70 N. Y. Suppl. 510 [*affirming* 32 Misc. (N. Y.) 577, 67 N. Y. Suppl. 324], garbage crematory.

23. Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547; State *v.* Waters-Pierce Oil Co., (Tex. Civ. App. 1902) 67 S. W. 1057; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679 [*affirming* 99 Fed. 354].

An exemption of labor unions from the operation of a law prohibiting the formation of trusts is a denial to all persons not members of such organizations of the equal protection of the laws. Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816.

24. Hargraves Mills *v.* Harden, 25 Misc. (N. Y.) 665, 56 N. Y. Suppl. 937.

25. Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552.

26. Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 20 S. Ct. 136, 44 L. ed. 192; Atchison, etc., R. Co. *v.* Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 8 S. Ct. 1161, 32 L. ed. 107.

tax,[27] or classifying lands in a certain relation to cities, into tracts used for agricultural purposes and tracts used for other purposes[28] is a rightful exercise of the power of a state, and not repugnant to this provision.

2. ASSESSMENTS FOR LOCAL IMPROVEMENTS. A city may be given control of its streets, alleys, etc., with power to construct and reconstruct them, and to pay for such work the city may make assessments.[29] It was formerly held that the whole cost could be assessed on the owners of the land fronting on the improvement, regardless of the benefits actually received,[30] on the ground that the legislature had the power to determine who was benefited and to what extent, and such determination precluded all judicial inquiry;[31] but under the better rule an abutting landowner can be assessed only to the amount of the benefit he has received from the improvement,[32] and if there is an assessment to any substantial amount in excess of the benefits received, there is *pro tanto* a taking without compensation and a denial of the equal protection of the laws.[33] So too the state or its agents may designate what district is benefited by an improvement, and may direct that the assessment for such improvement be placed on that district;[34] and in pursuance of this power the assessment is usually made on the owners of the land abutting on the improvement.[35]

3. BUILDING REGULATIONS. A city may by ordinance forbid the erection,[36] alteration, or repair[37] of buildings within certain districts or boundaries without denying the equal protection of the law, as such regulations are within the police power.

4. BUSINESS, TRADE, OR PROFESSIONAL REGULATIONS — a. In General. It is a fundamental right of a citizen of the United States, secured by the fourteenth amendment, to chose his own employment and pursue it in a lawful manner, subject only to constitutional regulations and restrictions,[38] and to the so-called police

27. Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037.

28. Clark *v.* Kansas City, 176 U. S. 114, 20 S. Ct. 284, 44 L. ed. 392.

29. Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544; and cases *infra*, note 30 *et seq.*

30. The manner of assessment which is known as the "front foot" rule was sustained in the following cases:

Illinois.— Job *v.* Alton, 189 Ill. 256, 59 N. E. 622.

Indiana.— Barber Asphalt Paving Co. *v.* Edgerton, 125 Ind. 455, 25 N. E. 436; Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Ross *v.* Stockhouse, 114 Ind. 200, 16 N. E. 501; Palmer *v.* Stumph, 29 Ind. 329.

Iowa.— Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

Kentucky.— Augusta *v.* Taylor, 23 Ky. L. Rep. 1647, 65 S. W. 837.

United States.— Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

31. Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Ross *v.* Stockhouse, 114 Ind. 200, 16 N. E. 501; Palmer *v.* Stumph, 29 Ind. 329. See Charles *v.* Marion, 100 Fed. 538.

32. Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443.

33. *California.*— Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581.

Michigan.— Thomas *v.* Gain, 35 Mich. 155, 24 Am. Rep. 535.

Missouri.— Kansas City *v.* Bacon, 157 Mo. 450, 57 S. W. 1045; McCormack *v.* Patchin, 53 Mo. 33, 14 Am. Rep. 440.

New Jersey.— State *v.* Newark, 37 N. J. L. 415, 18 Am. Rep. 729; State *v.* Hoboken, 36 N. J. L. 291; Bogert *v.* Elizabeth, 27 N. J. Eq. 568; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

Pennsylvania.— Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

Vermont.— Barnes *v.* Dyer, 56 Vt. 469.

United States.— Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Charles *v.* Marion, 100 Fed. 538; Fay *v.* Springfield, 94 Fed. 409.

See 10 Cent. Dig. tit. "Constitutional Law," § 686.

34. *In re* Piper, 32 Cal. 530.

35. Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047.

Where a special assessment to pay for a particular work has been held illegal, a subsequent authority given to make a new special assessment to pay for the completed work does not deny the equal protection of the laws. Lombard *v.* West Chicago Park Com'rs, 181 U. S. 33, 21 S. Ct. 507, 45 L. ed. 731 [*affirming* 181 Ill. 136, 58 N. E. 941].

36. Easton *v.* Covey, 74 Md. 262, 22 Atl. 266.

37. *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310; Hine *v.* New Haven, 40 Conn. 478.

38. Live-Stock Dealers', etc., Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 1 Abb. (U. S.) 388, 1 Woods (U. S.) 21, 15

power[39] of the legislature, which enables it to make regulations and restrictions for the health, morals, safety, and welfare of the general public. Whenever therefore any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated, even to suppression, and individual rights must give way to the welfare of the public.[40] In making such regulations some discrimination is necessary, and this alone will not render the regulation unconstitutional, as being a denial of equal protection of the law. It is only when the discrimination is clearly arbitrary, unjust, and without reasonable ground that the regulation is declared by the courts to be unconstitutional.[41] Such regulations may properly be made concerning the carrying on of laundries,[42] but cannot exclude them from certain localities regardless of the structure or appliances used;[43] the maintenance of a slaughter-house and the control and supervision of the inspection of animals slaughtered for market;[44] the carrying on of the business of fat-rendering, bone-boiling, etc., within the limits of any incorporated city or within three miles from such limits;[45] the operation of public warehouses;[46] the maintenance of private markets;[47] the establishment of hospitals in the built-up portions of the cities;[48] the landing of passengers and goods within a locality infected with an infectious or contagious disease;[49] the sanitary condition of places where cows are kept;[50] the sale and use of opium

Fed. Cas. No. 8,408, 5 Am. L. Rev. 171, 1 Chic. Leg. N. 17, 13 Int. Rev. Rec. 20.

39. As to police power see *supra*, VI.

40. Walker *v.* Com., (Pa. 1887) 11 Atl. 623, 625 note; New Orleans Water-Works Co. *v.* St. Tammany Water-Works Co., 14 Fed. 194.

A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727; *In re* Hong Wah, 82 Fed. 623.

An asylum for the treatment of mild forms of insanity is not properly classed as of such a noxious or offensive character. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727, holding an ordinance prohibiting the maintenance of a private asylum for mild forms of insanity within forty yards of any dwelling or school invalid.

41. Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463; State *v.* Holden, 14 Utah 96, 46 Pac. 1105, 37 L. R. A. 108; State *v.* Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103.

The right to carry on a business, trade, or profession may be dependent upon the consent of some official, body of officials, or a certain number of private persons who may by affected thereby; but such consent must depend on a judicial determination of the fitness of the applicant, premises, or situation, and not on the mere arbitrary personal will of the party giving it. Yick Wo. *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220 [*distinguished* in Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725, where an ordinance giving the mayor power to determine whether an applicant had the necessary qualities was held valid, there being no chance for the exercise of discretion other than of a judicial nature].

42. *Ex p.* Moynier, 65 Cal. 33, 2 Pac. 728 (requiring by ordinance a certificate from the health officer and one from the fire warden, and restricting the hours of business); Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145.

43. *Ex p.* Sing Lee, 96 Cal. 354, 31 Pac. 245; *In re* Hong Wah, 82 Fed. 623; *In re* Stockton Laundry Case, 26 Fed. 611; *In re* Sam Kee, 12 Sawy. (U. S.) 379, 31 Fed. 681.

44. State *v.* Fagon, 22 La. Ann. 545; New Orleans Butchers Benev. Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394.

45. People *v.* Rosenberg, 67 Hun (N. Y.) 52, 22 N. Y. Suppl. 56, 51 N. Y. St. 189.

46. Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

Laws prescribing maximum rates of charges and requiring grain stored to be insured at the expense of the warehouseman are valid. Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408].

47. Lamarque *v.* New Orleans, McGloin (La.) 28. See also Philadelphia *v.* Brabender, 201 Pa. St. 574, 51 Atl. 374, 58 L. R. A. 220.

48. Com. *v.* Pittsburg Charity Hospital, (Pa. 1901) 47 Atl. 980.

49. Compagnie Francaise de Navigation *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458.

50. State *v.* Broadbelt, 89 Md. 565, 43 Atl. 771, 73 Am. St. Rep. 201, 45 L. R. A. 433.

and intoxicating liquors;[51] the right to practise a certain profession;[52] or pursue a certain trade;[53] the sale of adulterated food;[54] combinations for the purpose of restricting competition or trade;[55] the inspection of coal mines;[56] the use of petroleum products, combustible below a certain temperature;[57] the use of labor-union labels on non-union made goods;[58] the making of marginal stock contracts;[59] or the transfer of notes given for patent rights.[60] So too the hours during which certain trades, etc., may be carried on may be regulated.[61] But the courts have held unconstitutional statutes restraining the manufacture of clothing[62] or cigars;[63] the sale of passenger tickets;[64] the keeping of "truck stores" or the owning of any interest in such, by certain kinds of corporations as mining, manufacturing, or railroad corporations;[65] the carrying on of an ordinary banking business by an individual;[66] or requiring owners and operators of coal mines to

51. *Alabama.*— Dorman *v.* State, 34 Ala. 216.

Colorado.—Adauss *v.* Cronin, 29 Colo. 488, 69 Pac. 590.

Michigan.— Whitney *v.* Grand Rapids Tp. Bd., 71 Mich. 234, 39 N. W. 40.

South Carolina.— State *v.* Berlin, 21 S. C. 292, 53 Am. Rep. 677.

Texas.— Peacock *v.* Limburger, (Tex. Civ. App. 1902) 67 S. W. 518.

Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

Washington.—Ah Lim *v.* Territory, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395.

United States.— Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205.

See 10 Cent. Dig. tit. "Constitutional Law," § 688.

52. State *v.* Call, 121 N. C. 643, 28 S. E. 517; State *v.* Carey, 4 Wash. 424, 30 Pac. 729; State *v.* Dent, 25 W. Va. 1. See also State *v.* Bohemier, 96 Me. 257, 52 Atl. 643; *In re* Taylor, 48 Md. 28, 30 Am. Rep. 451.

53. A law requiring persons keeping a pharmacy to be registered pharmacists or to employ a registered pharmacist is valid. State *v.* Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34.

54. State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

Oleomargarine.— A statute providing that no person shall manufacture out of any compound other than that produced from unadulterated milk any article designed to take the place of butter or cheese, or shall sell the same as butter, does not deny the equal protection of the laws, it being a regulation to promote the health of the public. People *v.* Rotter, (Mich. 1902) 91 N. W. 167, 9 Detroit Leg. N. 284; Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; McCann *v.* Com., 198 Pa. St. 509, 48 Atl. 470; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253 [*affirming* 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350]; *In re* Brosnahan, 4 McCrary (U. S.) 1, 18 Fed. 62. So too the manufacture of oleomargarine which contains any coloring matter may be prohibited, although by the statutes of the state, harmless coloring matter may be used in butter. Capital City Dairy Co. *v.* State, 183 U. S. 238, 22 S. Ct. 120, 46 L. ed. 171. But see People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34.

55. See *In re* Grice, 79 Fed. 627, holding, however, that a statute prohibiting such combinations, but exempting from its provisions "agricultural products or live stock while in the hands of the producer or raiser," denies the equal protection of the laws, even though the exempted parties are not in a position to combine.

56. Consolidated Coal Co. *v.* People, 186 Ill. 134, 57 N. E. 880; Chicago, etc., Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554.

57. State *v.* Santee, 111 Iowa 1, 82 N. W. 445, 53 L. R. A. 763.

58. Perkins *v.* Heert, 158 N. Y. 306, 53 N. E. 18, 70 Am. St. Rep. 483, 43 L. R. A. 858 [*affirming* 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223]; Com. *v.* Norton, 9 Pa. Dist. 132, 23 Pa. Co. Ct. 386.

59. Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927.

60. Shires *v.* Com., 120 Pa. St. 368, 14 Atl. 251.

61. Soon Hing *v.* Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

62. Com. *v.* Perry, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. Rep. 533, 14 L. R. A. 325.

63. *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

64. People *v.* City Prison, 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. Rep. 763, 43 L. R. A. 264 [*reversing* 26 N. Y. App. Div. 228, 50 N. Y. Suppl. 56]. But see Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472, holding that an act making it unlawful for any person not an authorized agent of the carriers to sell a passenger ticket is valid, as it is to prevent fraud upon travelers.

65. Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Luman *v.* Hitchens Bros. Co., 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393.

66. State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477. *Compare* State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420.

weigh the coal at the mine for the benefit of the public, but providing no compensation therefor.[67]

b. Employment and Payment of Laborers. The right to labor or employ labor and make contracts in respect thereto upon such terms as may be agreed upon between parties *sui juris* cannot be interfered with by the legislature except upon some reasonable ground;[68] but where such grounds exist the law may be limited to the dangers peculiar to a particular industry, without denying to any person the equal protection of the law.[69] Therefore a law limiting the period of daily employment of working men in certain positions,[70] the aggregate hours per week;[71] or the hours a woman or minor child may work in certain factories;[72] or prohibiting the employment by liquor-sellers of female servants in their places of business,[73] is constitutional. But a law prohibiting the employment of Chinese[74] or otherwise so regulating the right to employ labor that a discrimination is thereby made against persons within the United States[75] denies the equal protection of the laws and is unconstitutional. So too a state may pass a law requiring all corporations to pay their employees at stated intervals;[76] and a similar statute applying to individuals and partnerships would not deny the equal protection of the law to either;[77] nor is such a law made invalid by exempting religious, literary, or charitable corporations from its operation.[78] So also a statute providing for the payment by railroad corporations of their discharged employees on the day of their discharge is valid.[79] But acts providing that wages shall be paid by certain kinds of corporations only in United States money or draft or check on a bank where money is already deposited to meet the same,[80] or prohibiting the withholding of wages of an employee for imperfect work,[81] or the payment by coal-mining companies, firms, etc., of their labor in

67. Millet *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869.

68. Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621. See also Wheeling Bridge, etc., R. Co. *v.* Gilmore, 8 Ohio Cir. Ct. 658.

69. State *v.* Holden, 14 Utah 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108.

70. Thus laws limiting the period of employment of certain class of railroad employees (Wheeling Bridge, etc., R. Co. *v.* Gilmore, 8 Ohio Cir. Ct. 658, the ten-hour law); or the period of employment in underground mines (State *v.* Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103, the eight-hour law) have been held to be valid. But see *Ex p.* Kuback, 85 Cal. 274, 24 Pac. 737, 20 Am. St. Rep. 226, 9 L. R. A. 482 (where an ordinance forbidding the employment by any contractor of any person for more than eight hours of work a day on contract work for the city was held to be invalid); Low *v.* Rees Printing Co., 41 Nebr. 127, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702 (where an ordinance providing an eight-hour day for mechanics, servants, and laborers, except those engaged in farm and domestic labor, was held to be invalid).

71. People *v.* Lochner, 73 N. Y. App. Div. 120, 76 N. Y. Suppl. 396.

72. Com. *v.* Hamilton Mfg. Co., 120 Mass. 383. *Compare* Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79.

73. Hoboken *v.* Goodman, (N. J. 1902) 51 Atl. 1092; Bergman *v.* Cleveland, 39 Ohio St. 651.

74. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136.

75. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136.

76. State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; Skinner *v.* Garnett Gold-Min. Co., 96 Fed. 735. *Compare* Johnson *v.* Goodyear Min. Co., 127 Cal. 4, 59 Pac. 304, 78 Am. St. Rep. 17, 47 L. R. A. 338.

77. Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344.

78. State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856.

79. St. Louis, etc., R. Co. *v.* Paul, 64 Ark. 83, 40 S. W. 705, 62 Am. St. Rep. 154, 37 L. R. A. 504.

80. A "script law" applying to mining and manufacturing corporations only (State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621); or only to persons, corporations, etc., who employ ten or more persons (State *v.* Haun, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369 [*reversing* 7 Kan. App. 509, 54 Pac. 130]) is invalid.

81. Com. *v.* Perry, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. Rep. 533, 14 L. R. A. 325.

paper not redeemable for its face value in lawful money,[82] have been held unconstitutional.

c. Rates and Charges of Quasi-Public Corporations —(i) *In General.* When property is affected by public interest, such as railroads,[83] corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted,[84] express companies,[85] public warehouses,[86] grain elevators not used by the owner exclusively,[87] stock-yards,[88] or telegraph and telephone companies,[89] such property becomes to the extent of such interest subject to public control and subject of course to the constitutional limitations against the deprivation of property without compensation or without due process of law, or to a denial of the equal protection of the laws.[90] Hence where the legislature has fixed a maximum charge which allows a railroad or other corporation to declare a reasonable dividend after paying its expenses there is no denial of the equal protection of the laws;[91] but where the maximum rates prescribed by the legislature are less than the cost of performing the service, they are unreasonable and confiscatory, and their enforcement would be a taking of property without due process of law and a denial of the equal protection of the laws.[92] The rates

82. Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; State *v.* Fire Creek Coal, etc., Co., 33 W. Va. 188, 10 S. E. 288, 25 Am. St. Rep. 891, 6 L. R. A. 359; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

83. Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 17 S. Ct. 896, 42 L. ed. 243; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970.

84. Covington, etc., Turnpike Road Co. *v.* Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560.

85. Memphis, etc., R. Co. *v.* Southern Express Co., 117 U. S. 1, 29 S. Ct. 542, 628, 29 L. ed. 791.

86. Munn *v.* People, 69 Ill. 80; Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408].

87. People *v.* Budd, 117 N. Y. 1, 22 N. E. 670, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559 [*affirmed* in 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247].

88. Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 839.

89. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.

90. Munn *v.* People, 69 Ill. 80; Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408]; Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559]; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77; Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.

91. Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; Munn *v.* People, 69 Ill. 80; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408]; Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559]; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. ed. 176; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970 (see Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489); Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

A classification of railroad rates in proportion to the length of the road made under legislative power to regulate fares and freights is valid. Dow *v.* Beidelman, 125 U. S. 680, 8 S. Ct. 1028, 31 L. ed. 841 [*affirming* 49 Ark. 325, 5 S. W. 297].

An act fixing maximum rates of passenger fare upon railroads according to a classification based upon the gross annual earnings is valid. Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489 [*distinguishing* Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970].

An act regulating freight and passenger tariffs which may be charged by railroads is valid. Tilley *v.* Savannah, etc., R. Co., 4 Woods (U. S.) 427, 5 Fed. 641.

Establishing a commission charged with the duty of supervising railroads and authorizing it to fix maximum rates for transportation does not deprive railroad companies of the equal protection of the laws. Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636.

92. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560 (a statute fixing tolls); Dow *v.* Beidelman, 125 U. S. 680, 8 S. Ct. 1028, 31

so fixed must apply not solely to corporations operating railroads but also to individuals operating railroads in like manner.[93]

(II) *DETERMINATION OF.* The legislature, itself or through a railroad commissioner, etc., prescribes the rates. The courts decide whether it is so unjust and unreasonable as to conflict with the constitutional guaranties. The legislature cannot say finally that a rate is just and reasonable, nor can the court revise or change the rates or say what would be a reasonable and just rate.[94]

5. INSURANCE REGULATIONS.[95] Legislation forbidding any person, partnership, or association to issue any policy of insurance against fire unless expressly so authorized by a charter of incorporation does not deny the equal protection of the laws.[96] So also the states may provide that a fire-insurance policy in case of total loss shall be a liquidated claim against the company for the full amount thereof,[97] and that any stipulation in the policy to the contrary shall be void;[98] or that no misrepresentation made in obtaining a life-insurance policy shall be material, unless actually contributing to the contingency on which the policy is to become due.[99] Similarly a statute providing that health and life insurance companies, failing to pay a loss, shall in addition thereto pay attorney's fees, does not deny the equal protection of the laws.[1]

6. LICENSES. A statute may constitutionally place a license-tax upon, or require a license from elevators and warehouses on a railroad right of way or depot grounds,[2] sugar refineries,[3] laundries,[4] stages used for the transportation of

L. ed. 841 (a statute fixing a rate of three cents a mile as a maximum charge); Western Union Tel. Co. *v.* Myatt, 98 Fed. 335 (holding invalid a statute fixing a maximum rate on messages below the cost of sending). And see San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 90 Fed. 516 (irrigation company's rates fixed by statute).

93. Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679.

94. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479, 17 S. Ct. 896, 42 L. ed. 243; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Minneapolis R. Co. *v.* Minnesota, 134 U. S. 467, 10 S. Ct. 473, 33 L. ed. 985 [*affirming* Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970]; Memphis, etc., R. Co. *v.* Southern Express Co., 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. ed. 791; Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 388, 1191, 29 L. ed. 636; Louisville, etc., R. Co. *v.* McChord, 103 Fed. 216; Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 839.

95. See, generally, ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE.

96. Com. *v.* Vrooman, 164 Pa. St. 306, 35 Wkly. Notes Cas. (Pa.) 97, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250.

97. Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227; Merchants' Ins. Co. *v.* Levy, (Tex. Civ. App. 1895) 33 S. W. 996; Phœnix Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45, 33 S. W. 992, 995.

98. *Missouri.*—Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107.

Nebraska.—North America Ins. Co. *v.* Bachler, 44 Nebr. 549, 62 N. W. 911 [*following* Home F. Ins. Co. *v.* Bean, 42 Nebr. 537, 60 N. W. 907, 47 Am. St. Rep. 711].

Ohio.—Queen Ins. Co. *v.* Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45.

Tennessee.—Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

Texas.—Phœnix Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45, 33 S. W. 992, 995.

Wisconsin.—Reilly *v.* Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552.

See 10 Cent. Dig. tit. "Constitutional Law," § 692.

99. Schuermann *v.* Union Cent. L. Ins. Co., 165 Mo. 641, 65 S. W. 723.

1. Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; New York Mut. L. Ins. Co. *v.* Walden, (Tex. Civ. App. 1894) 26 S. W. 1012.

2. W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. ed. 618 [*affirming* 77 Minn. 223, 79 N. W. 962], although a license is not required for elevators and warehouses differently situated. See also Munn *v.* People, 69 Ill. 80 [*reversed* in 94 U. S. 113, 24 L. ed. 77].

3. American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. ed. 102 [*affirming* 51 La. Ann. 562, 25 So. 447]. See also Com. *v.* Snyder, 182 Pa. St. 630, 38 Atl. 356; New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323.

4. State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415, holding valid a statute requiring a laundryman with an assistant to

passengers,[5] banking,[6] gift enterprises,[7] the working of mines,[8] vendors of certain goods,[9] emigrant agents,[10] agents of packing houses,[11] peddling,[12] persons exercising certain professions,[13] the keeping of telephone poles and wires within the city limits,[14] the keeping of certain kinds of dogs,[15] the removing of the contents of privies,[16] the removing of corpses from a place of burial,[17] or corporations,[18] without denying the equal protection of the laws within the meaning of that guaranty.

pay a license-fee of twenty-five dollars per quarter, while persons engaged in the steam-laundry business are required to pay a fee of fifteen dollars per quarter only. *Compare In re* Tot Sang, 75 Fed. 983.

5. Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157.

6. Brooks *v.* State, (Tex. Civ. App. 1900) 58 S. W. 1032.

7. Humes *v.* Ft. Smith, 93 Fed. 857.

8. People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 321 (holding valid a license-tax on foreigners working gold mines); State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841 (holding valid a license-tax on the working of phosphate mines).

9. State *v.* Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595; State *v.* French, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590; *Ex p.* Brown, 48 Fed. 435.

Vendors of intoxicating liquors may be required to obtain a license, without in any way denying to them the equal protection of the laws. State *v.* Gray, 61 Conn. 39, 22 Atl. 675; Daniels *v.* State, 150 Ind. 348, 50 N. E. 74; Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226; Com. *v.* Fredericks, 119 Mass. 199.

A license-tax on drinking houses or establishments for the retail of spirituous liquor is valid. State *v.* Mettle, 48 La. Ann. 728, 19 So. 748.

A license-tax on retailers greater than that on wholesalers is valid. Com. *v.* Clark, 195 Pa. St. 634, 46 Atl. 286, 10 Pa. Super. Ct. 507, 86 Am. St. Rep. 694, 57 L. R. A. 348.

A statute requiring a different license for keeping a bar where no female acts as bartender from that required where a female does act as bartender is valid. *Ex p.* Felchlin, 96 Cal. 360, 31 Pac. 224, 31 Am. St. Rep. 223.

A license-tax on all companies, agents, or persons selling sewing-machines is valid because it applies to all the members of a class. Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; St. Louis *v.* Bowler, 94 Mo. 630, 7 S. W. 434.

10. Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186 [*affirming* 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685].

11. Stewart *v.* Kehrer, 115 Ga. 184, 41 S. E. 680.

12. State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339. But see Com. *v.* Snyder, 182 Pa. St. 630, 38 Atl. 356 (holding a peddler's license to be unconstitutional because by exempting merchants, peddlers who sell only to merchants, and all citizens of the county who peddle the products of their own growth or manufacture, it discriminates against citizens residing within the county on the sole ground of their residence); State *v.* Hoyt, 71 Vt. 59, 42 Atl. 973 (holding a peddler's license to be unconstitutional which applied only to peddlers offering goods manufactured within the state and so discriminating against such goods in favor of foreign goods).

13. **Doctors.**— State *v.* Call, 121 N. C. 643, 28 S. E. 517. See also Bozeman *v.* Cadwell, 14 Mont. 480, 36 Pac. 1042.

Lawyers.— Stewart *v.* Potts, 49 Miss. 749; St. Louis *v.* Sternberg, 69 Mo. 280; Bozeman *v.* Cadwell, 14 Mont. 480, 36 Pac. 1042.

Plumbers.— *Compare* State *v.* Benzenberg, 101 Wis. 172, 76 N. W. 345, holding that equal protection of the laws is denied by statute requiring licenses for plumbers on examination, but providing, "in the case of a firm or corporation, the examining or licensing of any one member . . . shall satisfy the requirements."

14. Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556, 50 N. Y. St. 301.

15. State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

16. Boehm *v.* Baltimore, 61 Md. 259.

17. *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624.

18. A license-tax on all foreign corporations doing business within the state, although greater than required of domestic corporations or although there is no such tax on similar domestic corporations, does not deny the equal protection of the laws. Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; New York City F. Dept. *v.* Stanton, 159 N. Y. 225, 54 N. E. 28 [*affirming* 28 N. Y. App. Div. 334, 51 N. Y. Suppl. 242]; People *v.* Philadelphia F. Assoc., 92 N. Y. 311, 44 Am. Rep. 380; New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323; Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

A tax on foreign corporations doing business within the state equal to the tax placed by the foreign state on the corporations of the state passing the statute is valid. Blackmer *v.* Home Ins. Co., 115 Ind. 596, 17 N. E. 583; Blackmer *v.* Royal Ins. Co., 115 Ind. 291, 17 N. E. 580; State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; Philadelphia F. Assoc. *v.* People, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342.

But a statute requiring a license from all people except citizens of a certain county, who sell or take orders for goods and merchandise not the product of that county,[19] or an ordinance prohibiting the stabling of more than two horses without a permit[20] is unequal in its operation and therefore unconstitutional. The granting of such licenses may be made discretionary with a certain official or body of officials,[21] or may depend on the consent of a certain number of the nearest *bona fide* residents,[22] the citizenship, habits, character, sex, or age of the applicant.[23]

7. RAILROAD REGULATIONS.[24] Railroad regulations may not only prevent any unjust discrimination and any unreasonable or extortionate charges,[25] but may embrace provisions for the safety, security, and convenience of the public, such as requiring railroads to fence their tracks and put in cattle-guards, etc.,[26] to make and pay for grade crossings,[27] to keep a watchman at a certain turnpike crossing,[28] or to put in tracks connecting with other railroads,[29] regulating the moving or speed of trains within the limits of the city;[30] prohibiting the operation of the road upon certain streets of the city;[31] requiring a certain kind of heating of the cars;[32] requiring in all passenger depots where there is a telegraph office the noting of all trains which are late;[33] for establishing railroad commissioners and requiring the railroads to pay the expenses thereof.[34]

8. SALE OF GOODS. It is not necessary that a statute regulating the sale of goods shall embrace all kinds of property, either personal or real, but it is sufficient if the selection of the articles and property is based on reasonable and just grounds of difference and the prohibition comprehends all kinds of property within the relations and circumstances which constitute the distinction, extends equally to every citizen and all classes of citizens, and denies to no one a privilege which another is permitted under like circumstances to exercise or employ.[35] Accordingly statutes making it unlawful to purchase options on certain commodi-

19. Graffty *v.* Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

20. State *v.* Kuntz, 47 La. Ann. 106, 16 So. 651.

21. State *v.* Gray, 61 Conn. 39, 22 Atl. 675; Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620 [*reversing* 43 Fed. 243].

A butcher's license depending upon the mere whim of a board of men is invalid. Walsh *v.* Denver, 11 Colo. App. 523, 53 Pac. 458 [*citing* Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220].

22. U. S. *v.* Ronan, 33 Fed. 117. See also *Ex p.* Sing Lee, 96 Cal. 354, 31 Pac. 245, 31 Am. St. Rep. 218, 24 L. R. A. 195.

23. Daniels *v.* State, 150 Ind. 348, 50 N. E. 74; Trageser *v.* Gray, 73 Md. 250, 20 Atl. 905, 25 Am. St. Rep. 587, 9 L. R. A. 780.

24. As to railroad regulations generally see RAILROADS.

25. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 22 S. Ct. 95, 46 L. ed. 298 [*affirming* 106 Ky. 633, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012]. And see *supra*, XII, B, 4, c.

26. Kingsbury *v.* Missouri, etc., R. Co., 156 Mo. 379, 57 S. W. 547; Stanley *v.* Missouri Pac. R. Co., 84 Mo. 625; Gorman *v.* Pac. R. Co., 26 Mo. 441, 72 Am. Dec. 220; Cole *v.* Chicago, etc., R. Co., 47 Mo. App. 624; Boyle *v.* Missouri Pac. R. Co., 21 Mo. App. 416; Morrow *v.* Missouri Pac. R. Co., 17 Mo. App. 103; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463 [*affirming* 82 Mo. 221, 52 Am. Rep. 369].

27. New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269.

28. Kentucky Cent. R. Co. *v.* Com., 13 Ky. L. Rep. 792, 18 S. W. 368.

29. Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389.

30. Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384; Neier *v.* Missouri Pac. R. Co., 12 Mo. App. 25 [*affirmed* in 88 Mo. 672, 1 S. W. 382, 386, 387]; Erb *v.* Morasch, 177 U. S. 584, 20 S. Ct. 819, 44 L. ed. 897 [*affirming* 60 Kan. 251, 56 Pac. 133]; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 20 S. Ct. 722, 44 L. ed. 868; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

31. Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

32. See New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853.

33. Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937.

34. Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051. See Louisville, etc., R. Co. *v.* Tennessee Railroad Commission, 19 Fed. 679.

35. Booth *v.* People, 186 Ill. 43, 57 N. E. 798, 78 Am. St. Rep. 229, 50 L. R. A. 762.

ties for future delivery;[36] requiring persons intending to engage in a certain kind of business to file a bond not to sell to certain people;[37] imposing a state and county occupation tax, and requiring payment of all taxes a year in advance;[38] or prohibiting the sale of certain commodities except in certain places and then only under license;[39] except where the law would operate so rigidly on property in existence at the time of its passage that it would absolutely prohibit its sale, and so amount to depriving the owner of his property,[40] would not be depriving one of equal protection of the law.

9. Street and Highway Regulations.[41] While the right of the state to legislate with regard to its streets, highways, etc., is subject to the same limitations as its rights to legislate in respect to other public matters,[42] yet as this amendment in no way impairs the police power of a state,[43] it follows that it may make rules and regulations governing the use of its highways, streets, parks, and thoroughfares, conducive to their safety and cleanliness and to good order thereon,[44] may prohibit altogether certain acts such as bicycle riding on the sidewalk,[45] may authorize harbor-masters to station vessels and to assign to each its place,[46] or may designate the liability for damage occasioned by the doing of a certain act.[47] Where a state constitution provides that a municipality shall lay a tax for a certain purpose, such municipality cannot oblige individual people to do the act for which the tax was provided.[48]

10. Sunday Regulations.[49] A statute prohibiting the pursuit of a certain avocation on Sunday, except in certain cities of a state,[50] excepting, from a general

36. Booth *v.* People, 186 Ill. 43, 57 N. E. 798, 78 Am. St. Rep. 229, 50 L. R. A. 762.

37. Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599, holding that a statute requiring an applicant for a liquor license to execute in advance a bond payable to the state, conditioned that he will not sell liquor to any person after having been notified by an officer or by certain relatives of such person not to do so, any of whom are authorized to sue on the bond in case of breach, is valid.

38. Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599.

39. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

40. Wynehamer *v.* People, 13 N. Y. 378 [*cited* in Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929].

41. See also, generally, Streets and Highways.

42. State *v.* Aldrich, 70 N. H. 391, 47 Atl. 602, 85 Am. St. Rep. 631.

43. Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79.

As to police power generally see *supra*, VI.

44. *In re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529; Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27; Pedrick *v.* Bailey, 12 Gray (Mass.) 161; *In re* Nightingale, 11 Pick. (Mass.) 168; Roderick *v.* Whitson, 51 Hun (N. Y.) 620, 4 N. Y. Suppl. 112, 22 N. Y. St. 858; Seward *v.* Beach, 29 Barb. (N. Y.) 239; Wilson *v.* Eureka City, 173 U. S. 32, 19 S. Ct. 317, 43 L. ed. 603.

To deposit "any glass, broken ware, dirt, rubbish, garbage, or filth" on a public street may be prohibited. *Ex p.* Casinello, 62 Cal. 538.

To remain within the limits of the market more than twenty minutes may be prohibited. Com. *v.* Brooks, 109 Mass. 355.

Prior consent may be required before it is permitted to "make orations, harangues, or loud outcries." Com. *v.* Abrahams, 156 Mass. 57, 30 N. E. 79; Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577.

45. State *v.* Aldrich, 70 N. H. 391, 47 Atl. 602, 85 Am. St. Rep. 631.

46. Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349.

An ordinance prohibiting marching without first obtaining the written consent of the mayor, but providing that the ordinance should not apply to fire companies or state militia, and that permission should not be refused any political party which had a regular state organization, was held unconstitutional, as such discriminations were unreasonable and conferred arbitrary power upon the mayor. Garrabad *v.* Dering, 84 Wis. 585, 54 N. W. 1104, 36 Am. St. Rep. 948, 19 L. R. A. 858 [*distinguished* in *In re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529].

47. Jones *v.* Brim, 165 U. S. 180, 17 S. Ct. 282, 41 L. ed. 677 [*affirming* 11 Utah 200, 39 Pac. 825, 29 L. R. A. 97].

48. As for example obliging a tenant or owner of a house to remove snow from the sidewalk, when the constitution provides that there shall be a tax for that purpose. State *v.* Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.

49. See also, generally, Sunday; and *supra*, VI.

50. People *v.* Sheriff, 13 Misc. (N. Y.) 587, 35 N. Y. Suppl. 19, 69 N. Y. St. 215.

Sunday-closing law certain designated business[51] or prohibiting the playing of a certain game on that day, where any fee is charged,[52] is not a denial of the equal protection of the law.

11. Taxation[53] — a. In General. The constitution of the United States contains no provision, express or implied, that taxes must be equal and uniform, nor is there any fundamental principle of free government or natural justice requiring uniformity and equality. In fact the provisions of the constitution are inconsistent with the existence of a theory of equality in taxation, which the judicial department is empowered to define and impose on the legislative. When the power of taxation is exercised considerations of public policy must dominate;[54] and the only rule of equality in respect to taxation is that the same means and methods shall be applied impartially to all the constituents of each class, so that the law shall act equally and uniformly upon all persons in similar circumstances.[55] Therefore uniformity is necessary to the validity of a tax levied upon the persons or property of citizens, but not to the validity of a tax on a corporation as such.[56] A greater tax may be placed on a foreign corporation than on a domestic one,[57] nor does the payment of a tax on goods where shipped exempt them from taxation where they are sold.[58] A state cannot, however, discriminate between the property of citizens and that of non-residents[59] or place a tax on the employment of aliens only.[60]

b. Determination. Different methods of ascertaining value, and different methods and remedies for the collection of properly assessed taxes may be provided. For these purposes the differences in the nature and uses of property may be taken into consideration; but all questions of this character relate to methods of procedure and not to the fundamental right involved.[61] The state

51. State *v.* Nichols, 28 Wash. 628, 69 Pac. 372.

52. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

53. See also, generally, TAXATION.

54. State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481; Simpson *v.* Hopkins, 82 Md. 478, 33 Atl. 714; Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969 (inheritance tax); Davidson *v.* New Orleans, 96 U. S. 97, 105, 24 L. ed. 616; Chicago Union Traction Co. *v.* State Bd. of Equalization, 112 Fed. 607. See also Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037 (inheritance tax); Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. ed. 892. *Compare* Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722.

55. Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414.

56. Home Ins. Co. *v.* Swigert, 104 Ill. 653; New York City F. Dept. *v.* Stanton, 28 N. Y. App. Div. 334, 51 N. Y. Suppl. 242.

57. Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529; Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 17 Ky. L. Rep. 887, 32 S. W. 952, 56 Am. St. Rep. 367, 31 L. R. A. 41; Com. *v.* Germania L. Ins. Co., 11 Phila. (Pa.) 553, 33 Leg. Int. (Pa.) 169; Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514.

58. *Ex p.* Thornton, 4 Hughes (U. S.) 220, 12 Fed. 538.

59. Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529; Halloway *v.* Police Jury, 16 La. Ann. 203; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449.

60. Juniata Limestone Co. *v.* Blair County Com'rs, 7 Pa. Dist. 201; Ade *v.* County Com'rs, 7 Pa. Dist. 199, 20 Pa. Co. Ct. 672; Fraser *v.* McConway, etc., Co., 6 Pa. Dist. 555.

61. Central Pac. R. Co. *v.* State Bd. of Equalization, 60 Cal. 35; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529; Merchants', etc., Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 S. Ct. 829, 42 L. ed. 236; Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. ed. 892; Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168; Pacific Express Co. *v.* Seibert, 44 Fed. 310.

A statute practically classifying railroad property as a separate class for the purpose of taxation does not for that reason deny the railroad the equal protection of the laws. Owensboro, etc., R. Co. *v.* Daviess County, 8 Ky. L. Rep. 773, 3 S. W. 164; Florida Cent., etc., R. Co. *v.* Reynolds, 183 U. S. 471, 22 S. Ct. 176, 46 L. ed. 283; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414.

A statute distributing the rolling-stock and personal property of a railroad among several counties traversed by the road for purpose of taxation, whereas the property of other corporations and individuals is taxed in the county of its principal office, although in such distribution the railroad is subject to varying rates of taxation, is valid. Columbus Southern R. Co. *v.* Wright, 89 Ga.

may determine what property shall be taxable[62] and to what class of property it belongs, that is, to taxable personal property or to taxable real property,[63] by whom it shall be taxed,[64] and how its assessable value shall be determined;[65] may provide different modes of assessment for different kinds of property[66] and different means for enforcing the collection of taxes;[67] or may require a certain percentage of the gross earnings of a railroad in lieu of taxes,[68] likewise the rate of taxation may be made to depend on different things,[69] as on the kind of estate[70] or on the value of the estate[71] or the state legislature may make exemptions of certain

574, 15 S. E. 293 [*affirmed* in 151 U. S. 470, 14 S. Ct. 396, 38 L. ed. 238].

Provision for the taxing of savings banks by assessing the "paid up capital" is not unconstitutionally discriminative against national banks, the "shares" of which are taxed. Davenport Nat. Bank *v.* Board of Equalization, 64 Iowa 140, 19 N. W. 889.

Different lengths of time between making assessments is valid. Central Iowa R. Co. *v.* Board of Sup'rs, 67 Iowa 199, 25 N. W. 128; Chamberlain *v.* Walter, 60 Fed. 788. And see State *v.* Under-Ground Cable Co., (N. J. 1889) 18 Atl. 581.

An act providing only one hearing for railroad companies, and that before the state board, while the ordinary taxpayer was allowed a hearing before one board and then a right to appeal to the state board, is valid. Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432 [*affirmed* in 154 U. S. 421, 14 S. Ct. 1114, 38 L. ed. 1031]; Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

Providing for a corporation a different opportunity to correct an assessment than that provided for an individual is valid. New York *v.* Barker, 179 U. S. 279, 21 S. Ct. 121, 45 L. ed. 190 [*affirming* 158 N. Y. 709, 53 N. E. 1130]. See also People *v.* Coleman, 4 N. Y. Suppl. 417, 21 N. Y. St. 178.

62. Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696 [*following* Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 588].

63. Mortgage on realty may be taxed as realty. Savings, etc., Soc. *v.* Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 L. ed. 803. See also Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681.

64. State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481 [*affirmed* in 185 U. S. 364, 22 S. Ct. 673, 46 L. ed. 949].

65. State *v.* Smith, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18; Newport *v.* Mudgett, 18 Wash. 271, 51 Pac. 466 [*quoting* Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. ed. 892]. See also Commercial Nat. Bank *v.* Chambers, 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227 [*affirming* 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346], holding a refusal to deduct the value of real estate owned in other states by a national bank from the value of its shares of stock does not make an unlawful discrimination against such banks or deny them the equal protection of the laws, where such deduction is not authorized by the laws of the state in valuing shares of stock of other corporations]; Savings, etc., Soc. *v.* Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 L. ed. 803.

66. Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443.

67. Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035. See also Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437, holding valid a statute authorizing the sale of land to pay a lien for a delinquent tax by simply giving certain notices where the lien is under three hundred dollars, instead of bringing an action and obtaining judgment as is necessary when the lien is more than three hundred dollars is constitutional.

68. Northern Pac. R. Co. *v.* Tressler, 2 N. D. 397, 51 N. W. 787; Northern Pac. R. Co. *v.* Brewer, 2 N. D. 396, 51 N. W. 787; Northern Pac. R. Co. *v.* Strong, 2 N. D. 395, 51 N. W. 787; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 395, 51 N. W. 786; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386. And see State *v.* Duluth, etc., R. Co., 77 Minn. 433, 80 N. W. 626; Marr *v.* Stearns, 72 Minn. 200, 75 N. W. 210; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681.

69. Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849 [*quoting* Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118].

The rate of an inheritance tax may be made to depend on the degree of consanguinity. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 596, 42 L. ed. 1037; U. S. *v.* Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287; Wallace *v.* Myers, 38 Fed. 184, 4 L. R. A. 171.

70. Billings *v.* People, 189 Ill. 472, 59 N. E. 798.

71. An inheritance tax the rate of which is made to progress with the amount of the estate passing is constitutional. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037. See State *v.* Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, holding that an inheritance tax exempting from its operation estates not exceeding twenty thousand dollars in value, taxing the whole of all estates exceeding that amount, and fixing a

classes of property.[72] So also a special tax may be put on a special district for a local purpose,[73] but such local tax cannot exclude from its benefits any person on whom it falls.[74]

12. Discriminations — a. In General. The fourteenth amendment was intended to secure equality of rights to all people;[75] and this includes equal exemption with others of the same class from all charges and burdens of every kind,[76] although a law may discriminate in favor of a certain class, and if founded upon a reasonable distinction in principle it does not deny the equal protection of the laws.[77]

b. By Reason of Race or Color[78]— (I) *Rule Stated.* This prohibition does, however, clearly prohibit unfriendly legislation distinctly because of color[79] or race.[80] Hence a city ordinance requiring all the inhabitants of a certain race to remove from the portion of a city theretofore occupied by them to another designated portion of the city,[81] an act which prohibits or places a penalty on the employment of a person because of his race,[82] a statute excluding negroes from the benefits of a homestead act,[83] or a statute which sets aside any race of foreigners as special objects of taxation and taxing them in their character as foreigners[84] is unconstitutional.

(II) *Application of Rule*— (A) *Competency of Witnesses.*[85] The fourteenth amendment does not apply so as to prevent congress from regulating the competency of witnesses in the United States court[86] or the state legislature as to their competency in state courts,[87] except where congress has provided that persons of those races shall have equal rights with white people to give evidence.[88]

(B) *Constitution of Juries.*[89] A citizen cannot be excluded from acting on a jury merely because of his race or color;[90] but this does not mean that a jury

higher rate of taxation on the estates of larger value than on the estates of smaller value denies the equal protection of the laws as declared in the Bill of Rights, § 2.

72. King *v.* Mullins, 171 U. S. 404, 18 S. Ct. 925, 43 L. ed. 214; Magoun *v.* Illinois Trust, etc., Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037.

73. Martin *v.* Laurens School Dist., 57 S. C. 125, 35 S. E. 517; Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024.

74. Atchison, etc., R. Co. *v.* Clark, 60 Kan. 826, 58 Pac. 477, 47 L. R. A. 77 [*modifying* 8 Kan. App. 733, 54 Pac. 930].

75. Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. See also Gaines *v.* State, 39 Tex. 606.

76. *In re* Ah Fong, 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102, 13 Am. L. Reg. N. S. 761, 3 Am. L. Rec. 403, 9 Am. L. Rev. 359, 1 Centr. L. J. 516, 7 Chic. Leg N. 17, 20 Int. Rev. Rec. 112.

77. American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. ed. 102 [*affirming* 51 La. Ann. 562, 25 So. 447].

78. See also, generally, Civil Rights, 7 Cyc. 158.

79. Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664. See also Riggsbee *v.* Durham, 94 N. C. 800; Puitt *v.* Gaston County Com'rs, 94 N. C. 709, 55 Am. Rep. 638; Claybrook *v.* Owensboro, 23 Fed. 634, 16 Fed. 297.

80. *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136.

81. *In re* Lee Sing, 43 Fed. 359. See also Jew Ho *v.* Williamson, 103 Fed. 10, holding void a municipal regulation establishing a quarantine district, where it is shown that such regulation is enforced against all Chinese persons within the district, and against the buildings occupied by them, but not enforced against persons of other races or against their residences within the same district.

82. Juniata Limestone Co. *v.* Fagley, 187 Pa. St. 193, 42 Wkly. Notes Cas. (Pa.) 537, 40 Atl. 977, 42 L. R. A. 442; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136.

83. Custard *v.* Poston, 8 Ky. L. Rep. 260, 1 S. W. 434; Eubank *v.* Eubank, 7 Ky. L. Rep. 295.

84. Lin Ging *v.* Washburn, 20 Cal. 534.

85. See, generally, Witnesses.

86. Li Sing *v.* U. S., 180 U. S. 486, 21 S. Ct. 449, 45 L. ed. 634 [*affirming* 86 Fed. 896, 30 C. C. A. 451, holding valid an act of congress excluding Chinese from being witnesses to certain facts in a case under the Chinese immigration law]; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068.

87. People *v.* Brady, 40 Cal. 198, 6 Am. Rep. 604 [*overruling* People *v.* Washington, 36 Cal. 658].

88. Kelley *v.* State, 25 Ark. 392; *Ex p.* Warren, 31 Tex. 143.

89. See, generally, Juries.

90. *Alabama.*— Green *v.* State, 73 Ala. 26.
Florida.— Tarrance *v.* State, (Fla. 1901) 30 So. 685.

must be composed of persons of each race in proportion to their respective numbers as citizens;[91] nor has any one a right to demand that a jury shall be composed of persons of both races.[92] So too this amendment applies only to race or color, and does not prevent exclusion because of lack of some reasonable qualification.[93]

(c) *Intermarriage.* The courts do not treat marriage as a mere contract between the parties, but as a status or institution;[94] and a statute prohibiting the marriage relation between white persons and persons of African descent in no way impairs their legal rights or denies to them equal protection of the laws.[95] But where the state constitution provides that the social status of the citizen shall never be the subject of legislation, the legislature cannot repeal former laws prohibiting marriages between white and colored persons nor enact new laws concerning such marriages.[96]

(d) *Public Conveyances, Schools, and Places of Amusement, Etc.*[97] Equality before the law means that all people shall have equal rights and share equal burdens, but not that every person shall have the identical rights and burdens which his neighbor has. Where the accommodations or privileges granted the colored race are equal to those granted the white race there is no denial of the equal protection of the laws. Therefore while equal accommodations must be given the

Kentucky.— Haggard *v.* Com., 79 Ky. 366; Com. *v.* Johnson, 78 Ky. 509.

Maryland.— See Cooper *v.* State, 64 Md. 40, 20 Atl. 986.

Texas.— Smith *v.* State, (Tex. Crim. 1902) 69 S. W. 151; Leach *v.* State, (Tex. Crim. 1901) 62 S. W. 422; Kipper *v.* State, (Tex. Crim. 1901) 62 S. W. 420.

United States.— Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664.

See 10 Cent. Dig. tit. "Constitutional Law," § 724.

The denial to Mongolians who are aliens of the right to serve as jurors does not conflict with the fourteenth amendment, as such denial is made because they are aliens and not by reason of race or color. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488. *Compare* Templar *v.* Michigan State Bd. Examiners, (Mich. 1902) 90 N. W. 1058, 9 Detroit Leg. N. 300, where it was held that no discrimination could be made on account of citizenship, and therefore a barber could not be denied a license because he was an alien.

91. Whitney *v.* State, (Tex. Crim. 1901) 63 S. W. 245. And see Hubbard *v.* State, (Tex. Crim. 1902) 67 S. W. 413.

92. *Kentucky.*— Haggard *v.* Com., 79 Ky. 366.

New Jersey.— Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668.

South Carolina.— State *v.* Brownfield, 60 S. C. 509, 39 S. E. 2.

Texas.— Lewis *v.* State, (Tex. Crim. 1900) 59 S. W. 1116.

United States.— *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

See 10 Cent. Dig. tit. "Constitutional Law," § 724.

A law conferring on the jury commissioners judicial powers in the selection of citizens for jury service is not on that account unconstitutional. Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87; *Ex p.* Murray, 66 Fed. 297. See also Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567.

93. Sands *v.* Com., 21 Gratt. (Va.) 871; McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710; Williams *v.* Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012; Gibson *v.* State, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075.

94. Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

95. *Alabama.*— Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739. *Compare* Burns *v.* State, 48 Ala. 195, 17 Am. Rep. 34.

Arkansas.— Dodson *v.* State, 61 Ark. 57, 31 S. W. 977.

Indiana.— State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42.

Missouri.— State *v.* Jackson, 80 Mo. 175, 50 Am. Rep. 499.

North Carolina.— Puit *v.* Gaston County Com'rs, 94 N. C. 709, 55 Am. Rep. 638.

Tennessee.— Lonas *v.* State, 3 Heisk. (Tenn.) 287.

Texas.— Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

United States.— Georgia *v.* Tutty, 41 Fed. 753, 7 L. R. A. 50; *Ex p.* Kinney, 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825, 7 Reporter 712, 3 Va. L. J. 370; *Ex p.* Francois, 3 Woods (U. S.) 367, 9 Fed. Cas. No. 5,047; *In re* Hobbs, 1 Woods (U. S.) 537, 12 Fed. Cas. No. 6,550, 4 Am. L. T. Rep. (U. S. Cts.) 190.

See 10 Cent. Dig. tit. "Constitutional Law," § 716.

It does not take away equal civil rights.— State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; Puitt *v.* Gaston County Com'rs, 94 N. C. 709, 55 Am. Rep. 638; Francois *v.* State, 9 Tex. App. 144.

96. Scott *v.* State, 39 Ga. 321.

97. See, generally, CIVIL RIGHTS, 7 Cyc. 158; SCHOOLS AND SCHOOL DISTRICTS.

races in public conveyances,[98] in hotels, inns, theaters, etc.,[99] and in public schools,[1] the fact that the races are kept separate is, however, immaterial, and, in the absence of state prohibitions against such separation,[2] separate equal accommodations may be provided either in transportation,[3] schools,[4] or theaters.[5]

(E) *Punishments.* It is not a denial of the equal protection of the law to place a different punishment on certain acts when committed between persons of the same race from that imposed when committed between persons of different races.[6]

c. By Reason of Sex. It is not a denial of equal protection of the law to exclude women from acting as jurors,[7] so too a statute may provide that railroads shall furnish separate but equal accommodations for male and female passengers.[8]

d. In Criminal Liability. Whenever the law operates alike upon all persons similarly situated, equal protection cannot be said to be denied;[9] but an act which

98. De Cuir *v.* Benson, 27 La. Ann. 1; Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 [*affirming* 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639]; Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46.

99. Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; U. S. *v.* Newcomer, 27 Fed. Cas. No. 15,868, 13 Alb. L. J. 221, 1 Cinc. L. Bul. 69, 22 Int. Rev. Rec. 115, 11 Phila. (Pa.) 519, 33 Leg. Int. (Pa.) 94, 23 Pittsb. Leg. J. (Pa.) 221.

1. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; Dawson *v.* Lee, 83 Ky. 49; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; Davenport *v.* Cloverport, 72 Fed. 689. *Compare* Marshall *v.* Donovan, 10 Bush (Ky.) 681.

2. For a state may pass a valid act prohibiting the separation of pupils because of color or race, and after the passage of such act any separation by reason thereof is unconstitutional. Kaine *v.* Com., 101 Pa. St. 490.

3. *Illinois.*— See Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

Louisiana.— *Ex p.* Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

Mississippi.— Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375.

Pennsylvania.— West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

United States.— Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 [*affirming* 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639]; Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46.

See 10 Cent. Dig. tit. "Constitutional Law," § 715.

4. *California.*— Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

Indiana.— State *v.* Gray, 93 Ind. 303; State *v.* Grubb, 85 Ind. 213; Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

Missouri.— Lehew *v.* Brummell, 103 Mo. 546, 15 S. W. 765, 23 Am. St. Rep. 895, 11 L. R. A. 828.

New York.— People *v.* Gallagher, 93 N. Y. 438, 45 Am. Rep. 232 [*affirming* 11 Abb. N. Cas. (N. Y.) 187]; Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 249.

North Carolina.— Puitt *v.* Gaston County Com'rs, 94 N. C. 709, 55 Am. Rep. 638.

Ohio.— Van Camp *v.* Board of Education, 9 Ohio St. 406; State *v.* Cincinnati, 19 Ohio 178.

United States.— U. S. *v.* Buntin, 10 Fed. 730; Bertonneau *v.* City Schools Directors, 3 Woods (U. S.) 177, 3 Fed. Cas. No. 1,361.

See 10 Cent. Dig. tit. "Constitutional Law," § 723.

An act providing separate schools for the Croatan Indians from which all negroes "to the fourth generation" are excluded is valid. McMillan *v.* School Committee Dist. No. 4, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823.

Such separate schools must be reasonably accessible and must afford substantially equal educational advantages with those provided for white children. Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738; Puitt *v.* Gaston County Com'rs, 94 N. C. 709, 55 Am. Rep. 638; People *v.* Gallagher, 11 Abb. N. Cas. (N. Y.) 187; Claybrook *v.* Owensboro, 23 Fed. 634; U. S. *v.* Buntin, 10 Fed. 730. See also Hooker *v.* Greenville, 130 N. C. 472, 42 S. E. 141; Cumming *v.* Board of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 [*affirming* 103 Ga. 641, 29 S. E. 488].

5. Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. Rep. 527, 16 L. R. A. 558.

6. Adultery and fornication between a white person and a negro may be more heavily punished than the same acts between white persons or between negroes. Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513; Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739 [*overruling* Burns *v.* State, 48 Ala. 195, 17 Am. Rep. 34]; Ford *v.* State, 53 Ala. 150; Ellis *v.* State, 42 Ala. 525; Pace *v.* State, 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, 4 Ky. L. Rep. 840.

The state may make a bastardy law which applies only to white women giving birth to illegitimate children. Plunkard *v.* State, 67 Md. 364, 10 Atl. 225, 309.

7. McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. See also Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664.

8. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

9. State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869; Marchant *v.* Pennsylvania R. Co.,

is made a crime for one person must be made a crime equally if done by any person coming within the same description as the first, or the equal protection of the laws will be denied to the former.[10] With this distinction in view, however, the legislature has a wide discretion in declaring certain acts to be crimes. Thus it may so declare with regard to the enticing away of a servant under a written contract,[11] playing on musical instruments or having women present in public drinking saloons after midnight,[12] obtaining board or lodging in any hotel by means of any trick or deception,[13] counterfeiting the labels of working-men's unions,[14] receiving money by a banker or broker for deposit with knowledge that he is unsafe or insolvent,[15] and refusing to disclose when convicted of intoxication, where and from whom the liquor was procured.[16]

e. In Criminal Punishment. The punishment for the same offense must be the same for all persons in the same class.[17] This does not prevent the legislature from providing a special punishment for a special class of offenders[18] or increase the punishment of previous offenders,[19] although it does prevent it from prescribing for an escaped prisoner a term equal to his original term.[20]

13. Creation or Discharge of Liability — a. In General. In the exercise of the police power the legislature, if they think it is for the public good, may in many instances place certain liabilities on certain parties, and discharge certain liabilities from other parties, without denying the equal protection of the laws. Thus a statute may give a right to security fees,[21] a certain lien for a certain kind of work,[22] but a statute may not constitutionally give a lien to certain persons named therein;[23] may allow attorney's fees as part of the judgment in particular classes of actions,[24] and such allowance may be made to depend on the nature of

153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

10. State *v.* Divine, 98 N. C. 778, 4 S. E. 477; Budd *v.* State, 3 Humphr. (Tenn.) 483, 39 Am. Dec. 189; *In re* Langford, 57 Fed. 570.

11. Murrell *v.* State, 44 Ala. 367.

12. *Ex p.* Smith, 38 Cal. 702.

13. State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994.

14. Com. *v.* Norton, 16 Pa. Super. Ct. 423, making it a misdemeanor.

15. State *v.* Darrah, 152 Mo. 522, 54 S. W. 226; Baker *v.* State, 54 Wis. 368, 12 N. W. 12; Dreyer *v.* Pease, 88 Fed. 978. See also Winchester *v.* Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

16. *In re* Clayton, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L. R. A. 66, making it contempt.

17. Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Fraser *v.* McConway, etc., Co., 82 Fed. 257; *In re* Grice, 79 Fed. 627; Cully *v.* Baltimore, etc., R. Co., 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466; Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 522, 12 Fed. Cas. No. 6,546, 20 Alb. L. J. 250, 8 Am. L. Rec. 72, 18 Am. L. Reg. N. S. 676, 4 Cinc. L. Bul. 545, 25 Int. Rev. Rec. 312, 3 Pac. Coast L. J. 415, 27 Pittsh. Leg. J. (Pa.) 40, 8 Reporter 195, 13 West. Jur. 409.

18. *Ex p.* Liddell, 93 Cal. 633, 29 Pac. 251; State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869; People *v.* Coon, 67 Hun (N. Y.) 523, 22 N. Y. Suppl. 865, 51 N. Y. St. 339.

19. Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648; McDonald *v.* Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. ed. 542; *In re* Boggs, 45 Fed. 475.

A statute prescribing what shall constitute a habitual criminal and prescribing the punishment for such on conviction of any felony is valid. McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

20. State *v.* Lewin, 53 Kan. 679, 37 Pac. 168.

21. *In re* Clark, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587.

22. Mallory *v.* La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071.

23. Randolph *v.* Builders', etc., Supply Co., 106 Ala. 501, 17 So. 721.

24. *Arkansas.*— Dow *v.* Beidelman, 49 Ark. 455, 5 S. W. 718.

Illinois.— Vogel *v.* Pekoe, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Peoria, etc., R. Co. *v.* Duggan, 109 Ill. 537, 50 Am. Rep. 619.

Iowa.— Gano *v.* Minneapolis, etc., R. Co., 114 Iowa 713, 87 N. W. 714, 89 Am. St. Rep. 393, 55 L. R. A. 263; Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 447.

Kansas.— British-American Assur. Co. *v.* Bradford, 60 Kan. 82, 55 Pac. 335; Atchison, etc., R. Co. *v.* Matthews, 58 Kan. 447, 49 Pac. 602; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Kansas Pac. R. Co. *v.* Yanz, 16 Kan. 583; Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573; Atchison, etc., R. Co. *v.* Campbell, 8 Kan. App. 661, 56 Pac. 509; Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940.

Louisiana.—Liquidating Com'rs *v.* Marrero, 106 La. 130, 30 So. 305 [*distinguishing* Gulf,

the suit or other circumstances;[25] may provide that certain companies shall be liable for an additional amount where they have failed to do some act which it was their duty to do, and in consequence of which failure an injury has occurred;[26] may impose a penalty for the non-payment of taxes;[27] may provide a penalty for malicious prosecution;[28] may provide that if a petitioner shall dismiss his petition, he shall be ordered on application of the defendant to pay costs and reasonable attorney's fees,[29] without denying the equal protection of the laws. And a statute providing that a company shall be liable for an additional amount in case of failure to pay a debt, claim, or damage for injury within a certain time has been held not to deny the equal protection of the laws.[30] So too the state

etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666].

Minnesota.— Cameron *v.* Chicago, etc., R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553.

Missouri.— Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; State *v.* Kerr, 8 Mo. App. 125.

Montana.— Wortman *v.* Kleinschmidt, 12 Mont. 316, 30 Pac. 280.

Nebraska.— Farmers', etc., Ins. Co. *v.* Dobney, 62 Nebr. 213, 86 N. W. 1070; Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

Oregon.— Title Guarantee, etc., Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

Tennessee.— Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618 [*distinguishing* St. Louis, etc., R. Co. *v.* Williams, 49 Ark. 492, 5 S. W. 883; Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382, 38 N. W. 289].

Texas.—Washington L. Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

United States.— Atchison, etc., R. Co. *v.* Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909 [*affirming* 58 Kan. 447, 49 Pac. 602].

Contra.— *Alabama.*—South, etc., R. Co. *v.* Morris, 65 Ala. 193.

Georgia.— Phœnix Ins. Co. *v.* Schwartz, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752; Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67 [*following* Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666].

Michigan.—Lafferty *v.* Chicago, etc., R. Co., 71 Mich. 35, 38 N. W. 660; Schut *v.* Chicago, etc., R. Co., 70 Mich. 433, 38 N. W. 291; Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382, 38 N. W. 289.

Mississippi.— Chicago, etc., R. Co. *v.* Moss, 60 Miss. 641.

Utah.— Openshaw *v.* Halfin, 24 Utah 426, 68 Pac. 138.

United States.— Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666 [*reversing* 87 Tex. 19, 26 S. W. 985].

See 10 Cent. Dig. tit. "Constitutional Law," § 702.

25. Liquidating Com'rs *v.* Marrero, 106 La. 130, 30 So. 305.

26. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679.

27. Statutes prescribing an additional penalty for the non-payment of taxes in certain cases after suit are constitutional. State *v.* Consolidated Virginia Min. Co., 16 Nev. 432; Western Union Tel. Co. *v.* Indiana, 165 U. S. 304, 17 S. Ct. 345, 41 L. ed. 725.

Laws disfranchising voters for the non-payment of their poll taxes are constitutional. Frieszleben *v.* Shallcross, 9 Houst. (Del.) 1, 19 Atl. 576, 8 L. R. A. 337.

28. Lowe *v.* Kansas, 163 U. S. 81, 16 S. Ct. 1031, 41 L. ed. 78.

29. Chicago Sanitary Dist. *v.* Bernstein, 175 Ill. 215, 71 N. E. 720.

30. Schimmele *v.* Chicago, etc., R. Co., 34 Minn. 216, 25 N. W. 347; Johnson *v.* Chicago, etc., R. Co., 29 Minn. 425, 13 N. W. 673; Porter *v.* Charleston, etc., R. Co., 63 S. C. 169, 41 S. E. 108; Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504 [*reversing* 8 Tex. Civ. App. 455]; Houston, etc., R. Co. *v.* Harry, 63 Tex. 256 (holding valid a statute allowing the recovery of an amount equal to the freight charges for every day's wrongful detention of freight); Fidelity, etc., Co. *v.* Allibone, 15 Tex. Civ. App. 178, 39 S. W. 632 [*distinguishing* New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Mutual L. Ins. Co. *v.* Walden, (Tex. Civ. App. 1894) 26 S. W. 1012; Fidelity Mut. L. Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922; Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. ed. 666]. See also Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 580. 12 S. W. 1001, 16 Am. St. Rep. 926, 7 L. R. A. 478; Houston, etc., R. Co. *v.* State, 61 Tex. 342.

Contra.— See St. Louis, etc., R. Co. *v.* Williams, 49 Ark. 492, 5 S. W. 883; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680 (holding that a provision for payment by the company of twelve per cent above the amount of the loss and attorneys' fees violated U. S. Const. Amendm. 14, § 1); San Antonio, etc., R. Co. *v.* Wilson, (Tex. App. 1892) 19 S. W. 910 (holding invalid an act making railroads liable to an employee for twenty per cent more than the amount originally due, if the railroad refused to pay its

may impose a fine or imprisonment on persons breaking certain kinds of contracts,[31] but the statute must make no discrimination in the punishment for breach of a contract between either party thereto.[32]

b. As to Counties. Statutes making counties liable for injuries caused by defects in highways or bridges are valid.[33]

c. As to Railways. In the United States the strict rule of the common law of England absolving a railroad from liability for accidental fires, without proof of negligence on its part,[34] has not been generally adopted; but the matter has been regulated in many of the states by statute; and a statute making railroad corporations liable in damages for fire caused by locomotive sparks without proof of negligence on the part of the corporation or its employees is usually held to be a valid exercise of the police power and not a denial of the equal protection of the law.[35] So too the legislature may pass a statute making railroad companies liable for stock injured or killed because of the want of a fence along the track, when the duty of building and maintaining this fence has already been placed on the com-

indebtedness within fifteen days, as against Tex. Const. art. 10, § 2); Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

31. *Ex p.* Williams, 32 S. C. 583, 10 S. E. 551.

32. State *v.* Williams, 32 S. C. 123, 10 S. E. 876. But see State *v.* Chapman, 56 S. C. 420, 34 S. E. 961, 76 Am. St. Rep. 557 [*distinguishing* State *v.* Williams, 32 S. C. 123, 10 S. E. 876], holding that a statute providing that any laborer working on shares of crop, or for wages in money or other valuable consideration, under a contract to labor on farm lands, who shall receive advances, and thereafter wilfully and without just cause fail to perform the services contracted for, is guilty of a misdemeanor, is valid, as it does not discriminate against the laborer.

33. Blum *v.* Richland County, 38 S. C. 291, 17 S. E. 20.

34. Powell *v.* Fall, 5 Q. B. D. 597, 49 L. J. Q. B. 428, 43 L. T. Rep. N. S. 562; Jones *v.* Festiniog R. Co., L. R. 3 Q. B. 733, 9 B. & S. 835, 37 L. J. Q. B. 214, 18 L. T. Rep. N. S. 902, 17 Wkly. Rep. 28; Piggot *v.* Eastern Counties R. Co., 3 C. B. 229, 10 Jur. 571, 15 L. J. C. P. 235, 54 E. C. L. 228; Aldridge *v.* Great Western R. Co., 1 Dowl. N. S. 247, 3 M. & G. 515, 4 Scott N. R. 156, 42 E. C. L. 272; Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. 212, 4 Wkly. Rep. 294; Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679, 6 Jur. N. S. 899, 29 L. J. Exch. 247, 2 L. T. Rep. N. S. 394, 8 Wkly. Rep. 549 [*reversing* 3 H. & N. 743].

35. *Colorado.*— Union Pac. R. Co. *v.* Moffatt, 12 Colo. 310, 20 Pac. 759; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350.

Connecticut.— Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239; Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; Grissell *v.* Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138; Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, 52 Am. Rep. 587.

Iowa.— Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, 20 Am. Rep. 592.

Maine.— Sherman *v.* Maine Cent. R. Co., 86 Me. 422, 30 Atl. 69; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92.

Massachusetts.— See the following cases decided before the fourteenth amendment was adopted: Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen (Mass.) 438; Ross *v.* Boston, etc., R. Co., 6 Allen (Mass.) 87; Lyman *v.* Boston, etc., R. Corp., 4 Cush. (Mass.) 288; Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Tourtellot *v.* Rosebrook, 11 Metc. (Mass.) 460.

Missouri.— Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161. See also the following cases arising before the amendment: Catron *v.* Nichols, 81 Mo. 80, 51 Am. Rep. 222; Miller *v.* Martin, 16 Mo. 508, 57 Am. Dec. 242; Finley *v.* Langston, 12 Mo. 120.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 63 N. H. 25; Rowell *v.* Railroad, 57 N. H. 132, 24 Am. Rep. 59; Hooksett *v.* Concord R. Co., 38 N. H. 242.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 579, 52 Pac. 944.

South Carolina.— Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; Lipfeld *v.* Charlotte, etc., R. Co., 41 S. C. 285, 19 S. E. 497; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440.

United States.— St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364, 13 S. Ct. 870, 37 L. ed. 769; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356; Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 62 Fed. 904.

See 10 Cent. Dig. tit. "Constitutional Law," §§ 702, 703.

Such statutes are not penal but remedial.—

panies,[36] but not where there was already no duty on the companies to fence;[37] may give landowners damages for the expense and inconvenience of watching cattle to keep them off the tracks, where the railroad company has failed to fence as it was legally bound to do;[38] or may make railroad companies liable for damages inflicted on passengers[39] or fellow servants.[40]

14. Remedies. This portion of the fourteenth amendment does not take away from the state its right to regulate and establish its courts;[41] extend the jurisdiction of the same;[42] or modify their procedure and rules[43] or the remedy granted

Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

36. Sullivan *v.* Oregon R., etc., Co., 19 Oreg. 319, 24 Pac. 408; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585.

Statutes imposing double damage on railroad companies for injury to or by stock, due to insufficient right-of-way fences, are valid. Fredway *v.* Sioux City, etc., R. Co., 43 Iowa 527; Kiugsbury *v.* Missouri, etc., R. Co., 156 Mo. 379, 57 S. W. 547; Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168, 20 S. W. 32; Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; Terry *v.* St. Louis, etc., R. Co., 89 Mo. 586, 1 S. W. 746; Hamilton *v.* Missouri Pac. R. Co., 87 Mo. 85; Hines *v.* Missouri Pac. R. Co., 86 Mo. 629; Phillips *v.* Missouri Pac. R. Co., 86 Mo. 540; Humes *v.* Missouri Pac. R. Co., 82 Mo. 221, 52 Am. Rep. 369 [*affirmed* in 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463]; Spealman *v.* Missouri Pac. R. Co., 71 Mo. 434; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; Trice *v.* Hannibal, etc., R. Co., 49 Mo. 438; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611; Missouri Pac. R. Co. *v.* Terry, 115 U. S. 523, 6 S. Ct. 114, 29 L. ed. 463.

Contra.— Zeigler *v.* South, etc., Alabama R. Co., 58 Ala. 594 [*doubted* in St. Louis, etc., R. Co. *v.* Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611].

37. Sweetland *v.* Atchison, etc., R. Co., 22 Colo. 220, 43 Pac. 1006; Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. Rep. 309, 23 L. R. A. 812.

38. Minneapolis, etc., R. Co. *v.* Nelson, 149 U. S. 368, 13 S. Ct. 871, 37 L. ed. 772; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364, 13 S. Ct. 870, 37 L. ed. 769.

39. Clark *v.* Russell, 97 Fed. 900, 78 C. C. A. 541.

40. *Georgia.*— Georgia, R., etc., Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939.

Indiana.— Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Pennsylvania Co. *v.* Ebaugh, 152 Ind. 531, 53 N. E. 763; Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412, 53 N. E. 419; Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301.

Iowa.— Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520; Pierce *v.* Central Iowa R. Co., 73 Iowa 140, 34 N. W. 783; Central Trust Co. *v.* Sloan, 65 Iowa 655, 22 N. W. 916; Bucklew *v.* Central Iowa R. Co., 64 Iowa 603, 21 N. W. 103.

Kansas.— Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 298, 6 Pac. 291 [*affirmed* in 127 U. S. 205, 8 S. Ct. 1161, 32 L. ed. 107]; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 32 Minn. 435, 21 N. W. 471, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771 [*affirmed* in 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109].

Missouri.— Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485.

North Carolina.— Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679.

Texas.— Galveston, etc., R. Co. *v.* Gibson, (Tex. Civ. App. 1899) 54 S. W. 779.

Wisconsin.— Ditberner *v.* Chicago, etc., R. Co., 47 Wis. 138, 2 N. W. 69.

United States.— Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 20 S. Ct. 136, 44 L. ed. 192; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109 [*affirming* 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771]; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 8 S. Ct. 1161, 32 L. ed. 107 [*affirming* 33 Kan. 298, 6 Pac. 291]; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L ed. 463; Cincinnati, etc., R. Co. *v.* Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280.

See 10 Cent. Dig. tit. "Constitutional Law," § 702.

41. State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989.

42. Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989; U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

43. *Florida.*— State *v.* Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221.

Illinois.— Cummings *v.* Chicago, etc., R. Co., 189 Ill. 608, 60 N. E. 51.

Kansas.— Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745.

Missouri.— Andrus *v.* Fidelity Mut. L. Ins. Assoc., 168 Mo. 151, 67 S. W. 582.

Ohio.— Snell *v.* Cincinnati St. R. Co., 66 Ohio St. 256, 54 N. E. 270.

Texas.— Houston, etc., R. Co. *v.* Stewart, 92 Tex. 540, 50 S. W. 333; Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App.) 1898) 48 S. W. 799.

United States.— Backus *v.* Fort St. Union Depot Co., 169 U. S. 557, 18 S. Ct. 445, 42

therein,[44] although the same remedy must be provided for resident and non-resident citizens.[45] The legislature may change the personnel of a court after appeal,[46] allow an appeal from certain courts,[47] prescribe a particular form of indictment,[48] or a different mode of procedure against debtors in certain courts,[49] allow fewer peremptory challenges of jurors in places of a certain size,[50] allow the filing, with leave of the court, of an information without a preliminary examination,[51] or authorize an arrest without warrant.[52] The failure of the law to provide a method for enforcing the attendance or procuring depositions of non-resident witnesses is not a denial of the equal protection of the laws.[53] And although the state cannot cut off a meritorious defense,[54] it may regulate the length of time a right of action shall continue to exist,[55] and declare what shall constitute *prima facie* evidence.[56]

XIII. DUE PROCESS OF LAW.

A. Definition. "Due process of law" in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual

L. ed. 853. See also Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552, holding valid a statute making conclusive as against the insurance company the value of the property stated in the policy.

See 10 Cent. Dig. tit. "Constitutional Law," § 710.

44. *Alabama.*— Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125.

Colorado.— Hawse *v.* Burgmire, 4 Colo. 313.

Georgia.— Continental Nat. Bank *v.* Folsom, 78 Ga. 449, 3 S. E. 269.

Indiana.— Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586; Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863.

Tennessee.— See Wally *v.* Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511, holding that a statute authorizing the court to dismiss Indian reservation cases, when prosecuted for the use of another, is unconstitutional.

Virginia.— Virginia Development Co. *v.* Crozer Iron Co., 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893.

United States.— Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 343, 43 L. ed. 623 [*reversing* 5 Okla. 396, 49 Pac. 48]; Chappell Chemical, etc., Co. *v.* Virginia Sulphur Mines Co., 172 U. S. 472, 19 S. Ct. 268, 43 L. ed. 520; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751; Fielden *v.* Illinois, 143 U. S. 452, 12 S. Ct. 528, 36 L. ed. 224 [*affirming* 128 Ill. 595, 21 N. E. 584]; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989; U. S. *v.* Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143; Gilchrist *v.* Helena, etc., R. Co., 58 Fed. 708 [*distinguishing* San Mateo County *v.* Southern Pac. R. Co., 8 Sawy. (U. S.) 238, 13 Fed. 722].

See 10 Cent. Dig. tit. "Constitutional Law," § 710.

45. Black *v.* Seal, 6 Houst. (Del.) 541; Pearson *v.* Portland, 69 Me. 278, 31 Am. Rep. 276.

46. State *v.* Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829.

47. The allowance of an appeal from the court of one district, but not from that of another, is valid. Sullivan *v.* Haug, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; Mallett *v.* North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. ed. 1015 [*affirming* 125 N. C. 718, 34 S. E. 651]; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989. See also Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659.

48. *In re* Krug, 79 Fed. 308.

49. Brown's Case, 173 Mass. 498, 53 N. E. 998; Hayes *v.* Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 578; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989.

50. Hayes *v.* Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 478.

A statute allowing fewer peremptory challenges where a struck jury has been ordered than where the ordinary jury is to hear the trial is valid. Brown *v.* New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. ed. 119.

51. State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

52. A statute authorizing the arrest without warrant of any one violating a law against carrying dangerous weapons is constitutional. Miller *v.* Texas, 153 U. S. 535, 14 S. Ct. 874, 38 L. ed. 812.

53. Minder *v.* State, 113 Ga. 772, 39 S. E. 284 [*affirmed* in 183 U. S. 559, 22 S. Ct. 224, 46 L. ed. 328].

54. Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131.

55. Narron *v.* Wilmington, etc., R. Co., 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415.

56. Thus a statute providing that in actions to recover damages for injury to property caused by fire communicated by a locomotive while passing, such fire shall be *prima facie* evidence to charge the railroad with liability is valid. Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833.

rights as those maxims prescribe for the class of cases to which the one in question belongs.[57] It has also been defined as: A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.[58] Law in its regular course of administration through courts of justice.[59] A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.[60]

57. Cooley Const. Lim., § 356 [*quoted* in Lent *v.* Tillson, 72 Cal. 404, 424, 14 Pac. 71; *Ex p.* Ah Fook, 49 Cal. 402, 406; Denver, etc., R. Co. *v.* Outcalt, 2 Colo. App. 395, 31 Pac. 177; Baltimore Belt R. Co. *v.* Baltzell, 75 Md. 94, 99, 23 Atl. 74; State *v.* State Bd. of Medical Examiners, 34 Minn. 387, 389, 26 N. W. 123; McGavock *v.* Omaha, 40 Nebr. 64, 75, 58 N. W. 543; *In re* Union El. R. Co., 112 N. Y. 61, 75, 19 N. E. 664, 20 N. Y. St. 498, 2 L. R. A. 359; Bertholf *v.* O'Reilly, 74 N. Y. 509, 519, 30 Am. Rep. 323; Stuart *v.* Palmer, 74 N. Y. 183, 191, 30 Am. Rep. 389; People *v.* Cipperly, 37 Hun (N. Y.) 319, 322; *In re* Fuller, 34 Misc. (N. Y.) 750, 70 N. Y. Suppl. 1050; Light *v.* Canadian County Bank, 2 Okla. 543, 549, 37 Pac. 1075; Beyman *v.* Black, 47 Tex. 558; Bartlett *v.* Wilson, 59 Vt. 23, 35, 8 Atl. 321].

58. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 581, 4 L. ed. 629, argument of Mr. Webster [*cited* in Zeigler *v.* South, etc., R. Co., 58 Ala. 594, 598; Denver, etc., R. Co. *v.* Outcalt, 2 Colo. App. 395, 401, 31 Pac. 177; Clark *v.* Mitchell, 64 Mo. 564; Chauvin *v.* Valiton, 8 Mont. 451, 460, 20 Pac. 658, 3 L. R. A. 194; McGavock *v.* Omaha, 40 Nebr. 64, 76, 58 N. W. 543; Conklin *v.* Cunningham, 7 N. M. 445, 471, 38 Pac. 170; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172; Hall *v.* Webb, 21 W. Va. 318, 325; Kansas *v.* Bradley, 26 Fed. 289, 291].

59. 2 Kent Comm. 10 [*quoted* in San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 322, 326, 58 Pac. 824; Kalloch *v.* San Francisco, 56 Cal. 229, 239; Ahern *v.* Dubuque Lead, etc., Min. Co., 48 Iowa 140, 148; *Ex p.* Grace, 12 Iowa 208, 214, 79 Am. Dec. 529; Kansas Pac. R. Co. *v.* Dunmeyer, 19 Kan. 539, 542; Garnett *v.* Jennings, 19 Ky. L. Rep. 1712, 1713, 44 S. W. 382; Jones *v.* Robbins, 8 Gray (Mass.) 329, 361; Crane *v.* Waldron, (Mich. 1903) 94 N. W. 593, 598; State *v.* Becht, 23 Minn. 411, 413; Beaupre *v.* Hoerr, 13 Minn. 366; Baker *v.* Kelley, 11 Minn. 480; Hulett *v.* Missouri, etc., R. Co., 145 Mo. 35, 37, 46 S. W. 951; Jones *v.* Yore, 142 Mo. 38, 44, 43 S. W. 384; Kansas City *v.* Duncan, 135 Mo. 571, 584, 37 S. W. 513; Clark *v.* Mitchell, 64 Mo. 564, 577; Conklin *v.* Cunningham, 7 N. M. 445, 471, 38 Pac. 170; Happy *v.* Mosher, 48 N. Y. 313, 317; People *v.* Leubischer, 34 N. Y. App. Div. 577, 585, 54 N. Y. Suppl. 869; People *v.* Dunn, 13 N. Y. Crim. 491, 499; Matter of McDonald, 2 N. Y. Crim. 82, 94; *Ex p.* Bushnell, 9 Ohio St. 77, 169; Light *v.* Canadian County Bank, 2 Okla. 543, 549, 37 Pac. 1075; Church *v.* South Kingstown, 22 R. I. 381, 385, 48 Atl. 3, 53 L. R. A. 739; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 433, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316; *In re* McKee, 19 Utah 231, 237, 57 Pac. 23; Rowan *v.* State, 30 Wis. 129, 146, 11 Am. Rep. 559; Burton *v.* Platter, 53 Fed. 901, 904, 4 C. C. A. 95; *In re* Ah Lee, 6 Sawy. (U. S.) 410, 5 Fed. 899].

Other similar definitions are: "Ordinary judicial proceedings in court." Stewart *v.* Polk County, 30 Iowa 9, 28, 1 Am. Rep. 238.

"A trial according to some settled course of proceeding." Holman *v.* Manning, 65 N. H. 228, 229, 19 Atl. 1002.

"Lawful judicial proceedings in a court of competent jurisdiction." Matter of Curry, 1 N. Y. Civ. Proc. 319, 326.

"A timely and regular proceeding to judgment and execution." Backus *v.* Shipherd, 11 Wend. (N. Y.) 629, 635.

"The settled course of judicial procedure as determined by the law of the State." Hawaii *v.* Edwards, 11 Hawaii 571.

"Judicial proceedings, according to the course and usage of the common law." Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388, 407.

"The application of the law as it exists in the fair and regular course of administrative procedure." Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 432, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316.

"A trial by a court of justice, according to the regular and established course of judicial proceedings." State *v.* Doherty, 60 Me. 504, 509.

"That kind of procedure . . . which is suitable and proper to the nature of the case and sanctioned by the established usages and customs of the courts." San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 322, 326, 58 Pac. 824; *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552.

"Process due according to the law of the land." Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678 [*quoted* in Hawaii *v.* Edwards, 11 Hawaii 571, 579; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 433, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316; Hall *v.* Armstrong, 65 Vt. 421, 424, 26 Atl. 592, 20 L. R. A. 366; Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 540, 78 N. W. 767; Bittenhaus *v.* Johnston, 92 Wis. 588, 597, 66 N. W. 805, 32 L. R. A. 380; Cox *v.* Gilmer, 88 Fed. 343, 348].

60. Taylor *v.* Porter, 4 Hill (N. Y.) 140, 147, 40 Am. Dec. 274 [*quoted* in *Ex p.* Grace, 12 Iowa 208, 214, 79 Am. Dec. 529; Jones *v.*

An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights.[61] Laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws.[62]

Robbins, 8 Gray (Mass.) 329, 361; Weimer *v.* Bunbury, 30 Mich. 201, 210; Rockwell *v.* Nearing, 35 N. Y. 302, 305; Burch *v.* Newbury, 10 N. Y. 374, 397, Seld. Notes (N. Y.) 28; Embury *v.* Conner, 3 N. Y. 511, 517, 53 Am. Dec. 325; People *v.* O'Brien, 45 Hun (N. Y.) 519, 543; Matter of Hatch, 43 N. Y. Super. Ct. 89; People *v.* Haws, 15 Abb. Pr. (N. Y.) 115, 120; Rowan *v.* State, 30 Wis. 129, 148, 11 Am. Rep. 559].

Other similar definitions are: "All the steps essential to deprive a person of life, liberty or property." Jenkins *v.* Ballantyne, 8 Utah 245, 247, 30 Pac. 760, 16 L. R. A. 689.

"That one shall hold his life, liberty and property under the protection of the general rules which govern society." Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 644, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 532, 33 N. E. 421, 18 L. R. A. 729.

"By indictment or presentment of good and lawful men, where such deeds be done, in due manner, or by writ original, of the common law." Dale County *v.* Gunter, 46 Ala. 118, 141; Taylor *v.* Porter, 4 Hill (N. Y.) 140, 147, 40 Am. Dec. 274.

61. State *v.* Billings, 55 Minn. 467, 474, 57 N. W. 206, 794, 43 Am. St. Rep. 525; *In re* Union El. R. Co., 112 N. Y. 61, 75, 19 N. E. 664, 20 N. Y. St. 498, 2 L. R. A. 359; Stuart *v.* Palmer, 74 N. Y. 183, 191, 30 Am. Rep. 289; Goldie *v.* Goldie, 77 N. Y. App. Div. 12, 14, 79 N. Y. Suppl. 268; Brooks *v.* Tayntor, 17 Misc. (N. Y.) 534, 40 N. Y. Suppl. 445, 449, 74 N. Y. St. 879; Avant *v.* Flynn, 2 S. D. 153, 163, 49 N. W. 15.

Other similar definitions are: "The observance of those general rules established in our system of jurisprudence for the security of private rights." Dewey *v.* Des Moines, 101 Iowa 416, 429, 70 N. W. 605.

"Some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself." Doyle, Petitioner, 16 R. I. 537, 538, 18 Atl. 159, 27 Am. St. Rep. 759, 5 L. R. A. 359.

"Such general legal forms and course of proceedings as were known either to the common law or as were generally recognized in this country at the time of the adoption of the constitution." Gibson *v.* Mason, 5 Nev. 283, 302.

"The ordinary judicial proceedings recognized by law, and provided for determining the rights of property and for subjecting the citizen to deprivation of his liberty for violation of the law." Eikenberry *v.* Edwards, 67 Iowa 619, 626, 25 N. W. 832, 56 Am. Rep. 360.

"A course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights." Pennoyer *v.* Neff, 95 U. S. 714, 737, 24 L. ed. 565 [*quoted* in San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 322, 326, 58 Pac. 824; District of Columbia *v.* Humphries, 12 App. Cas. (D. C.) 122, 128; McGavock *v.* Omaha, 40 Nebr. 64, 75, 58 N. W. 543; South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253; Church *v.* South Kingston, 22 R. I. 381, 385, 48 Atl. 3, 53 L. R. A. 739; McCreery *v.* Davis, 44 S. C. 195, 217, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655]. See also Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095.

"The right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, . . . and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." Zeigler *v.* South, etc., R. Co., 58 Ala. 594, 599; McGavock *v.* Omaha, 40 Nebr. 64, 75, 58 N. W. 543; Meyers *v.* Shields, 61 Fed. 713, 718; *Ex p.* Murray, 35 Fed. 496, 497.

"In the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Westervelt *v.* Gregg, 12 N. Y. 202, 209, 62 Am. Dec. 160 [*quoted* in Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524, 544; Burdick *v.* People, 149 Ill. 600, 605, 36 N. E. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152; Board of Education *v.* Bakewell, 122 Ill. 339, 348, 10 N. E. 378; State *v.* Height, 117 Iowa 650, 91 N. W. 935, 936; Foule *v.* Mann, 53 Iowa 42, 43, 3 N. W. 814; Louisville *v.* Cochran, 82 Ky. 15, 22; Stuart *v.* Palmer, 74 N. Y. 183, 191, 30 Am. Rep. 289; Campbell *v.* Evans, 45 N. Y. 356, 358; Rockwell *v.* Nearing, 35 N. Y. 302, 305; People *v.* Leuhischer, 34 N. Y. App. Div. 577, 585, 54 N. Y. Suppl. 869; Brooks *v.* Tayntor, 17 Misc. (N. Y.) 534, 539, 40 N. Y. Suppl. 445, 74 N. Y. St. 879; Burke *v.* Mechanics' Sav. Bank, 12 R. I. 513, 517; State *v.* Staten, 6 Coldw. (Tenn.) 233, 244; Jelly *v.* Dils, 27 W. Va. 267, 274; Peerce *v.* Adamson, 20 W. Va. 57; White *v.* Crump, 19 W. Va. 583, 595; Peerce *v.* Kitzmiller, 19 W. Va. 564, 578; *Ex p.* Murray, 35 Fed. 496, 497; *In re* Ah Lee, 6 Sawy. (U. S.) 410, 5 Fed. 899].

62. Atty.-Gen. *v.* Jochim, 99 Mich. 358, 371, 58 N. W. 611, 41 Am. St. Rep. 606, 23

B. General Nature and Principles. The term "due process of law" is synonymous with "law of the land."[63] The constitution contains no description of those processes which it was intended to allow or forbid, and it does not even declare what principles are to be applied to ascertain whether it be due process. But clearly it was not left to the legislative power to enact any process which might be devised.[64] "Due process of law" does not mean the general body of the law, common and statute, as it was at the time the constitution took effect. It means certain fundamental rights, which our system of jurisprudence has always recognized.[65] The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law[66] extend to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative, or executive,[67] and

L. R. A. 699; Sears *v.* Cottrell, 5 Mich. 251, 254; Chauvin *v.* Valiton, 8 Mont. 451, 465, 20 Pac. 658, 3 L. R. A. 194; Talcott *v.* Pine Grove, 1 Flipp. (U. S.) 120, 23 Fed. Cas. No. 13,735.

Other similar definitions are: "A requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances, enacted for the general public good or welfare." State *v.* Ashbrook, 154 Mo. 375, 394, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265.

"General public law, legally enacted, binding upon all the members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals." Bailey *v.* People, 190 Ill. 28, 34, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L. R. A. 838; Eden *v.* People, 161 Ill. 296, 303, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L. R. A. 659; Harding *v.* People, 160 Ill. 459, 464, 43 N. E. 624, 52 Am. St. Rep. 344, 32 L. R. A. 445; Ritchie *v.* People, 155 Ill. 98, 105, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; Braceville Coal Co. *v.* People, 147 Ill. 66, 70, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Frorer *v.* People, 141 Ill. 171, 181, 31 N. E. 395, 16 L. R. A. 492; Millett *v.* People, 117 Ill. 294, 301, 7 N. E. 631, 57 Am. Rep. 869; Janes *v.* Reynolds, 2 Tex. 250, 252.

63. *California.*— Kalloch *v.* San Francisco, 56 Cal. 229.

Colorado.— *In re* Lowrie, 8 Colo. 499, 9 Pac. 489, 54 Am. Rep. 558.

Kansas.— Kansas Pac. R. Co. *v.* Dunmeyer, 19 Kan. 539.

Michigan.— Sears *v.* Cottrell, 5 Mich. 251.

Mississippi.— Brown *v.* Board of Levee Com'rs, 50 Miss. 468.

Pennsylvania.— Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

Tennessee.— State *v.* Staten, 6 Coldw. (Tenn.) 233.

United States.— Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

See 10 Cent. Dig. tit. "Constitutional Law," § 732; and cases cited *supra*, notes 57–62.

Although the phrase "law of the land" as originally used referred to trial by wager of battle or by ordeal, as distinguished from trial by one's peers, it has long been settled in England and in America that under modern law and institutions this phrase and "due process of law" are identical in meaning. Pomeroy Const. Law (9th ed.), § 245.

Magna Charta.— The provision that no person shall be deprived of life, liberty, or property, without due process of law, taken from Magna Charta, there appears in the following form: "Nullus liber homo capiatur vel imprisonetur aut disseisiatur . . . aut utlagetur aut exulet aut aliquo modo destruatur nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terræ." No freeman shall be taken, or imprisoned, or disseized, or outlawed, or in any other manner injured, nor will we proceed against him, unless by the lawful judgment of his peers, or by the law of the land.

64. Weimer *v.* Bunbury, 30 Mich. 201; Com. *v.* Wasson, 12 Pittsb. Leg. J. N. S. 434; U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372.

65. *California.*— Hickman *v.* O'Neal, 10 Cal. 292.

Mississippi.— Brown *v.* Board of Levee Com'rs, 50 Miss. 468.

Texas.— Beyman *v.* Black, 47 Tex. 558.

West Virginia.— Peerce *v.* Adamson, 20 W. Va. 57; Griffee *v.* Halstead, 19 W. Va. 602; Williams *v.* Freeland, 19 W. Va. 599; Peerce *v.* Kitzmiller, 19 W. Va. 564.

United States.— Hurtad *v.* California, 110 U. S. 516, 4 S. Ct. 292, 28 L. ed. 232.

See 10 Cent. Dig. tit. "Constitutional Law," § 732.

66. U. S. Const. Amendm. 5; 15.

67. *Alabama.*— Dorman *v.* State, 34 Ala. 216.

California.— Sherman *v.* Buick, 32 Cal. 241, 91 Am. Rep. 577.

Connecticut.— Camp *v.* Rogers, 44 Conn. 291.

Delaware.— Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524.

Iowa.— State *v.* Height, 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437; Foule *v.* Mann, 53 Iowa 42, 3 N. W. 814.

relate to that class of rights the protection of which is peculiarly within the province of the judicial branch of the government.[68] The term "due process of law," when applied to judicial proceedings, means that there must be a competent tribunal to pass on the subject-matter; notice actual or constructive, an opportunity to appear and produce evidence, to be heard in person or by counsel; and if the subject-matter involves the determination of tne personal liability of defendant he must be brought within the jurisdiction by service of process within the state, or by his voluntary appearance. And there must be a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.[69] But the forms of procedure and practice may be changed; and the constitution is satisfied if the substance of the right is not affected and if an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate and adequate.[70] Although due process of law implies generally the course of judicial proceedings established at the time the constitution was framed, due process is not limited to such, but refers also to many measures of a summary nature.[71] The

Kentucky.— Louisville *v.* Cochrane, 82 Ky. 15.

Maine.— State *v.* Doherty, 60 Me. 504.

Michigan.—Crane *v.* Waldron, (Mich. 1903) 94 N. W. 593; Weimer *v.* Bunbury, 30 Mich. 201.

Minnesota.— State *v.* State Bd. of Medical Examiners, 34 Minn. 387, 26 N. W. 123.

Missouri.— Clark *v.* Mitchell, 64 Mo. 564.

Nebraska.— Low *v.* Rees Printing Co., 41 Nebr. 127, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702; Atchison, etc., R. Co. *v.* Baty, 6 Nebr. 37, 29 Am. Rep. 356.

New York.— Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

Pennsylvania.— Huber *v.* Reily, 53 Pa. St. 112.

Tennessee.— Davis *v.* State, 3 Lea (Tenn.) 376; State *v.* Burnett, 6 Heisk. (Tenn.) 186; Alexandria *v.* Dearmon, 2 Sneed (Tenn.) 104; Sheppard *v.* Johnson, 2 Humphr. (Tenn.) 285; Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Officer *v.* Young, 5 Yerg. (Tenn) 320, 26 Am. Dec. 268; State Bank *v.* Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517; Wally *v.* Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; Vanzant *v.* Waddel, 2 Yerg. (Tenn.) 260.

United States.—Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780; Central Land Co. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. ed. 91; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 702, 33 L. ed. 970; Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232; U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; Columbia Bank *v.* Okely, 4 Wheat. (U. S.) 235, 4 L. ed. 559; Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421; *Ex p.* Ulrich, 42 Fed. 587.

See 10 Cent. Dig. tit. "Constitutional Law," §§ 733–735.

Constitutional convention.— A state can no more deprive a man of life, liberty, or property through the medium of a constitutional convention than through an act of legislation. Clark *v.* Mitchell, 69 Mo. 627.

68. *Arkansas.*— Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

Iowa.— Mason *v.* Messenger, 17 Iowa 261.

Kansas.— Kansas Pac. R. Co. *v.* Dunmeyer, 19 Kan. 539.

New York.— Wynehamer *v.* People, 2 Park. Crim. (N. Y.) 421.

United States.— U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

69. *Alabama.*— Zeigler *v.* South, etc., Alabama R. Co., 58 Ala. 594.

Michigan.— Parsons *v.* Russell, 11 Mich. 113, 83 Am. Dec. 728.

Nebraska.— South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

New York.— *In re* Hatch, 43 N. Y. Super. Ct. 89; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172.

Tennessee.— State *v.* Staten, 6 Coldw. (Tenn.) 233.

Wisconsin.— Schlitz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

See 10 Cent. Dig. tit. "Constitutional Law," § 732.

70. Brown *v.* Board of Levee Com'rs, 50 Miss. 468; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 292, 28 L. ed. 232.

71. Hallett *v.* Denver, 4 Colo. L. Rep. 565; Weimer *v.* Bunbury, 30 Mich. 201; Chicago, etc., R. Co. *v.* Keith, 21 Ohio Cir. Ct. 669, 12

fifth amendment of the federal constitution is a restriction only upon the federal government, and not upon the states.[72] The fourteenth amendment is a restriction upon the states;[73] it adds nothing to the right of one citizen against another, but simply furnishes a guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen.[74]

C. Persons Protected. The constitutional right to be secured against deprivation of liberty or property without due process of law extends to all natural persons within the jurisdiction of the United States, independently of any treaty stipulations with the nations to whom such persons may owe allegiance,[75] and protects alien enemies.[76] The weight of authority holds that private corporations are "persons" within the fourteenth amendment, prohibiting the state from depriving any "person" of property without due process of law,[77] and prior to the adoption of the fourteenth amendment it was held that the property and franchises of a private corporation were property which was entitled to the same constitutional protection as the property of individuals.[78] Except where constitutional restriction, state or national, is imposed, the corporate existence, duties, and powers of counties, cities, and towns are subject to legislative control.[79] Municipal corporations cannot sustain their privileges or their existence upon anything like a contract between themselves and the legislature; and the constant

Ohio Cir. Dec. 208; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372.

72. *Iowa.*— Boyd *v.* Ellis, 11 Iowa 97.

Michigan.— Weimer *v.* Bunbury, 30 Mich. 201.

Mississippi.— Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661.

Missouri.— North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

New York.— Isola *v.* Weber, 34 N. Y. Suppl. 77, 68 N. Y. St. 32, 13 Misc. (N. Y.) 97; Livingston *v.* New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622.

Ohio.— Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

United States.— *In re* Boggs, 45 Fed. 475; Griffing *v.* Gibb, McAll. (U. S.) 212, 11 Fed. Cas. No. 5,819.

See 10 Cent. Dig. tit. "Constitutional Law," § 727.

73. State *v.* Boswell, 104 Ind. 541, 4 N. E. 675; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Kiernan *v.* Multnomah County, 95 Fed. 849; *Ex p.* Ulrich, 42 Fed. 587; Scott *v.* Toledo, 36 Fed. 385, 1 L. R. A. 688; Kansas *v.* Bradley, 26 Fed. 289.

One claiming that a state statute violates the fourteenth amendment is limited solely to the inquiry whether in the case which he himself presents the statute has operated to infringe his constitutional rights, and the court will not consider whether in a different case the statute might so operate. Del Castillo *v.* McConnico, 168 U. S. 674, 18 S. Ct. 229, 42 L. ed. 622.

Process of state.— The phrase "due process of law" refers to the state's own process. *In re* Mahon, 34 Fed. 525.

74. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

75. *In re* Tiburcio Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, 1 Ky. L. Rep. 136, holding that Chinese or Mongolians residing within the jurisdiction of California are "persons" within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of life, liberty, or property without due process of law. And see ALIENS, 2 Cyc. 88.

76. Buford *v.* Speed, 11 Bush (Ky.) 338, holding that alien enemies, when proceeded against by legal process, have the right to appear in person or by counsel, whom they have a right to employ, and to introduce evidence and make defense.

77. Wheeling Bridge, etc., R. Co. *v.* Gilmore, 8 Ohio Cir. Ct. 658; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722. But see State *v.* Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. See, generally, CORPORATIONS.

78. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

79. *California.*— San Francisco *v.* Beideman, 17 Cal. 443; Hart *v.* Burnett, 15 Cal. 530.

Connecticut.— Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148.

Michigan.— Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

Missouri.— Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

New York.— People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187, 56 N. Y. St. 807; Taylor *v.* Constable, 131 N. Y. 597, 30 N. E. 63, 42 N. Y. St. 949 [*affirming* 15 N. Y. Suppl. 795, 40 N. Y. St. 60]; People *v.* Porter, 26 Hun (N. Y.) 622.

Pennsylvania.— Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575.

South Carolina.— Blum *v.* Richland County, 38 S. C. 291, 17 S. E. 20.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 690.

See 10 Cent. Dig. tit. "Constitutional

practice is to so enlarge or diminish their territory as to reapportion their property.[80] The contracts made by municipal corporations are also to a considerable degree subject to legislative control;[81] but it is unconstitutional to provide that a city shall be discharged from contractual obligations already incurred in favor of an individual.[82] Legislative power over municipal corporations in their public or governmental character is far more extensive than over them in their private character; in the latter aspect their rights are analogous to those of private corporations.[83]

D. Deprivation of Life or Liberty — 1. IN GENERAL. The words "life" and "liberty" are used in the fourteenth amendment in a broad sense, and have received liberal construction, the idea being that the constitutional safeguards to life and liberty embrace far more than the preservation of existence, and protection from arbitrary physical punishment — although the provisions of criminal law cover an important aspect of personal rights — and secure the broader rights, such as freedom to live, work, and enjoy life untrammeled, except so far as restraints upon individual action appear, according to the fundamental and established principles of law, to be necessary for the preservation and promotion of the public health, comfort, morals, safety, and welfare.[84]

Law," § 731; and, generally, COUNTIES; MUNICIPAL CORPORATIONS; TOWNS.

80. *Illinois.*— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Louisiana.— Layton *v.* New Orleans, 12 La. Ann. 515.

Massachusetts.— Chandler *v.* Boston, 112 Mass. 200.

New York.— Sill *v.* Corning, 15 N. Y. 297; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

Pennsylvania.— Dunmore's Appeal, 52 Pa. St. 374.

United States.— Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699; Morgan *v.* Beloit, 7 Wall. (U. S.) 613, 19 L. ed. 203.

See 10 Cent. Dig. tit. "Constitutional Law," § 731; and, generally, MUNICIPAL CORPORATIONS.

81. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. ed. 943, holding that a contract made by a city with a water company, so far as the city's rights are concerned, is subject to the will of the legislature, and a statute authorizing a change therein modifying the city's right to tax the water company does not operate as a taking of its property without due process of law.

82. People *v.* Otis, 90 N. Y. 48 (holding unconstitutional a provision to discharge a city from liability on its negotiable bonds stolen from a bank, upon delivery of duplicate bonds to the bank); Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 247, 6 Am. Rep. 70; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 533, 25 L. ed. 699.

83. *Alabama.*—Askew *v.* Hale County, 54 Ala. 639, 25 Am. Rep. 730.

California.— Hoagland *v.* Sacramento, 52 Cal. 142.

Illinois.— Board of Education *v.* Blodgett, 155 Ill. 441, 40 N. E. 1025, 46 Am. St. Rep. 348, 31 L. R. A. 70.

Maine.— Small *v.* Danville, 51 Me. 359.

Massachusetts.— Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

Michigan.— People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

New York.— Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468; People *v.* Briggs, 50 N. Y. 553; Webb *v.* New York, 64 How. Pr. (N. Y.) 10.

Wisconsin.— Milwaukee *v.* Milwaukee City, 12 Wis. 93.

United States.— U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597.

See 10 Cent. Dig. tit. "Constitutional Law," § 731.

A legislative grant of a street railway franchise without the consent of the municipal corporation and not providing compensation is valid. Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364.

84. "By the term 'life' . . . something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision." Per Field, J., in Munn *v.* Illinois, 94 U. S. 113, 142, 24 L. ed. 77.

"By the term 'liberty' . . . something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent

2. Contempt Proceedings. The power to commit or fine for a contempt committed in the presence of the court may be exercised in a summary manner;[85] but in case of a contempt not committed in the presence of the court, due process of law requires that the accused shall have a day in court.[86]

3. Courts-Martial. Courts-martial may constitutionally be empowered to try and to punish military offenses.[87]

4. Criminal Prosecutions — a. In General. The constitutional guaranty of due process of law implies the existence of a complainant, a defendant, and a judge, regular allegations, an opportunity to answer the criminal charge, trial according to some settled course of judicial proceedings, and the right to be discharged unless the charge is proved.[88]

b. Creation or Definition of Offenses. As in the formation of the federal constitution the existing police powers of the states were not granted to the federal government they have the right, by virtue of their inherent sovereignty, to insure the protection of all property and of the lives, health, comfort, and safety of all persons within their jurisdiction, by reasonable criminal provisions for the crea-

with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." Per Field, J., in Munn *v.* Illinois, 94 U. S. 113, 142, 24 L. ed. 77.

85. *Colorado.*— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Kansas.— *In re* Noonan, 47 Kan. 771, 28 Pac. 1104.

Maine.—Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

North Carolina.— State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161.

Oklahoma.— Smith *v.* Speed, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402.

United States.— *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 52 L. ed. 405; Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 227, 5 L. ed. 242.

See 10 Cent. Dig. tit. "Constitutional Law," § 739; and Contempt.

One cannot be declared infamous in an order punishing him for contempt. Fletcher *v.* Daingerfield, 20 Cal. 427.

86. *California.*— Sargent *v.* Cavis, 36 Cal. 552; People *v.* Turner, 1 Cal. 152.

Connecticut.— Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567.

Florida.— Palmer *v.* Palmer, 28 Fla. 295, 9 So. 657.

Illinois.—Smith *v.* Tenney, 62 Ill. App. 571.

Indiana.— Whittem *v.* State, 36 Ind. 196.

Iowa.— State *v.* Folsom, 34 Iowa 583.

Kansas.— *In re* Smith, 52 Kan. 13, 33 Pac. 957.

Louisiana.— State *v.* Judges Civil Dist. Ct., 32 La. Ann. 1256.

Minnesota.— State *v.* Willis, 61 Minn. 120, 63 N. W. 169; State *v.* Ives, 60 Minn. 478, 62 N. W. 831.

Missouri.— *Ex p.* Mason, 16 Mo. App. 41.

New Jersey.— Holt's Case, 55 N. J. L. 384, 27 Atl. 909.

New York.— Pitt *v.* Davison, 37 Barb. (N. Y.) 97; Fall Brook Coal Co. *v.* Heckscher, 6 N. Y. St. 676.

Pennsylvania.— Com. *v.* Gibbons, 9 Pa. Super. Ct. 527.

Texas.— *Ex p.* Rust, 38 Tex. 344; *Ex p.* Kilgore, 3 Tex. App. 247.

Vermont.— *In re* Leach, 51 Vt. 630; *Ex p.* Langdon, 25 Vt. 680.

West Virginia.—State *v.* Gibson, 33 W. Va. 97, 10 S. E. 58.

United States.— *Ex p.* Stricker, 109 Fed. 145.

See 10 Cent. Dig. tit. "Constitutional Law," § 739; and Contempt.

Violation of injunction.— Under a state statute authorizing an injunction to restrain the illegal sale of intoxicating liquors and providing that a person violating such injunction shall be punished for the contempt by fine or imprisonment or both, in the discretion of the court, summary proceedings by a state court, imposing fine and imprisonment for contempt in violating such an injunction issued by it, without presentment of indictment or trial by jury is due process of law, within the meaning of U. S. Const. Amendm. 14. Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801, 802.

87. People *v.* Daniell, 50 N. Y. 274.

88. State *v.* Whisner, 35 Kan. 271, 10 Pac. 852; *In re* Roberts, 4 Kan. App. 292, 45 Pac. 942; Huber *v.* Reily, 53 Pa. St. 112; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

A statute undertaking to legalize criminal proceedings of a court, had without proper jurisdiction, is unconstitutional and void, being a deprivation of liberty otherwise than by the law of the land. State *v.* Doherty, 60 Me. 504.

The state and federal governments have full control over criminal procedure within their jurisdictions, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict

tion, definition, and punishment of offenses.[89] But unreasonable and arbitrary exercises of power are illegal; violate the guaranty of due process of law;[90] and persons deprived of liberty under such acts are entitled to be released by writ of habeas corpus issued from the proper court of the United States.[91] The legisla-

with specific and applicable constitutional provisions. Com. *v.* Walton, 11 Allen (Mass.) 238; Com. *v.* Greenen, 11 Allen (Mass.) 241; Miller *v.* State, 53 Miss. 403; Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. ed. 597; Brown *v.* New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. ed. 119; Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; Caldwell *v.* Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. ed. 816. Provisions violating the established principles of pleading and practice violate the constitutional guaranty of due process of law. King *v.* State, 49 Ind. 210; Landringham *v.* State, 49 Ind. 186; State *v.* Symonds, 57 Me. 148; State *v.* Wilburn, 25 Tex. 738; Hewitt *v.* State, 25 Tex. 722; *Ex p.* Farley, 40 Fed. 66.

89. *California.*— People *v.* Bosquet, 116 Cal. 75, 47 Pac. 879.

Indiana.—State *v.* Cooper, 5 Blackf. (Ind.) 258.

Kansas.— State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.

Kentucky.— Com. *v.* Minor, 88 Ky. 442, 10 Ky. L. Rep. 1008, 11 S. W. 472.

Minnesota.— State *v.* Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757.

Missouri.— State *v.* Missouri Guarantee Sav., etc., Assoc., 167 Mo. 489, 67 S. W. 215; *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726.

New York.— *In re* Davis, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

Oregon.— *Ex p.* Northrup, 41 Oreg. 489, 69 Pac. 445.

Rhode Island.— State *v.* Smith, 14 R. I. 100, 51 Am. Rep. 344.

Texas.— Ham *v.* State, 4 Tex. App. 645.

United States.— Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205.

See 10 Cent. Dig. tit. "Constitutional Law," § 748.

In pursuance of the state's constitutional right to define and punish criminal offenses, the possession, manufacture, and distribution of articles of food (State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253), and of liquors (Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205) may be regulated, and provisions enforced by imprisonment or other appropriate means. Bonds may be required of persons guilty of keeping or frequenting immoral places; and on failure to find such sureties the authorities may commit such persons to prison. State *v.* Main, 31 Conn. 572. Association with reputed thieves or prostitutes with intent to aid or abet their crimes may be punished. St. Louis *v.* Fitz, 53 Mo. 582. Gambling operations may be defined and prohibited under penalty. State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39; State *v.* Maxey, 1 McMull. (S. C.) 501. The possession of certain articles connected with a lottery may be made an offense, without regard to the possessor's knowledge of their nature. Ford *v.* State, 85 Md. 465, 37 Atl. 172, 50 Am. St. Rep. 337, 41 L. R. A. 551. Smoking in street-cars may be punished by fine and imprisonment. State *v.* Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388. A state may also make it an offense for any white person to marry a negro or one of mixed blood. Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739 [*overruling* Burnes *v.* State, 48 Ala. 195, 17 Am. Rep. 34]; Lonas *v.* State, 3 Heisk. (Tenn.) 287; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; Kinney *v.* Com., 30 Gratt. (Va.) 859, 32 Am. Rep. 690. A state may further provide that any corporation or individual who shall enter into a pool or trust to fix or maintain insurance rates shall be guilty of conspiracy and shall forfeit his rights to do business in the state. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595.

90. People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578, 2 L. R. A. 721; State *v.* Wilson, 15 R. I. 180, 1 Atl. 415; State *v.* Kartz, 13 R. I. 528; State *v.* Beswich, 13 R. I. 211, 43 Am. Rep. 26; State *v.* Ryan, 70 Wis. 676, 36 N. W. 823; *In re* Ah Jow, 29 Fed. 181; *Ex p.* Field, 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761.

91. *In re* Lee Tong, 9 Sawy. (U. S.) 333, 18 Fed. 253.

But when a person accused of crime within a state is subjected, like all other persons in the state, to the law in its regular course of administration in courts of justice, the judgment so arrived at cannot be held to be such an unrestrained and arbitrary exercise of power as to be unconstitutional; and if so convicted he cannot be released on habeas corpus under the fourteenth amendment. *Ex p.* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. ed. 796 [*affirming* 42 Fed. 217]; *Ex p.* Kinnebrew, 35 Fed. 52; *In re* Taylor, 23 Fed. Cas. No. 13,774, 12 Chic. Leg. N. 17, 25 Int. Rev. Rec. 321, 8 N. Y. Wkly. Dig. 554, 13 West. Jur. 505. The fourteenth amendment was not designed to, and does not, interfere with the general power of the state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of the state in administering the process provided by its laws. Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. ed. 597; Brown

ture, in creating offenses, is not confined to a definition of specific acts or omissions;[92] need not define the offense as a felony or misdemeanor, but may provide punishment in the alternative;[93] and may authorize a jury under an indictment for a graver offense to punish for a lesser offense.[94]

c. **Jurisdiction and Venue.** The established principles of law must be adhered to in all matters affecting jurisdiction and venue, and departure from them is a violation of the constitution.[95]

d. **Former Jeopardy.** Within the meaning of the fourteenth amendment, the trial and commitment, either in state or federal courts, of one who has already been tried and acquitted of the same offense is depriving him of his liberty without due process of law.[96]

e. **Preliminary Complaint.** A complaint running against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offense, is not due process.[97]

f. **Warrant and Arrest.** Statutes authorizing an arrest without a warrant in certain cases do not deprive the person arrested of liberty without due process of law.[98] The arrest, however, must have been made in pursuance of some method

v. New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. ed. 119; Moore *v.* Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. ed. 301; *Ex p.* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. ed. 796; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 27 L. ed. 923; *In re* Krug, 79 Fed. 308; *In re* King, 46 Fed. 905. The only restriction imposed in this connection upon the states by the fourteenth amendment was that no state could deprive particular persons or classes of persons of equal and impartial justice under the law, through the imposition of any different or higher punishment on one than was imposed on all for like offenses. Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; *Ex p.* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. ed. 796. A state cannot be deemed guilty of a violation of its obligations under the United States constitution because of a decision, even if erroneous, of its highest court while acting within its jurisdiction. *Ex p.* Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. ed. 796; *In re* Storti, 109 Fed. 807. And a person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned in violation of the federal constitution. People *v.* Sheriff, 11 N. Y. Civ. Proc. 172; *In re* Ah Lee, 6 Sawy. (U. S.) 410, 5 Fed. 899.

92. Morgan *v.* Nolte, 37 Ohio St. 23, 41 Am. Rep. 485.

93. Murrah *v.* State, 51 Miss. 652, holding that failure to define offense either as a felony or misdemeanor did not invalidate.

94. Davis *v.* State, 20 Tex. App. 302.

95. State *v.* Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130; *In re* Kelly, 46 Fed. 653. See, generally, CRIMINAL LAW.

96. *Ex p.* Ulrich, 42 Fed. 587.

97. State *v.* Learned, 47 Me. 426; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614. And see CRIMINAL LAW.

Necessity of complaint.— In State *v.* Newman, 96 Wis. 258, 71 N. W. 438, it was held that one arrested on a search warrant not naming him, and issued on an affidavit which does not, must, on being brought before the court, be charged by complaint with such offense.

98. North *v.* People, 139 Ill. 81, 28 N. E. 966; Jones *v.* Root, 6 Gray (Mass.) 435; Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859; Judson *v.* Reardon, 16 Minn. 431. But *compare* Robison *v.* Miner, 68 Mich. 549, 37 N. W. 21, holding unconstitutional the Michigan act of June 28, 1887, which authorizes officers to close up places for sale of liquor found open upon certain days and at certain hours and to arrest the offender without warrant. And see State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529, holding that an ordinance which gives a policeman power to arrest persons who in his opinion are violating the ordinance and "take them to the station-house," without warrant or preliminary examination, is void, as in violation of N. C. Const. art. 1, § 17, which provides that no person shall be taken, imprisoned, or in any manner deprived of his liberty but by the law of the land. See, generally, ARREST, 3 Cyc. 867.

A convict at large on good behavior may be summarily rearrested and returned to custody upon the governor's order, and is not entitled to freedom from rearrest except on probable cause supported by oath. Fuller *v.* State, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 1, 45 L. R. A. 502.

Persons illegally brought within jurisdiction.— As the phrase "due process of law" refers to the state's own process, a lawful arrest under authority of a state court of one unlawfully brought into the state by private persons is not a violation of the constitutional safeguard. *In re* Mahon, 34 Fed. 525. See also *In re* Von Der Ahe, 85 Fed. 959. And the mere fact that a criminal is illegally carried, against his will, into the United States from a foreign country, with no reference to extradition treaties, does not render his sub-

warranted by the established principles of law in the jurisdiction where it was made.[99]

g. Preliminary Examination. It is valid to provide that informations may be filed without preliminary examination, whenever the prosecuting attorney is satisfied that an offense has been committed in his county.[1]

h. Indictment or Information. The privileges and immunities of a citizen of the United States do not include the right to be exempt from any trial in a state court for a state offense, unless upon presentment by a grand jury; but a proceeding by information instead of an indictment by a grand jury is sufficient to constitute due process of law.[2]

i. Rules of Evidence. A state may establish and alter the rules of evidence as to what constitutes proof of an offense, provided the accused is given a fair opportunity to explain and contest the charge, and the rule is not arbitrary in character.[3] So a state may prescribe what shall be considered presumptive evi-

sequent trial and conviction, based upon jurisdiction regularly acquired by his presence in the country, invalid. Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421. See also ARREST, 3 Cyc. 874.

99. Hutchins *v.* Edson, 1 N. H. 139; Mayo *v.* Wilson, 1 N. H. 53. See also ARREST, 3 Cyc. 867.

1. State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3. See also State *v.* Brett, 16 Mont. 360, 40 Pac. 873, holding that a statute allowing an information to be filed with leave of court without preliminary examination does not violate the fourteenth amendment. And see Com. *v.* McClure, 10 Wkly. Notes Cas. (Pa.) 466, holding that it is not essential to due process in a prosecution for obstructing a public office that there should be any preliminary hearing before holding the accused for the grand jury.

A convict, conditionally pardoned, who has been arrested for alleged violation of the condition, is entitled, before reincarceration, to a hearing in order to show whether he has performed the condition, or has a legal excuse, and detention without bail or examination is unconstitutional. People *v.* Moore, 62 Mich. 496, 29 N. W. 80; State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

2. *California.*— Kalloch *v.* San Francisco, 56 Cal. 229.

Colorado.— *In re* Dolph, 17 Colo. 35, 28 Pac. 470.

Indiana.— State *v.* Boswell, 104 Ind. 541, 4 N. E. 675.

Missouri.— *Compare* State *v.* Stein, 2 Mo. 67.

Wisconsin.— Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

United States.— Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. ed. 597; Hodgson *v.* Vermont, 168 U. S. 262, 18 S. Ct. 80, 42 L. ed. 461; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882; Caldwell *v.* Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. ed. 816 [*affirming* 28 Tex. App. 566, 14 S. W. 122]; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. ed. 232; *In re* Humason, 46 Fed. 388.

See 10 Cent. Dig. tit. "Constitutional Law," § 755; and INDICTMENTS AND INFORMATIONS.

Number of grand jurors.— The fourteenth amendment does not prohibit a state from organizing a grand jury consisting of less than the common-law number of jurors. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683. The general principles of established law control its organization, when it is employed at all. State *v.* Doherty, 60 Me. 504. See, generally, GRAND JURIES.

Prosecution in federal courts.— The fifth amendment requires presentment or indictment of a grand jury in certain criminal cases in the courts of the United States. *Ex p.* McClusky, 40 Fed. 71.

3. *Colorado.*— Robertson *v.* People, 20 Colo. 279, 38 Pac. 326.

Connecticut.— State *v.* Thomas, 47 Conn. 546, 36 Am. Rep. 98; State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan's Liquors, 25 Conn. 278; State *v.* Cunningham, 25 Conn. 195.

Florida.— Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Kentucky.— Com. *v.* Minor, 88 Ky. 422, 10 Ky. L. Rep. 1008, 11 S. W. 472; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70.

Maine.— State *v.* Day, 37 Me. 244.

Massachusetts.— Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; Com. *v.* Rowe, 14 Gray (Mass.) 47; Com. *v.* Burns, 9 Gray (Mass.) 132; Com. *v.* Wallace, 7 Gray (Mass.) 222; Com. *v.* Williams, 6 Gray (Mass.) 1.

New York.—Auburn *v.* Merchant, 103 N. Y. 143, 8 N. E. 484; People *v.* Clipperly, 101 N. Y. 634, 4 N. E. 107; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628, 35 N. Y. St. 146; People *v.* Toynbee, 2 Park. Crim. (N. Y.) 329.

North Carolina.— State *v.* Divine, 98 N. C. 778, 4 S. E. 477.

Rhode Island.— State *v.* Groves, 15 R. I. 208, 2 Atl. 384; State *v.* Wilson, 15 R. I. 180, 1 Atl. 415; State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note; State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26.

Texas.— Faith *v.* State 32 Tex. 373.

dence of guilt.[4] This principle has been frequently tested in legislation, aimed at regulation or suppression of the liquor traffic, and statutes establishing presumptions of guilt from certain evidence have been generally sustained,[5] although their arbitrary character at times has rendered them invalid.[6] Rules made for the enforcement of food regulations have also been generally sustained.[7]

j. Course and Conduct of Trial. A state may constitutionally provide for a speedy trial, without postponement.[8] It is also constitutional to provide that in certain criminal cases the people shall have a certain number of peremptory challenges.[9] So a prisoner in a prosecution for murder is not deprived of a trial by due process of law because the prosecuting attorney was represented by another counsel with the court's assent.[10] And a statute authorizing the state in effect to contradict its own witness, and to ask him if he has made other statements, does not violate the fourteenth amendment.[11] It is not, however, within the province of the legislature to prescribe what instructions a court shall give in a murder case, unless the legislature has first embodied such instructions in an act as the law of the land.[12]

k. Trial by Jury. Although the sixth amendment secures the right to a jury trial in criminal prosecutions in the courts of the United States, this provision does not apply to the states, which may provide for the trial of offenders without a jury[13] or before a jury of less than twelve men.[14]

l. Judgment and Sentence.[15] The legislature may specify alternative punish

West Virginia.— State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883.

United States.— U. S. *v.* Long Hop, 55 Fed. 58. See also *In re* Sing Lee, 54 Fed. 334.

See 10 Cent. Dig. tit. "Constitutional Law," § 756.

4. Robertson *v.* People, 20 Colo. 279, 38 Pac. 326; State *v.* Cunningham, 25 Conn. 195; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819; State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883. But see State *v.* Divine, 98 N. C. 778, 4 S. E. 477, holding invalid N. C. Code, § 2329, providing that whenever any live stock shall be killed by the engines or cars on any of the railroads mentioned, and such killing is proved, it shall be *prima facie* evidence of negligence in any indictment therefor under this chapter.

5. *Connecticut.*—State *v.* Thomas, 47 Conn. 546, 36 Am. Rep. 98; State *v.* Brennan's Liquors, 25 Conn. 278.

Kansas.— State *v.* Sheppard, 64 Kan. 451, 67 Pac. 870.

Kentucky.— Com. *v.* Minor, 88 Ky. 422, 10 Ky. L. Rep. 1008, 11 S. W. 472.

Maine.— State *v.* Day, 37 Me. 244.

Massachusetts.— Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; Com. *v.* Rowe, 14 Gray (Mass.) 47; Com. *v.* Burns, 9 Gray (Mass.) 132.

New York.— Board of Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484.

Rhode Island.— State *v.* Wilson, 15 R. I. 180, 1 Atl. 415; State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

See 10 Cent. Dig. tit. "Constitutional Law," § 756.

6. People *v.* Toynbee, 2 Park. Crim. (N. Y.) 329; State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26.

7. People *v.* Clipperly, 101 N. Y. 634, 4 N. E. 107; People *v.* Eddy, 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 628, 35 N. Y. St. 146; State *v.* Groves, 15 R. I. 208, 2 Atl. 384.

8. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

The refusal of a state court to continue a criminal case on account of the absence of material witnesses residing in another state is not a denial of due process secured by the fourteenth amendment. Minder *v.* Georgia, 183 U. S. 559, 22 S. Ct. 224, 46 L. ed. 328 [*affirming* 113 Ga. 772, 39 S. E. 284].

9. Walters *v.* People, 6 Park. Crim. (N. Y.) 15. And see JURIES.

10. State *v.* Conley, (N. C. 1902) 41 S. E. 543. And see PROSECUTING ATTORNEYS.

11. State *v.* Bloor, 20 Mont. 574, 52 Pac. 611. And see WITNESSES.

12. State *v.* Hopper, 71 Mo. 425. And see HOMICIDE.

13. State *v.* Dobard, 45 La. Ann. 1412, 14 So. 253 (lottery-ticket ordinance); Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597. But see Barter *v.* Com., 3 Penr. & W. (Pa.) 253, holding that a charter authorizing a municipal corporation to pass ordinances giving power to the mayor and aldermen to imprison on summary conviction is unconstitutional and void. See, generally, JURIES.

14. Welborne *v.* Donaldson, 115 Ga. 563, 41 S. E. 999 (holding that a state may provide for criminal juries of five men); Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (sustaining validity of criminal trials in Utah before juries of eight men).

The state may provide that failure to demand a jury in certain cases shall be a waiver of the right, consistently with the fourteenth amendment. *In re* Cox, (Mich. 1902) 89 N. W. 440.

15. See, generally, CRIMINAL LAW.

ments, leaving the choice of penalty in the courts.[16] The legislature may also provide for punishment of death by electrocution, since such is not a cruel and unusual punishment in the sense forbidden by the fourteenth amendment.[17] So to constitute due process it is not necessary that the mode of confinement or of execution of sentence shall be defined with such certainty that the accused may know all details.[18] And generally it is for the states, by their courts or otherwise, to determine the interpretation of their processes, and the question whether, under their own procedure, execution of sentence may be had;[19] but arbitrary action is an unconstitutional deprivation of liberty.[20]

m. New Trial. Regulation of provisions for a new trial is in the hands of the legislature; so it may legally be provided that a motion for a new trial must be filed before judgment, and within four days after the return of the verdict or finding by the court.[21]

n. Review. A right of review in capital cases by an appellate court is not a necessary element of due process of law, but it is wholly within the discretion of each state to refuse it or grant it on terms.[22] And when a prisoner carries his

16. Durham *v.* State, 89 Tenn. 723, 18 S. W. 74.

Commitment for non-payment of costs.— It may be provided that if an accused person elects not to be tried and waives an examination, the judge shall collect from him all costs of the proceedings and shall have power to commit him to jail for non-payment thereof. People *v.* Webb, 16 Hun (N. Y.) 42.

Degree of crime.— A state may distinguish two degrees of a crime, and provide that upon a plea of guilty the court shall proceed by examination of witnesses to determine the degree of the prisoner's crime and to pass sentence accordingly. Hallinger *v.* Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. ed. 986. But when no statutory provisions exist, it is for the jury, not the court, to determine the degree of crime. *In re* Friedrich, 51 Fed. 747.

17. *In re* Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519.

18. McElvaine *v.* Brush, 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971, sustaining N. Y. Code Crim. Proc. §§ 491, 492.

A state may confer on the governor the power of fixing the day on which a convict sentenced to death by a court of competent jurisdiction shall be executed. Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734.

19. Lambert *v.* Barrett, 159 U. S. 660, 16 S. Ct. 135, 40 L. ed. 296 (holding that the fact that a contention by one under sentence of death that the warrant issued by the governor for his execution was unauthorized because issued without authority, after a reprieve for a greater time than was authorized by the state law, was decided adversely to the prisoner, does not involve any denial of due process of law or the infraction of any provision of the United States constitution); *In re* Cross, 146 U. S. 271, 13 S. Ct. 109, 36 L. ed. 969; Schwab *v.* Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. ed. 218; McElvaine *v.* Brush, 142 U. S. 155, 159, 12 S. Ct. 156, 35 L. ed. 971; Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734.

The view of the operation of a judgment or sentence, taken by a state court, is generally binding upon the federal courts, and it was not intended by congress that the courts of the United States should by writs of habeas corpus obstruct the ordinary administration of the criminal laws of the states through their own tribunals. Trezza *v.* Brush, 142 U. S. 160, 12 S. Ct. 160, 35 L. ed. 974 (holding that the court of appeals of New York having decided that an appeal from a conviction of murder in the first degree operates as a stay of the execution only, and not of the solitary confinement, this is controlling upon the supreme court of the United States; and hence a continuance of solitary confinement pending an appeal by the prisoner is the result of his own act, and is not in violation of any right secured by the constitution of the United States); McElvaine *v.* Brush, 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971; Wood *v.* Brush, 140 U. S. 278, 289, 11 S. Ct. 738, 35 L. ed. 505.

20. Gross *v.* Rice, 71 Me. 241; Knox *v.* State, 9 Baxt. (Tenn.) 202.

21. Brooks *v.* Missouri, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454. And see NEW TRIAL.

Where a prisoner is convicted of murder in the second degree under an indictment for first degree murder, and he is retried under a second indictment after reversal of the judgment on appeal for murder in the first degree, such new trial for first degree murder is due process. State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

22. Andrews *v.* Swartz, 156 U. S. 272, 15 S. Ct. 389, 39 L. ed. 422. But see Sullivan *v.* Adams, 3 Gray (Mass.) 476, holding that an act which provides for the conviction of any person by an inferior court without a jury and obstructs the right to appeal therefrom is unconstitutional. See, generally, CRIMINAL LAW.

A change in the personnel of the appellate court, although by constitutional amendment,

case to an appellate court, due process of law does not require that he shall be personally present when the court pronounces judgment, since in case of affirmance it pronounces no new sentence, but merely directs that the sentence already imposed shall be carried into execution.[23]

5. Particular Classes Subject to Restraint — a. Immigrants. So a state may properly, by statute, empower a commissioner of immigration to visit vessels arriving from foreign ports, and to determine finally whether debauched persons are among the passengers, and if such are found to prevent them from landing unless bonds are given to indemnify the authorities against expenses which may be incurred by reason of their infirmities or vices.[24]

b. Incorrigible Youths. For the correction of incorrigible youths, the legislature may legally establish reform schools and regulate commitments thereto after judicial investigation;[25] but arbitrary provisions are invalid.[26]

c. Insane Persons and Inebriates.[27] A person's insanity justifies his arrest without legal process, but only where it is reasonably necessary;[28] and an insane person may be confined, provided there are provisions for judicial investigation and determination of the question of sanity, with an opportunity given to him to be heard.[29] The modes provided for discharge from confinement must be such

after appeal, but before hearing, does not violate the fourteenth amendment. State *v.* Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829.

Discharge by a state court of a writ of habeas corpus does not deny due process, where the commitment sought to be reviewed is not void, since the writ cannot be availed of as an appeal or writ of error. Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91.

The dismissal by a state court of a criminal appeal, after the accused has escaped, pursuant to an order that the appeal should be dismissed unless he should surrender or be recaptured within a specified time, does not deny due process. Allen *v.* Georgia, 166 U. S. 138, 17 S. Ct. 525, 41 L. ed. 949.

Failure to provide that an appeal from an order directing execution in a capital case, made after a final judgment of conviction, shall operate as a stay of execution, does not violate the fourteenth amendment. *In re* Durrant, 84 Fed. 317.

Taking exceptions below.— A state may provide that errors shall be brought before an appellate court only when exceptions have been seasonably taken at the trial. Davis *v.* Texas, 139 U. S. 651, 11 S. Ct. 675, 35 L. ed. 300 [*affirming* 28 Tex. App. 542, 13 S. W. 994].

23. Fielden *v.* Illinois, 143 U. S. 452, 12 S. Ct. 528, 36 L. ed. 224 [*affirming* 128 Ill. 595, 21 N. E. 584]; Schwab *v.* Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. ed. 218.

24. *Ex p.* Ah Fook, 49 Cal. 402. And see Aliens, 2 Cyc. 119.

25. Jarrard *v.* State, 116 Ind. 98, 17 N. E. 912. See also Wilkinson *v.* Board of Children's Guardians, 168 Ind. 1, 62 N. E. 481.

Custody of children.— Parents are entitled to a hearing upon the question of being deprived of the custody of their children. People *v.* New York Catholic Protectory, 3 How. Pr. N. S. (N. Y.) 343. And see Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197.

Justices of the peace may be given authority to commit to a state school any boy who is being, or is in danger of being, brought up to lead an idle or vicious life; and no appeal from such commitment need be allowed. Reynolds *v.* Howe, 51 Conn. 472.

26. State *v.* Ray, 63 N. H. 406, 56 Am. Rep. 529.

27. See, generally, Insane Persons.

28. Keleher *v.* Putnam, 60 N. H. 30, 49 Am. Rep. 304.

29. *California.*— *In re* Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856.

Iowa.— Chavannes *v.* Priestly, 80 Iowa 316, 45 N. W. 766, 9 L. R. A. 193.

Louisiana.— *In re* Ross, 38 La. Ann. 523.

Massachusetts.— *In re* Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290. See also *In re* Le Donne, 173 Mass. 550, 54 N. E. 244.

Minnesota.— State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525.

Mississippi.— Fant *v.* Buchanan, (Miss. 1895) 17 So. 371.

Missouri.— Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206.

New York.—Ayers *v.* Russell, 50 Hun (N. Y.) 282, 3 N. Y. Suppl. 338, 20 N. Y. St. 323; *In re* Janes, 30 How. Pr. (N. Y.) 446.

Rhode Island.— Doyle, Petitioner, 16 R. I. 537, 18 Atl. 159, 27 Am. St. Rep. 752, 5 L. R. A. 359.

United States.— Simon *v.* Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. ed. 1165; Nobles *v.* Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. ed. 515.

See 10 Cent. Dig. tit. "Constitutional Law," § 737.

Pending proceedings for hearing and examination, a probate judge may be authorized to make and enforce reasonable orders for the custody of the alleged insane. Porter *v.*

as can be resorted to directly as of right by the one confined,[30] and are not constitutional if such as to leave the liberty of the person confined to the pleasure of officials, such as prison inspectors.[31]

d. Paupers and Vagrants. By virtue of their inherent sovereignty, both the state and federal governments may control the lives and property of all persons within their jurisdictions who from incompetence or unfitness endanger the welfare of the community; and so may cause to be committed all paupers, vagrants, and idle persons, not having any visible means of support and living without employment.[32]

e. Persons Endangering the Public Health. All persons infected with, or exposed to, dangerous or contagious diseases may be arrested and confined in certain hospitals or other designated places.[33]

E. Deprivation of Property — 1. In General. The term "property"[34] is used in a broad sense in the constitutional guaranty forbidding the deprivation of property without due process of law, and has received a liberal construction analogous in spirit to that applied to "life" and "liberty."[35] All rights to the use, title, and possession of private property are held subject to the right of the legislature to control them, according to the established principles of our jurisprudence, so far as may be necessary for the public welfare, the only limitations upon the legislative power being found in specific and applicable constitutional restrictions.[36]

Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

30. Doyle, Petitioner, 16 R. I. 537, 18 Atl. 159, 27 Am. St. Rep. 752, 5 L. R. A. 359.

31. Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633.

Inebriates.— A state cannot make the term of imprisonment of one committed for intoxication to a workhouse dependent solely upon the *ex parte* determination of the workhouse commissioner and commissioner of correction as to whether he has been previously convicted of a like offense. Matter of Kenny, 23 Misc. (N. Y.) 9, 49 N. Y. Suppl. 1037.

32. People *v.* Forbes, 4 Park. Crim. (N. Y.) 611. And see Poor Persons; Vagrancy.

Pauper children, although not criminal, may be committed to a state industrial school. Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

Poor persons likely to become a public charge may be removed by the authorities to their county of legal settlement. Lovell *v.* Seeback, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667.

33. State *v.* New Orleans, 27 La. Ann. 521; Haverty *v.* Bass, 66 Me. 71. And see Health.

Violating rules of board of health.— The authorities may order the arrest of persons violating rules of the board of health or other sanitary regulations. Cooper *v.* Schultz, 32 How. Pr. (N. Y.) 107.

34. What is property.— A debt (People *v.* Eddy, 43 Cal. 331, 13 Am. Rep. 143), a dog (Lynn *v.* State, 33 Tex. Crim. 153, 25 S. W. 779; Jenkins *v.* Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689. See also Animals, II, A, 1, b [2 Cyc. 305]), intoxicating liquors (Wynehamer *v.* People, 13 N. Y. 378, 12 How. Pr. (N. Y.) 238, 2 Park. Crim. (N. Y.) 421 [*reversing* 20 Barb. (N. Y.) 567]. But see Oviatt *v.* Pond, 29 Conn. 479), an invention secured by letters patent (Brady *v.* Atlantic Works, 107 U. S. 192, 2 S. Ct. 225, 27 L. ed. 438), a privilege to construct and operate a railroad in streets of a city (Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388), a right to become a surety (Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. 470), and a right to damages, as for false imprisonment (Griffin *v.* Wilcox, 21 Ind. 370) have all been held to be property. So a law declaring void a contract between a citizen of one state and a corporation of another, made and to be performed in the other state, insuring property within the former state, contravenes the fourteenth amendment. Western Massachusetts Mut. F. Ins. Co. *v.* Hilton, 42 N. Y. App. Div. 52, 58 N. Y. Suppl. 996.

What is not property.— Anticipated profits (Munn *v.* People, 69 Ill. 80), an office (State Prison *v.* Day, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295; State *v.* Crumbaugh, 26 Tex. Civ. App. 521, 63 S. W. 925; Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. See also Officers), and a license for the sale of intoxicating liquors (La Croix *v.* Fairfield County Com'rs, 50 Conn. 321, 47 Am. Rep. 648; Martin *v.* State, 23 Nebr. 371, 36 N. W. 554. See also Intoxicating Liquors) are not property.

35. See *supra*, XIII, D, 1.

36. Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Boyd *v.* Alabama, 94 U. S. 645, 24 L. ed. 302; Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929. See also Molett *v.* State, 33 Ala. 408; Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691 (Missouri compromise).

Fences, walls, and boundaries.— Laws regulating partition fences, party-walls, the inclosure of woodlands, the ditching and em-

2. CIVIL PROCEEDINGS AND REMEDIES — a. In General. While forms of procedure and practice may be altered, due process requires that the substance of property rights be preserved, and that an opportunity remain to invoke the equal protection of the law by some judicial proceedings adequate and appropriate.[37] The fourteenth amendment does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.[38]

b. Particular Requirements. Due process requires in all cases an impartial tribunal, competent by the law of its creation to pass upon the subject-matter of

banking of meadows, and other like regulations, the object of which is to regulate the management and enjoyment of property by the owners or a majority of them, are old and well settled as valid. Coster *v.* Tide Water Co., 18 N. J. Eq. 54. So the height of existing and future fences may be limited. Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep. 560, 2 L. R. A. 81. It is also competent for the legislature to provide that after a certain time in the future all wire fences facing public highways shall be of round, smooth wire. Com. *v.* Barrett, 13 Ky. L. Rep. 451, 17 S. W. 336. But in Texas the law providing that the owner should erect a gate in each three miles of his fence running in the same general direction was held invalid, since no compensation was provided for. Dilworth *v.* State, 36 Tex. Crim. 189, 36 S. W. 274. See also U. S. *v.* Douglass-William-Sartoris Co., 3 Wyo. 287, 22 Pac. 92.

Forfeiture of lands for non-entry for five successive years may be provided for. State *v.* Swann, 46 W. Va. 128, 33 S. E. 89.

Logs drifting upon another's land.— Henry *v.* Roberts, 50 Fed. 902.

Prohibiting injury to property sold for taxes.— Prentice *v.* Weston, 111 N. Y. 460, 18 N. E. 720, 19 N. Y. St. 279 [*affirming* 47 Hun (N. Y.) 121].

Removal of sand from beach.— Com. *v.* Tewksbury, 11 Metc. (Mass.) 55; Hodges *v.* Perrine, 24 Hun (N. Y.) 516.

Restraining employment of children.— No property right is violated by regulations restraining the employment of children in certain places of amusement. *In re* Ewer, 141 N. Y. 129, 36 N. E. 4, 56 N. Y. St. 668, 25 L. R. A. 794 [*affirming* 70 Hun (N. Y.) 239, 24 N. Y. Suppl. 500, 54 N. Y. St. 348].

The use of billiard tables and bowling alleys in public resorts may be regulated so as to avoid injury to the public morals; but the legislature cannot restrict any one from making or using in private billiard tables. Stevens *v.* State, 2 Ark. 291, 35 Am. Dec. 72. So taxes may be imposed on billiard tables and ten-pin alleys, as a means of preserving good order. Washington *v.* State, 13 Ark. 752. And the use of bowling alleys after six P. M. on Saturday afternoons may be prohibited. Com. *v.* Colton, 8 Gray (Mass.) 488.

Wasteful use of natural gas in flambeaux may be forbidden. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

37. *Connecticut.*— O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547.

Florida.— Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 48 Am. Dec. 178.

Georgia.— Gunn *v.* Hendry, 43 Ga. 556.

Indiana.— Dawson *v.* Shaver, 1 Blackf. (Ind.) 204.

Iowa.— Thoeni *v.* Dubuque, 115 Iowa 482, 88 N. W. 967.

Maryland.— Garrison *v.* Hill, 81 Md. 551, 32 Atl. 191.

Michigan.— Price *v.* Hopkin, 13 Mich. 318.

Missouri.— Clark *v.* Mitchell, 64 Mo. 564.

New York.— Gilman *v.* Tucker, 128 N. Y. 190, 28 N. E. 1040, 40 N. Y. St. 71, 26 Am. St. Rep. 464, 13 L. R. A. 304 [*affirming* 59 N. Y. Super. Ct. 575, 13 N. Y. Suppl. 804, 36 N. Y. St. 1024]; Barnett *v.* Chicago, etc., R. Co., 4 Hun (N. Y.) 114; Jackson *v.* Griswold, 5 Johns. (N. Y.) 139.

Ohio.— West Alexandria, etc., Turnpike Road Co. *v.* Gay, 50 Ohio St. 583, 35 N. E. 308; Salt Creek Valley Turnpike Co. *v.* Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769.

Oklahoma.— Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075.

Pennsylvania.— Byers *v.* Pennsylvania R. Co., 26 Pittsb. Leg. J. N. S. 447.

Tennessee.— State Bank *v.* Cooper, 4 Yerg. (Tenn.) 599, 24 Am. Dec. 516.

United States.— Iowa Cent. R. Co. *v.* Iowa, 100 U. S. 389, 16 S. Ct. 344, 40 L. ed. 467; Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Young *v.* Wempe, 46 Fed. 354. But see Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483, holding that the bar of the statute of limitations may be removed as a defense to an action of contract.

See 10 Cent. Dig. tit. "Constitutional Law," § 925.

38. Salt Creek Valley Turnpike Co. *v.* Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769; Simon *v.* Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. ed. 1165; Lynde *v.* Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810 [*affirming* 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679]; Iowa Cent. R. Co. *v.* Iowa, 160 U. S. 389, 16 S. Ct.

the suit,[39] parties duly brought within the jurisdiction of the court, and an opportunity for each side to contest in person or by counsel the matters in dispute.[40] To render a judgment *in personam* against one within the state valid, there must be service of process upon him within the state or his voluntary appearance.[41] A judgment *in personam* against a non-resident who is out of the state and who does not voluntarily appear cannot be validly based upon publication of process or of notice in the state in which the tribunal sits, nor can the process of one state validly run into another so as to give jurisdiction.[42] But where property of a non-resident is brought under the control of the court by attachment or equivalent act, a judgment *in rem* may be rendered which will bind that property if notice is given by substituted service by publication or in some other authorized form.[43] If the non-resident has no property within the state, there is nothing

344, 40 L. ed. 467; Ludeling *v.* Chaffe, 143 U. S. 301, 12 S. Ct. 439, 36 L. ed. 313; Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225.

39. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

The remote contingent interest which a judge may have with the rest of the public in liquors forfeited does not disqualify him from sitting. State *v.* Intoxicating Liquors, 54 Me. 564.

40. *Alabama.*— Betancourt *v.* Eberlin, 71 Ala. 461.

Connecticut.— Bostwick *v.* Isbell, 41 Conn. 305.

Illinois.— Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782.

Iowa.— Boyd *v.* Ellis, 11 Iowa 97.

Kentucky.— Burnam *v.* Com., 1 Duv. (Ky.) 210.

New Jersey.— Harker *v.* Brink, 24 N. J. L. 333.

New York.—Continental Nat. Bank *v.* U. S. Book Co., 143 N. Y. 648, 37 N. E. 828, 60 N. Y. St. 873 [*affirming* 74 Hun (N. Y.) 632, 26 N. Y. Suppl. 956, 57 N. Y. St. 226]; Happy *v.* Mosher, 48 N. Y. 313; Campbell *v.* Evans, 45 N. Y. 356.

North Carolina.— Den *v.* Adams, 6 N. C. 161.

Pennsylvania.— Wynkoop *v.* Cooch, 89 Pa. St. 450.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Mehlin *v.* Ice, 56 Fed. 12, 5 C. C. A. 403; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722.

See 10 Cent. Dig. tit. "Constitutional Law," § 929.

41. *Connecticut.*— Berlin *v.* New Brittain, 9 Conn. 175.

Minnesota.— McNamara *v.* Casserly, 61 Minn. 335, 63 N. W. 880; Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152.

New York.— People *v.* Ryder, 65 Hun (N. Y.) 175, 19 N. Y. Suppl. 977, 47 N. Y. St. 492, 22 N. Y. Civ. Proc. 388; Martin *v.* Central Vermont R. Co., 50 Hun (N. Y.) 347, 3 N. Y. Suppl. 82, 30 N. Y. St. 375.

Pennsylvania.— Ervine's Appeal, 16 Pa. St. 256, 55 Am. Dec. 499.

Rhode Island.— Doyle, Petitioner, 16 R. I. 537, 18 Atl. 159, 27 Am. St. Rep. 759, 5 L. R. A. 359.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761.

See 10 Cent. Dig. tit. "Constitutional Law," § 929.

42. *California.*— See Ware *v.* Robinson, 9 Cal. 107.

Delaware.— Caldwell *v.* Armour, 1 Pennew. (Del.) 545, 43 Atl. 517.

Iowa.— Reed *v.* Wright, 2 Greene (Iowa) 15.

Louisiana.— Hobson *v.* Peake, 44 La. Ann. 383, 10 So. 762.

Massachusetts.— Martin *v.* Kittredge, 144 Mass. 13, 10 N. E. 710; Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603.

Tennessee.— Kemper-Thomas Paper Co. *v.* Shyer, (Tenn. 1902) 67 S. W. 856.

Texas.— Reid *v.* Mickles, (Tex. Civ. App. 1895) 29 S. W. 563.

United States.— Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Webster *v.* Reid, 52 U. S. 437, 13 L. ed. 761; Brooks *v.* Dun, 51 Fed. 138; Sumner *v.* Marcy, 3 Woodb. & M. (U. S.) 105, 23 Fed. Cas. No. 13,609.

See 10 Cent. Dig. tit. "Constitutional Law," § 929.

Personal service on a non-resident infant is not necessary in probate court proceedings for the appointment of a guardian for his estate, where a notice on the next of kin is provided. Kurtz *v.* West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132; Kurtz *v.* St. Paul, etc., R. Co., 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657.

43. *Massachusetts.*— Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337; Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Ocean Ins. Co. *v.* Portsmouth Marine R. Co., 3 Metc. (Mass.) 420.

New York.— Happy *v.* Mosher, 48 N. Y. 313.

Pennsylvania.— Philadelphia *v.* Jenkins, 162 Pa. St. 451, 29 Atl. 794; Luther *v.* Fowler, 1 Grant (Pa.) 176.

upon which either a judgment *in personam* or *in rem* can be validly based.[44] The federal constitution imposes, by the seventh amendment, the necessity in the federal courts of allowing trial by jury in suits at common law involving property rights exceeding twenty dollars in value, but this amendment does not apply to the states.[45] As the fourteenth amendment was not intended to control procedure in the states they may, except so far as specially limited by local constitutions or other provisions of local law, dispense with jury trials in all civil actions;[46] and may prescribe such rules of procedure as they see fit, the only constitutional limitation upon their power being that fundamental and established rights must be preserved.[47]

3. CONFISCATION OF PROPERTY. In general vested property cannot be confiscated by the legislature;[48] and no person can be deprived of his property without legal

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147.

Vermont.— Hogle *v.* Mott, 62 Vt. 255, 20 Atl. 276, 22 Am. St. Rep. 106.

United States.— Rothschild *v.* Knight, 184 U. S. 334, 22 S. Ct. 391, 46 L. ed. 573 [*affirming* 176 Mass. 48, 57 N. E. 337]; King *v.* Cross, 175 U. S. 396, 20 S. Ct. 131, 44 L. ed. 211; Chicago, etc., R. Co. *v.* Sturn, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144; Sugg *v.* Thornton, 132 U. S. 524, 10 S. Ct. 163, 33 L. ed. 447; Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

See 10 Cent. Dig. tit. "Constitutional Law," § 929.

But upon a judgment in rem the state cannot provide that in case of insufficiency of the property attached a general execution may issue "in all respects as in other cases." Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603.

Proceedings in rem against vessels have been sustained, although notice to the owner was not provided for. Keating *v.* Spink, 3 Ohio St. 105, 62 Am. Dec. 214; The John Owen *v.* Johnson, 2 Ohio St. 142; Thompson *v.* The Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658; Luther *v.* Fowler, 1 Grant (Pa.) 176.

44. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

45. Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372. *Compare In re* Sing Lee, 54 Fed. 334, holding that the provision of the Chinese exclusion act of May 5, 1892, for summary proceedings before a commissioner for the deportation of unauthorized persons, is not, by reason of its failure to allow a jury trial, open to the objection that it fails to provide due process of law. See also Hilton *v.* Merritt, 110 U. S. 97, 3 S. Ct. 548, 28 L. ed. 83, holding that the denial of a jury trial to determine the right to recovery of duties paid under an alleged excessive valuation did not deprive the importer of property without due process, proper administration of the taxing power demanding uniform appraisal and review by commissioners.

46. *Iowa.*— *In re* Bradley, 108 Iowa 476, 79 N. W. 280; McKeever *v.* Jenks, 59 Iowa 300, 13 N. W. 295.

Kentucky.—Harrison *v.* Chiles, 3 Litt. (Ky.) 194; Garnett *v.* Jennings, 19 Ky. L. Rep. 1712, 44 S. W. 382.

New York.— Astor *v.* New York, 37 N. Y. Super. Ct. 539.

Pennsylvania.— White *v.* Thielens, 106 Pa. St. 173; North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488, 82 Am. Dec. 530; *In re* Northern Liberty Hose Co., 13 Pa. St. 193.

South Carolina.— Murray *v.* Alston, 1 Mill (S. C.) 128.

United States.— Wilson *v.* State, 169 U. S. 586, 18 S. Ct. 435, 42 L. ed. 865; Church *v.* Kelsey, 121 U. S. 282, 7 S. Ct. 897, 30 L. ed. 960; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Columbia Bank *v.* Okely, 17 U. S. 235, 4 L. ed. 559.

See 10 Cent. Dig. tit. "Constitutional Law," § 933; and JURIES.

47. *California.*— High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121.

Michigan.— Parsons *v.* Russell, 11 Mich. 113, 83 Am. Dec. 728.

New York.— Follett Wool Co. *v.* Albany Terminal Warehouse Co., 61 N. Y. App. Div. 296, 70 N. Y. Suppl. 474; Butler *v.* Palmer, 1 Hill (N. Y.) 324.

North Carolina.— Barnes *v.* Barnes, 53 N. C. 366.

West Virginia.— Harness *v.* Babb, 22 W. Va. 315; Griffee *v.* Halstead, 19 W. Va. 602; Williams *v.* Freeland, 19 W. Va. 599; White *v.* Crump, 19 W. Va. 583; Peerce *v.* Kitzmiller, 19 W. Va. 564.

United States.— Iowa Cent. R. Co. *v.* Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. ed. 467; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

See 10 Cent. Dig. tit. "Constitutional Law," § 934.

48. Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

A commanding officer of the militia has no lawful authority, even in time of war, to impress the horse of a citizen. Jacobs *v.* Lever-

investigation and adjudication.[49] But congress may determine what property of the public enemy shall be confiscated.[50]

4. Creation of Liability — a. For Negligence of Servant.[51] The state may enlarge the liability of a master for the negligence of a servant, provided the master is given a fair opportunity to contest.[52]

b. For Injuries From Defective Highway.[53] Municipal corporations may be made liable for defects in highways, as highways are for public and not for local use, and the fact that the officials charged with the duty of maintaining the highways are not agents of the municipality is immaterial.[54]

c. For Property Destroyed by Mob. The people of the local divisions of a state may be required to pay for any damages done to property within such local divisions, and such an act is not a taking of property without due process of law.[55]

d. For Damages by Animals.[56] The owner of animals may be charged with liability for damage done by them, but he is entitled to a judicial determination of the extent of liability.[57]

e. For Cost of Party-Wall.[58] The state cannot provide that the owner of land shall without compensation permit his neighbor to set one half of his partition wall upon the former's land, and that when the former shall build he shall pay for one half of such partition wall, so far as it shall be built against.[59]

f. Of Owner For Acts of Another. As an owner of property may under the police power be absolutely prohibited from allowing his property to be used in a manner harmful to the public comfort and health, the state may prescribe reasonable conditions upon him in permitting his use for such purposes, and so one leasing his property for the sale of intoxicating liquor may be made directly liable for all injuries caused by such sales[60] or may be held secondarily responsible for

ing, 2 Cranch C. C. (U. S.) 117, 13 Fed. Cas. No. 7,162.

49. Cotter *v.* Doty, 5 Ohio 393.

50. Knœfel *v.* Williams, 30 Ind. 1; Atherton *v.* Johnson, 2 N. H. 31; Page *v.* U. S., 11 Wall. (U. S.) 268, 20 L. ed. 135; The Ned, Blatchf. Prize Cas. (U. S.) 119, 17 Fed. Cas. No. 10,078. But see Norris *v.* Doniphan, 4 Metc. (Ky.) 385, holding that under the act of congress of July 17, 1862, proceedings considered to be for the seizure of property of the public enemy must be confined to properties employed in maintaining war against the United States. And see Clark *v.* Mitchell, 64 Mo. 564, holding unconstitutional the act of congress of March 3, 1863, in so far as it purports to authorize confiscation during the Civil war of debts due from one citizen to another. See also Hodgson *v.* Millward, 3 Grant (Pa.) 406, holding that the act of Congress of Aug. 6, 1861, requiring the president in certain cases to cause certain property "to be seized, confiscated, and condemned" did not authorize such action except by due process of law; and that a mere order issued by the district attorney, under which a marshal seized a newspaper establishment and proceedings were instituted for forfeiture, was no justification to the marshal. See, generally, War.

Detention of vessel in port.— The detention of a vessel in port by the president, under the act of congress of April 30, 1818, authorizing the detention of vessels built for warlike purposes and about to depart, when circumstances render it probable that they are intended to commit hostilities against a friendly power, is an arrest by due process of law. Graham *v.* U. S., 2 Ct. Cl. 327.

51. See, generally, Master and Servant.

52. Levick *v.* Norton, 51 Conn. 461.

53. See, generally, Streets and Highways.

54. Bidwell *v.* Murray, 40 Hun (N. Y.) 190.

55. Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. (N. Y.) 352, 88 Am. Dec. 248; Davidson *v.* New York, 2 Rob. (N. Y.) 230, 27 How. Pr. (N. Y.) 342.

Subjecting a county to a five-thousand-dollar liability to the legal representatives of one lynched by a mob, without allowing the county the benefit of a hearing, is invalid. Mitchell *v.* Champaign County, 5 Ohio N. P. 158.

56. See, generally, Animals.

57. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692.

58. See, generally, Party-Walls.

59. Wilkins *v.* Jewett, 139 Mass. 29, 29 N. E. 214. *Contra*, Larche *v.* Jackson, 9 Mart. (La.) 724, holding that the territorial legislature had a right to enact that part of the civil code which confers upon him who builds first, in a place not surrounded by walls, the right to place one half of his wall upon the land of his neighbor. And see Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462.

60. Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. St. Rep. 323, holding that the act of April 29, 1873, is constitutional.

damages assessed against the occupant on account of such traffic;[61] but the owner of property, the ordinary use of which is beneficial to the public, cannot be made liable for the negligence of one not a servant or occupying a similar relation.[62]

g. Of Railroads[63] — (i) *For Failure to Fence Right of Way.* In consideration of the valuable franchises granted to railroads and by virtue of its police power, the state may require railroads to construct and maintain without compensation fences along their right of way, and may provide for allowance of damages from diminution in value of farms resulting from failure to fence;[64] may hold a railroad company liable for damages occasioned by or resulting from an accident or collision, unless the company shows that the statutory requirements have been performed by it;[65] and may provide that where a railroad fails to keep its way fenced as specified by law, it shall be liable for the amount of all damages resulting from injuries to stock getting upon the tracks because of defects in the fences.[66]

(ii) *For Fire Set by Locomotive.* The state may provide that every railroad company operating within the state shall be liable, irrespective of negligence, for damages caused by fire from its locomotives.[67]

(iii) *For Injury to Passenger and Employee.* Railroads may be made liable for injuries to passengers except where the injury arises from the criminal negligence of the person injured or when the injury complained of results from violation of some expressed rule or regulation of said road actually brought to the passenger's notice,[68] and may be made liable to their employees for all damages occasioned by negligence or mismanagement of their agents.[69]

61. Dugan *v.* Neville, 49 Ohio St. 462, 31 N. E. 1080; Mullen *v.* Peck, 49 Ohio St. 447, 31 N. E. 1077; Blakeny *v.* Green, 8 Ohio Dec. (Reprint) 570, 15 Cinc. L. Bul. 143.

62. Camp *v.* Rogers, 44 Conn. 291, holding void, as taking property without due process of law, Conn. Gen. Stat. p. 234, § 21, which provides that the driver of any vehicle meeting another on the highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner or any person in it or the property of any person shall pay to the injured person treble damages, and that the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages.

63. See, generally, RAILROADS.

A connecting carrier may be made liable for damages to freight done on the line of the initial carrier, where the freight was shipped under a contract for through carriage within the state, acquiesced in and acted upon by the connecting carrier. Texas, etc., R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

64. Minneapolis, etc., R. Co. *v.* Nelson, 149 U. S. 368, 13 S. Ct. 871, 37 L. ed. 772; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364, 13 S. Ct. 870, 37 L. ed. 769.

65. Louisville, etc., R. Co. *v.* Burke, 6 Coldw. (Tenn.) 45.

66. Sullivan *v.* Oregon R., etc., Co., 19 Oreg. 319, 24 Pac. 408; Texas Cent. R. Co. *v.* Childress, 64 Tex. 346; Quackenbush *v.* Wisconsin, etc., R. Co., 71 Wis. 472, 37 N. W. 834, 62 Wis. 411, 22 N. W. 519; Missouri Pac. R. Co. *v.* Terry, 115 U. S. 523, 6 S. Ct. 114, 29 L. ed. 467; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463, providing that double damages may be assessed on the railroad. And see Louisville, etc., R. Co. *v.* Belcher, 89 Ky. 193, 11 Ky. L. Rep. 393, 12 S. W. 195.

67. *Colorado.*— Union Pac. R. Co. *v.* Tracy, 19 Colo. 331, 35 Pac. 537; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Union Pac. R. Co. *v.* Arthur, 2 Colo. App. 159, 29 Pac. 1031.

Maine.— Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Missouri.— Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175; Matthews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 579, 52 Pac. 944.

South Carolina.—Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; Lipfeld *v.* Charlotte, etc., R. Co., 41 S. C. 285, 19 S. E. 497; McCandless *v.* Richmond, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440.

See 10 Cent. Dig. tit. "Constitutional Law," § 856.

68. Chicago, etc., R. Co. *v.* Hambel, (Nebr. 1902) 89 N. W. 643; Union Pac. R. Co. *v.* Porter, 38 Nebr. 226, 56 N. W. 808; Chicago, etc., R. Co. *v.* Eaton, 183 U. S. 589, 22 S. Ct. 228, 46 L. ed. 341 [*affirming* 59 Nebr. 698, 82 N. W. 1119]; Chicago, etc., R. Co. *v.* Zernecke, 183 U. S. 582, 22 S. Ct. 229, 46 L. ed. 339 [*affirming* 59 Nebr. 689, 82 N. W. 26].

69. Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109; Missouri Pac. R. Co. *v.* Mackay, 127 U. S.

(IV) *For Killing Animal.* The state may impose an absolute statutory duty to perform certain acts, as to fence the way, and may provide that irrespective of questions of negligence breach of such statutory duty shall entitle the owner to damages for loss of animals killed;[70] but it cannot create an absolute liability for damage, irrespective of negligence in a railroad, and without imposing any statutory duty.[71] A railroad can be held liable only when its negligence or its breach of duty and the extent of the damage attending the injury have been judicially determined.[72]

(V) *For Services Rendered to Employee.* The state may require railroads to pay reasonable expenses incurred in assuring the public safety in travel, and so may require them to pay the fees for medical examination of employees in regard to color blindness.[73]

205, 8 S. Ct. 1161, 32 L. ed. 107. *Compare* Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485, holding valid Mo. Laws (1897), c. 96, defining the liabilities of railroads in relation to damages sustained by their employees and stating who are fellow servants.

70. Chicago, etc., R. Co. *v.* Reidy, 66 Ill. 43; Texas Cent. R. Co. *v.* Childress, 64 Tex. 346; Quackenbush *v.* Wisconsin, etc., R. Co., 71 Wis. 472, 37 N. W. 834, 62 Wis. 411, 22 N. W. 519.

71. *Alabama.*—Birmingham Mineral R. Co. *v.* Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92, 27 L. R. A. 263.

Colorado.— Union Pac. R. Co. *v.* Kerr, 19 Colo. 273, 35 Pac. 47; Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. Rep. 309, 23 L. R. A. 812; Rio Grande Western R. Co. *v.* Whitson, 4 Colo. App. 426, 36 Pac. 159; Rio Grande Western R. Co. *v.* Chamberlain, 4 Colo. App. 149, 34 Pac. 1113; Rio Grande Western R. Co. *v.* Vaughn, 3 Colo. App. 465, 34 Pac. 264; Denver, etc., R. Co. *v.* Outcalt, 2 Colo. App. 395, 31 Pac. 177.

Idaho.— Cateril *v.* Union Pac. R. Co., 2 Ida. 540, 21 Pac. 416.

Montana.— Thompson *v.* Northern Pac. R. Co., 8 Mont. 279, 21 Pac. 25; Bielenberg *v.* Montana Union R. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813.

Utah.— Jensen *v.* Union Pac. R. Co., 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724.

Washington.— Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; Oregon R., etc., Co. *v.* Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. Rep. 143 [*overruling* Oregon R., etc., Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415].

Wyoming.— Schenck *v.* Union Pac. R. Co., 5 Wyo. 430, 40 Pac. 840.

See 10 Cent. Dig. tit. "Constitutional Law," § 855.

72. South, etc., Alabama R. Co. *v.* Morris, 65 Ala. 193; Zeigler *v.* South, etc., Alabama R. Co., 58 Ala. 594; Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. Rep. 309, 23 L. R. A. 812; Rio Grande Western R. Co. *v.* Whitson, 4 Colo. App. 426, 36 Pac. 159.

73. Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 S. Ct. 28, 32 L. ed. 352. *Contra,* Louisville, etc., R. Co. *v.* Baldwin, 85 Ala. 619, 5 So. 311, 7 L. R. A. 266.

For services rendered to passenger.— Liability of railroads must be founded on negligence or violation of statutory duty. So the Illinois act of 1885, making railroad companies liable for all expenses of a coroner and his inquest and the burial of all persons who may die on its cars or who may be killed by collision, or other accident occurring to such cars or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law and have been guilty of no negligence. Ohio, etc., R. Co. *v.* Lackey, 78 Ill. 55, 20 Am. Rep. 259.

Imposition of fees and costs in certain railroad cases.—Minn. Gen. Stat. (1894), §§ 2660, 2661, allowing reasonable attorney's fees to plaintiff in ejectment for land taken by a railroad company, without compensation, for its right of way, is not unconstitutional, as depriving the railroad of its property without due process of law. Cameron *v.* Chicago, etc., R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553. Tex. Laws (1889), c. 107, § 1, providing that where a claim not exceeding fifty dollars for stock killed by a railway shall be presented, etc., and not paid within thirty days, the claimant may recover in addition to the claim the fee of an attorney if one is employed not exceeding ten dollars is not in violation of the bill of rights (section 19), providing that property, etc., shall not be taken without due process of law. Gulf, etc., R. Co. *v.* Ellis, (Tex. 1892) 18 S. W. 723, 17 L. R. A. 286.

Liability for salaries of certain public officers.— The entire expenses of railroad commissions may be placed upon the railroads operating within the state, since the business is affected with a public interest, and the exercise of powers by a commission is not only beneficial to the public but also to the railroads (Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051 [*affirming* 27 S. C. 385, 4 S. E. 49]); and the salaries of commissioners of electrical subways may be made payable by companies constructing or operating electrical subways (New York *v.* Squire, 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666 [*af-*

h. Right of Action of Parent For Injury to Child.[74] A parent may be authorized to maintain an action in his own name for injury to his minor child, and such right does not, either as to the child or the defendant, take property without due process of law.[75]

i. Penalties.[76] The state may impose penalties as a means of enforcing its right of control over business affected with a public interest. It may so punish for exceeding legal charges for transportation[77] or for delay in the transportation of goods;[78] may authorize recovery against a railroad company of double damages for stock killed by its negligence or breach of statutory duty;[79] or may penalize insurance companies for failure to pay losses promptly.[80] Penalties may be used to assist in executing license and revenue laws[81] and in general to enforce police regulations.[82]

firming 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893]).

Liability of prevailing party for costs.— N. Y. Code Civ. Proc. § 709, providing that where a warrant of attachment is vacated or annulled, or the attachment is discharged upon the application of the defendant, the sheriff shall deliver the property to the defendant upon payment of his fees, is not unconstitutional, as requiring the payment of fees by defendant for which he is not liable. Union Distilling Co. *v.* Union Pharmaceutical Co., 56 N. Y. Super. Ct. 417, 6 N. Y. Suppl. 539. But see the earlier case of Bowe *v.* U. S. Reflector Co., 36 Hun (N. Y.) 407.

74. See, generally, PARENT AND CHILD.

75. Lathrop *v.* Schutte, 61 Minn. 196, 63 N. W. 493.

76. See, generally, PENALTIES.

77. Burkholder *v.* Union Trust Co., 82 Mo. 572.

78. Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347.

79. Memphis, etc., R. Co. *v.* Horsfall, 36 Ark. 651; Cairo, etc., R. Co. *v.* Warrington, 92 Ill. 157; Cairo, etc., R. Co. *v.* Peoples, 92 Ill. 97, 34 Am. Rep. 112; Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723; Welch *v.* Chicago, etc., R. Co., 53 Iowa 632, 6 N. W. 13 [*following* Jones *v.* Galena, etc., R. Co., 16 Iowa 6]; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585. But see *contra*, Atchison, etc., R. Co. *v.* Baty, 6 Nebr. 37, 29 Am. Rep. 356.

80. Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; New York Fidelity, etc., Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364.

81. State *v.* Moss, 69 Mo. 495; *In re* Lyman, 59 N. Y. App. Div. 217, 69 N. Y. Suppl. 309 [*affirming* 32 Misc. (N. Y.) 210, 67 N. Y. Suppl. 48]; Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463; Passavant *v.* U. S., 148 U. S. 214, 13 S. Ct. 572, 37 L. ed. 426. But see *Ex p.* Nightingale, 12 Fla. 272, holding that the act of July 31, 1868, relating to the licensing of stevedores, and which provides that "any person found violating the intent . . . of this act, shall be guilty of a fraud, and shall be adjudged to be indebted to the Board of Commissioners of Pilotage in the sum of three hundred dollars, a d the court shall enter judgment therefor," is invalid so far as it enacts that the debt to the commissioners shall be a judgment, without requiring defendant to be summoned to answer. And see McBride *v.* State Revenue Agent, 70 Miss. 716, 12 So. 699, holding that Miss. Code (1892), § 1590, providing that any person who shall sell liquors unlawfully shall be subject to pay a certain penalty, which the sheriff or state revenue agent shall assess and collect whenever he is informed that such sales have been made, is in violation of the constitutional provision declaring that no person shall be deprived of his property except by due course of law.

82. Black *v.* Stein, 23 Nebr. 302, 36 N. W. 548; Craig *v.* Gerrish, 58 N. H. 513. And see McFarland *v.* McKnight, 6 B. Mon. (Ky.) 500.

A penal statute may validly provide that one half the penalty shall go to the prosecutor. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

Judicial determination of liability to pay penalty is necessary. State *v.* Allen, 2 McCord (S. C.) 55.

Mortgagor selling without written consent of holder of the debt may be penalized. State *v.* Heldenbrand, 62 Nebr. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

Penalty for refusing to accept public office. — A statute imposing a penalty for refusing to qualify and serve in a town office to which one has been duly appointed or elected does not violate a constitutional provision that "no person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or in any manner deprived of his life, liberty or property, but by the law of the land." London *v.* Headen, 76 N. C. 72.

Refusal of paid mortgagee to discharge the mortgage may be punished by penalty. Clearwater Bank *v.* Kurkonski, 45 Nebr. 1, 63 N. W. 133.

Wrongful order for payment of public moneys.— Cal. Stat. (1883), p. 300, § 8, provided that whenever a board of supervisors shall without authority of law order any money paid as salary of fees, and such money shall have been actually paid, it may be recovered back in a suit in the name of the county against the person to whom it was

j. Liens.[83] Liens may be created in favor of those who add by labor or materials to the value of property by consent of or authority from the owner, and rights of action may also be created on such grounds against the owner.[84]

5. Discharge of Liability — a. In General. The fourteenth amendment protects every species of property alike, except such as in its nature and origin is subject to legislative control; so vested rights cannot be impaired without compensation, although the state may affect remedies.[85] Ordinarily an existing right of action or a judgment cannot be destroyed or substantially impaired,[86] nor can a person be adversely affected by substitution of parties.[87] But liabilities of municipal corporations may in some cases be validly placed in abeyance by restricting the

paid, together with twenty per cent damages for the use thereof. It was held that the provision for the recovery of such damages is not unconstitutional as taking property without due process of law. Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594.

83. See, generally, Liens.

84. See, generally, the following cases:

California.— Hicks *v.* Murray, 43 Cal. 515, mechanic's lien. But see Stimson Mill Co. *v.* Braun, 136 Cal. 122, 68 Pac. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726; Gibbs *v.* Tally, 133 Cal. 373, 65 Pac. 970 [*reversing* (Cal. 1900) 63 Pac. 168], holding invalid a requirement that the owner give a bond to be used against him by those with whom he had had no dealings.

Indiana.— Barrett *v.* Millikan, 156 Ind. 510, 60 N. E. 310, 83 Am. St. Rep. 220; Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 635, lien for labor or materials.

Iowa.— Brown Shoe Co. *v.* Hunt, 103 Iowa 586, 72 N. W. 765, 64 Am. St. Rep. 198, 39 L. R. A. 291, hotel-keeper's lien.

Massachusetts.— Hart *v.* Boston, etc., R. Co., 121 Mass. 510.

Michigan.— Crane Lumber Co. *v.* Bellows, 117 Mich. 482, 76 N. W. 67.

Minnesota.— Brown *v.* Markham, 60 Minn. 233, 62 N. W. 123, 30 L. R. A. 84 (logger's lien); Stapp *v.* Steam-Boat Clyde, 43 Minn. 192, 45 N. W. 430 (lien for supplies to vessel).

Mississippi.— Richardson *v.* Warwick, 7 How. (Miss.) 131, lien for labor or materials.

Missouri.— Henry, etc., Co. *v.* Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332, lien to subcontractors and others.

Nevada.—Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373, lien to miners, mechanics, and others.

New York.— Glacius *v.* Black, 67 N. Y. 563 (lien for labor or materials); Blauvelt *v.* Woodworth, 31 N. Y. 285 (mechanic's lien); Hauptman *v.* Catlin, 3 E. D. Smith (N. Y.) 666.

South Dakota.— Albright *v.* Smith, 2 S. D. 577, 51 N. W. 590, mechanic's lien.

Tennessee.—Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S. W. 1045, lien for work or materials.

Washington.— Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421; McCoy *v.* Cook, 13 Wash. 158, 42 Pac. 546, logger's lien.

Owners are presumed to contract with reference to existing lien laws, and so to consent to liens in favor of subcontractors and others with whom they may have had no direct dealings. Bardwell *v.* Mann, 46 Minn. 285, 48 N. W. 1120; Laird *v.* Moonan, 32 Minn. 358, 20 N. W. 354; Bohn *v.* McCarthy, 29 Minn. 23, 11 N. W. 127. *Contra*, Quimby *v.* Hazen, 54 Vt. 132.

For provisions relating to liens held invalid as being arbitrary or amounting to confiscation see Randolph *v.* Builders', etc., Supply Co., 106 Ala. 501, 17 So. 721; Mellis *v.* Race, 78 Mich. 80, 43 N. W. 1033; John Spry Lumber Co. *v.* Sault Sav. Bank, etc., Co., 77 Mich. 199, 43 N. W. 778, 18 Am. St. Rep. 396, 6 L. R. A. 204; Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777; Brooks *v.* Tayntor, 17 Misc. (N. Y.) 534, 40 N. Y. Suppl. 445; Creech *v.* Pittsburg, etc., R. Co., 11 Ohio Dec. (Reprint) 764, 29 Cinc. L. Bul. 112.

85. Scammon *v.* Commercial Union Assur. Co., 6 Ill. App. 551; Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559; De Cordova *v.* Galveston, 4 Tex. 470.

As to vested rights generally see *supra*, VIII.

Liabilities of discharged receiver.— The Texas act of March 19, 1889, providing that when a receiver is discharged and the property restored to the owner without sale the owner shall be liable for all unpaid liabilities of the receiver does not deprive such owner of property without due process of law. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272.

86. *Illinois.*—Scammon *v.* Commercial Union Assur. Co., 6 Ill. App. 551.

Iowa.— Thoeni *v.* Dubuque, 115 Iowa 482, 88 N. W. 967.

Maryland.— Williams *v.* Johnson, 30 Md. 500, 96 Am. Dec. 613.

Michigan.— Price *v.* Hopkin, 13 Mich. 318.

New York.— Livingston *v.* Livingston, 74 N. Y. App. Div. 261, 77 N. Y. Suppl. 476.

Pennsylvania.— Byers *v.* Pennsylvania R. Co., 26 Pittsb. Leg. J. N. S. 447.

United States.— Campbell *v.* Holt, 115 U. S. 620, 623, 6 S. Ct. 209, 29 L. ed. 483. But see authorities *contra* in dissenting opinion.

See 10 Cent. Dig. tit. "Constitutional Law," § 867.

87. Maish *v.* Littleton, 62 Iowa 105, 17 N. W. 182; Sunberg *v.* Babcock, 61 Iowa 601, 16 N. W. 716; Foule *v.* Mann, 53 Iowa 42,

only sources of revenue to such sums as are inadequate to pay obligations;[88] and the state may require that owners shall comply with recording acts in order to retain their rights against others, such acts not amounting to a taking without due process.[89]

b. For Acts Done Under Military Authority. The principle of law exists independently of constitutional or statutory provisions that for acts done in accordance with the usages of civilized warfare there is no personal liability, so legislation providing for discharge from any supposed liability of such a nature is valid.[90]

6. Destruction of Property to Prevent Conflagration. When there is reasonable ground to believe it necessary, it is lawful to destroy property to prevent conflagration.[91]

7. Impairment of Value of Grants and Franchises. Property rights legally vested under grants or franchises cannot be controlled or destroyed by any subsequent statute, unless power for that purpose be reserved to the legislature;[92] and this principle applies not only to natural persons but to private corporations.[93] But the legislature cannot by any grant or franchise deprive itself of the power of making any needful police regulations, the police power being inalienable even by express grant.[94] Even municipal corporations, although their charters are in no sense contracts, are protected by the constitution in the property which they rightfully acquire for local purposes, and the state cannot despoil them of it.[95] Since the decision in the Dartmouth College case,[96] it has become customary for legislatures to reserve to themselves the power to alter, amend, or repeal cor-

3 N. W. 814. But see Hein *v.* Davidson, 66 How. Pr. (N. Y.) 354 [*reversed* in 96 N. Y. 175, 47 Am. Rep. 612].

88. Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936.

89. Vance *v.* Vance, 108 U. S. 514, 2 S. Ct. 854, 27 L. ed. 808.

90. Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268; Freeland *v.* Williams, 131 U. S. 405, 9 S. Ct. 763, 33 L. ed. 193; Clark *v.* Dick, 1 Dill. (U. S.) 8, 5 Fed. Cas. No. 2,818, 8 Am. L. Reg. N. S. 739.

91. Conwell *v.* Emrie, 2 Ind. 35; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420. But see Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282, 34 How. Pr. (N. Y.) 147.

92. *California.*— Lathrop *v.* Mills, 19 Cal. 513.

Kentucky.— Hamilton *v.* Keith, 5 Bush (Ky.) 458.

Louisiana.— Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453.

Massachusetts.— Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

North Carolina.— State University *v.* Foy, 5 N. C. 58, 3 Am. Dec. 672.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450. See also Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

Tennessee.— Williams *v.* Register, Cooke (Tenn.) 214.

Texas.— Wright *v.* Hawkins, 28 Tex. 452.

United States.—Greenwood *v.* Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961.

See 10 Cent. Dig. tit. "Constitutional Law," § 763.

When privilege has been granted subject to certain conditions revocation must be accompanied by judicial process. Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388; Baltimore *v.* Pittsburg, etc., R. Co., 1 Abb. (U. S.) 9, 2 Fed. Cas. No. 827, 4 Am. L. Reg. N. S. 750, 6 Phila. (Pa.) 190, 23 Leg. Int. (Pa.) 308, 3 Pittsb. (Pa.) 20, 13 Pittsb. Leg. J. (Pa.) 576. But see Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549.

93. State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Cass County *v.* Morrison, 28 Minn. 257, 9 N. W. 761; U. S. *v.* Minnesota, etc., R. Co., 1 Minn. 127; Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 25 L. ed. 496; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Georgia Cent. R. Co. *v.* Macon, 110 Fed. 865.

Provision for payment to legal representatives of a police officer from a fund in case of his death creates no vested right in the officer, and repeal of the law deprives him of no property without due process of law. Pennie *v.* Reis, 80 Cal. 266, 22 Pac. 176.

94. Charleston *v.* Goldsmith, 2 Speers (S. C.) 428; New Orleans Gas-Light Co. *v.* Louisiana light, etc., Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. ed. 516; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

As to police power see *supra*, VI.

95. Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 5 N. W. 275; People *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; State *v.* Haben, 22 Wis. 660; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

96. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

porate privileges;[97] and although the limits upon this reserved power are not yet well settled, there is no well-considered case in which it has been held that a legislature under its power to amend a charter might take from a corporation any of its substantial property or property rights.[98]

8. Inspection of Property. Laws requiring articles to be inspected, weighed, or measured before being sold are valid,[99] and vendors may be required to furnish samples gratuitously to aid enforcement of such regulations,[1] and provision may be made by which, on application of an interested person, an inspection of property shall be made, in order to ascertain, enforce, or protect such person's rights.[2]

9. Municipal Aid to Corporations. In the absence of specific constitutional restrictions, municipal corporations may be authorized to subscribe to the stock of a railroad corporation,[3] to issue bonds in payment for subscriptions,[4] and to use

97. Myrick *v.* Brawley, 33 Minn. 377, 23 N. W. 549; Fox *v.* Cincinnati, 104 U. S. 783, 26 L. ed. 928; Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 25 L. ed. 496; Baltimore *v.* Pittsburg, etc., R. Co., 1 Abb. (U. S.) 9, 2 Fed. Cas. No. 827, 4 Am. L. Reg. N. S. 750, 6 Phila. (Pa.) 190, 23 Leg. Int. (Pa.) 308, 3 Pittsb. (Pa.) 20, 13 Pittsb. Leg. J. (Pa.) 576.

98. Com. *v.* Essex Co., 13 Gray (Mass.) 239; Detroit *v.* Detroit, etc., Plank Road Co., 43 Mich. 140, 5 N. W. 275; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; Rochester, etc., Turnpike Road Co. *v.* Joel, 41 N. Y. App. Div. 43, 58 N. Y. Suppl. 346; *In re* Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 24 L. ed. 836.

Under the power to alter or amend charters the legislature cannot, without the assent of all shareholders, change fundamentally the character of the business or the method of running it. Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. *Compare* Dickinson *v.* Consolidated Traction Co., 114 Fed. 232, holding that the exercise of corporate rights given by the law of the state creating a corporation, against the will of a dissenting minority shareholder, is not a taking of his property without due process, because by joining the corporation he assented to such acts.

99. Gaines *v.* Coates, 51 Miss. 335. And see Inspection.

Disinfection and quarantine.— The state may, in protection of the lives, health, and comfort of the community, authorize a board of health or other police official or set of officials to remove all suspected vessels and persons to a quarantine ground, and there subject them to fumigation and control. And the owners of property involved may be compelled to bear the expense of such precautionary measures. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113. And see Health.

1. State *v.* Du Paquier, 46 La. Ann. 577, 15 So. 502, 49 Am. St. Rep. 334, 26 L. R. A. 162 (sustaining a city ordinance requiring vendors of milk to furnish gratuitously, on application of sanitary inspectors, samples of milk, not exceeding one half pint, for inspection and analysis); Com. *v.* Carter, 132 Mass. 12 (sustaining a statute authorizing milk inspectors to enter all milk carts, and when thought necessary, to take samples for analysis).

2. Montana Co. *v.* St. Louis Min., etc., Co., 152 U. S. 160, 14 S. Ct. 506, 38 L. ed. 398 [*affirming* 9 Mont. 288, 23 Pac. 510], holding that a statute authorizing the court upon petition of a party having interest in a mine, after due notice and hearing, to order an inspection thereof when necessary for ascertaining, enforcing, or protecting the petitioner's rights is not invalid as a taking of property without due process of law, although it does not define the right or interest of the petitioner, require him to give bond, or provide for a jury trial or an appeal.

3. *Alabama.*— Gibbons *v.* Mobile, etc., R. Co., 36 Ala. 410.

California.— Napa Valley R. Co. *v.* Napa County, 30 Cal. 435.

Indiana.— Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

Michigan.— See People *v.* State Treasurer, 23 Mich. 499.

New York.— Grant *v.* Courter, 24 Barb (N. Y.) 232.

Ohio.— Knox County Com'rs *v.* Nichols, 14 Ohio St. 260; Steubenville, etc., R. Co. *v.* North Tp., 1 Ohio St. 105. But see Griffith *v.* Crawford County Com'rs, 20 Ohio 609.

Pennsylvania.— Com. *v.* Perkins, 43 Pa. St. 400; Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

United States.— Tipton County *v.* Rogers Locomotive, etc., Works, 103 U. S. 523, 26 L. ed. 340; Chicago, etc., R. Co. *v.* Otoe, County, 16 Wall. (U. S.) 667, 21 L. ed. 375.

See 10 Cent. Dig. tit. "Constitutional Law," § 775; and Municipal Corporations.

But authorizing towns, by gifts of money, to assist individuals or corporations to establish or carry on business would be in violation of the constitution which provides that no person shall be deprived of property but by the judgment of his peers or the law of the land. Opinion of Justices, 58 Me. 590.

4. Gibson *v.* Mason, 5 Nev. 283; Grant *v.* Courter, 24 Barb. (N. Y.) 232; Pine Grove

the taxing power in aid of railroads,[5] such provisions not amounting to a taking of the private property of the persons affected for private uses.

10. Nuisances. Rights of private property are subservient to the public right to be free from nuisances, which may be regulated or abated without compensation to the owner of the offending property.[6] The abatement may be as prompt and as summary as in the judgment of the authorities is necessary; and although notice and opportunity to be heard affecting private interests should when practicable be given before abatement, yet no right of property is invaded if either before or after abatement the existence and extent of the nuisance may be made the subjects of a determination judicial in character.[7] The authorities may also legalize uses of property which are nuisances for which an action would otherwise lie in favor of private persons or of the community; and such acts do not deprive any person of property without due process of law.[8]

11. Performance of Service Without Compensation. Physicians and midwives may be compelled under penalty to report without compensation, births, deaths, and cases of certain diseases.[9] Persons solemnizing marriages may also be

Tp. *v.* Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227. But see Sweet *v.* Hulbert, 51 Barb. (N. Y.) 312.

5. Napa Valley R. Co. *v.* Napa County, 30 Cal. 435; Chicago, etc., R. Co. *v.* Shea, 67 Iowa 728, 25 N. W. 901; Snell *v.* Leonard, 55 Iowa 553, 8 N. W. 425; Renwick *v.* Davenport, etc., R. Co., 47 Iowa 511; Stewart *v.* Polk County Sup'rs, 30 Iowa 9, 1 Am. Rep. 238; Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227. But see Hanson *v.* Vernon, 27 Iowa 28, 1 Am. Rep. 215.

6. *Georgia.*— Dunbar *v.* Augusta, 90 Ga. 390, 17 S. E. 907.

Indiana.— Bepley *v.* State, 4 Ind. 264, 58 Am. Dec. 628.

Iowa.— McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327; Pontius *v.* Bowman, 66 Iowa 88, 23 N. W. 277; Pontius *v.* Winebrenner, 65 Iowa 591, 22 N. W. 646; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

Maryland.— Sprigg *v.* Garrett Park, 89 Md. 406, 43 Atl. 813.

Massachusetts.— Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

New Jersey.— Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251.

New York.— People *v.* Board of Health, 58 Hun (N. Y.) 595, 12 N. Y. Suppl. 561, 35 N. Y. St. 411; Coe *v.* Schultz, 2 Abb. Pr. N. S. (N. Y.) 193; Weil *v.* Schultz, 33 How. Pr. (N. Y.) 7.

See 10 Cent. Dig. tit. "Constitutional Law," § 779; and Nuisances.

Pollution of water-courses.— All persons may be forbidden to allow substances deleterious to fish or to the public health, comfort, or safety, to be placed in any water-courses of the jurisdiction. Blydenburgh *v.* Miles, 39 Conn. 484. And when a reservoir is supplied by streams, the casting of foul matter into any such supplying streams may be forbidden, notwithstanding evidence that the stream would purify itself before reaching the reservoir. State *v.* Wheeler, 44 N. J. L. 88.

7. *Iowa.*— Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

Massachusetts.— Stone *v.* Heath, 179 Mass. 385, 60 N. E. 975; Cambridge *v.* Munroe, 126 Mass. 496; Taunton *v.* Taylor, 116 Mass. 254; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Belcher *v.* Farrar, 8 Allen (Mass.) 325; Com. *v.* Howe, 13 Gray (Mass.) 26.

Mississippi.— Quintini *v.* Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

New Jersey.— Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251.

New York.— Cartwright *v.* Cohoes, 165 N. Y. 631, 59 N. E. 1120; People *v.* Board of Health, 58 Hun (N. Y.) 595, 12 N. Y. Suppl. 561, 35 N. Y. St. 411; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282; People *v.* Krushaw, 31 How. Pr. (N. Y.) 344 note; Holt *v.* Excise Com'rs, 31 How. Pr. (N. Y.) 334 note.

Texas.— Chambers *v.* Gilbert, 17 Tex. Civ. App. 106, 42 S. W. 630.

But see Baldwin *v.* Smith, 82 Ill. 162, holding invalid any ordinance or law which authorizes the authorities of a town to close a saloon or grocery store by force, without having it first judicially declared a nuisance and ordered to be abated. And see Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301, holding that a town ordinance declaring all intoxicating liquors kept within the town limits to be a nuisance if kept for the purpose of being sold or given away as a beverage, and which directed the police officers of the town to abate the nuisance by removing the liquor beyond the town limits, could not authorize such officers to seize and carry away such property until it had been judicially determined whether the ordinance had been violated.

See 10 Cent. Dig. tit. "Constitutional Law," § 779; and Nuisances.

8. Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27 (sustaining an act which nullified an injunction previously granted to a plaintiff obtained in a private action for a nuisance created by ringing of factory bells, and making no provision for compensation to said plaintiff); Bancroft *v.* Cambridge, 126 Mass. 438.

9. State *v.* Wordin, 56 Conn. 216, 14 Atl. 801; Robinson *v.* Hamilton, 60 Iowa 134, 14 N. W. 202, 46 Am. Rep. 63.

required gratuitously to report marriages.[10] But physicians or surgeons cannot be required to testify to professional opinion without compensation in advance.[11] The state may compel performance of service in some cases, where the only compensation is indirect.[12]

12. Place of Residence. Except where public necessity, acting through a reasonable exercise of some such power as that of police or of eminent domain, requires removal from a certain locality, all persons may maintain homes wherever they wish; and arbitrary interference with this right violates the constitution.[13]

13. Property Kept, Sold, or Used in Violation of Law. Property kept in violation of law may be taken on search warrant,[14] but some particular person must be charged with violation of the law;[15] and the owner must have specific information of the proceedings, and is entitled to a judicial determination of the question of liability.[16] And property kept, sold, or used in violation of law may be forfeited or destroyed, if notice and judicial determination are provided for before final disposition of the property.[17]

14. Property of State. A state may dispose of the public property of the state without compensation.[18]

15. Public Improvements — a. In General. The legislature has a broad power to provide for public improvements either by direct action or by the establishment of boards or districts, and may in many cases legally require that the expense of such shall be borne in part or wholly by a part of the community, through local or special taxation.[19] Special assessments are laid by virtue of the

As to compelling attorney to act without compensation see Attorney and Client, 4 Cyc. 924.

10. State *v.* Madden, 81 Mo. 421.

11. Dills *v.* State, 59 Ind. 15; Buchman *v.* State, 59 Ind. 1, 26 Am. Rep. 75.

12. Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306, holding constitutional a statute which compelled all persons living within two miles of a certain turnpike road, and who were liable by law to work on public roads, to perform six days' labor on said road in each and every year, as they were by the same statute exempted from payment of toll for passing over said road.

Improvement of streets.— Municipal corporations may be compelled to improve streets, although the act makes no provision for assessments of benefits and damages occasioned by such improvements. Ray *v.* Jeffersonville, 90 Ind. 567.

13. *In re* Lee Sing, 43 Fed. 359, holding invalid an ordinance requiring all Chinese inhabitants to remove from the portion of the city heretofore occupied by them to another designated place.

14. Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594; Hibbard *v.* People, 4 Mich. 125; State *v.* Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586; Kansas *v.* Bradley, 26 Fed. 289; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

15. Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

16. Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594; Hibbard *v.* People, 4 Mich. 125; Kramer *v.* Marks, 64 Pa. St. 151; Greene *v.* Briggs, 1 Curt. (U. S.) 311, 10 Fed. Cas. No. 5,764, 15 Law Rep. 614.

A distress warrant issued by a government officer to seize property under the laws for collection of internal revenue is due process of law. Mason *v.* Rollins, 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

17. *California.*— Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

Connecticut.— Oviatt *v.* Pond, 29 Conn. 479; State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan's Liquors, 25 Conn. 278.

Illinois.— Frost *v.* People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352.

Indiana.— State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

Maine.— Gray *v.* Kimball, 42 Me. 299.

Maryland.—Board of Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423, 52 L. R. A. 775.

Massachusetts.— Com. *v.* Clapp, 5 Gray (Mass.) 97; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

Missouri.—Lowry *v.* Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

United States.— Greene *v.* James, 2 Curt. (U. S.) 187, 10 Fed. Cas. No. 5,766.

See 10 Cent. Dig. tit. "Constitutional Law," § 778.

Sale of property without notice to owner for violation of a police regulation is arbitrary and invalid. So an ordinance directing a sale of property left upon a levee beyond a certain length of time with no provision for hearing or notice to the owner is not due process. Rost *v.* New Orleans, 15 La. 129, 35 Am. Dec. 186; Lanfear *v.* New Orleans, 4 La. 97, 23 Am. Dec. 477.

18. Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; People *v.* Long Island R. Co., 60 How. Pr. (N. Y.) 395.

19. *California.*— German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac.

taxing power, not under the power of eminent domain, and must be paid because the government laying them has decided the contribution due for public purposes; and the amount of the assessment is not controlled or determined by the extent of special benefits received.[20] The weight of judicial authority is that unless there are some special constitutional restraints it is a question of legislative expediency whether the expense of improvements shall be met out of the general treasury, or whether the cost shall be assessed upon the abutting property or other property specially benefited; and if in the latter mode whether the assessment shall be upon all property found to be benefited or only upon the abutters, estimated according to frontage, valuation, or area of the lots.[21] There is, however, considerable authority sustaining the view that taxation by special assessments is permissible under state constitutions and under the United States consti-

1067; Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554, 34 Pac. 239.

Colorado.— Farmers' Independent Ditch Co. *v.* Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444, 55 Am. St. Rep. 149.

Idaho.— Pioneer Irr. Dist. *v.* Bradbury, (Ida. 1902) 68 Pac. 295.

Indiana.— Ross *v.* Davis, 97 Ind. 79.

Louisiana.— Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873.

Maryland.—Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; Alexander *v.* Baltimore, 5 Gill (Md.) 383, 46 Am. Dec. 630.

Massachusetts.— Butler *v.* Worcester, 112 Mass. 541.

Michigan.— Roberts *v.* Smith, 115 Mich. 5, 72 N. W. 1091.

Minnesota.— Duluth *v.* Dibblee, 62 Minn. 18, 63 N. W. 1117; Hennepin County *v.* Bartleson, 37 Minn. 343, 34 N. W. 222.

Mississippi.— Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

Nebraska.— Kountze *v.* Omaha, 63 Nebr. 52, 88 N. W. 117; Board of Directors *v.* Collins, 46 Nebr. 411, 64 N. W. 1086.

New Hampshire.— Webster *v.* Alton, 29 N. H. 369.

New Jersey.— Brittin *v.* Blake, 36 N. J. L. 442.

New York.— Howell *v.* Buffalo, 37 N. Y. 267; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Striker *v.* Kelly, 7 Hill (N. Y.) 9.

Vermont.— Woodhouse *v.* Burlington, 47 Vt. 300.

Wisconsin.—Meggett *v.* Eau Claire, 81 Wis. 326, 51 N. W. 566; State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637; Johnson *v.* Milwaukee, 40 Wis. 315.

United States.— Lent *v.* Tillson, 140 U. S. 316, 11 S. Ct. 825, 35 L. ed. 419 [*affirming* 72 Cal. 404, 14 Pac. 71]; Spencer *v.* Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 L. ed. 763 [*affirming* 100 N. Y. 585, 3 N. E. 682]; Wurts *v.* Hoagland, 114 U. S. 606, 5 S. Ct. 1086, 29 L. ed. 229; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569; Garrison *v.* New York City, 21 Wall. (U. S.) 196, 22 L. ed. 612.

See 10 Cent. Dig. tit. "Constitutional Law," § 870.

20. Spencer *v.* Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 L. ed. 763; Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616.

21. *California.*— San Francisco Paving Co. *v.* Bates, 134 Cal. 39, 66 Pac. 2.

Illinois.— White *v.* People, 94 Ill. 604.

Indiana.— Martin *v.* Wills, 157 Ind. 153, 60 N. E. 1021.

Iowa.— Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568, 89 N. W. 7; Hackworth *v.* Ottumwa, 114 Iowa 467, 87 N. W. 424.

Kentucky.— Augusta *v.* Taylor, 23 Ky. L. Rep. 1647, 65 S. W. 837; Barfield *v.* Louisville, 23 Ky. L. Rep. 1102, 64 S. W. 959.

Minnesota.— Ramsey County *v.* Robert P. Lewis Co., (Minn. 1901) 86 N. W. 611.

New York.— People *v.* Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372 [*affirming* 64 N. Y. App. Div. 316, 72 N. Y. Suppl. 191]; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

West Virginia.— Dancer *v.* Mannington, 50 W. Va. 322, 40 S. E. 475.

Wisconsin.— Dickson *v.* Racine, 61 Wis. 545, 21 N. W. 620.

United States.—King *v.* Portland, 184 U. S. 61, 22 S. Ct. 290, 46 L. ed. 431 [*affirming* 38 Oreg. 402, 63 Pac. 2, 55 L. R. A. 812]; Carson *v.* Brockton Sewer Com'rs, 182 U. S. 398, 21 S. Ct. 860, 45 L. ed. 1151 [*affirming* 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277]; Shumate *v.* Heman, 181 U. S. 402, 21 S. Ct. 645, 45 L. ed. 916, 922 [*affirming* 156 Mo. 534, 57 S. W. 559]; Webster *v.* Fargo, 181 U. S. 394, 21 S. Ct. 623, 45 L. ed. 912, 916; Tonawanda *v.* Lyon, 181 U. S. 389, 21 S. Ct. 609, 45 L. ed. 908; French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879; Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943; Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; Paulsen *v.* Portland, 149 U. S. 30, 13 S. Ct. 750, 37 L. ed. 637; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544; Spencer *v.* Merchant, 125 U. S. 345, 8 S. Ct. 345, 31 L. ed. 763; Minnesota, etc., Land, etc., Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 70; Zehnder *v.* Barber Asphalt Paving Co., 108 Fed. 570; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269.

See 10 Cent. Dig. tit. "Constitutional Law," § 870; and MUNICIPAL CORPORATIONS.

tution only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits.[22]

b. Levy and Collection of Assessments — (I) *In General.* Taxation for a local purpose cannot be sustained if the law authorizing it be unconstitutional, even though the tax be voted by a majority;[23] and the sale of land to satisfy a void assessment which the legislature has unconditionally attempted to validate is a taking of property without due process of law.[24] A municipality authorized by statute to assess expense of local improvements upon persons benefited may legally cause apportionment of such persons to be made by commissioners;[25] and a municipality may be authorized to create liens upon land upon which valid taxes are unpaid.[26] The state has full power over the creation of taxing districts, which may be made for certain purposes small portions of cities, and may provide that the total expense of local improvements within such districts shall be assessed upon residents therein.[27]

(II) *Notice or Opportunity to Be Heard* — (A) *Necessity.* Before special taxes or assessments can become a fixed and permanent charge on the property of individuals they must have had notice of the assessment or some opportunity to be heard and to contest the validity and fairness of such.[28] Pro-

Non-abutting property may be assessed for improvements to streets. Ray *v.* Jeffersonville, 90 Ind. 567.

22. *California.*— Taylor *v.* Palmer, 31 Cal. 240.

Maine.—Dyar *v.* Farmington Village Corp., 70 Me. 515.

Massachusetts.— Tileston *v.* Boston St. Com'rs, 182 Mass. 325, 65 N. E. 380; Warren *v.* Boston St. Com'rs, 181 Mass. 6, 62 N. E. 951; Stark *v.* Boston, 180 Mass. 293, 62 N. E. 375; Sears *v.* Boston St. Com'rs, 180 Mass. 274, 62 N. E. 397; Dexter *v.* Boston, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306; Sears *v.* Boston St. Com'rs, 173 Mass. 350, 53 N. E. 876; Sears *v.* Boston, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834; Weed *v.* Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Boston *v.* Boston, etc., R. Co., 170 Mass. 95, 49 N. E. 95; Norwood *v.* New York, etc., R. Co., 161 Mass. 259, 37 N. E. 199; Mt. Auburn Cemetery *v.* Cambridge, 150 Mass. 12, 22 N. E. 66, 4 L. R. A. 836; Dorgan *v.* Boston, 12 Allen (Mass.) 223; Wright *v.* Boston, 9 Cush. (Mass.) 233.

Michigan.— Thomas *v.* Gain, 35 Mich. 155, 24 Am. Rep. 535.

New Jersey.— New Brunswick Rubber Co. *v.* New Brunswick St., etc., Com'rs, 38 N. J. L. 190; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

New York.— Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Sharpe *v.* Speir, 4 Hill (N. Y.) 76.

Pennsylvania.— Erie *v.* Russell, 148 Pa. St. 384, 23 Atl. 1102; Wistar *v.* Philadelphia, 111 Pa. St. 604, 4 Atl. 511; Orphan Asylum's Appeal, 111 Pa. St. 135, 3 Atl. 217; Seely *v.* Pittsburgh, 82 Pa. St. 360, 22 Am. Rep. 760; *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255; Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

Texas.— Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. 848, 71 Am. St. Rep. 884, 45 L. R. A. 289.

Vermont.— Barnes *v.* Dyer, 56 Vt. 469.

Virginia.— Norfolk *v.* Chamberlain, 89 Va. 196, 16 S. E. 730.

United States.— Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Fay *v.* Springfield, 94 Fed. 409.

See 10 Cent. Dig. tit. "Constitutional Law," § 870; and MUNICIPAL CORPORATIONS.

23. Anderson *v.* Hill, 54 Mich. 477, 29 N. W. 549.

24. Brady *v.* King, 53 Cal. 44.

25. Alexander *v.* Baltimore, 5 Gill (Md.) 383, 46 Am. Dec. 630.

26. Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

27. Hilliard *v.* Asheville, 118 N. C. 845, 24 S. E. 738, holding constitutional a charter which makes each street or portion of a street improved a taxing district, by requiring the cost of the total improvement on each street or portion of a street improved to be ascertained, and one third thereof assessed on the property abutting on each side of the street, proportioned according to the "frontage" of each owner, and provides means whereby each property-owner may contest his assessment.

Hearing for dissenting voters in organization of taxing or improvements districts, see *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755.

28. *California.*— Hutson *v.* Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. 549, 21 Pac. 435.

Colorado.— Hallett *v.* Denver, 4 Colo. L. Rep. 565.

Georgia.— Augusta *v.* King, 115 Ga. 454, 41 S. E. 661.

Indiana.— Kizer *v.* Winchester, 141 Ind. 694, 40 N. E. 265; Garvin *v.* Daussman, 114

ceedings in violation of these principles will be enjoined.[29] It has been held, however, that the act authorizing the assessment need not expressly provide for notice.[30]

(B) *Requisites and Sufficiency.* The legislature has broad power in determining what the notice or mode of hearing shall be;[31] and it has been held due

Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Scott *v.* Brackett, 89 Ind. 413.

Iowa.— Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510; Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605; Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886.

Kansas.— Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781.

Maryland.— Ulman *v.* Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224; Baltimore *v.* Scharf, 54 Md. 499. But see Baltimore *v.* Ulman, 79 Md. 469, 30 Atl. 43.

Michigan.—Sligh *v.* Grand Rapids, 84 Mich. 497, 47 N. W. 1093.

Missouri.— Springfield *v.* Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Kansas City *v.* Duncan, 135 Mo. 571, 37 S. W. 513.

New Jersey.— Tims *v.* Newark, 25 N. J. L. 399.

New York.— Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; People *v.* Henion, 64 Hun (N. Y.) 471, 19 N. Y. Suppl. 488, 46 N. Y. St. 71. But see Hennessey *v.* Volkening, 30 Abb. N. Cas. (N. Y.) 100, 22 N. Y. Suppl. 528 [*distinguishing* Remsen *v.* Wheeler, 105 N. Y. 573, 12 N. E. 564].

North Carolina.— Gamble *v.* McCrady, 75 N. C. 509.

Ohio.— Anderson *v.* Cincinnati, 10 Ohio Dec. (Reprint) 794, 23 Cinc. L. Bul. 430.

Pennsylvania.— Rutherford's Case, 72 Pa. St. 82, 13 Am. Rep. 655.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382.

Wisconsin.— Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500. See also Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213.

United States.— Goodrich *v.* Detroit, 184 U. S. 432, 22 S. Ct. 397, 46 L. ed. 627 [*affirming* 123 Mich. 559, 82 N. W. 255]; Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; Paulsen *v.* Portland, 149 U. S. 30, 13 S. Ct. 750, 37 L. ed. 637 [*affirming* 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673]; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Murdock *v.* Cincinnati, 39 Fed. 891; Scott *v.* Toledo, 36 Fed. 385, 1 L. R. A. 688.

See 10 Cent. Dig. tit. "Constitutional Law," § 872; and MUNICIPAL CORPORATIONS.

Waiver of notice.—An owner of land abutting on a street, by petitioning for its improvement and agreeing not only to pay his own assessments but also to answer for any deficiency in the collectability of the assessments against other abutting owners, waives his right to notice or an opportunity to be heard before the assessments are levied. Murdock *v.* Cincinnati, 44 Fed. 726.

29. Murdock *v.* Cincinnati, 39 Fed. 891.

30. *Iowa.*— Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510.

Kansas.— Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781.

New Jersey.— Tims *v.* Newark, 25 N. J. L. 399.

North Carolina.— Gamble *v.* McCrady, 75 N. C. 509.

Oregon.— Wilson *v.* Salem, 24 Oreg. 504, 34 Pac. 691.

United States.— Paulsen *v.* Portland, 149 U. S. 30, 13 S. Ct. 750, 37 L. ed. 637 [*affirming* 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673].

See 10 Cent. Dig. tit. "Constitutional Law," § 872.

The only requirement is that at some time before the liability is finally enforced the property-owner shall be afforded an opportunity to question the amount of the assessment and the validity of the proceedings. Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886; Kansas City *v.* Huling, 87 Mo. 203; Skinkle *v.* Essex Public Road Bd., 47 N. J. L. 93.

31. Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781; Barfield *v.* Louisville, 23 Ky. L. Rep. 1102, 64 S. W. 959; Wilson *v.* Karle, 42 N. J. L. 612.

Personal service is not necessary. Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771; Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781; Kinkade *v.* Witherop, 29 Wash. 10, 69 Pac. 399. Notice by publication has been held sufficient to validate proceedings *in rem*. Crall *v.* Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797. And publishing notice of intention to make a public improvement, its character, and posting the same near the land affected have been held to constitute due process of law. Wulzen *v.* San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17. See also Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71, holding that persons affected are charged with notice provided for by statute, so that newspaper publication is sufficient. And see Johnson *v.* Lewis, 115 Ind. 490, 18 N. E. 7.

Notice before assessment.— It is not material that the person charged has no notice before the assessment.

California.— Reclamation Dist. No. 108 *v.* Evans, 61 Cal. 104.

Delaware.—English *v.* Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158.

Indiana.— Johnson *v.* Lewis, 115 Ind. 490, 18 N. E. 7; Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637.

process where there was an inquiry before a jury of six men, which was to view the premises and assess the damages, coupled with a right of appeal to the highest court in the state;[32] where the owners aggrieved may appear to contest at each stage of the proceedings;[33] where an appeal may be taken from the reports or determinations of officials;[34] where the only method of enforcing the tax was by a suit against the owner;[35] or where the owner after execution issued is permitted to file an affidavit denying the validity of any part of the assessment, with opportunity for hearing.[36] And generally where property-owners have a chance to resist the assessment in a suit or otherwise there is no violation of the fourteenth amendment.[37] An act is not invalid because the owners assessed have no right to be heard as to the appointment of assessors or to appeal from such appointment.[38]

16. Qualifications For Office. The legislature may provide that not more than two of the three persons constituting a board or commission shall belong to the same political party.[39]

17. Regulation of Trades, Professions, and Business — a. In General. The general right to engage person or property in any trade, profession, or business is subject to the power inherent in the state to make all rules and regulations respecting the use and enjoyment of property rights necessary for the preservation of the public health, morals, comfort, order, and safety; and such regulations do not deprive owners of property without due process of law.[40] The

Missouri.— Kansas City *v.* Huling, 87 Mo. 203; St. Louis *v.* Richeson, 76 Mo. 470.

New York.— Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 21 N. Y. Suppl. 147, 49 N. Y. St. 161.

Ohio.— Caldwell *v.* Carthage, 49 Ohio St. 334, 31 N. E. 602.

Pennsylvania.— Harrisburg *v.* McPherran, 200 Pa. St. 343, 49 Atl. 988.

See 10 Cent. Dig. tit. "Constitutional Law," § 873.

32. Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436.

33. Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771.

34. Davis *v.* Lake Shore, etc., R. Co., 114 Ind. 364, 16 N. E. 639; Fries *v.* Brier, 111 Ind. 65, 11 N. E. 958; State *v.* Johnson, 105 Ind. 463, 5 N. E. 553; Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213; State *v.* Oshkosh, 84 Wis. 548, 54 N. W. 1095.

35. Saxton Nat. Bank *v.* Carswell, 126 Mo. 430, 29 S. W. 279; St. Louis *v.* Richeson, 76 Mo. 470; Schenectady *v.* Union College, 66 Hun (N. Y.) 179, 21 N. Y. Suppl. 147, 49 N. Y. St. 161; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544 [*affirming* 86 Ky. 492, 9 Ky. L. Rep. 819, 5 S. W. 546].

36. Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

37. Pioneer Irr. Dist. *v.* Bradbury, (Ida. 1902) 68 Pac. 295; McEneney *v.* Sullivan, 125 Ind. 407, 25 N. E. 540; Caldwell *v.* Carthage, 49 Ohio St. 334, 31 N. E. 602. And see Gillette *v.* Denver, 21 Fed. 822.

Trial by jury.— A statute regulating public improvements is not unconstitutional because it provides for the assessment of benefits otherwise than by a jury. Grace *v.* Board of Health, 135 Mass. 490.

38. Kelly *v.* Minneapolis City, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92.

39. Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 33 N. Y. St. 55, 9 L. R. A. 579 [*affirming* 51 Hun (N. Y.) 637, 3 N. Y. Suppl. 674, 20 N. Y. St. 984]. And see Officers.

Test oath acts.—An oath may be required of an attorney, the purpose of which is to purge himself of a former bearing of arms against the government. *Ex p.* Quarrier, 4 W. Va. 210; *Ex p.* Hunter, 2 W. Va. 122. But the test oath required by the act of congress of Jan. 24, 1865, and the act of congress of July 2, 1862, for practice in federal courts, barring all who had borne arms against the government, was held to be unconstitutional. *In re* Shorter, 28 Fed. Cas. No. 12,811. So an oath barring from a constitutional convention all who had borne arms against the state was held to be invalid. Green *v.* Shumway, 39 N. Y. 418. An oath of fidelity to the federal and state constitutions, and to perform the duties of office faithfully may be exacted. *In re* Attorney's Oaths, 20 Johns. (N. Y.) 492. And an oath may be required of voters and office-holders that they are not believers in polygamy. Wooley *v.* Watkins, 2 Ida. 555, 22 Pac. 102.

40. *Ex p.* Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Robinson *v.* Haug, 71 Mich. 38, 38 N. W. 668; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

Making or mending burglars' tools, or having such in possession may be forbidden. *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726.

power to regulate extends to the property rights of all persons and corporations, domestic and foreign;[41] and the time and mode of passing title may be controlled so as to protect lawful owners or to insure obedience to law.[42] The sale of any article the use of which is detrimental to the health or morals of the community may be regulated.[43] Adulteration or dilution of articles used for food may be regulated, and the state may prohibit the adulteration of dairy products and fraud in the sale thereof;[44] may prohibit the manufacture or sale of oleomargarine or of any substance made in imitation of butter;[45] may require that substitutes for butter shall be plainly marked or otherwise distinguished;[46] or may require that all milk sold shall be undiluted[47] or unadulterated,[48] and pre-

41. Compagnie Francaise, etc., *v.* Louisiana State Bd. of Health, 186 U. S. 380, 22 S. Ct. 811, 46 L. ed. 1209. And see American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

Requiring convict-made goods to be labeled.—A law requiring convict-made goods to be labeled as such when exposed for sale is unconstitutional, as depriving persons of property, etc., without due process of law, since it applies to certain goods purchased before its enactment. People *v.* Hawkins, 10 Misc. (N. Y.) 65, 31 N. Y. Suppl. 115, 63 N. Y. St. 399.

Sale and redemption of railroad tickets.—The legislature may require owners of railroads to provide each ticket agent with a certificate of authority and to redeem tickets wholly or partly unused, and may forbid persons not having certificates to sell such tickets excepting to the railroads. Com. *v.* Keary, 198 Pa. St. 500, 48 Atl. 472; Com. *v.* Wilson, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484. And see Burdick *v.* People, 149 Ill. 600, 611, 36 N. E. 948, 952, 41 Am. St. Rep. 329, 24 L. R. A. 152. But see People *v.* Caldwell, 168 N. Y. 671, 61 N. E. 1132 [*affirming* 64 N. Y. App. Div. 46, 71 N. Y. Suppl. 654], holding that providing that no person shall sell railroad tickets as a broker unless authorized by certificate from the railroad whose ticket is sold is an unconstitutional interference with a legitimate business.

Vessels, harbors, and wharves.—A state may establish lines in harbors beyond which no wharf shall be extended or maintained. Com. *v.* Alger, 7 Cush. (Mass.) 53. It may provide that certain parts of harbors shall be set apart for the exclusive use of certain kinds of vessels during such periods as accommodation is required. Roosevelt *v.* Godard, 52 Barb. (N. Y.) 533; Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349.

42. Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128; State *v.* Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; Mason *v.* Rollins, 32 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

43. *Georgia.*— Badkins *v.* Robinson, 53 Ga. 613.

Louisiana.— State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224.

Maine.— State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782.

Maryland.—State *v.* Broadbelt, 89 Md. 565, 43 Atl. 771, 73 Am. St. Rep. 201, 45 L. R. A. 433.

Michigan.— Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116. See also People *v.* Rotter, (Mich. 1902) 91 N. W. 167.

Nevada.— State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

New York.— People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 54 N. Y. St. 809, 36 Am. St. Rep. 668 [*affirming* 63 Hun (N. Y.) 306, 18 N. Y. Suppl. 25, 43 N. Y. St. 427]; Mullins *v.* People, 24 N. Y. 399, 23 How. Pr. (N. Y.) 289; Bell *v.* Gaynor, 14 Misc. (N. Y.) 334, 36 N. Y. Suppl. 122, 71 N. Y. St. 71.

North Carolina.— State *v.* Muse, 20 N. C. 463.

Rhode Island.— State *v.* Read, 12 R. I. 137.

United States.— Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599; *Ex p.* Yung Jon, 28 Fed. 308.

See 10 Cent. Dig. tit. "Constitutional Law," § 826.

44. Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638; Walker *v.* Com., (Pa. 1887) 11 Atl. 623.

45. *Maryland.*—McAllister *v.* State, 72 Md. 390, 20 Atl. 143.

Michigan.— People *v.* Rotter, (Mich. 1902) 91 N. W. 167.

Minnesota.— State *v.* Horgan, 55 Minn. 183, 56 N. W. 688.

Missouri.—State *v.* Addington, 12 Mo. App. 214.

Pennsylvania.— McCann *v.* Com., 198 Pa. St. 509, 48 Atl. 470; Com. *v.* Paul, 148 Pa. St. 559, 24 Atl. 78.

United States.— Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 22 S. Ct. 120, 46 L. ed. 171 [*affirming* 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181]; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253 [*affirming* 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350]; *In re* Brosnahan, 4 McCrary (U. S.) 1, 18 Fed. 62.

See 10 Cent. Dig. tit. "Constitutional Law," § 827.

46. Pierce *v.* State, 63 Md. 592; State *v.* Horgan, 55 Minn. 183, 56 N. W. 688.

47. Com. *v.* Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

48. State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187. 40 Am. St. Rep. 249; Com. *v.* Evans,

scribe reasonable rules of evidence for determination of adulteration.[49] Dealers in lard compounds may be compelled to disclose to the purchaser the nature and ingredients of the articles sold;[50] and so too the purity of vinegar,[51] wine,[52] baking powders,[53] and of food commodities in general may be enforced by proper legislation. The legislature may provide for tests of articles so as to guard the public from fraud and from worthless compounds.[54] The state may forbid the keeping of private markets within prescribed distances of public markets,[55] and may prohibit sale of certain food at retail outside of certain markets.[56] The manufacture and sale of intoxicating liquors except for certain purposes may be prohibited, and such action is due process of law;[57] and illegal traffic in intoxicating liquors may be abated by proceedings in chancery[58] or otherwise.[59] Valid regulations may be made by means of local option laws.[60] Business of a gambling nature may be prohibited.[61] The state may prohibit the doing of business at such hours

132 Mass. 11; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun (N. Y.) 319].

49. Com. *v.* Evans, 132 Mass. 11; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun (N. Y.) 319].

50. State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; State *v.* Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. Rep. 620.

51. People *v.* Girard, 145 N. Y. 105, 39 N. E. 823, 64 N. Y. St. 554, 45 Am. St. Rep. 595 [*affirming* 73 Hun (N. Y.) 457, 26 N. Y. Suppl. 272, 56 N. Y. St. 47]; Williams *v.* McNeal, 7 Ohio Cir. Ct. 280.

52. *Ex p.* Kohler, 74 Cal. 38, 15 Pac. 436.

53. Stolz *v.* Thompson, 44 Minn. 271, 46 N. W. 410.

54. Steiner *v.* Ray, 84 Ala. 93, 4 So. 172, 5 Am. St. Rep. 332.

55. New Orleans *v.* Faber, 105 La. 208, 29 So. 507, 83 Am. St. Rep. 232, 53 L. R. A. 165; State *v.* Natal, (La. 1887) 2 So. 305; State *v.* Gisch, 31 La. Ann. 544; New Orleans *v.* Stafford, 27 La. Ann. 417, 21 Am. Rep. 563.

56. *Ex p.* Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

57. *Delaware.*—State *v.* Allmond, 2 Houst. (Del.) 612.

Illinois.— Streeter *v.* People, 69 Ill. 595.

Kansas.— State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650; *In re* Prohibitory Amendm. Cases, 24 Kan. 700.

Michigan.— People *v.* Hawley, 3 Mich. 330.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657; Wynehamer *v.* People, 13 N. Y. 378, 2 Park. Crim. (N. Y.) 421 [*reversing* 2 Park. Crim. (N. Y.) 377].

South Carolina.— State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39; State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; State *v.* O'Donnell, 41 S. C. 553, 19 S. E. 748; McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

United States.— Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205 [*affirming* 29 Kan. 252, 44 Am. Rep. 634]; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929; Cantini *v.* Tillman, 54 Fed. 969; Tanner *v.* Alliance, 29 Fed. 196; Kansas *v.* Bradley, 26 Fed. 289.

But see Com. *v.* Murphy, 10 Gray (Mass.) 1, holding that a law prohibiting the sale of intoxicating liquors was unconstitutional so far as it applied to liquor owned by defendant at the time of its enactment. And *compare* People *v.* Toynbee, 2 Park. Crim. (N. Y.) 329, holding that an act, so far as it prohibits the sale of intoxicating liquors to be drunk as a beverage, is in conflict with that portion of the constitution which declares that no person shall be deprived of his property without due process of law. See also Wynehamer *v.* People, 13 N. Y. 378, 2 Park. Crim. (N. Y.) 421 [*reversing* 2 Park. Crim. (N. Y.) 377], holding that the prohibitory act of April 9, 1855, in its operation upon property in intoxicating liquors in the hands of citizens when it took effect, is a violation of the provision of the constitution which declares that no person shall be deprived of life, liberty, or property without due process of law, inasmuch as its various provisions destroy the property in such liquors. In State *v.* Walruff, 26 Fed. 178, it was held that in so far as Kansas liquor laws deprived brewers established at the time of legislation of the use of their property acquired previous to the legislation, without compensation, they deprived them of their property without due process of law under the fourteenth amendment.

See 10 Cent. Dig. tit. "Constitutional Law," § 841; and, generally, INTOXICATING LIQUORS.

58. State *v.* Jordan, 72 Iowa 377, 34 N. W. 285.

59. Streeter *v.* People, 69 Ill. 595.

60. Burnside *v.* Lincoln County Ct., 86 Ky. 423, 9 Ky. L. Rep. 635, 6 S. W. 276; Steele *v.* State, 19 Tex. App. 425; *Ex p.* Lynn, 19 Tex. App. 293; Savage's Case, 84 Va. 619, 5 S. E. 565.

61. State *v.* Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846 (book-making and pool-selling); Davis *v.* State, 3 Lea (Tenn.) 376 (speculation in witness fees and other fees originating in courts).

as are injurious to the public comfort, morals, or safety;[62] may require that business shall not be done upon Sunday;[63] and may prohibit the sale of any goods near a place in which a religious society is holding an out-door meeting[64] or traffic of a harmful nature near institutions of learning, asylums, prisons, soldiers' homes, state capitol grounds, and kindred places.[65] This plenary power of self-protection enables the state to prohibit or regulate the pursuit of any contemplated business enterprise which causes conditions of public or private nuisance to exist,[66] or the carrying on of an existing business under such circumstances that a nuisance is caused.[67] So the establishment of certain obnoxious business within certain limits may be prohibited,[68] and exclusive privileges of

A statute avoiding contracts in restraint of trade or competition does not violate the fourteenth amendment. Texas Brewing Co. *v.* Durrum, (Tex. Civ. App. 1898) 46 S. W. 880.

Forbidding the issue and distribution of trading stamps to be redeemed by any person other than the merchant who sells the goods with which such stamps are given is an unlawful deprivation of property. People *v.* Dycker, 72 N. Y. App. Div. 308, 76 N. Y. St. 111.

Margin contracts may be constitutionally forbidden. Corey *v.* Griffin, 181 Mass. 229, 63 N. E. 420; Wall *v.* Metropolitan Stock Exch., 168 Mass. 282, 46 N. E. 1062; Crandell *v.* White, 164 Mass. 54, 41 N. E. 204.

Negotiating or transacting in the state insurance business with a foreign insurance company not admitted to do business in the state may be forbidden without violating the fourteenth amendment. Nutting *v.* Massachusetts, 183 U. S. 553, 22 S. Ct. 238, 46 L. ed. 324 [*affirming* 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483].

The Texas anti-trust law of 1889 is unconstitutional. *In re* Grice, 79 Fed. 627.

62. *Ex p.* Moynier, 65 Cal. 33, 2 Pac. 728; Smith *v.* Knoxville, 3 Head (Tenn.) 245; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923.

63. *Louisiana.*—State *v.* Fernandez, 39 La. Ann. 538, 2 So. 233; State *v.* Judge, 39 La. Ann. 132, 1 So. 437.

Michigan.— People *v.* Bellet, 99 Mich. 151, 57 N. W. 1094, 41 Am. St. Rep. 589, 22 L. R. A. 696.

New Hampshire.— Mayo *v.* Wilson, 1 N. H. 53.

New York.— Lindenmuller *v.* People, 33 Barb. (N. Y.) 548; People *v.* Hoym, 20 How. Pr. (N. Y.) 76.

Oregon.— *Ex p.* Northrup, 41 Oreg. 489, 69 Pac. 445.

Tennessee.— Breyer *v.* State, 102 Tenn. 103, 50 S. W. 769.

Washington.— State *v.* Nichols, 28 Wash. 628, 69 Pac. 372.

But see Eden *v.* People, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L. R. A. 659, holding that the act of June 26, 1895, forbidding barbers to keep open their shops or work at their trade on Sunday is a taking of property without due process of law, within the meaning of Const. art. 2, § 2, providing that no person shall be deprived of liberty or property without due process of law. And see State *v.* Burgoyne, 7 Lea (Tenn.) 173, 40 Am. Rep. 60.

See 10 Cent. Dig. tit. "Constitutional Law," § 839.

64. Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580; State *v.* Cate, 58 N. H. 240; State *v.* Read, 12 R. I. 137.

65. Dorman *v.* State, 34 Ala. 216; *Ex p.* McClain, 61 Cal. 436, 44 Am. Rep. 554; Whitney *v.* Grand Rapids Tp. Bd., 71 Mich. 234, 39 N. W. 40.

66. *Illinois.*— Streeter *v.* People, 69 Ill. 595.

Louisiana.— Waters Pierce Oil Co. *v.* New Iberia, 47 La. Ann. 863, 17 So. 343; Villavaso *v.* Barthet, 39 La. Ann. 247, 1 So. 599; Crescent City Live Stock Landing, etc., Co. *v.* New Orleans, 33 La. Ann. 934.

Massachusetts.— Newton *v.* Joyce, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174 [*distinguishing* Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116]; Taunton *v.* Taylor, 116 Mass. 254; Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694.

Missouri.— State *v.* Fisher, 52 Mo. 174.

New York.— People *v.* Rosenberg, 67 Hun (N. Y.) 52, 22 N. Y. Suppl. 56, 51 N. Y. St. 189; Coe *v.* Schultz, 47 Barb. (N. Y.) 64.

United States.— Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

See 10 Cent. Dig. tit. "Constitutional Law," § 825 *et seq.*

Regulating transportation of natural gas. — As natural gas is intrinsically dangerous, the legislature may forbid its transportation through pipes at a high pressure otherwise than by its natural flow. Jamieson *v.* Indiana Natural Gas, etc., Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

67. Waters Pierce Oil Co. *v.* New Iberia, 47 La. Ann. 863, 17 So. 343; Villavaso *v.* Barthet, 39 La. Ann. 247, 1 So. 599; Newton *v.* Joyce, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; Com. *v.* Parks, 155 Mass. 531, 30 N. E. 174; State *v.* Fisher, 52 Mo. 174; People *v.* Rosenberg, 67 Hun (N. Y.) 52, 22 N. Y. Suppl. 56, 51 N. Y. St. 189.

68. Villavaso *v.* Barthet, 39 La. Ann. 247, 1 So. 599; Crescent City Live Stock Landing, etc., Co. *v.* New Orleans, 33 La. Ann. 934;

conducting obnoxious business may be granted;[69] but the power of regulation is limited by the necessity of the case, and oppressive restraint under guise of police regulation is against due process of law.[70] Another broad range of business, not obnoxious on the ground of nuisance, is subject to the legislative control because it is "clothed with a public interest."[71]

b. Qualifications For Engaging in Profession or Business. The state may require that persons engaging in certain professions, trades, or occupations shall possess certain qualifications. So the approval of a board of examiners may be required for all persons practising the professions of medicine, surgery,[72] or

Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694; *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

69. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

70. *Alabama.*— Ingram *v.* State, 39 Ala. 247, 84 Am. Dec. 782.

California.— *Ex p.* Sing Lee, 96 Cal. 354, 31 Pac. 245, 31 Am. St. Rep. 218, 24 L. R. A. 195.

Illinois.— Bailey *v.* People, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L. R. A. 838.

Missouri.— St. Louis *v.* Dow, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686; State *v.* Fisher, 52 Mo. 174.

New York.— People *v.* Marx, 99 N. Y. 377, 3 N. Y. Crim. 200, 2 N. E. 29, 52 Am. Rep. 34 [*reversing* 35 Hun (N. Y.) 528]; *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636 [*affirming* 33 Hun (N. Y.) 374].

United States.— *In re* Sam Kee, 12 Sawy. (U. S.) 379, 31 Fed. 680.

See 10 Cent. Dig. tit. "Constitutional Law," § 825 *et seq.*

A prohibition of business, couched in general language, but aimed really at a particular interest which does not injure the public health, and amounting to a confiscation of property rights is invalid — as where a rendering business was forbidden. New York Sanitary Utilization Co. *v.* Brooklyn Health Dept., 61 N. Y. App. Div. 106, 70 N. Y. Suppl. 510.

71. The leading exposition of this right to regulate is found in the case of Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77 [*affirming* 69 Ill. 80], which established that when an owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in its use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use. He may withdraw his grant by discontinuing the use. The court holding that an act to regulate public warehouses, etc., was not repugnant to the constitution of the United States, that where warehouses are situated and business is carried on exclusively within the state it may as a matter of domestic concern prescribe regulations for them, notwithstanding that they are used by those engaged in interstate commerce, as well as state commerce; and that until congress acts in reference to their interstate relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction, also remarked that in the exercise of its general power it had been customary from the earliest times for the legislature to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and other similar employments, and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. See also Cooley Const. Lim. (5th ed.) 737, 739, for a statement of the circumstances which clothe property with a "public interest."

Notice of insurance assessments may be regulated. Hamilton Mut. Ins. Co. *v.* Parker, 11 Allen (Mass.) 574.

Owners of electric wires may be compelled to remove them from their overhead location and to locate them underground and the loss of the easement from use of wires overhead need not be compensated. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 36 N. Y. St. 252, 21 Am. St. Rep. 764, 13 L. R. A. 454; Western Union Tel. Co. *v.* New York City, 38 Fed. 552, 3 L. R. A. 449. And although no subways exist the continuance of wires considered dangerous may be forbidden as a police regulation. U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788, 27 N. Y. St. 767; Electric Imp. Co. *v.* San Francisco, 45 Fed. 593, 13 L. R. A. 131.

Requiring insurance companies to pay losses in full.— An act providing that all insurance companies shall pay losses in full and prohibiting stipulations to the contrary does not conflict with U. S. Const. Amendm. 14, § 1, providing that no state shall deprive any person of property without due process of law, because the right of contracting is subject to legislative control, when demanded by public policy or in the exercise of the police power. Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

72. *California.*— *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; *Ex p.* Fraser, 54 Cal. 94.

Minnesota.— State *v.* Fleischer, 41 Minn. 69, 42 N. W. 696; State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Ohio.— State *v.* Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105.

dentistry,[73] dealing in drugs or medicines,[74] or engaging in an occupation as plumbing.[75] And generally the state may prescribe such qualifications and requirements as are necessary to protect the public welfare.[76]

c. Licenses and Privilege Taxes. It is due process of law for the state, as a means of enforcement of its police power, to require licenses and privilege taxes of those engaging in business affecting the public health, morals, comfort, or safety. So the state may require all persons engaging in the manufacture[77] or sale[78] of intoxicating liquors to obtain licenses. And physicians and surgeons,[79] druggists,[80] plumbers,[81] persons dealing in food,[82] persons engaged in theatrical or amusement enterprises,[83] in gambling enterprises,[84] second-hand dealers and pawnbrokers,[85] peddlers,[86] and others[87] may be required to obtain licenses or pay privi-

Texas.— Logan *v.* State, 5 Tex. App. 306.

Washington.— State *v.* Carey, 4 Wash. 424, 30 Pac. 729.

But see Com. *v.* Wasson, 3 Crim. L. Mag. 726, holding that the act of April 17, 1876, providing that it shall be unlawful for any person except physicians and surgeons to engage in the practice of dentistry unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught, or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of the act to issue such certificate, is unconstitutional so far as it affects a person practising at the time of its passage, because it deprives him of property without due process of law.

See 10 Cent. Dig. tit. "Constitutional Law," § 830.

73. Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192.

74. State *v.* Forcier, 65 N. H. 42, 17 Atl. 577.

75. Singer *v.* State, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 64 N. Y. St. 51, 27 L. R. A. 718 [*affirming* 81 Hun (N. Y.) 434, 30 N. Y. Suppl. 1095, 63 N. Y. St. 283].

76. Driscoll *v.* Com., 93 Ky. 393, 14 Ky. L. Rep. 376, 20 S. W. 431, 703; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888; Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513; Olsen *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. 320.

77. State *v.* Volkman, 20 La. Ann. 585.

78. *California.*— *In re* Bickerstaff, 70 Cal. 35, 11 Pac. 393.

Connecticut.— State *v.* Gray, 61 Conn. 39, 22 Atl. 675.

Kentucky.— Com. *v.* Fowler, 98 Ky. 648, 17 Ky. L. Rep. 1209, 34 S. W. 21.

Maryland.— Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226.

Massachusetts.— Com. *v.* Murphy, 10 Gray (Mass.) 1.

Minnesota.— State *v.* Cooke, 24 Minn. 247, 31 Am. Rep. 344; State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Rochester *v.* Upman, 19 Minn. 108.

Missouri.— State *v.* Searcy, 20 Mo. 489.

Ohio.— Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

Pennsylvania.— Com. *v.* Schoenhutt, 3 Phila. (Pa.) 20, 15 Leg. Int. (Pa.) 4.

South Carolina.— Charleston *v.* Ahrens, 4 Strobh. (S. C.) 241.

Wisconsin.— State *v.* Ludington, 33 Wis. 107.

United States.— Gray *v.* Connecticut, 159 U. S. 74, 15 S. Ct. 985, 40 L. ed. 80; *In re* License Cases, 5 How. (U. S.) 504, 12 L. ed. 256.

But see Holt *v.* Excise Com'rs, 31 How. Pr. (N. Y.) 334 note, holding that N. Y. Laws (1866), c. 578, providing that after a certain date no person shall within a certain district publicly keep, sell, give away, or dispose of any spirituous liquors in quantities less than five gallons at a time, unless he shall be licensed, is unconstitutional as depriving persons of property without due process of law, when applied to persons who hold unexpired licenses granted under a former law.

79. *Ex p.* McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787; Eastman *v.* State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. ed. 623.

80. State *v.* Forcier, 65 N. H. 42, 17 Atl. 577; State *v.* Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34.

81. State *v.* Gardner, 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689.

82. Haines *v.* People, 7 Colo. App. 467, 43 Pac. 1047; St. Louis *v.* Fischer, 167 Mo. 654, 67 S. W. 872; U. S. *v.* Dubé, 40 Fed. 576.

83. Wallack *v.* New York, 5 Thomps. & C. (N. Y.) 310.

84. Brennan *v.* Brighton Beach Racing Assoc., 56 Hun (N. Y.) 188, 9 N. Y. Suppl. 220, 30 N. Y. St. 406, 24 Abb. N. Cas. (N. Y.) 305.

85. Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116; Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123.

86. *Ex p.* Mosler, 8 Ohio Cir. Ct. 324; Com. *v.* Shaffer, 128 Pa. St. 575, 24 Wkly. Notes Cas. (Pa.) 539, 18 Atl. 390.

87. Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; Humes *v.* Ft. Smith, 93 Fed.

lege taxes. Persons engaged in a noxious business may be required to obtain licenses or pay privilege taxes.[88] The state may control business "clothed with a public interest" by requiring persons engaged therein to procure licenses or to pay license-taxes.[89] And in many cases the state imposes license regulations or exacts privilege taxes when the business is not one closely concerning the public health, morals, or safety, if clothed in a strict sense with a public interest, the main or sole idea oftentimes being to gain revenue. So general business corporations,[90] foreign corporations doing business within the state,[91] as well as general commercial or professional business not done by corporations,[92] are subject to these rights of the state.

d. Railroads. Although railroads are private corporations, their uses are clothed with a public interest, and are therefore subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppres-

857, holding that dealers in trading-stamp enterprises and those patronizing such firms may be required to pay license-taxes of large amounts. But see Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, holding an act unconstitutional which provided for license and examination of horse-shoers, with unequal operation among members of the trade.

Maintaining a private employment agency for hire may be made conditional upon the payment to the state of license-taxes and the giving of bonds, and a penalty for violation thereof may be provided. Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588.

Amount of license charge.—Where police regulation alone is the object of a license, there is a conflict among the authorities as to the rule governing the amount which may be charged for such license. The nature of the occupation, trade, or profession has of necessity much to do with it. In the case of such as are useful and beneficial to the community, the license charged should not ordinarily be so great as in the case of those not so, especially when immoral in their nature or tendency. The weight of authority is that the amount exacted for a license, although designed for regulation and not for revenue, is not to be confined to the expense of issuing it, but that a reasonable compensation may be charged for the additional expense of supervision over the particular business or vocation at the place where it is licensed. For this purpose the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence. Cooley Tax. 396, 397; Cooley Const. Lim. (4th ed.) 245, 246.

88. Newton *v.* Joyce, 166 Mass. 83, 44 N. E. 116; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394.

89. New York Bd. of Fire Underwriters *v.* Whipple, 2 N. Y. App. Div. 361, 37 N. Y. Suppl. 712, 73 N. Y. St. 386; Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556, 50 N. Y. St. 301; New York City F. Dept. *v.* Noble, 3 E. D. Smith (N. Y.) 440; Com. *v.* Vrooman, 164 Pa. St. 306, 35 Wkly. Notes Cas. (Pa.) 97, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

90. Weaver *v.* State, 89 Ga. 639, 15 S. E. 840; *In re* Oliver, 21 S. C. 318, 53 Am. Dec. 681.

91. *Missouri.*— State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243.

New York.— New York City F. Dept. *v.* Noble, 3 E. D. Smith (N. Y.) 440.

Virginia.— Slaughter *v.* Com., 13 Gratt. (Va.) 767.

Wisconsin.— Milwaukee F. Dept. *v.* Helfenstein, 16 Wis. 136.

United States.— Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972 [*following* Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357]; Insurance Co. *v.* New Orleans, 1 Woods (U. S.) 85, 13 Fed. Cas. No. 7,052.

See 10 Cent. Dig. tit. "Constitutional Law," § 831.

92. Sydow *v.* Territory, (Ariz. 1894) 36 Pac. 214; District of Columbia *v.* Humason, 2 MacArthur (D. C.) 158; New Orleans *v.* Turpin, 13 La. Ann. 56; Downham *v.* Alexandria, 10 Wall. (U. S.) 173, 19 L. ed. 929; American Harrow Co. *v.* Shaffer, 68 Fed. 750; American Fertilizing Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179. See State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472, holding that since N. C. Acts (1891), c. 75, defining an "'emigrant agent' 'to mean any person engaged in hiring laborers in the State, to be employed beyond the limits of the same,'" and providing that emigrant agents shall pay the state treasurer a license-fee of one thousand dollars before they can hire laborers in certain counties of the state to be employed beyond the limits of the state, does not prescribe any regulation as to how the business shall be carried on nor any police supervision; and since it exacts a very large license-fee, it is restrictive and prohibitory of the business mentioned therein, and if considered as an exercise of police power is void for that reason.

sion;[93] and the imposition upon them in particular instances of the entire expense of the performance of acts required by the public interest, in the exercise of legislative discretion not employed arbitrarily or capriciously, does not deprive them of property without due process of law.[94] Dangerous modes of running trains may be prohibited,[95] and lighting sufficient for public convenience and safety compelled.[96] Penalties may be prescribed for failure to render prompt and efficient service or to deliver freight upon tender of charges.[97] Railroads may be compelled by the state to erect and maintain depots at specified places on their lines determined by railroad commissioners to be reasonably necessary for public convenience,[98] as where their roads cross and are crossed by other roads.[99] They may be required to erect and maintain, without compensation, suitable fences upon the sides of the way,[1] cattle-guards at all farm and road crossings,[2] bridges,[3] viaducts,[4] or grade crossings;[5] to alter or remove crossings at grade or to furnish other crossings not at grade.[6]

e. Regulation of Charges, Rates, and Prices. When a business is of such a nature as to be affected with a public interest, the state may require that charges shall be reasonable, and may adopt measures necessary to secure that result.[7] It

93. The operation of a railroad in a location dangerous to the public may be prohibited, and such regulation is not a taking without due process of law. Veazie *v.* Mayo, 45 Me. 560; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

Quarterly railroad reports.— A municipal ordinance may validly require that street railroads make quarterly reports of the number of passengers carried. St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221.

94. Toledo, etc., R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269 [*affirming* 62 Conn. 527, 26 Atl. 122]; Minneapolis, etc., R. Co. *v.* Emmons, 149 U. S. 364, 13 S. Ct. 870, 36 L. ed. 769; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. ed. 1051; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585; Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 S. Ct. 28, 32 L. ed. 353.

95. Jones *v.* Alabama, etc., R. Co., 72 Miss. 22, 16 So. 379; Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382.

96. Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152; St. Bernard *v.* Cleveland, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 371.

Heating of passenger-cars by stoves may be forbidden. New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. ed. 853.

Requiring railroads to furnish separate coaches for white and for colored passengers does not contravene the fourteenth amendment provision about taking property. Chesapeake, etc., R. Co. *v.* Com., 21 Ky. L. Rep. 228, 51 S. W. 160.

Requiring railroads to transport policemen free of charge is a taking of property without due process. Wilson *v.* United Traction Co., 72 N. Y. App. Div. 233, 76 N. Y. Suppl. 203.

97. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436; Houston, etc., R. Co. *v.* Harry, 63 Tex. 256.

98. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

99. State *v.* Wabash, etc., R. Co., 83 Mo. 395.

1. *Indiana.*—Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217.

Kansas.— Missouri Pac. R. Co. *v.* Harrelson, 44 Kan. 253, 24 Pac. 465; Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573.

Montana.— Beckstead *v.* Montana Union R. Co., 19 Mont. 147, 47 Pac. 795.

New York.—Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes (N. Y.) 196, 33 How. Pr. (N. Y.) 139.

United States.— Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585.

See 10 Cent. Dig. tit. "Constitutional Law," § 832.

2. Birmingham Mineral R. Co. *v.* Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92, 27 L. R. A. 263; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625.

3. English *v.* New Haven, etc., Co., 32 Conn. 240.

4. Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

5. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Illinois Cent. R. Co. *v.* Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862. But see People *v.* Detroit, etc., R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717.

6. New York, etc., R. Co.'s Appeal, 58 Conn. 532, 20 Atl. 670; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. ed. 269 [*affirming* 62 Conn. 527, 26 Atl. 122].

7. Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 43 N. Y. Suppl. 320; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

Water-rates.—A waterworks company sup-

may regulate ferries, hackmen, and other common carriers, telephone companies, bakers, millers, wharfingers, warehousemen, innkeepers, and other similar employments, and in so doing fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.[8] A state may establish railroad and warehouse commissions, charged with the duty of supervising those businesses and authorized to fix maximum rates,[9] and may provide that the maximum rate made by the commission shall be *prima facie* evidence of its reasonableness;[10] but railroads and others have a right to require that rates fixed shall be just and reasonable, and an arbitrary provision is a deprivation of property without due process of law.[11] And while the determination of rates is primarily for the legislature,

plying a city with water may be required to supply water at a price fixed annually by municipal authorities, without giving the corporation a voice in the matter. Spring Valley Water-Works *v.* Bartlett, 8 Sawy. (U. S.) 555, 16 Fed. 615. See also San Diego Water Co. *v.* San Diego, 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460, holding that reasonable water-rates may be prescribed. And see Rogers Park Water Co. *v.* Fergus, 178 Ill. 571, 53 N. E. 363.

8. *Illinois.*— Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

Indiana.— Central Union Telephone Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 599, 5 N. E. 202.

Kentucky.— Winchester, etc., Turnpike Road Co. *v.* Croxton, 98 Ky. 739, 17 Ky. L. Rep. 1299, 34 S. W. 518, 33 L. R. A. 177.

Maine.— State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504.

New York.— *In re* Annon, 50 Hun (N. Y.) 413, 2 N. Y. Suppl. 275, 18 N. Y. St. 45, 6 N. Y. Crim. 57.

United States.—Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 [*affirming* 2 N. D. 482, 52 N. W. 408]; Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247 [*affirming* 117 N. Y. 1, 22 N. E. 670, 682, 26 N. Y. St. 533, 15 Am. St. Rep. 460, 5 L. R. A. 559]; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 6 S. Ct. 334, 29 L. ed. 636; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77; Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625, 1 Month. West. Jur. 188.

See 10 Cent. Dig. tit. "Constitutional Law," § 847.

An interchangeable mileage law is unconstitutional. Atty.-Gen. *v.* Boston, etc., R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

Requiring railroad companies in the state to keep for sale one-thousand-mile tickets at specified rates, less than the regular rates, to be used in the name of the purchaser, his wife, and children, and valid for two years, where the maximum passenger rates have been previously established by the legislature, is void, as not within the legislative power to fix maximum rates, nor a proper regulation, and is a taking of property without due process. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 19 S. Ct. 565, 43 L. ed. 858 [*reversing* 114 Mich. 460, 72 N. W. 328].

9. Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Stone *v.* Farmers' L. & T. Co., 116 U. S. 307, 6 S. Ct. 334, 29 L. ed. 636; Chicago, etc., R. Co. *v.* Becker, 32 Fed. 849.

It is due process to give a railroad commission power to make exceptions in particular cases, after investigation, from the general prohibition of greater rates for shorter than for longer hauls. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 22 S. Ct. 95, 46 L. ed. 298 [*affirming* 106 Ky. 633, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012, 90 Am. St. Rep. 236].

Punishment for violating a statutory provision that a railroad shall not charge more for a short than for a long haul may be left to a railroad commission, since the question of reasonableness of charge under such circumstances was not at common law of judicial cognizance. Illinois Cent. R. Co. *v.* Com., 23 Ky. L. Rep. 1159, 64 S. W. 975.

10. Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

11. *Illinois.*— Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 16 Am. Rep. 599.

Mississippi.— Western Union Tel. Co. *v.* Mississippi R. Commission, 74 Miss. 80, 21 So. 15.

Nebraska.— State *v.* Sioux City, etc., R. Co., 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47.

Pennsylvania.— Atty.-Gen. *v.* Germantown, etc., Turnpike Road Co., 55 Pa. St. 466.

United States.— Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 22 S. Ct. 900, 46 L. ed. 1151 [*affirming* 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514]; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 10 S. Ct. 702, 33 L. ed. 970; Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436; Mercantile Trust Co. *v.* Texas, etc., R. Co., 51 Fed. 529; Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679.

See 10 Cent. Dig. tit. "Constitutional Law," § 847.

Reducing rates of railroad fare below what will permit the railroad company to earn a reasonable income on the capital invested is

such determination cannot be made so conclusive as to prevent the matter from becoming the subject of judicial inquiry.[12] Common carriers of passengers may be forbidden to discriminate between passengers on account of race and color;[13] and common carriers of freight or passengers may be required to perform the same service for all persons at the same rates without discrimination.[14] Insurance companies may be forbidden to make any discrimination in favor of individuals between rates of insurance of the same class,[15] and telephone companies may be forbidden to discriminate in rentals.[16]

f. Conditions of Employment. It is due process of law for the state, in the exercise of its police power, to grant an exclusive privilege to do certain business,[17] and to forbid the transaction of business under circumstances injurious to the public comfort or morals.[18] The legislature cannot forbid employers in one business making contracts with employees which employers in another business are left free to make;[19] and generally legislation restraining or forbidding employment must operate uniformly toward all similarly situated.[20] The state may pass general legislation requiring individuals, partnerships, and corporations to pay at specified times wages earned by employees;[21] may prohibit any person or corporation from issuing or delivering to any employee in payment of wages any scrip or other evidence of indebtedness, payable or redeemable otherwise than in law-

a taking without due process. Ball *v.* Rutland R. Co., 93 Fed. 513.

Through joint rates.— A state may validly provide that car-load lots shall be transferred from one line to another without unloading, unless such unloading is done without charge to the shipper, and may provide that joint rates shall be fixed by special proceedings before commissioners, after notice to railroad companies interested. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Through rates on hard coal in car-load lots were held validly fixed by a railroad commission, although such rates on all freight would not pay operating expenses, where hard coal formed but a small part of a railroad's traffic. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 22 S. Ct. 900, 46 L. ed. 1151 [*affirming* 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514].

12. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819.

As to the tests to be applied to determine reasonableness of rate regulations see Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Cotting *v.* Kansas City Stock Yards, 82 Fed. 850.

13. Decuir *v.* Benson, 27 La. Ann. 1.

14. Tilley *v.* Savannah, etc., R. Co., 5 Fed. 641.

15. Com. *v.* Morning Star, 144 Pa. St. 103, 28 Wkly. Notes Cas. (Pa.) 442, 22 Atl. 867.

16. Central Union Telephone Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721.

17. *In re* Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; National Fertilizer Co. *v.* Lambert, 48 Fed. 458.

18. *Ex p.* Smith, 38 Cal. 702; People *v.* City Prison, 81 Hun (N. Y.) 434, 30 N. Y. Suppl. 1095, 63 N. Y. St. 283.

So the state may forbid the employment of women in factories or workshops more than a specified number of hours per week. Com. *v.* Hamilton Mfg. Co., 120 Mass. 383. But see Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79, holding invalid the act of June 17, 1893, § 5, forbidding employment of women over eight hours in any one day or over forty-eight hours weekly.

As to hours of labor in general see Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780, sustaining the Utah eight-hour law relating to mine and smelting workers.

19. State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

20. People *v.* Warren, 13 Misc. (N. Y.) 615, 34 N. Y. Suppl. 942, 69 N. Y. St. 167; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481, holding invalid Cal. Const. art. 19, § 2, providing that no corporation shall employ any Chinese or Mongolians as violating the fourteenth amendment.

Apprenticeship of an orphaned freedman without his presence and without notice to him could not be authorized by the legislature. Jack *v.* Thompson, 41 Miss. 49.

The Ohio act of March 26, 1890, § 1, as amended by the act of April 23, 1891, and the act of April 15, 1892, declaring ten hours shall constitute a day's work for certain classes of railroad employees, and that for any time in excess thereof that any such employee shall work, under the direction of a superior or at the request of the company, he shall be paid in addition to his *per diem*, is in conflict with U. S. Const. art. 14, § 1, providing that no person shall be deprived of property without due process of law. Wheeling Bridge, etc., R. Co. *v.* Gilmore, 8 Ohio Cir. Ct. 658.

21. St. Louis, etc., R. Co. *v.* Paul, 64 Ark. 83, 40 S. W. 705, 62 Am. St. Rep. 154, 37 L. R. A. 504; Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6

ful money.[22] The authorities are conflicting as to the right to require employers to pay according to certain methods of determining wages, as by weight of the product.[23] While statutes requiring payment of wages to be made in lawful money have been at times sustained,[24] a state cannot forbid persons or corporations engaged in mining or manufacturing from being interested directly or indirectly in keeping truck stores or shops for furnishing of supplies, tools, clothing, or provisions to employees without placing similar restrictions on employers engaged in other kinds of business.[25] It is due process of law for the state to provide that reasonable safeguards shall be taken by employers to insure the health, comfort, and safety of employees.[26]

L. R. A. 576; *In re* House Bill No. 1,230, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344. But see Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264, holding that the legislature cannot make it unlawful for individuals to agree with each other that wages shall be paid at any time after the day on which the labor by which they are earned shall be completed, since such a contract as to the time of performance is necessarily harmless and of purely private concern. This jurisdiction allows restrictions upon wage contracts by corporations, however, not permitted against individuals. And see Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354.

22. Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385. But see *contra*, Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; State *v.* Goodwill, 33 W. Va. 179; 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

23. See *In re* House Bill No. 203, 21 Colo. 27, 39 Pac. 431 (holding that House Bill No. 203, dated Feb. 20, 1895, and entitled "A bill for an act to regulate the weighing of coal at mines, etc.," in so far as it attempts to deprive persons of the right to fix by contract the manner of ascertaining compensation for mining coal, is in violation of U. S. Const. Amendm. 14, and of Colo. Bill of Rights, art 2, § 25, which provides that "'no person shall be deprived of life, liberty or property, without due process of law'"); Frorer *v.* People, 142 Ill. 387, 32 N. E. 366; Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853 (holding that the act of June 10, 1891, which requires the operators and owners of coal mines, where the miner is paid on the basis of the amount of coal mined by him, to weigh the coal on pit cars before it is screened and to compute the compensation upon the weight of the unscreened coal is unconstitutional, as depriving persons without due process of law of the property right of making contracts); Millett *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869 (holding that the act of June 29, 1885, amendatory of the act of June 14, 1883, to provide for the weighing of coal at the mines, which requires the owners and operators of mines to provide scales and weigh all coal taken out, and making such weight the basis of wages, is unconstitutional); State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385 (holding that the act of March 9, 1891, which provides that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine, before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on; that coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine is not repugnant to the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law).

24. Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

25. Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492.

Interference with membership in trades unions.— The Missouri act of March 6, 1893, in making it unlawful for an employer to prohibit an employee from joining, or to require an employee to withdraw from, a trade or labor union or other lawful organization, violates U. S. Const. Amendm. 5, and Mo. Const. art. 2, § 30, declaring that no one shall be deprived of life, liberty, or property without due process of law, and article 14, § 1, prohibiting any state from depriving any person of life, liberty, or property without due process of law. State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257.

26. So those operating mines may be required to cause accurate plans or maps of the workings of mines to be made (Daniels *v.* Hilgard, 77 Ill. 640) and to provide sufficient ventilation (Com. *v.* Bonnell, 8 Phila. (Pa.) 534; Com. *v.* Wilkesbarre Coal Co., 29 Leg. Int. (Pa.) 213). But see Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 50 Am. St. Rep. 801, 29 L. R. A. 808, holding that the Pennsylvania act of 1891, requiring coal-mine owners to employ a mine foreman who shall be certified by the secretary of internal affairs to be competent, who shall every alternate day examine every working place in

18. Regulation of Use and Enjoyment of Property — a. Animals. The legislature may license and otherwise regulate the keeping of dogs;[27] may authorize the killing of all dogs not kept in conformity with prescribed methods, without liability for loss to owner;[28] may regulate the running at large of cattle, horses, sheep, and other animals along highways or elsewhere;[29] and may regulate the relative rights and responsibilities of the proprietors of inclosed land and of the owners of stock going at large or kept in adjacent inclosures.[30] Cattle taken damage feasant may be impounded and after reasonable public notice sold;[31] but notice to owner of intended sale or some hearing or other judicial determination of liability is necessary.[32] Regulations in the usual form providing that expenses

the mine and direct it to be properly secured, and permit no one to work in an unsafe place, except to make it secure, is unconstitutional, as in violation of the bill of rights, in so far as it makes the owner liable to injuries to other employees from failure of such foreman, a fellow servant of the other workman, to do properly what the statute requires of him. And railway companies may be required to furnish vestibules and screens for the protection of employees. State *v.* Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; State *v.* Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317. And certain industries and behavior upon lands of the employer may be made unlawful. State *v.* Warren, 113 N. C. 683, 18 S. E. 498.

27. *Connecticut.*— Wilton *v.* Weston, 48 Conn. 325.

Illinois.— Cole *v.* Hall, 103 Ill. 30.

Indiana.— Mitchell *v.* Williams, 27 Ind. 62.

Michigan.— Longyear *v.* Buck, 83 Mich. 236, 47 N. W. 234, 10 L. R. A. 43; Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159.

Wisconsin.— Tenney *v.* Lenz, 16 Wis. 566; Carter *v.* Dow, 16 Wis. 298.

See 10 Cent. Dig. tit. "Constitutional Law," § 812; and Animals, 2 Cyc. 437.

28. *Illinois.*— Leach *v.* Elwood, 3 Ill. App. 453.

Massachusetts.— Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

New Hampshire.—Morey *v.* Brown, 42 N. H. 373.

New York.— People *v.* Tighe, 9 Misc. (N. Y.) 607, 30 N. Y. Suppl. 368, 61 N. Y. St. 669.

North Carolina.— Mowery *v.* Salisbury, 82 N. C. 175.

But see Lynn *v.* State, 33 Tex. Crim. 153, 25 S. W. 779, holding that dogs are property, and that a city ordinance requiring policemen to shoot unmuzzled dogs found in any public highway in the city is invalid, as taking them without compensation or due process of law.

See 10 Cent. Dig. tit. "Constitutional Law," § 814; and Animals, 2 Cyc. 439.

29. Welch *v.* Bowen, 103 Ind. 252, 2 N. E. 722; Griffin *v.* Martin, 7 Barb. (N. Y.) 297; Graves *v.* Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63.

30. Myers *v.* Dodd, 9 Ind. 290, 68 Am. Dec. 624; Wills *v.* Walters, 5 Bush (Ky.) 351.

Seizure of unbranded animals.— A statute authorizing the seizure of all unbranded animals about to be slaughtered, shipped, or driven out of the county, and requiring inspection and sequestration thereof, notice to the judge of the district court, and a citation from such judge to show cause why they should not be sold for the benefit of the county is not unconstitutional as not being due process of law. Beyman *v.* Black, 47 Tex. 558.

31. *Alabama.*— Dillard *v.* Webb, 55 Ala. 468.

Arkansas.— Ft. Smith *v.* Dobson, 46 Ark. 296, 55 Am. Rep. 589.

Colorado.— Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

Kansas.— Gilchrist *v.* Schmidling, 12 Kan. 263.

Kentucky.— Armstrong *v.* Brown, 106 Ky. 81, 20 Ky. L. Rep. 1766, 50 S. W. 17, 90 Am. St. Rep. 207; McKee *v.* McKee, 8 B. Mon. (Ky.) 433.

Michigan.— Campau *v.* Langley, 39 Mich. 451, 33 Am. Rep. 414; Grover *v.* Huckins, 26 Mich. 476.

Mississippi.— Anderson *v.* Locke, 64 Miss. 283, 1 So. 251.

New York.— Cook *v.* Gregg, 46 N. Y. 439; McConnell *v.* Van Aerman, 56 Barb. (N. Y.) 534; Fox *v.* Dunkel, 55 Barb. (N. Y.) 431, 38 How. Pr. (N. Y.) 136; Campbell *v.* Evans, 54 Barb. (N. Y.) 566; Squares *v.* Campbell, 41 How. Pr. (N. Y.) 193. But see Leavitt *v.* Thompson, 56 Barb. (N. Y.) 542.

Oregon.— Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

Texas.— Paris *v.* Hale, 13 Tex. Civ. App. 386, 35 S. W. 333; Coyle *v.* McNabb, (Tex. App. 1892) 18 S. W. 198.

Washington.— Wilson *v.* Beyers, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858.

West Virginia.— Burdett *v.* Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337.

See 10 Cent. Dig. tit. "Constitutional Law," § 813; and Animals, XIV, A, 1 [2 Cyc. 437].

32. *Illinois.*— Bullock *v.* Geomble, 45 Ill. 218.

Kentucky.— Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208.

New York.— Rockwell *v.* Nearing, 35 N. Y. 302 [*reversing* 44 Barb. (N. Y.) 472].

North Carolina.— McNamara *v.* Karns, 24 N. C. 66; Shaw *v.* Kennedy, 4 N. C. 591.

and reasonable officers' fees shall be deducted from proceeds of the sale, the balance to go to the use of the owner, are valid.[33] Animals having contagious or infectious diseases may be declared common nuisances and killed;[34] and in some cases dangerous animals may be summarily destroyed without notice to the owner.[35] But where public necessity does not demand summary action, as in cases of cruelty to, abandonment or neglect of, animals, notice must be given to the owner before killing.[36]

b. Cemeteries. Further interments in cemeteries may be forbidden,[37] and bodies already interred may be removed by order of a legislature or municipality.[38]

c. Fish and Game. The legislature may protect fish and game within its jurisdiction by forbidding the catching, taking, killing, or having the possession or control of such within certain seasons or during a term in the future.[39] It may prohibit the use of certain devices for taking fish or game and enforce its regulations by provisions for forfeiture of the instruments used.[40] It may forbid under

Ohio.— Archer *v.* Baertschi, 8 Ohio Cir. Ct. 12.

Texas.— Armstrong *v.* Traylor, 87 Tex. 598, 30 S. W. 440.

See 10 Cent. Dig. tit. "Constitutional Law," § 813; and ANIMALS, 2 Cyc. 438.

33. Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399; Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267; Paris *v.* Hale, 13 Tex. Civ. App. 386, 35 S. W. 333. But see Donovan *v.* Vicksburg, 29 Miss. 247, 64 Am. Dec. 143, holding invalid an ordinance directing the city marshal to seize and sell all hogs found running at large, to pay over half of the proceeds to the city hospital, and to keep one half for his services.

34. Newark, etc., R. Co. *v.* Hunt, 50 N. J. L. 308, 12 Atl. 697. And see ANIMALS, 2 Cyc. 339.

35. Leach *v.* Elwood, 3 Ill. App. 453; State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; Jenkins *v.* Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689. But see People *v.* Tighe, 9 Misc. (N. Y.) 607, 30 N. Y. Suppl. 368, 61 N. Y. St. 669, holding invalid a city ordinance which provides that if a dog attacks a person a police justice may on complaint made order the owner to kill the dog immediately and impose a fine for failure to obey the order, but which does not require that notice of the proceedings and an opportunity to be heard shall be given to the owner of the dog.

36. Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 329, 35 L. R. A. 682; King *v.* Hayes, 80 Me. 206, 13 Atl. 882; Brill *v.* Ohio Humane Soc., 4 Ohio Cir. Ct. 358. See also Carter *v.* Colby, 71 N. H. 230, 51 Atl. 904.

37. Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58; Coates *v.* New York, 7 Cow. (N. Y.) 585; Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793; Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114. And see CEMETERIES, 6 Cyc. 708.

Prohibiting disinterment of dead bodies.— It is valid to provide that a permit must be obtained before removal from place of burial of the remains of any deceased person. *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624.

38. Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377. But see Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203, holding that an act providing that lands held by a city for burial purposes may be devoted to other public uses, when in the opinion of the city council the public good will be served thereby, cannot be upheld as an exercise of the police power of the state to protect the public health, as it confers on the city council general power to divert land from the use as a burial ground to any other purpose, without reference to the requirements of the public health.

39. *Massachusetts.*— Com. *v.* Bailey, 13 Allen (Mass.) 541.

Michigan.— People *v.* Brooks, 101 Mich. 98, 59 N. W. 444.

Minnesota.— State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

Missouri.— State *v.* Judy, 7 Mo. App. 524.

New York.— Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140; People *v.* Reed, 47 Barb. (N. Y.) 235.

See 10 Cent. Dig. tit. "Constitutional Law," § 823; and FISH AND GAME.

Fishways.— An act requiring an owner of an existing dam to provide a sluiceway for the passage of fish, and prohibiting the erection of a dam so as to prevent the passage of fish is against due process of law. Sibley *v.* State, 107 Tenn. 515, 64 S. W. 703. But *compare* State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138, holding that an owner of a dam may be compelled to provide fishways and that failure so to do entitles the state to abate the dam as a nuisance.

40. *Illinois.*— People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684 [*reversing* 39 Ill. App. 656].

Indiana.— State *v.* Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52.

Michigan.—Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982.

Minnesota.— State *v.* Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76.

penalty the selling or offering for sale of game[41] or the consignment of such by common carrier to any commission merchant or sale market,[42] and may make it unlawful to transport or to receive for transportation certain game killed within the state, knowing that the same has been sold or is to be offered for sale.[43] And the legislature may enforce its general rights of regulation by providing for forfeitures; but in general notice to the owner or judicial determination of the facts upon which the condemnation is based is necessary.[44] Greater restrictions and severer penalties may be lawfully imposed by a state upon non-residents than upon residents without violating the federal constitution.[45]

d. Location and Erection of Buildings. For the protection of the community, the erection, alteration, or repair of wooden or frame buildings may be forbidden or otherwise restricted within certain limits;[46] and the authorities may remove all buildings within established fire limits, the walls of which are not constructed of specified materials.[47] The height of certain buildings in streets

New Jersey.— Weller *v.* Snover, 42 N. J. L. 341; Haney *v.* Compton, 36 N. J. L. 507.

New York.— *Compare* Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609, holding invalid N. Y. Laws (1896), c. 383, providing for forfeiture of vessels disturbing private oyster-beds.

North Carolina.— Rea *v.* Hampton, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21.

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

Virginia.— Boggs *v.* Com., 76 Va. 989.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.—Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. 581, 995, 16 Am. St. Rep. 813, 7 L. R. A. 134]; The Ann, 5 Hughes (U. S.) 292, 8 Fed. 923.

See 10 Cent. Dig. tit. "Constitutional Law," § 823; and FISH AND GAME.

41. *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129.

42. State *v.* Chapel, 64 Minn. 130, 66 N. W. 205, 58 Am. St. Rep. 524, 32 L. R. A. 131.

43. American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

44. Heck *v.* Anderson, 57 Cal. 251, 40 Am. Rep. 115; State *v.* Owen, 4 Ohio S. & C. Pl. Dec. 163; Boggs *v.* Com., 76 Va. 989; The Ann, 5 Hughes (U. S.) 292, 8 Fed. 923. See also The J. W. French, 5 Hughes (U. S.) 429, 13 Fed. 916, holding that a law providing for the forfeiture by a proceeding at common law of a vessel or boat used in catching fish in violation of law is unconstitutional as divesting persons of property without the verdict of a jury. But see Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. 581, 995, 16 Am. St. Rep. 813, 7 L. R. A. 134], holding valid a law declaring certain fishing articles public nuisances and allowing game protectors and other persons to abate and destroy them summarily.

45. Allen *v.* Wyckoff, 48 N. J. L. 90, 2 Atl. 659, 57 Am. Rep. 548.

46. *California.*— McCloskey *v.* Kreling, 76 Cal. 511, 18 Pac. 433; *Ex p.* Fiske, 72 Cal. 125, 13 Pac. 310.

Maine.— Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188.

Massachusetts.— Salem *v.* Maynes, 123 Mass. 372.

Missouri.— Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

Pennsylvania.— Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555; Respublica *v.* Duquet, 2 Yeates (Pa.) 493.

See 10 Cent. Dig. tit. "Constitutional Law," § 809.

Prohibiting the moving of buildings into or upon any city streets without the written permission of the mayor does not contravene the fourteenth amendment. Eureka *v.* Wilson, 15 Utah 53, 67, 48 Pac. 41, 150, 62 Am. St. Rep. 904.

Regulating connections with sewer.— The legislature may require all landowners abutting on streets in which are sewers to have sufficient water-closets connected with the sewer. Com. *v.* Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400.

Regulating water-supply.— The legislature may require tenement-houses to have a supply of water on each floor occupied or intended to be occupied by one or more families, when so directed by the board of health, and may prescribe a penalty for failure to comply, although the order by the board of health is made without notice to the owner. New York City Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579.

Requiring maintenance of fire-escapes.—The legislature may require erection and maintenance of suitable fire-escapes at the expense of property-owners. Cincinnati *v.* Steinkamp, 54 Ohio St. 284, 43 N. E. 490.

47. Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590. But see Matter of Brooklyn *v.* Franz, 87 Hun (N. Y.) 54, 33 N. Y. Suppl. 869, 67 N. Y. St. 485, holding void Brooklyn City Charter, tit. 14, § 51, providing that any building in violation of the provision as to fire limits may be removed, but not requiring notice to be given to the owner of such building.

exceeding certain widths may be regulated[48] and building lines may be established;[49] but it has been held necessary to provide for proceedings for the condemnation of the land affected.[50]

19. Revocation of License. As a license lacks the essential elements of a vested right or property it may be revoked.[51]

20. Summary Proceedings Against Trespassers and Disorderly Persons. In general summary proceedings, coupled with judicial investigation, are valid;[52] but seizure and sale of property of a supposed trespasser, even on public lands, at the mere command of an official, are illegal acts.[53] An administrative officer may be authorized to compel, under penalty of fine or imprisonment, occupants of disorderly houses to remove upon notice, although occupants who are also owners of such may be affected.[54]

21. Taking Property For Public Use — a. In General. All persons and corporations hold their rights of property subject to the right of the state to appropriate them for the public benefit or use when the public safety, welfare, necessity, and convenience may demand;[55] but due process of law requires that fair compensation be made for whatever is taken.[56] Whether the use is public is

48. People *v.* D'Oench, 111 N. Y. 359, 18 N. E. 862, 20 N. Y. St. 599.

49. St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; Matter of Perry's Ct., 10 Phila. (Pa.) 27, 30 Leg. Int. (Pa.) 116.

50. St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

51. La Croix *v.* Fairfield County Com'rs, 50 Conn. 321, 47 Am. Rep. 648; Com. *v.* Kinsley, 133 Mass. 578; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; Martin *v.* State, 27 Nebr. 325, 43 N. W. 108. But *compare* Buffalo *v.* Chadeayne, 7 N. Y. Suppl. 501, 27 N. Y. St. 60, holding that where expense in construction has been incurred in proceeding under a permit to construct frame buildings within fire limits, revocation, except in case of public necessity, must be preceded by a hearing.

52. People *v.* Dibble, 16 N. Y. 203; Wynkoop *v.* Cooch, 89 Pa. St. 450.

Forcible entry and detainer.— The legislature may provide for an action of forcible entry and detainer and summary removal of an alleged trespasser from premises, if the right to possession is to be later adjudicated and defendant has a means of obtaining repossession if entitled. Fleeman *v.* Horen, 8 Ark. 353. See Forcible Entry and Detainer.

53. Dunn *v.* Burleigh, 62 Me. 24.

54. State *v.* Mack, 41 La. Ann. 1079, 6 So. 808.

55. *Georgia.*— Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 115 Ga. 554, 42 S. E. 1.

Illinois.— Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679.

Michigan.— People *v.* Humphrey, 23 Mich. 471, 9 Am. Rep. 94.

New Jersey.— Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.— People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; People *v.* New York, 32 Barb. (N. Y.) 102.

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

See 10 Cent. Dig. tit. "Constitutional Law," § 878 *et seq.*

As to what is a taking see the leading case of Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

56. *Delaware.*—Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524.

Louisiana.— Torres *v.* Falgoust, 37 La. Ann. 497.

Maryland.—Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

Michigan.— Stock *v.* Jefferson Tp., 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355.

New York.— Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698]; Stevens *v.* New York El. R. Co., 57 N. Y. Super. Ct. 416, 8 N. Y. Suppl. 313, 31 N. Y. St. 404; Varick *v.* New York, 4 Johns. Ch. (N. Y.) 53.

North Carolina.— Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 42 S. E. 587, 89 Am. St. Rep. 868.

Pennsylvania.— Lebanon School Dist. *v.* Lebanon Female Seminary, (Pa. 1888) 12 Atl. 857.

Tennessee.— Ryan *v.* Louisville, etc., Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

United States.— Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979; Monongahela Nav. Co. *v.* U. S., 149 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463; Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; Garrison *v.* New York City, 21 Wall. (U. S.) 196, 22 L. ed. 612; Hollingsworth *v.* Tensas Parish, 4 Woods (U. S.) 280, 17 Fed. 109. *Compare* Newburyport Water Co. *v.* Newburyport, 85 Fed. 723, holding unconstitutional a statute under which a water company is in effect compelled to convey its property to the city, under threat of municipal competition, and which allows nothing for its franchise rights, good-will, etc.

See 10 Cent. Dig. tit. "Constitutional Law," § 878 *et seq.*

for the courts, but the necessity of exercise of taking for a public use is a matter of legislative discretion.[57]

A city by extending its limits cannot deprive a private corporation of the franchise of exacting tolls, without making compensation. Ft. Wayne Land, etc., Co. *v.* Maumee Ave. Gravel Road Co., 132 Ind. 80, 30 N. E. 880, 15 L. R. A. 651.

An extension of city limits is not a taking of property without due process, because it exempts agricultural lands. Kansas City *v.* Union Pac. R. Co., 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321.

Annexation of territory to city.— Mere extension of a town or city limits is not a taking without compensation. Dodson *v.* Fort Smith, 33 Ark. 508; Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586; Stilz *v.* Indianapolis, 55 Ind. 515; Callen *v.* Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; Groff *v.* Frederick City, 44 Md. 67; Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661; Blanchard *v.* Bissell, 11 Ohio St. 96; Kelley *v.* Pittsburg, 104 U. S. 78, 26 L. ed. 659. Consent of outside landowner to extension is immaterial. Giboney *v.* Cape Girardeau, 58 Mo. 141; Manley *v.* Raleigh, 57 N. C. 370; Smith *v.* McCarthy, 56 Pa. St. 359. The weight of authority is that the courts cannot take cognizance of added burdens through taxation upon lands added to municipalities, imposition of such being a question wholly of legislative discretion. Taggart *v.* Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586; New Orleans *v.* Michoud, 10 La. Ann. 763; Turner *v.* Althaus, 6 Nebr. 54 [*overruling* Bradshaw *v.* Omaha, 1 Nebr. 16]; State *v.* Brown, 53 N. J. L. 162, 20 Atl. 772; Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659. But in some jurisdictions the view prevails that taxing lands originally outlying for municipal purposes without corresponding benefits is a taking without due process of law. Durant *v.* Kauffman, 34 Iowa 194; Fulton *v.* Davenport, 17 Iowa 404; Morford *v.* Unger, 8 Iowa 82; Covington *v.* Southgate, 15 B. Mon. (Ky.) 491. See also Dillon Mun. Corp. § 795; State *v.* Cincinnati, 20 Ohio St. 18, 27 L. R. A. 737 and note.

Drainage.— Upon this subject there have been much legislation and widely varying views of different courts. Legislation providing for laying of drains through private lands for the benefit of the owners has been held invalid as taking property without due process. Fleming *v.* Hull, 73 Iowa 598, 35 N. W. 673; McQuillen *v.* Hatton, 42 Ohio St. 202. But see Chronic *v.* Pugh, 136 Ill. 539, 27 N. E. 415, constitutional provision. Drainage acts to promote the public health have been sustained under the police power. Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637. But see Cheesebrough's Case, 78 N. Y. 232, requiring compensation. The state may authorize companies to construct drains on private lands for reclamation purposes (O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169); but an act is invalid where its effect is merely to promote a private scheme at the expense of landowners (Kean *v.* Driggs Drainage Co., 45 N. J. L. 91). And see Jewel *v.* Green Island Draining Co., 12 Nebr. 163, 10 N. W. 547.

Lighthouse purposes.— It is not within the scope of state power to provide for condemnation of land by the governor for conveyance to the United States for lighthouse purposes. People *v.* Humphrey, 23 Mich. 471, 9 Am. Rep. 94.

Mills and mill-dams.— The fourteenth amendment is not violated by a mill act authorizing dams on non-navigable streams, and providing for flowage damages after judicial inquiry, although a perpetual right to flow is granted. Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 5 S. Ct. 441, 28 L. ed. 889. The right of compensation for such flowage is essential. Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335. The injured owner may be deprived of any common-law remedy, if an adequate statutory remedy is provided for injury from dams. Newcomb *v.* Smith, 2 Pinn. (Wis.) 131, 1 Chandl. (Wis.) 71.

Owners abutting on a street ordered paved may be required to construct at their own expense sewer, water, and gas connections or if the city has to put these in the cost may be assessed upon such abutting owners. Gleason *v.* Waukesha County, 103 Wis. 225, 79 N. W. 249.

Rights of riparian owners.—Although the mere establishment of harbor lines may not require compensation (People *v.* New York, etc., Ferry Co., 49 How. Pr. (N. Y.) 511; Yesler *v.* Harbor Line Com'rs, 146 U. S. 646, 13 S. Ct. 190, 36 L. ed. 1119), yet the filling in in front of a wharf entitles the wharf-owner to damages (Kingsland *v.* New York, 35 Hun (N. Y.) 458). And the owner of a dam in a navigable stream, maintained by legislative sanction, must be compensated for removal by an act declaring the stream navigable. Glover *v.* Powell, 10 N. J. Eq. 211. The right of a riparian owner to drive piles cannot be arbitrarily forbidden without compensation. Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808. But see Green *v.* Swift, 47 Cal. 536, sustaining as an exercise of the police power the turning or altering of a river channel to prevent inundation to a populous section, such act not being a taking requiring compensation. *Compare* Deming *v.* Cleveland, 22 Ohio Cir. Ct. 1, 12 Ohio Cir. Dec. 198, holding that compensation to riparian proprietors must be provided for injury done by diversion of the course of streams to promote the public health.

57. *Georgia.*— Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 115 Ga. 554, 42 S. E. 1.

b. Procedure. An enactment of the legislature is not of itself enough to constitute due process, but the owner must be afforded an opportunity to contest the validity of the proceedings and to have the amount of compensation determined by some impartial tribunal.[58] But an owner who has had a full and fair trial in the courts of his own state, under general provisions of law applicable to all persons in his situation, is deprived of no property rights under the fourteenth amendment.[59] It is not essential to due process that the damages in condemnation proceedings be assessed by a jury.[60] No provisions of general applicability exist as to the necessity of notice to the owner of the taking or proceedings to take.[61]

Illinois.— Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333.

Maine.— State *v.* Noyes, 47 Me. 189.

Massachusetts:— Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402.

New York.— Harris *v.* Thompson, 9 Barb. (N. Y.) 350. But see *In re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 62 N. Y. St. 809, 26 L. R. A. 270.

Vermont.— Stearns *v.* Barré, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L. R. A. 240.

See 10 Cent. Dig. tit. "Constitutional Law," § 870 *et seq.*

Acts under police power regulating, restricting, or forbidding the use or enjoyment of property to insure the public health, safety, comfort, order, or morals are not a "taking" of property in the sense that compensation must be made to the owner affected. State *v.* Brennan's Liquors, 25 Conn. 278; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734.

Nor is the taxing power a "taking" in the sense that compensation is necessary. Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305.

That a public taking is advantageous to an individual who offers to pay the attendant expenses is not material. Barr *v.* New Brunswick, 67 Fed. 402, 19 C. C. A. 71.

The extent, degree, and equality of interest to be taken in property are for legislative determination. Dingley *v.* Boston, 100 Mass. 544; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

Levees.— In Louisiana titles to land upon rivers are held subject to the right to enter and construct levees without payment of compensation to owners for the injury. Eldridge *v.* Trezevant, 160 U. S. 452, 16 S. Ct. 345, 40 L. ed. 490.

58. *Georgia.*—Atlanta *v.* Central R., etc., Co., 53 Ga. 120.

Illinois.— Cook *v.* South Park Com'rs, 61 Ill. 115.

Indiana.— Campbell *v.* Dwiggins, 83 Ind. 473; McCormick *v.* Lafayette, 1 Ind. 48.

Maryland.— Stuart *v.* Baltimore, 7 Md. 500.

Michigan.—Ames *v.* Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 Am. Dec. 731.

Minnesota.— Langford *v.* Ramsey County Com'rs, 16 Minn. 375.

Nebraska.— McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543.

New Hampshire.— Pierce *v.* Somersworth, 10 N. H. 369.

New Jersey.— State *v.* Jersey City, 30 N. J. L. 93.

New York.— Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325.

Texas.— Rhine *v.* McKinney, 53 Tex. 354.

See 10 Cent. Dig. tit. "Constitutional Law," § 880; and Story Const. L. (5th ed.), § 1956.

But the state may by legislation, without first resorting to the courts, resume some control over property of which the general public has the use. Duffy *v.* New Orleans, 49 La. Ann. 114, 21 So. 179.

59. Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751. *Compare* Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353, holding hearing without appeal sufficient.

60. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165.

The law authorizing a taking must be complied with in all its essential requirements or the proceedings will be invalid. People *v.* Tallman, 36 Barb. (N. Y.) 222; Stroub *v.* Manhattan R. Co., 14 N. Y. Suppl. 773; Croft *v.* Bennington, etc., R. Co., 64 Vt. 1, 23 Atl. 922; State *v.* Oshkosh, 84 Wis. 548, 54 N. W. 1095.

The right to take for public use does not depend upon any contract between the owner and the public, and there is no vested right to compensation until property is taken. Lamb *v.* Schottler, 54 Cal. 319.

Making findings and surveys by canal commissioners evidence of ownership of state or canal lands was held unconstitutional in State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

Payment of compensation may be delayed until the title of the owner can be clearly ascertained judicially. Gilmer *v.* Lime Point, 18 Cal. 229.

61. Requirements for notice vary widely in different jurisdictions. See the following cases:

Michigan.— Kundinger *v.* Saginaw, 59 Mich. 355, 26 N. W. 634.

New York.— Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 285.

c. Liability For Consequences of Damages. For consequential and remote damages to property, resulting from acts done under and pursuant to authority conferred by a valid act of the legislature, and with reasonable care and skill in the exercise of the power, there is not, in the absence of express constitutional or statutory provisions, any liability.[62]

22. Taking Property For Private Use — a. In General. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth amendment to the constitution of the United States, even if done under the guise of taxation or of eminent domain.[63] But the temporary

Oregon.— Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355.

Pennsylvania.— Zack *v.* Pennsylvania R. Co., 25 Pa. St. 394; Philadelphia *v.* Scott, 9 Phila. (Pa.) 171, 31 Leg. Int. (Pa.) 12.

Tennessee.— Anderson *v.* Turbeville, 6 Coldw. (Tenn.) 150.

Washington.— *In re* Smith, 9 Wash. 85, 37 Pac. 311, 494.

West Virginia.— See Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812. And see Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69, holding that infant owners who have reached the age of discretion must be personally served with notice of condemnation proceedings.

United States.— Burnes *v.* Multnomah R. Co., 8 Sawy. (U. S.) 543, 15 Fed. 177.

Compare Aldredge *v.* Payne County School Dist. No. 16, 10 Okla. 694, 65 Pac. 96, holding that notice to the owner of condemnation proceedings for a school site was necessary. And see Territory *v.* Jerome, (Ariz. 1901) 64 Pac. 417, holding that a lack of notice of proceedings to incorporate a town does not make a deprivation without due process.

See 10 Cent. Dig. tit. "Constitutional Law," § 880.

A railroad charter is not invalid in not providing for notice to owners of proceedings to assess damages for taking lands. Swan *v.* Williams, 2 Mich. 427.

62. *Alabama.*— Dyer *v.* Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655.

Illinois.— Rigney *v.* Chicago, 102 Ill. 64.

Massachusetts.— Flagg *v.* Worcester, 13 Gray (Mass.) 601.

New Jersey.— Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247.

New York.— Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Lansing *v.* Smith, 8 Cow. (N. Y.) 146, holding that no compensation need be paid to upper riparian owners and occupants for inconvenience caused by construction of a basin lower down the Hudson river.

Wisconsin.—Alexander *v.* Milwaukee, 16 Wis. 247.

United States.— Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557, a leading case. And see Knox *v.* Lee, 12 Wall (U. S.) 457, 20 L. ed. 287, holding that the fifth amendment referred only to a direct appropriation and not to such effects as those produced by the legal tender acts.

But see Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396, holding that the erection of a bridge near to a ferry, tending to decrease the value of the ferry franchise, was an unconstitutional deprivation. *Compare*, however, Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938.

See 10 Cent. Dig. tit. "Constitutional Law," § 890.

Damages for change of grade, in absence of special provisions, are remote and consequential. Callender *v.* Marsh, 1 Pick. (Mass.) 418; Dillon Mun. Corp. § 990 *et seq.*

Damage to property from rightful exercise of the police power is *absque injuria.* Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244, so holding where location of public levees caused damage.

63. *California.*— Gillan *v.* Hutchinson, 16 Cal. 153; Reynolds *v.* West, 1 Cal. 322.

Illinois.— Lee *v.* Newkirk, 18 Ill. 550; Harding *v.* Butts, 18 Ill. 502.

Louisiana.— See State *v.* Gaines, 46 La. Ann. 431, 15 So. 174.

Massachusetts.— Cobb *v.* Tirrell, 141 Mass. 459, 5 N. E. 828; Denny *v.* Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; Holden *v.* James, 11 Mass. 396, 6 Am. Dec. 174.

Michigan.— Lloyd *v.* Wayne Cir. Judge, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378.

Minnesota.— State *v.* Chicago, etc., R. Co., 36 Minn. 402, 31 N. W. 365.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 54.

New Jersey.— Koch *v.* Delaware, etc., R. Co., 53 N. J. L. 256, 21 Atl. 284; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

New York.— Westervelt *v.* Gregg, 12 N. Y. 202, 52 Am. Dec. 160; Powers *v.* Bergen, 6 N. Y. 358; Taylor *v.* Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274.

Pennsylvania.— Ervine's Appeal, 16 Pa. St. 256, 55 Am. Dec. 499.

South Carolina.— Bowman *v.* Middleton, 1 Bay (S. C.) 252.

Tennessee.— Stratton *v.* Morris, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645.

United States.— Wisconsin Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 17 S. Ct. 130, 41

seizure of water-power apparatus to enable officials to ascertain partition rights in water power is not an invalid interference with private property.[64] So provision for reversion to the owner of land taken by a railroad for a right of way, which has done no construction for eight years, is not a taking of private property, since the easement itself is coexistent only with the use for which it was acquired.[65]

b. Authorizing Sale of Property. The legislature, acting as the guardian and protector of those not competent to act for themselves, may constitutionally, by general or private laws, authorize the sale or other disposition of their property, in order to promote their interests;[66] and may so control the estates of infants,[67]

L. ed. 489; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Vanhorne *v.* Dorrance, 2 Dall. (U. S.) 304, 28 Fed. Cas. No. 16,857.

See 10 Cent. Dig. tit. "Constitutional Law," § 907 *et seq.*

Destroying a remedy on champertous contracts by declaring that neither party shall have a right to maintain any suit on the title concerning which the champertous contract was made is not unconstitutional as a taking of property. Shepherd *v.* McIntire, 5 Dana (Ky.) 574.

Placing property in the custody of the law by authorizing a judge to issue his warrant commanding seizure of books detained by a former office-holder is not invalid, since no right to the property is thereby determined. Flentge *v.* Priest, 53 Mo. 540.

Private ways cannot be authorized across the lands of a private owner, against his consent. Taylor *v.* Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274. But see State *v.* Stackhouse, 14 S. C. 417, sustaining a statute providing for the construction of private ways of necessity over lands of other owners. See, generally, PRIVATE ROADS.

A title defective by reason of an outstanding title in trustees may, even after suit brought, be perfected by virtue of authority of an act of the legislature. Kitchen *v.* Kerr, 1 Phila. (Pa.) 24, 7 Leg. Int. (Pa.) 11.

Transfer of property to the corporation may be made by the legislature from the trustee of the body when unincorporated. Presbyterian Church *v.* Picket, Wright (Ohio) 57.

64. Janesville Cotton Mfg. Co. *v.* Ford, 55 Wis. 197, 12 N. W. 377.

65. Skillman *v.* Chicago, etc., R. Co., 78 Iowa 404, 43 N. W. 275, 16 Am. St. Rep. 452.

Authorizing later sale by a municipality of part of land originally taken for a public park is not a taking for private purposes. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70 [*affirming* 3 Lans. (N. Y.) 429].

66. *Alabama.*— Munford *v.* Pearce, 70 Ala. 452; Tindal *v.* Drake, 60 Ala. 170; Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758.

Maryland.— Davis *v.* Helbig, 27 Md. 452, 92 Am. Dec. 646.

Massachusetts.— Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448; Rice *v.* Parkman, 16 Mass. 326.

Missouri.— Stewart *v.* Griffith, 33 Mo. 13, 82 Am. Dec. 148.

New York.— Powers *v.* Bergen, 6 N. Y. 358; Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; Clark *v.* Van Surlay, 15 Wend. (N. Y.) 436.

Pennsylvania.— Estep *v.* Hutchman, 14 Serg. & R. (Pa.) 435.

Wisconsin.— Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124.

United States.— Williamson *v.* Berry, 8 How. (U. S.) 495, 12 L. ed. 1170.

See 10 Cent. Dig. tit. "Constitutional Law," § 911.

67. *Alabama.*— Munford *v.* Pearce, 70 Ala. 452.

Kentucky.— Nelson *v.* Lee, 10 B. Mon. (Ky.) 495.

Maryland.— Davis *v.* Helbig, 27 Md. 452, 92 Am. Dec. 646; Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87.

Massachusetts.— Rice *v.* Parkman, 16 Mass. 326.

New Hampshire.— *Compare In re* Opinion of Court, 4 N. H. 565.

New York.— Leggett *v.* Hunter, 19 N. Y. 445; Towle *v.* Forney, 4 Duer (N. Y.) 164; Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; Clark *v.* Van Surlay, 15 Wend. (N. Y.) 436.

See 10 Cent. Dig. tit. "Constitutional Law," § 911; and GUARDIAN AND WARD; INFANTS.

Where infants are under no obligation to pay a certain debt, the legislature has no authority by special act to authorize their guardian to sell or mortgage their property for the payment of such debts. Burke *v.* Mechanics' Sav. Bank, 12 R. I. 513.

Where the failure of a probate court to require a guardian to give bond as provided by a state statute when he sells his ward's land has been passed upon by the state courts and its effect determined, such is due process, and no consideration of the fourteenth amendment is involved. Arrowsmith *v.* Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. ed. 243.

lunatics,[68] and others incapacitated.[69] Where all evidence of ownership is lost the state may constitutionally dispose of the property.[70] And the state may authorize the sale of property not capable of actual partition.[71] But in the absence of special grounds legislative interference is unconstitutional.[72]

c. Compensation For Services to Property Without Owner's Consent. The legislature cannot constitutionally authorize one person to improve his own property or the property of another without the latter's consent and compel the latter to pay for the benefit conferred, unless the character of the improvement is public.[73] But it is due process of law to allow, against the absolute owner, full remuneration to the occupant in good faith who has by improvements added to the value of the estate.[74]

68. Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448; *In re* Valentine, 72 N. Y. 184; McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910; Palmer *v.* Garland, 81 Va. 444. And see INSANE PERSONS.

69. Reinders *v.* Koppelmann, 68 Mo. 482, 30 Am. Rep. 802 (holding that the state may authorize the partition of property in which contingent interests in favor of persons not *in esse* exist); Sergeant *v.* Kuhn, 2 Pa. St. 393; Norris *v.* Clymer, 2 Pa. St. 277.

70. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314; People *v.* Ryder, 58 Hun (N. Y.) 407, 12 N. Y. Suppl. 48, 34 N. Y. St. 322 (holding that proceeds unclaimed for twenty-five years by unknown heirs may be vested in the known heirs). See also Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415.

Property believed by an inspector to be stolen may be seized, and after judicial proceedings with notice to claimant may be sold by order of court if such claimant fails to establish ownership. Lastro *v.* State, 3 Tex. App. 363.

71. Metcalf *v.* Hoopingardner, 45 Iowa 510.

72. *California.*—Tay *v.* Hawley, 39 Cal. 93.

Connecticut.—Linsley *v.* Hubbard, 44 Conn. 109, 26 Am. Rep. 431.

Iowa.— Reed *v.* Wright, 2 Greene (Iowa) 15.

Kentucky.— Gossom *v.* McFerran, 79 Ky. 236.

New York.— People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 7 Am. St. Rep. 684, 2 L. R. A. 255 [*affirming* 45 Hun (N. Y.) 519]; Oviatt *v.* Hopkins, 20 N. Y. App. Div. 168, 46 N. Y. Suppl. 959.

Ohio.— Gilpin *v.* Williams, 25 Ohio St. 283.

Pennsylvania.—Ervine's Appeal, 16 Pa. St. 256, 55 Am. Dec. 499; Austin *v.* State University, 1 Yeates (Pa.) 260.

South Dakota.— Johnson *v.* Brauch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857.

Tennessee.— Owens *v.* Rains, 5 Hayw. (Tenn.) 106.

Wisconsin.— Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124.

See 10 Cent. Dig. tit. "Constitutional Law," § 911.

An act taking the estate of a decedent from the heirs and applying it to payment of decedent's debts is not against due process of law. Holman *v.* Norfolk Bank, 12 Ala. 369; Shehan *v.* Barnett, 6 T. B. Mon. (Ky.) 592. But see Lane *v.* Dorman, 4 Ill. 238, 36 Am. Dec. 543.

73. *Indiana.*— Gifford Drainage Dist. *v.* Shroer, 145 Ind. 572, 44 N. E. 636; Logan *v.* Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Ross *v.* Davis, 97 Ind. 79; Tillman *v.* Kircher, 64 Ind. 104; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

Iowa.— Fleming *v.* Hull, 73 Iowa 598, 35 N. W. 673. But see Ahern *v.* Dubuque Lead, etc., Min. Co., 48 Iowa 140.

Michigan.— Ames *v.* Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 Am. Dec. 731.

Nebraska.— Jenal *v.* Green Island Draining Co., 12 Nebr. 163, 10 N. W. 547.

New Jersey.— Kean *v.* Driggs Drainage Co., 45 N. J. L. 91; Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

Ohio.— Reeves *v.* Treasurer, 8 Ohio St. 333.

Pennsylvania.— Rutherford *v.* Mynes, 97 Pa. St. 78.

Tennessee.— Johnson *v.* Hudson, 96 Tenn. 630, 36 S. W. 380.

See 10 Cent. Dig. tit. "Constitutional Law," § 912.

Laws regulating partition fences, party-walls, the inclosure of woodlands, embanking of meadows, etc., stand on a different footing, the object being to regulate the management and enjoyment of property by the owners or a majority of them at their common expense, and are well established as a valid exercise of the police power. Coster *v.* Tide Water Co., 18 N. J. Eq. 54. But see an exceptional doctrine *contra*, in Ahern *v.* Dubuque Lead, etc., Min. Co., 48 Iowa 140.

74. *Illinois.*— Ross *v.* Irving, 14 Ill. 171.

Indiana.— Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374.

Iowa.— Childs *v.* Shower, 18 Iowa 261.

Kentucky.— Thomas *v.* Thomas, 16 B. Mon. (Ky.) 420.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Minnesota.— *Compare* Madland *v.* Benland, 24 Minn. 372, holding that the owner could not be compelled to pay interest on the value of improvements made by the occupant. And

d. Curative Acts. An interference with private property, void for want of jurisdiction, cannot in general be validated by later legislation.[75] But the legislature may cure defects merely in form, as in the execution of instruments affecting the title to property.[76] Property rights vested under a valid judgment cannot be destroyed by legislative act setting aside or in effect annulling the judgment.[77]

23. TAXATION — a. In General. The taking of property for public purposes by taxation authorized by competent legislative authority[78] is according to due process of law; but when the purpose is clearly not public the courts will declare the act unconstitutional.[79] In order to bring taxation imposed by a state or under

see Wilson *v.* Red Wing School Dist., 22 Minn. 488.

Missouri.— Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557.

New Hampshire.— Withington *v.* Corey, 2 N. H. 115.

New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

New York.— *Compare* Putnam *v.* Ritchie, 6 Paige (N. Y.) 390.

North Carolina.— Justice *v.* Baxter, 93 N. C. 405; Wharton *v.* Moore, 84 N. C. 479, 37 Am. Rep. 627; Merritt *v.* Scott, 81 N. C. 385.

Ohio.— McCoy *v.* Grandy, 3 Ohio St. 463.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

South Carolina.— Lumb *v.* Pinckney, 21 S. C. 471.

Tennessee.— *Compare* Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

Texas.— Saunders *v.* Wilson, 19 Tex. 194.

Vermont.— Whitney *v.* Richardson, 31 Vt. 300.

United States.— Griswold *v.* Bragg, 48 Fed. 519; Bright *v.* Boyd, 2 Story (U. S.) 605, 4 Fed. Cas. No. 1,876. And see Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

See 10 Cent. Dig. tit. "Constitutional Law," § 917.

But it is unconstitutional to give an election to the occupant to keep the land, so compelling the legal owner to abandon his title. Childs *v.* Shower, 18 Iowa 261; McCoy *v.* Grandy, 3 Ohio St. 463 [*approved* in Barker *v.* Owen, 93 N. C. 198].

Provisions allowing the owner to relinquish his estate in the land, upon payment to him by the occupant of the value unimproved, have been sustained. Barker *v.* Owen, 93 N. C. 198; Griswold *v.* Bragg, 48 Fed. 519.

75. *California.*— Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

Colorado.— Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438.

Kentucky.— Yeatman *v.* Day, 79 Ky. 186.

Massachusetts.— Forster *v.* Forster, 129 Mass. 559; Sohier *v.* Massachusetts Gen. Hospital, 3 Cush. (Mass.) 483.

Pennsylvania.— Dale *v.* Medcalf, 9 Pa. St. 108.

See 10 Cent. Dig. tit. "Constitutional Law," § 924.

But statutes confirming sales of land under order of court for an adequate consideration, where there was a want of jurisdiction in the court, where the deed was originally made to another person than the actual bidder, where the sale was after the time limited in the license, or where the confirming act was passed upon the petition of all parties having the legal title have been sustained. Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87; Sohier *v.* Massachusetts Gen. Hospital, 3 Cush. (Mass.) 483; Cooper *v.* Robinson, 2 Cush. (Mass.) 184; Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Wilkinson *v.* Leland, 10 Pet. (U. S.) 294, 9 L. ed. 430, 2 Pet. (U. S.) 627, 7 L. ed. 542.

Invalid subscriptions to stock, which could not be enforced by either party, cannot be validated by a later statute. New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473.

Rights to property vested by death of another cannot be destroyed by a later act which attempts to authorize reformation of a will, fatally defective under an existing law in regard to execution. *In re* Alter, 7 Phila. (Pa.) 529.

76. Weed *v.* Donovan, 114 Mass. 181; Denny *v.* Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; Wildes *v.* Vanvoorhis, 15 Gray (Mass.) 139; Lane *v.* Nelson, 79 Pa. St. 407; Randall *v.* Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124.

77. Berrett *v.* Oliver, 7 Gill & J. (Md.) 191; People *v.* Saginaw County, 26 Mich. 22; Menges *v.* Dentler, 33 Pa. St. 495, 75 Am. Dec. 616; Taylor *v.* Place, 4 R. I. 324.

78. *Alabama.*— Lott *v.* Ross, 38 Ala. 156.

California.—German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; People *v.* Austin, 47 Cal. 353; High *v.* Shoemaker, 22 Cal. 363.

Georgia.— Vanover *v.* Davis, 27 Ga. 354.

Indiana.— Bright *v.* McCullough, 27 Ind. 223.

Massachusetts.— Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Mississippi.— Daily *v.* Swope, 47 Miss. 367.

See 10 Cent. Dig. tit. "Constitutional Law," § 891 *et seq.*

79. *Iowa.*— Hanson *v.* Vernon, 27 Iowa 28, 1 Am. Rep. 215.

Maine.— Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Opinion of Justices, 58 Me. 591.

Massachusetts.— Jenkins *v.* Andover, 103 Mass. 94.

New York.— Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586; People *v.* Brooklyn, 4

its authority within the scope of the provision of the fourteenth amendment relating to due process of law, the act should be so clearly an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax.[80] The power to tax extends to all persons and property within the jurisdiction, and the legislature is the sole judge of the necessity of taxation, and of the sorts of property to be taken;[81] but due process requires that taxation be only upon persons,

N. Y. 419, 55 Am. Dec. 266; Guildford *v.* Cornell, 18 Barb. (N. Y.) 615.

Pennsylvania.— Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

Texas.— Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159.

United States.— Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455.

See 10 Cent. Dig. tit. "Constitutional Law," § 892.

Compensation not a test of due process. Taxation, unlike eminent domain, is not affected by the existence of exact compensation for property taken, beyond the benefit which each citizen derives from the application of the tax to the purpose for which it was levied. Sufficient consideration is presumed in the general benefits of government. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

The benefit to the public must be direct, and not merely incidental. Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39; People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400.

There must be a direct benefit to the district taxed, so that a charge properly lying on a whole state cannot be forced upon a smaller subdivision. Ryerson *v.* Utley, 16 Mich. 269; *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

Nor can an individual under the guise of a local assessment be compelled to pay for a general public improvement. McCormack *v.* Patchin, 53 Mo. 33, 14 Am. Rep. 440.

As to the law upon local assessments for public improvements as a taking of private property without due process of law see *supra*, XIII, E, 15, b.

A majority vote under an unconstitutional tax law has no validity, since it would deprive the minority of property without due process of law. Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549.

Provision for issue of city bonds to cover debts contracted in excess of the prescribed limit is not a taking of taxpayers' property by means of taxation without due process. People *v.* Burr, 13 Cal. 343. To similar effect see Forsythe *v.* Hammond, 68 Fed. 774.

A requirement that certain fire-insurance companies pay to a firemen's benevolent association a percentage on all insurance contracts made by them has been held constitutional (Firemen's Benev. Assoc. *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115); but such provisions are of doubtful validity as taking for private purposes (Philadelphia Disabled Firemen's Relief Assoc. *v.* Wood, 39 Pa. St. 73).

Authorizing deduction of a percentage from teachers' salaries in order to provide a teachers' pension fund is not a valid exercise of power. State *v.* Hubbard, 12 Ohio Cir. Dec. 87.

80. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823.

81. *California.*— Hagar *v.* Yolo County, 47 Cal. 222; People *v.* Doe G. 1,034, 36 Cal. 220.

Illinois.— People *v.* Soldiers' Home, etc., 95 Ill. 564; Northwestern University *v.* People, 80 Ill. 333, 22 Am. Rep. 187.

New Jersey.— State *v.* Newark, 26 N. J. L. 519.

New York.— People *v.* Dayton, 55 N. Y. 367; Litchfield *v.* Vernon, 41 N. Y. 123; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Com., 66 Pa. St. 73, 5 Am. Rep. 344.

United States.— Sanford *v.* Poe, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683; Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482; Lane County *v.* Oregon, 7 Wall. (U. S.) 71, 19 L. ed. 101; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

See 10 Cent. Dig. tit. "Constitutional Law," § 891 *et seq.*

A mortgagee's interest in land may be taxed as real estate, regardless of his residence. Savings, etc., Soc. *v.* Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 L. ed. 803.

Taxation on collateral inheritances was held to be according to due process of law in State *v.* Hamlin, 86 Me. 495, 30 Atl. 76, 41 Am. St. Rep. 569, 25 L. R. A. 632.

The New York transfer tax law (N. Y. Laws (1897), c. 284) which is construed as subjecting to taxation remainders created by a will before the precedent estates terminate and the remainders vest in possession does not violate the fourteenth amendment. Orr *v.* Gilman, 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196.

Invalidity from pecuniary interest of officials.— Where a state auditor was charged with the duty of discovering property withheld from tax-lists, and received a commission upon all property so found, it was held that proceedings taken under such powers were not due process of law, as the pecuniary interest of the auditor rendered him unfit for his judicial functions of investigation. Brinkerhoff *v.* Brumfield, 94 Fed. 422.

business, or other property within the jurisdiction.[82] If no express constitutional limitation exists, the rate of taxation, however great, is solely for legislative determination.[83] Due process also implies that taxation shall be according to some rule of apportionment, so as to secure uniformity among those subject to the particular tax.[84]

b. Manner of Enforcement. As the general power of taxation lies in the legislature, it may, subject to express constitutional restrictions, adopt any measures of enforcement, which it sees fit, upon persons and property within its jurisdiction.[85] So it has been held that a summary mode of collecting taxes is due

82. State *v.* Howard County Ct., 69 Mo. 454; Catlin *v.* Hull, 21 Vt. 152; Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558; *In re* State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423, 20 L. ed. 192; Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596, 15 L. ed. 254.

A law requiring property in the hands of a non-resident guardian of a non-resident ward, situated without the state, to be taxed in the county within the state where the guardian was appointed, unless elsewhere taxed, is not unconstitutional. Baldwin *v.* State, 89 Md. 587, 43 Atl. 857.

83. Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Forsythe *v.* Hammond, 68 Fed. 774.

84. O'Kane *v.* Treat, 25 Ill. 557; Tide Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

85. *Illinois.*—People *v.* Morgan, 90 Ill. 558.

Indiana.— Sears *v.* Warren County, 36 Ind. 267, 10 Am. Rep. 62.

Massachusetts.—Oliver *v.* Washington Mills, 11 Allen (Mass.) 268.

Nebraska.— Leigh *v.* Green, (Nebr. 1902) 90 N. W. 255.

New York.— People *v.* Brooklyn, 4 N. Y. 420, 55 Am. Dec. 266; Matter of Fuller, 62 N. Y. App. Div. 428, 71 N. Y. Suppl. 40 [*reversing* 34 Misc. (N. Y.) 750, 70 N. Y. Suppl. 1050].

Ohio.— Lima *v.* McBride, 34 Ohio St. 338.

United States.— Taylor *v.* Secor, 92 U. S. 615, 23 L. ed. 663; *In re* State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179; *In re* License Cases, 5 How. (U. S.) 504, 12 L. ed. 256.

See 10 Cent. Dig. tit. "Constitutional Law," § 893 *et seq.*

Decision of tax commissioners may be made final in matters of assessment. Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; Gibbs *v.* Hampden County Com'rs, 19 Pick. (Mass.) 298; Chase *v.* Blackstone Canal Co., 10 Pick. (Mass.) 244; U. S. *v.* Lawrence, 3 Dall. (U. S.) 42, 1 L. ed. 502.

A legislature may provide for judicial proceedings to obtain an adjudication upon taxes as a preliminary to sale, invoking the aid of equity for that purpose. *In re* Tax Sale, 54 Mich. 417, 23 N. W. 189; State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493.

Giving a new remedy for the collection of taxes already due is not a taking of property without due process. People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521. So a county may be authorized, in case of failure to collect taxes by the ordinary process, to foreclose the tax lien by proceedings in a district court. Pritchard *v.* Madren, 24 Kan. 486.

Persons removing from one county into another may be forced to pay through sending a tax bill to the sheriff of the county into which they have removed. De Arman *v.* Williams, 93 Mo. 158, 5 S. W. 904.

Verified statements of their taxable property may be required from all persons and corporations. Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443; McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414. And see Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

The state may forbid registration of deeds of lands on which there are unpaid taxes. State *v.* Ramsey County, 26 Minn. 521, 6 N. W. 337.

A tax may be made a prior lien upon the property. Durgan's Appeal, 68 Pa. St. 204, 8 Am. Rep. 169; *In re* Wallace, 59 Pa. St. 401; Jersey City Provident Sav. Inst. *v.* Jersey City, 113 U. S. 506, 5 S. Ct. 612, 28 L. ed. 1102.

Statutes imposing penalties for non-payment of taxes do not violate due process of law. Myers *v.* Park, 8 Heisk. (Tenn.) 550; Palmer *v.* McMahon, 133 U. S. 660, 10 S. Ct. 324, 33 L. ed. 772 [*affirming* 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796]. But a statute imposing penalties for past delinquencies is not due process but confiscation. State *v.* Jersey City, 37 N. J. L. 39. Penalties may be enforced for failure to return sworn inventories of property. Kinsworthy *v.* Mitchell, 21 Ark. 145; Biddle *v.* Oakes, 59 Cal. 94; Berry *v.* State, 10 Tex. App. 315; Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321. But in Minnesota such penalties are forbidden by the constitution. McCormick *v.* Fitch, 14 Minn. 252.

A penalty of fifty per cent may be imposed upon express, telegraph, telephone, and sleeping-car companies for non-payment of taxes. Western Union Tel. Co. *v.* Indiana, 165 U. S. 304, 17 S. Ct. 345, 41 L. ed. 725.

process of law,[86] and payment may be enforced by distraint and sale of either real or personal property.[87] So, unless specially forbidden, it may be enforced by

Collection of taxes on corporate obligations.— To insure collection the state may require a corporation to deduct the tax from interest payable to bondholders, without violating due process of law. Com. *v.* Delaware, etc., Canal Co., 150 Pa. St. 245, 24 Atl. 599; Jennings *v.* Coal Ridge Imp., etc., Co., 147 U. S. 147, 13 S. Ct. 282 37 L. ed. 116 [*affirming* 127 Pa. St. 397, 17 Atl. 986, and *following* Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. ed. 892]; Chester *v.* Pennsylvania, 134 U. S. 240, 10 S. Ct. 536, 33 L. ed. 896. And banking corporations may be required to withhold from dividends or profits a tax on capital stock. State *v.* Mayhew, 2 Gill (Md.) 487.

Taxation of bank shares may be provided by requiring the banks to make returns showing the market value of their shares, and levy at the established tax-rate may be made upon such valuation without affording shareholders any notice or opportunity to be heard, the tax bills being validly made self-executing. People's Nat. Bank *v.* Marye, 107 Fed. 570.

Suit to restrain assessment or collection of any tax authorized may be prohibited without depriving a person of property without due process. Pullan *v.* Kinsinger, 2 Abb. (U. S.) 94, 20 Fed. Cas. No. 11,463, 9 Am. L. Reg. N. S. 557, 5 Am. L. Rev. 184, 11 Int. Rev. Rec. 197.

The state may use taxation as a remedy for enforcement of an equitable claim against a municipality. Guilford *v.* Cornell, 18 Barb. (N. Y.) 615.

But the enforcement under a void law by a state of a tax levied in pursuance thereof is a taking of property without due process under the fourteenth amendment. Dundee Mortg., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359.

86. *California.*— High *v.* Shoemaker, 22 Cal. 363.

Connecticut.— Ives *v.* Lynn, 7 Conn. 505.

Kentucky.— Harris *v.* Wood, 6 T. B. Mon. (Ky.) 641.

Louisiana.— New Orleans *v.* Cannon, 10 La. Ann. 764.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 260, 30 Pac. 689.

New Hampshire.— Willard *v.* Wetherbee, 4 N. H. 118.

Pennsylvania.— Moore *v.* Marsh, 60 Pa. St. 46.

Tennessee.— McCarrol *v.* Weeks, 5 Hayw. (Tenn.) 246.

United States.— McMillen *v.* Anderson, 95 U. S. 37, 24 L. ed. 335.

The constitutional guaranty of due process of law, derived from Magna Charta, in substance declares that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land. In taxation proceedings, from very ancient times, the determination of the legislature has been in itself considered the "law of the land" when within the constitutional limitations of legislative authority. State *v.* Frazier, 48 Ga. 137; Harper *v.* Elberton, 23 Ga. 566; Harris *v.* Wood, 6 T. B. Mon. (Ky.) 641; State *v.* Mayhew, 2 Gill (Md.) 487; Weimer *v.* Bunbury, 30 Mich. 201; Cruikshanks *v.* Charleston, 1 McCord (S. C.) 360. In Cowles *v.* Brittain, 9 N. C. 204, 207, the court said that "the mode of levying, as well as the right of imposing taxes, is completely and exclusively within the legislative power, which, it is to be presumed, will always be exercised with an equal regard to the security of the publick and individual rights and convenience. The existence of government, depending on the prompt and regular collection of the revenue, must, as an object of primary importance, be insured in such a way as the wisdom of the Legislature may prescribe. . . . But to pursue every delinquent liable to pay taxes, through the forms of process and a Jury trial, would materially impede, if not wholly obstruct, the collection of the revenue."

87. *Illinois.*— Chambers *v.* People, 113 Ill. 509; Rhinehart *v.* Schuyler, 7 Ill. 473; Messinger *v.* Germain, 6 Ill. 631.

Louisiana.— Duncan *v.* State, 7 La. Ann. 377; Union Towboat Co. *v.* Bordelon, 7 La. Ann. 192.

Michigan.— Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130; Sears *v.* Cottrell, 5 Mich. 251.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

New York.— Hersee *v.* Porter, 100 N. Y. 403, 3 N. E. 338; Sheldon *v.* Van Buskirk, 2 N. Y. 473.

Pennsylvania.— McGregor *v.* Montgomery, 4 Pa. St. 237.

South Carolina.— State *v.* Allen, 2 McCord (S. C.) 55.

Tennessee.— McCarrol *v.* Weeks, 5 Hayw. (Tenn.) 246.

Washington.—State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

United States.— Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659; Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253; Sherry *v.* McKinley, 99 U. S. 496, 25 L. ed. 330; De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174; Tyler *v.* Defrees, 11 Wall. (U. S.) 331, 20 L. ed. 161; Page *v.* U. S., 11 Wall. (U. S.) 268, 20 L. ed. 135; Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; O'Reilly *v.* Holt, 4 Woods (U. S.) 645, 18 Fed. Cas. No. 10,563.

But see Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194.

See 10 Cent. Dig. tit. "Constitutional Law," § 893 *et seq.*

After expiration of lien for taxes the state cannot authorize the sale of property. Kipp *v.* Elwell, 65 Minn. 525, 68 N. W. 105, 33 L. R. A. 435.

forfeitures.[88] But due process requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him.[89] Reasonable conditions may be imposed by the state upon

In Louisiana a tax-sale is void if made without notice. Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462.

88. Newton *v.* Roper, 150 Ind. 630, 50 N. E. 749; King *v.* Mullins, 171 U. S. 404, 18 S. Ct. 925, 43 L. ed. 214. But see Shaw *v.* Robinson, 23 Ky. L. Rep. 998, 64 S. W. 620, holding invalid an act forfeiting property for non-payment of taxes for twenty years.

Forfeiture.— In some states a forfeiture for default in paying taxes cannot be perfected so as to defeat the title of a former owner without inquest of office (Marshall *v.* McDaniel, 12 Bush (Ky.) 378; Robinson *v.* Huff, 3 Litt. (Ky.) 37; Barbour *v.* Nelson, 1 Litt. (Ky.) 59; Hill *v.* Lund, 13 Minn. 451; Baker *v.* Kelley, 11 Minn. 480; St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321; Griffin *v.* Mixon, 38 Miss. 424); but the opposite view has also been taken (Adams *v.* Larrabee, 46 Me. 516; Hodgdon *v.* Wight, 36 Me. 326; Usher *v.* Pride, 15 Gratt. (Va.) 190; Flanagan *v.* Grimmet, 10 Gratt. (Va.) 421; Hale *v.* Branscum, 10 Gratt. (Va.) 418; Wild *v.* Serpell, 10 Gratt. (Va.) 405 [*overruling* Kinney *v.* Beverley, 2 Hen. & M. (Va.) 318]). *Compare* Bagley *v.* Castile, 42 Ark. 77. Provisions for forfeiture must be strictly adhered to or the taking will be unlawful. Hopkins *v.* Sandidge, 31 Miss. 668.

Provision for forfeiture to the state of interests in unclaimed military tracts assessed, unless within a designated time the owners established their titles, was held to be a taking without due process in Scharf *v.* Tasker, 73 Md. 378, 21 Atl. 56.

89. *California.*— Bowman *v.* Dewey, (Cal. 1885) 8 Pac. 613; San Francisco *v.* Low, (Cal. 1885) 8 Pac. 600; People *v.* Pittsburg R. Co., 67 Cal. 625, 8 Pac. 381.

Illinois.— Darling *v.* Gunn, 50 Ill. 424.

Indiana.— Hubbard *v.* Goss, 157 Ind. 485, 62 N. E. 36; Kuntz *v.* Sumption, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655.

Iowa.— Auer *v.* Dubuque, 65 Iowa 650, 22 N. W. 914; Griswold College *v.* Davenport, 65 Iowa 633, 22 N. W. 904.

Kentucky.— Owensboro, etc., R. Co. *v.* Daviess County, 8 Ky. L. Rep. 773, 3 S. W. 164.

Louisiana.—Montgomery *v.* Maryland Land, etc., Co., 46 La. Ann. 403, 15 So. 63; Concordia Parish *v.* Bertron, 46 La. Ann. 356, 15 So. 60; Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462; State *v.* Judge Fourth Dist. Ct., 27 La. Ann. 704.

Michigan.— People *v.* Saginaw County, 26 Mich. 22.

Minnesota.— Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 42 N. W. 473.

New Jersey.— State *v.* Drake, 33 N. J. L. 194.

New York.— People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498 [*affirming* 49 Hun (N. Y.) 466, 2 N. Y. Suppl. 253, 18 N. Y. St. 26]; *In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502; Dasey *v.* Skinner, 57 Hun (N. Y.) 593, 11 N. Y. Suppl. 821, 33 N. Y. St. 15; *In re* Jensen, 28 Misc. (N. Y.) 378, 59 N. Y. Suppl. 653.

North Carolina.— Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348.

Ohio.— Fagin *v.* Ohio Humane Soc., 9 Ohio S. & C. Pl. Dec. 341, 6 Ohio N. P. 357.

Pennsylvania.— Philadelphia *v.* Miller, 49 Pa. St. 440.

Texas.— McFadden *v.* Lougham, 58 Tex. 579.

United States.— Gallup *v.* Schmidt, 183 U. S. 300, 22 S. Ct. 162, 46 L. ed. 207 [*affirming* 154 Ind. 196, 56 N. E. 443]; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569 [*affirming* 6 Sawy. (U. S.) 567, 4 Fed. 366]; McMillen *v.* Anderson, 95 U. S. 37, 24 L. ed. 335; Sanford *v.* Poe, 69 Fed. 546, 16 C. C. A. 305; Meyers *v.* Shields, 61 Fed. 713; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; *In re* Railroad Tax Cases, 8 Sawy. (U. S.) 238, 13 Fed. 722.

See 10 Cent. Dig. tit. "Constitutional Law," § 893 *et seq.*

Private persons or private corporations like levee districts cannot validly be authorized to levy and collect taxes or special assessments, without affording the people taxed an opportunity to assent or dissent. Board of Directors *v.* Houston, 71 Ill. 318.

Sufficiency of notice and hearing.— The statement in the text above is as definite as can be made with general applicability. It is not customary to provide that a taxpayer shall be heard before the assessment is made. Cooley Tax. (1st ed.) 266. Statutory provisions, commonly covering notice and hearing, are mandatory (Walker *v.* Chapman, 22 Ala. 116; Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Nashville *v.* Weiser, 54 Ill. 245; Cleghorn *v.* Postlewaite, 43 Ill. 428; Marsh *v.* Chestnut, 14 Ill. 223; Philadelphia Ins. Contributionship *v.* Yard, 17 Pa. St. 331; Phillips *v.* Stevens' Point, 25 Wis. 594; French *v.* Edwards, 13 Wall. (U. S.) 506, 20 L. ed. 702); and strict observance of such requirements is a condition precedent to liability (Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Kansas Pac. R. Co. *v.* Russell, 8 Kan. 558; Lovejoy *v.* Hunt, 48 Me. 377; Moulton *v.* Blaisdell, 24 Me. 283; Lowell *v.* Wentworth, 6 Cush. (Mass.) 221; Powers' Appeal, 29 Mich. 504; State *v.* Jersey City, 25 N. J. L. 309; Bennett *v.* Buffalo, 17 N. Y. 383).

Constructive notice by advertisement in an

the privilege of allowing the defaulting owner of property sold for taxes to redeem it.[90] And the state may in certain cases impose limitations upon the time within which the holder of a tax-title or the original owner may question the validity of taxation proceedings or the ownership of the property.[91]

c. Rules of Evidence. The legislative power to frame and change rules of

official newspaper has been held sufficient. Shreveport *v.* Jones, 26 La. Ann. 708; Bond *v.* Hiestand, 20 La. Ann. 139; New Orleans *v.* Cannon, 10 La. Ann. 764.

A law itself has been held sufficient notice, without any special notice to taxpayers, where it prescribed time and place for meeting of assessors, with opportunity then to be heard. State *v.* Jones, 51 Ohio St. 492, 37 N. E. 945; Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 14 S. Ct. 1114, 38 L. ed. 1031 [*affirming* 133 Ind. 625, 33 N. E. 432]. See Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., (Ky. 1901) 63 S. W. 749, sustaining taxation where the only mode of collection was by suit, although no other notice was provided for. And see Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 50 C. C. A. 435, holding that three weeks' publication of a tax-list, with thirty days' opportunity to contest the assessment, afforded due process.

Opportunity for hearing before assessment has been held unnecessary where the mode of collection provided by law was by suit. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; Owensboro, etc., R. Co. *v.* Daviess County, 8 Ky. L. Rep. 773, 3 S. W. 164; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569 [*affirming* 6 Sawy. (U. S.) 567, 4 Fed. 366].

The opportunity for hearing before a board of equalization, afforded to and accepted by a taxpayer, constitutes due process of law. McLeod *v.* Receveur, 71 Fed. 455, 18 C. C. A. 188.

Collection may be made before hearing where reasonable provision exists for a subsequent hearing. Williams *v.* Albany County, 21 Fed. 99.

Restriction of defenses in hearings by affecting rules of evidence or otherwise must not be arbitrary or oppressive. Louisville *v.* Cochran, 82 Ky. 15.

For fuller discussion of requisites of notice and hearing in taxation and especially in local assessments for public improvements see *supra*, XIII, E, 15.

90. Thus the delinquent party recovering in ejectment may be required to pay the fair value of betterments which an adverse claimant has in good faith made upon the property. Pope *v.* Macon, 23 Ark. 644; Childs *v.* Shower, 18 Iowa 261; Howard *v.* Zeyer, 18 La. Ann. 407; Bracket *v.* Norcross, 1 Me. 89; Jones *v.* Carter, 12 Mass. 314; Bacon *v.* Callender, 6 Mass. 303; King *v.* Harrington, 18 Mich. 213; Dothage *v.* Stuart, 35 Mo. 251; Longworth *v.* Wolfington, 6 Ohio 9; Lynch *v.* Brudie, 63 Pa. St. 206; Steele *v.* Spruance, 22 Pa. St. 256; Brown *v.* Storm, 4 Vt. 37. The delinquent redeeming may also be required as a condition precedent to file an affidavit of tender to purchaser of tax-title of all taxes, costs, and interest thereon, in addition to the full value of improvements. Pope *v.* Macon, 23 Ark. 644. The claimant may be required to pay all taxes paid by the occupant under a defective tax-title which were a valid charge upon the land, such being in substance only a transfer of the lien of the state to the person originally paying the tax. Madland *v.* Benland, 24 Minn. 372. And the right has been sustained to require payment of taxes as a condition precedent to recovery from the tax purchaser, when it was proposed to contest the validity of the tax proceedings. Pope *v.* Macon, 23 Ark. 644; Craig *v.* Flanagin, 21 Ark. 319; Glass *v.* White, 5 Sneed (Tenn.) 475; Tharp *v.* Hart, 2 Sneed (Tenn.) 569. *Contra*, Bennett *v.* Davis, 90 Me. 102, 37 Atl. 864. *Compare* Wakeley *v.* Nicholas, 16 Wis. 558. But when the tax itself is bad doubt has been expressed as to the constitutional right of the state to require the alleged delinquent to tender taxes to the purchaser, the rule of *caveat emptor* being said to apply to the tax buyer, who must look to the state for reparation on account of the invalid tax. Hart *v.* Henderson, 17 Mich. 218. See also Fuller *v.* Hannahs, 44 Mich. 578, 7 N. W. 240; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367. A redeeming owner may be required to pay a penalty of thirty per cent on all subsequent taxes paid by the tax purchaser within a certain time (Mulligan *v.* Hintrager, 18 Iowa 171); and an owner recovering his land on account of a formal defect in a tax deed may be required to pay for the adverse claimant's use all subsequent taxes plus twenty-five per cent interest thereon (Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843). But it is depriving an owner without due process to require that he deposit double the amount of the purchase-money as a condition precedent to suit for recovery. Stoudenmire *v.* Brown, 48 Ala. 699.

Repealing or attaching additional conditions to the right of redemption does not deprive an owner of property without due process of law, because a law allowing redemption after default is a privilege. Craig *v.* Flanagin, 21 Ark. 319.

91. *Arkansas.*— Cofer *v.* Brooks, 20 Ark. 542.

Indiana.— Doe *v.* Hearick, 14 Ind. 242; Vancleave *v.* Milliken, 13 Ind. 105.

evidence extends to making a tax deed given by a competent officer *prima facie* evidence not only of the regularity of the sale but of all prior proceedings and of title in the purchaser;[92] but a tax deed cannot be made conclusive evidence of validity of the sale and of all proceedings prior thereto.[93]

d. Curative Acts.[94] Tax-sales void under the law existing when they were made cannot be validated;[95] and while mere irregularities in tax proceedings may be cured,[96] the legislature cannot cure a want of authority to act at all.[97]

Iowa.— Jeffrey *v.* Brokaw, 35 Iowa 505; Thomas *v.* Stickle, 32 Iowa 71; Henderson *v.* Oliver, 28 Iowa 20.

Wisconsin.— Lawrence *v.* Kenney, 32 Wis. 281; Gunnison *v.* Hoehne, 18 Wis. 268; Jones *v.* Collins, 16 Wis. 594.

United States.— MacFarland *v.* Jackson, 137 U. S. 258, 11 S. Ct. 79, 34 L. ed. 664; Wheeler *v.* Jackson, 137 U. S. 245, 11 S. Ct. 76, 34 L. ed. 659; Barrett *v.* Holmes, 102 U. S. 651, 26 L. ed. 291; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228.

See 10 Cent. Dig. tit. "Constitutional Law," § 899.

But where the owner of the original title remains in possession after the original tax-sale it has been held not competent to limit a period at the expiration of which the tax-title shall become perfect and indefeasible. Case *v.* Dean, 16 Mich. 12; Groesbeck *v.* Seeley, 13 Mich. 329. See Conway *v.* Cable, 37 Ill. 82, 87, Am. Dec. 240; Waln *v.* Shearman, 8 Serg. & R. (Pa.) 357, 11 Am. Dec. 624.

Where the land remains unoccupied the state may validly provide that lapse of time shall perfect a title against any person only when he could by some means within the period contest the validity of title. Baker *v.* Kelly, 11 Minn. 480; Cranmer *v.* Hall, 4 Watts & S. (Pa.) 36; Waln *v.* Shearman, 8 Serg. & R. (Pa.) 357, 11 Am. Dec. 624; Barrett *v.* Holmes, 102 U. S. 651, 26 L. ed. 291.

Where the tax purchaser has taken possession the state may validly provide that after a reasonable time rights of parties shall be fixed. Vancleave *v.* Milliken, 13 Ind. 105; McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Edgarton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228.

92. *Maine.*— Orono *v.* Veazie, 57 Me. 517; Freeman *v.* Thayer, 33 Me. 76.

Michigan.— Groesbeck *v.* Seeley, 13 Mich. 329.

Mississippi.— Belcher *v.* Mhoon, 47 Miss. 613; Ray *v.* Murdock, 36 Miss. 692.

Missouri.— Abbott *v.* Lindenbower, 46 Mo. 291; Cook *v.* Hacklemann, 45 Mo. 317.

New York.— Johnson *v.* Elwood, 53 N. Y. 431; Forbes *v.* Halsey, 26 N. Y. 53; Hand *v.* Ballou, 12 N. Y. 541.

Ohio.— Turney *v.* Yeoman, 14 Ohio 207.

Pennsylvania.— Hoffman *v.* Bell, 61 Pa. St. 444.

See 10 Cent. Dig. tit. "Constitutional Law," § 900.

93. *Alabama.*— Calhoun *v.* Fletcher, 63 Ala. 574; Stoudenmire *v.* Brown, 48 Ala. 699

Iowa.— Immegart *v.* Gorgas, 41 Iowa 439; Powers *v.* Fuller, 30 Iowa 476; McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214.

Missouri.— Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528; Abbott *v.* Lindenbower, 42 Mo. 162.

Nebraska.— Larson *v.* Dickey, 39 Nebr. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

United States.— Bannon *v.* Burns, 39 Fed. 892; Kelly *v.* Herrall, 20 Fed. 364.

But see *In re* Lake, 40 La. Ann. 142, 3 So. 479. And see Joslyn *v.* Rockwell, 128 N. Y. 334, 28 N. E. 604, 40 N. Y. St. 274 [*reversing* Joslyn *v.* Pulver, 59 Hun (N. Y.) 129, 13 N. Y. Suppl. 311, 35 N. Y. St. 888]. *Compare* Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

See 10 Cent. Dig. tit. "Constitutional Law," § 900.

But it has been held that the state may make a tax deed conclusive evidence of matters not essential to a valid sale. Hurley *v.* Powell, 31 Iowa 64; Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502; *In re* Douglas, 41 La. Ann. 765, 6 So. 675; Larson *v.* Dickey, 39 Nebr. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

In Iowa it has been held that a deed may be made conclusive that the mere sale was according to law. Jeffrey *v.* Brokaw, 35 Iowa 505; Ware *v.* Little, 35 Iowa 234; McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214. But the original owner may still contest the liability to any tax. Martin *v.* Cole, 38 Iowa 141.

94. As to curative acts in general see *supra*, X, B.

As to validating illegal tax levies as affecting vested rights see *supra*, X, B, 2, e, (IV).

95. Harper *v.* Rowe, 53 Cal. 233; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240; Baer *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

96. Hart *v.* Henderson, 17 Mich. 218.

97. *California.*— People *v.* Goldtree, 44 Cal. 323.

Illinois.— McDaniel *v.* Correll, 19 Ill. 226, 68 Am. Dec. 587.

Kansas.—Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301.

Massachusetts.— Denny *v.* Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

Michigan.— Hart *v.* Henderson, 17 Mich. 218.

Missouri.—Abbott *v.* Lindenbower, 42 Mo. 162.

See 10 Cent. Dig. tit. "Constitutional Law," § 906.

The legislature cannot make valid, retro-

XIV. REMEDIES FOR INJURIES.

A. Constitutional Guaranties — 1. IN GENERAL. The constitutions of the different states usually guarantee to each individual a prompt and certain remedy by due course of law for injuries which he may receive in his person, property, or reputation, and provide that he may obtain such remedy freely without being obliged to purchase it.[98]

2. LIMITATION AND SCOPE. These guaranties relate exclusively to the judicial and not to the legislative department of government;[99] they open to every subject equal access to courts established by the state;[1] but they do not authorize a person to invoke the jurisdiction of all the courts of the state in a given case.[2] The constitutional guaranty of a "certain" remedy at law precludes the leaving to a jury to determine the constitutionality of a law;[3] but a constitutional provision requiring that all courts shall be at all times open for the transaction of business, except for trial of issues of fact requiring a jury, does not invalidate a judgment signed and entered after the expiration of the term.[4] Protection is not guaranteed for property illegally in one's possession or used for illegal purposes;[5] nor is a remedy guaranteed for injuries suffered either on account of bad or unwise legislation, when the legislature acts within its powers[6] or on account of taxation, where the same is for a legitimate purpose.[7] Nor do these guaran-

spectively, what it could not originally have authorized, and so no unconstitutional taxation can be confirmed or any that wants any essential element of taxation. Billings *v.* Detten, 15 Ill. 218; Marsh *v.* Chestnut, 14 Ill. 223; Stewart *v.* Trevor, 56 Pa. St. 374; Miller *v.* Hale, 26 Pa. St. 432. The unauthorized acts of individuals can confer no power upon the state. Cleveland Nat. Bank *v.* Iola, 9 Kan. 689, per Dillon, J. Where the only defect in a tax is the want of previous legislation, this may, in the absence of special prohibitions, be cured retrospectively. Booth *v.* Woodbury, 32 Conn. 118; Lowell *v.* Oliver, 8 Allen (Mass.) 247; Crowell *v.* Hopkinton, 45 N. H. 9; State *v.* Demarest, 32 N. J. L. 528; Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237.

Provision may be made for taxation of property unlawfully omitted from assessment, and for reassessment of property grossly undervalued. State *v.* Weyerhauser, 68 Minn. 353, 71 N. W. 265.

The defect of depriving of a hearing is jurisdictional and cannot be cured. Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Billings *v.* Detten, 15 Ill. 218.

Where a sheriff's power to sell land for taxes is given on condition that it be exercised within a certain time, the state cannot by a private act give him power to sell after the time allowed by law. Taylor *v.* Allen, 67 N. C. 346.

Where a special assessment to pay for a particular work has been held to be illegal, a special authority given to make a new special assessment to pay for the completed work does not violate the fourteenth amendment. Lombard *v.* West Chicago Park Com'rs, 181 U. S. 33, 21 S. Ct. 507, 45 L. ed. 731 [*affirming* 181 Ill. 136, 54 N. E. 941].

98. See *infra*, XIV, B, *et seq.*

Requiring the dismissal of a deputy, by his superior, for the taking of illegal fees, is intended as a furtherance to a constitutional requirement that justice shall be administered without sale, denial, or delay. Leeds' Appeal, 75 Pa. St. 75.

99. Barkley *v.* Glover, 4 Metc. (Ky.) 44; Johnson *v.* Higgins, 3 Metc. (Ky.) 566.

1. *In re* Townsend, 39 N. Y. 171; *In re* Courts for Trial of Infants, 14 Pa. Co. Ct. 254.

Application to non-residents.— A statute providing that a foreign corporation may be sued by any resident of the state for any cause of action, and by a non-resident only when the cause of action shall be situated within the state, does not conflict with a constitutional provision that "all courts shall be public; and every person, for any injury that he may receive in his lands, goods, person, or reputation, shall have remedy, by due course of law," as the object of that section of the constitution was not to open the courts of the state to all persons, to demand redress for injuries received anywhere, but simply to secure to the inhabitants of the particular state access to the courts for redress of injuries which they may have received. Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192.

2. People *v.* Richmond, 16 Colo. 274, 26 Pac. 929.

3. Pierce *v.* State, 13 N. H. 536.

4. Shackelford *v.* Miller, 91 N. C. 181.

5. State *v.* Miller, 48 Me. 576; Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639; Opinion of Justices, 25 N. H. 537; Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

6. Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759, 2 Am. L. Reg. 29.

7. Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759, 2 Am. L. Reg. 29.

ties authorize an appeal to the courts in matters properly within the province of ecclesiastical bodies.[8]

B. Violations and Infringements of the Guaranties — 1. In General. The lawful use of private property cannot be restricted without provision for just compensation,[9] and such compensation must be just and fair without discrimination between different persons or different classes.[10]

2. Conditions and Restrictions on Enforcement of Liabilities — a. In General. The legislature may impose reasonable conditions and limitations which will be binding upon those seeking a legal remedy,[11] and may make reasonable regulations defining the method of fixing the liability of a city,[12] or the method of enforcing a claim against the same.[13]

b. Conditions Precedent. Statutes or charters which impose conditions which must be fulfilled before a suit can be maintained are constitutional,[14] except where they work an unreasonable abridgment of the right to obtain redress for injuries.[15]

3. Particular Guaranties — a. Free Justice — (i) *In General.* Constitutional provisions declaring that every person is entitled to obtain justice freely, completely, and without denial do not guarantee to a citizen the right to litigate entirely without expense.[16]

(ii) *Damages For Frivolous or Groundless Appeal.* Inasmuch as the rights of individuals are always limited by a corresponding duty not to abuse such rights, it has been held that an allowance of damages for a frivolous appeal is not unconstitutional.[17]

(iii) *Payment of Costs and Fees.* Statutes requiring the payment of reasonable court costs and fees or of security for such disbursements do not violate the constitutional provision that justice shall be administered freely and without purchase,[18] unless requiring the payment of such costs and fees discrimi-

8. West Alexandria, etc., Turnpike Road Co. *v.* Gay, 50 Ohio St. 583, 35 N. E. 308; Salt Creek Valley Turnpike Co, *v.* Parks. 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769.

9. Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808.

A franchise is within the meaning of the term "property"; hence the legislature cannot take away the right of trial by jury in any proceeding to enforce the forfeiture of a franchise. Landis *v.* Campbell, 79 Mo. 433, 49 Am. Rep. 239.

10. Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830. And see Jackson *v.* Butler, 8 Minn. 117; McFarland *v.* Butler, 8 Minn. 116; Keough *v.* McNitt, 7 Minn. 30; Wilcox *v.* Davis, 7 Minn. 23; Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

11. Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532.

12. McNally *v.* Cohoes, 53 Hun (N. Y.) 202, 6 N. Y. Suppl. 842, 25 N. Y. St. 65.

13. State *v.* Brown, 30 La. Ann. 78.

Municipal corporations are not exempt from liability for any wrongs committed by them, and if a judgment cannot be collected against a city by fieri facias it can be compelled by mandamus to levy a tax. U. S. *v.* New Orleans, 17 Fed. 483.

14. Martin *v.* Martin, 25 Ala. 201; Cunningham *v.* Denver, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212; Shalley *v.* Danbury, etc., Horse R. Co., 64 Conn. 381, 30 Atl. 135; McKibben *v.* Amory, 89 Wis. 607, 62 N. W. 416.

15. Riggs *v.* Martin, 5 Ark. 506, 41 Am. Dec. 103.

16. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; Willard *v.* Redwood County, 22 Minn. 61; Adams *v.* Corriston, 7 Minn. 456; Perce *v.* Hallett, 13 R. I. 363.

17. Davis *v.* Jonti, 14 La. 95. On the other hand it has been held that under a state constitution allowing the review of a cause as a matter of right, a statute providing that on the affirmance of a judgment the supreme court shall, unless it enters upon the minutes that there was a reasonable ground for the proceeding in error, enter judgment for a certain per cent against the plaintiff is unconstitutional. Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171; Moore *v.* Herron, 17 Nebr. 703, 24 N. W. 425, 451. See also Madison etc., R. Co. *v.* Herod, 10 Ind. 2.

18. *Arkansas.*— Murphy *v.* State, 38 Ark. 514; Williams *v.* Pindall, 35 Ark. 434; Lee County *v.* Abrahams, 34 Ark. 166.

Illinois.— Andrews *v.* Rumsey, 75 Ill. 598; Gesford *v.* Critzer, 7 Ill. 698.

Indiana.—Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Iowa.— Burlington, etc., R. Co., *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477,

nates between parties who before the law are entitled to the same remedy under the same conditions.[19]

(iv) *Payment of Taxes on Claims or Property in Suit.* The courts are at variance with regard to the right to require the payment of all taxes upon any demand before maintaining suits thereon.[20]

(v) *Tax on Litigation.* A reasonable tax on litigation does not violate the constitutional provision that right and justice shall be administered without sale, denial, or delay.[21]

b. Prompt Justice. Reasonable regulations in regard to the commencement and prosecution of suits do not violate those constitutional provisions which declare that justice shall be administered without delay.[22]

4. Proceedings For Review. A citizen has no natural or inalienable right to a

12 L. R. A. 436; State *v.* Verwayne, 44 Iowa 621; Steele *v.* Central R. Co., 43 Iowa 109; Adae *v.* Zangs, 41 Iowa 536.

Louisiana.— Grinage *v.* Times-Democrat Pub. Co., 107 La. 121, 31 So. 682; Grover's Succession, 49 La. Ann. 1050, 22 So. 313.

Maryland.— Knee *v.* Baltimore City Pass. R. Co., 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363; U. S. Electric Power, etc., Co. *v.* State, 79 Md. 63, 28 Atl. 768.

Massachusetts.— Com. *v.* Munn, 14 Gray (Mass.) 361.

Minnesota.— Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; Willard *v.* Redwood County, 22 Minn. 61.

Missouri.— State *v.* Wright, 13 Mo. 243.

Montana.— Helena Steam-Heating, etc., Co. *v.* Wells, 16 Mont. 65, 40 Pac. 78; Wortman *v.* Kleinschmidt, 12 Mont. 316, 30 Pac. 280.

Nebraska.— Cass County School Dist. No. 6 *v.* Traver, 43 Nebr. 524, 61 N. W. 720; State *v.* Ream, 16 Nebr. 681, 21 N. W. 398; State *v.* Lancaster County, 4 Nebr. 537, 19 Am. Rep. 641.

Nevada.— State *v.* Fogus, 19 Nev. 249, 9 Pac. 123.

New York.— Tucker *v.* Gilman, 58 Hun (N. Y.) 167, 11 N. Y. Suppl. 555, 33 N. Y. St. 962.

North Carolina.— State *v.* Nutt, 79 N. C. 263.

Ohio.— State *v.* Judges Ct. C. Pl., 21 Ohio St. 11.

Oregon.— Northern Countries Invest. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188.

Pennsylvania.—McDonald *v.* Schell, 6 Serg. & R. (Pa.) 240.

Rhode Island.— Merrill *v.* Bowler, 20 R. I. 226, 38 Atl. 114; Perce *v.* Hallett, 13 R. I. 363; Conley *v.* Woonsocket Sav. Inst., 11 R. I. 147.

Tennessee.— State *v.* Howran, 8 Heisk. (Tenn.) 824; Harrison *v.* Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

Texas.— Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504.

Wisconsin.— Christianson *v.* Pioneer Furniture Co., 101 Wis. 343, 77 N. W. 174, 917; Lombard *v.* Cowham, 34 Wis. 300.

Compare Randolph *v.* Builders', etc., Supply Co., 106 Ala. 501, 17 So. 721; South, etc., Alabama R. Co. *v.* Morris, 65 Ala. 193; St. Louis, etc., R. Co. *v.* Williams, 49 Ark. 492, 5 S. W. 883; Davidson *v.* Jennings, 27 Colo. 187, 60 Pac. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340; People *v.* Haverstraw, 151 N. Y. 75, 45 N. E. 384.

See 10 Cent. Dig. tit. "Constitutional Law," § 959.

19. Dillingham *v.* Putnam, (Tex. 1890) 14 S. W. 303.

20. Sustaining such right see Walker *v.* Whitehead, 43 Ga. 538.

The tender of taxes before bringing suit to recover land from the holder of a tax deed may be required. Coats *v.* Hill, 41 Ark. 149.

In other jurisdictions it is held that the requirement of such a tender would be compelling the parties to buy justice and for that reason would be invalid. Wilson *v.* McKenna, 52 Ill. 43; Weller *v.* St. Paul, 5 Minn. 95. To similar effect see State *v.* Gorman, 40 Minn. 232, 41 N. W. 948, 2 L. R. A. 712.

Similarly the requirement for payment into court of purchase-money and interest before questioning the title to the tax deed has been held to be unconstitutional. Lassitter *v.* Lee, 68 Ala. 287; Senichka *v.* Lowe, 74 Ill. 274; Reed *v.* Tyler, 56 Ill. 288.

21. Swann *v.* Kidd, 79 Ala. 431 (holding valid an act imposing a tax fee of six dollars in each case decided by the supreme court, for the benefit of its library); Harrison *v.* Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

22. *Ex p.* Pollard, 40 Ala. 77; Johnson *v.* Higgins, 3 Metc. (Ky.) 566; Bruns *v.* Crawford, 34 Mo. 330; Toledo *v.* Preston, 50 Ohio St. 361, 34 N. E. 353.

In the absence of special circumstances, however, all litigants, whether plaintiffs or defendants, should be considered equal before the law, and a regulation operating wholly in favor of one of the parties would not be a reasonable regulation. Ashurst *v.* Phillips, 43 Ala. 158; Antlers Park Regent Min. Co. *v.* Cunningham, 29 Colo. 284, 68 Pac. 226 [*following* Davidson *v.* Jennings, 27 Colo. 187, 60 Pac. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340]; Chicago, etc., R. Co. *v.* Moss, 60 Miss. 641. See also Coffman *v.* Kentucky Bank, 40

hearing in the higher or supreme court of a state;[23] and where such right is not guaranteed by the state constitution it is discretionary with the legislature to determine the proceedings for review.[24] Whether such right be guaranteed or not, statutory provisions regulating in a reasonable way proceedings for review are constitutional;[25] but as a general rule provision is made in the various state constitutions for appeal in some manner, and acts in such states wholly denying the right are unconstitutional.[26]

5. REPEAL OF STATUTE GIVING REMEDY. If a remedy is given by statute the legislature may repeal the same and thus defeat the remedy, even though the statute was in force at the adoption of the constitution.[27]

CONSTITUTIONES TEMPORE POSTERIORES POTIORES SUNT HIS QUÆ IPSAS PRÆCESSERUNT. A maxim meaning "Later laws prevail over those which preceded them."[1]

CONSTRAIN. To RESTRAIN,[2] *q. v.*

CONSTRAINT. COMPULSION,[3] *q. v.*; RESTRAINT,[4] *q. v.* In Scotch law, duress.[5]

CONSTRUCT.[6] To put together the constituent parts of (something) in their

Miss. 29, 90 Am. Dec. 311; Durkee *v.* Janesville, 28 Wis. 464, 9 Am. Rep. 500.

23. People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; *In re* Tax Sale, 54 Mich. 417, 23 N. W. 189; State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493.

24. People *v.* Fowler, 9 Cal. 85; Dismukes *v.* Stokes, 41 Miss. 430.

25. *Arkansas.*— *Ex p.* Allis, 12 Ark. 101.

Indiana.— Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

Iowa.—Richards *v.* Hintrager, 45 Iowa 253.

Montana.— Kleinschmidt *v.* McAndrews, 4 Mont. 8, 223, 2 Pac. 286, 5 Pac. 281.

Nebraska.— Schmidt *v.* Boyle, 54 Nebr. 387, 74 N. W. 964; Chicago, etc., R. Co. *v.* Headrick, 49 Nebr. 286, 68 N. W. 489; Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79.

New Jersey.—Reilly *v.* Newark Second Dist. Ct., 63 N. J. L. 541, 42 Atl. 842.

New York.— *In re* Lent, 47 N. Y. App. Div. 340, 62 N. Y. Suppl. 227; Morris *v.* People, 1 Park. Crim. (N. Y.) 441.

South Carolina.— State *v.* Bowen, 3 Strobh. (S. C.) 573.

South Dakota.— McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287.

Texas.— Gerald *v.* State, 4 Tex. App. 308; Cherry *v.* State, 4 Tex. App. 4.

Washington.— Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211.

See 10 Cent. Dig. tit. "Constitutional Law," § 963.

A constitutional provision that all courts shall be open, etc., is satisfied by a trial in a court of competent jurisdiction in which the right to a trial by jury is afforded in proper cases. Lake Erie, etc., R. Co. *v.* Watkins, 157 Ind. 600, 62 N. E. 443.

26. *Ex p.* Haughton, 38 Ala. 570; Tims *v.* State, 26 Ala. 165. See also Pawley *v.* McGimpsey, 7 Yerg. (Tenn.) 502; Morton *v.* Gordon, Dall. (Tex.) 396.

27. Templeton *v.* Linn County, 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730. *Contra*, Eastman *v.* Clackamas County, 12 Sawy. (U. S.) 613, 32 Fed. 24. See also Cummings *v.* White Mountains R. Co., 43 N. H. 114.

1. Black L. Dict.

2. Edmondson *v.* Harris, 2 Tenn. Ch. 427, 433, where it is said: "One of the meanings which both Sheridan and Johnson give to the verb constrain is, to restrain."

3. Webster Int. Dict. And see ACKNOWLEDGMENTS, 1 Cyc. 600, note 94.

4. Edmondson *v.* Harris, 2 Tenn. Ch. 427, 433, where it is said: "In Latin, *constringo* and *restringo* mean the same thing — to bind; *constringo*, to bind with — that is, together; *restringo*, to bind again — that is, tightly. Any Latin dictionary will show us that one translation given to both is 'to restrain.' In classical and legal terminology this sense seems to be the favorite one for *constringo*. Thus, Cicero uses it in two of his noted phrases: '*Constringere orbem novis legibus*,' and '*constringere fraudem supplicio*.' Any English and French dictionary will show us that the English words 'constraint' and 'restraint' are translated into French by *contrainte*, and, *e converso*, the latter word has the meaning of both the English words given to it." And see ACKNOWLEDGMENTS, 1 Cyc. 600, note 98. But see Hodgin El. Cas. [*quoted* in Worcester Dict.], where it is said: "Constraint respects the movements of the body only; restraint, those of the mind and outward action."

5. Black L. Dict.

6. "'Construct and erect' are the usual words employed in a building contract, and we do not recall that it has ever been doubted that they are effective words of sale, to pass the title to the building materials, when erected, from the builder to the owner of the land." Ott *v.* Sweatman, 166 Pa. St. 217, 228, 31 Atl. 102.

"Construct and maintain" waterworks for a city does not include the power to sell or dispose of the same. Huron Waterworks Co. *v.* Huron, 7 S. D. 9, 19, 62 N. W. 975, 58 Am. St. Rep. 817, 30 L. R. A. 848. But *compare*

proper place or order;[7] to build;[8] to form; to make;[9] to form, to build together;[10] to put together, as the parts of a thing, for a new product; to form with contrivance; to fabricate.[11]

CONSTRUCTIO AD PRINCIPIA REFERTUR REI. A maxim meaning "Construction is referred to the principles of a thing."[12]

CONSTRUCTIO LEGIS NON FACIT INJURIAM. A maxim meaning "The construction of the law (a construction made by the law) works no injury."[13]

CONSTRUCTION. The art of building or making; the art of devising and forming; fabrication;[14] the method of constructing, interpreting, or explaining a declaration or fact; an attributed sense or meaning; understanding; explanation; interpretation; sense;[15] the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known, from and given in the text — conclusions which are in the spirit though not in the letter of the text.[16] Strictly, the term signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed.[17] In practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument or of an oral agreement.[18] (Construction: Of Acknowledgment, see ACKNOWLEDGMENTS. Of Admission, see EVIDENCE. Of Assignment, see ASSIGNMENTS; ASSIGNMENT FOR BENEFIT OF CREDITORS. Of Award, see ARBITRATION AND AWARD. Of Bill or Note, see COMMERCIAL PAPER. Of Bond, see BONDS. Of Building Contract, see BUILDERS AND ARCHITECTS. Of Compromise, see COMPROMISE AND SETTLEMENT. Of Constitutional Provision, see CONSTITUTIONAL LAW. Of Contract, see CONTRACTS. Of Covenant, see COVENANTS. Of Deed, see DEEDS. Of Guaranty, see GUARANTY. Of Indemnity, see INDEMNITY. Of Judgment, see JUDGMENTS. Of Lease, see LANDLORD AND TENANT. Of Ordinance, see MUNICIPAL CORPORATIONS. Of Pleading, see PLEADING. Of Railroad, see RAILROADS. Of Release, see RELEASE. Of Sale, see SALES; VENDOR AND PURCHASER. Of Statute, see STATUTES. Of Subscrip-

Seymour *v.* Tacoma, 6 Wash. 138, 148, 32 Pac. 1077 [*quoted* in Michigan Cent. R. Co. *v.* Pere Marquette R. Co., 128 Mich. 333, 87 N. W. 271].

"Construct and repair" and "construction" are synonymous terms. McNair *v.* Ostrander, 1 Wash. 110, 115, 23 Pac. 414 [*citing* Gurnee *v.* Chicago, 40 Ill. 165; People *v.* Brooklyn, 21 Barb. (N. Y.) 484].

May be accorded a similar meaning to "provide."— Seymour *v.* Tacoma, 6 Wash. 138, 149, 32 Pac. 1077.

7. City Sewage Utilization Co. *v.* Davis, 8 Phila. (Pa.) 625, 626; Webster Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].

8. Seymour *v.* Tacoma, 6 Wash. 138, 147, 32 Pac. 1077; Webster Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831]; Worcester Dict. [*quoted* in Stisser *v.* New York Cent., etc., R. Co., 32 N. Y. App. Div. 98, 101, 52 N. Y. Suppl. 861].

9. Seymour *v.* Tacoma, 6 Wash. 138, 147, 32 Pac. 1077; Webster Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].

10. *In re* Fowler, 53 N. Y. 60, 64.

11. Worcester Dict. [*quoted* in Stisser *v.* New York Cent., etc., R. Co., 32 N. Y. App. Div. 98, 101, 52 N. Y. Suppl. 861].

12. Morgan Leg. Max. [*citing* Lofft 516]. See also Richman *v.* Richman, 10 N. J. L. 114, 116.

13. Black L. Dict.; Broom Leg. Max.; 2 Coke Litt. 183*b*.

Applied in Rodger *v.* Comptoir d'Escompte de Paris, L. R. 2 P. C. 393, 406, 38 L. J. P. C. 30, 21 L. T. Rep. N. S. 33, 5 Moore P. C. N. S. 538, 16 Eng. Reprint 618; Snow *v.* Morton, 8 Nova Scotia 237, 241.

14. Century Dict.

"Erection" and "construction" seem to be synonymous in their meaning; and in common acceptation, when applied to a house, they mean the building of it by putting together the necessary material and raising it (Burke *v.* Brown, 10 Tex. Civ. App. 298, 299, 30 S. W. 936), include "alterations or repairs" (Hancock's Appeal, 115 Pa. St. 1, 7 Atl. 773, 775).

15. Webster Int. Dict. [*quoted* in Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 277, 75 N. W. 101].

16. Lieber Hermeneutics 11 [*quoted* in State *v.* Smith, 35 Nebr. 13, 22, 52 N. W. 700, 16 L. R. A. 791; Jones *v.* Morris Aqueduct, 36 N. J. L. 206, 209; People *v.* Tax Com'rs, 95 N. Y. 554, 559].

17. Webster Int. Dict. [*quoted* in Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 277, 75 N. W. 101].

18. Bouvier L. Dict.

tion, see Subscriptions. Of Trust, see Trusts. Of Will, see Wills. Parol Evidence to Aid, see Evidence.)

CONSTRUCTION CONTRACTS. See Builders and Architects.

CONSTRUCTION, COURT OF. A court of equity or of common law, as the case may be, is called the Court of Construction with regard to wills, as opposed to the Court of Probate, whose duty is to decide whether an instrument be a will at all.[19] (See, generally, Wills.)

CONSTRUCTIVE. Derivative, inferential;[20] that which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, made out by legal interpretation.[21] (Constructive: Assent, see Constructive Assent. Assignment, see Assignments; Assignments For Benefit of Creditors. Breaking, see Burglary. Contempt, see Contempt. Contract, see Contracts. Conversion, see Trover and Conversion. Delivery, see Sales. Eviction, see Constructive Eviction, Force, see Robbery. Fraud, see Fraud; Fraudulent Conveyances. Malice, see False Imprisonment; Homicide; Libel and Slander; Malicious Mischief; Malicious Prosecution. Murder, see Homicide. Notice — Generally, see Notice; To Purchaser, see Bonds; Commercial Paper; Sales; Vendor and Purchaser. Possession, see Adverse Possession. Service of Process, see Process. Taking, see Trover and Conversion. Total Loss, see Fire Insurance; Marine Insurance. Trust, see Trusts.)

CONSTRUCTIVE ASSENT. An assent or consent imputed to a party from a construction or interpretation of his conduct; as distinguished from one which he actually expresses.[22]

CONSTRUCTIVE EVICTION. Is deemed to be caused by the inability of the purchaser of real estate to obtain possession by reason of the paramount title.[23] (See, generally, Landlord and Tenant.)

CONSTRUED. Regarded, considered.[24]

CONSUETUDINARY LAW. Customary law; law derived by oral tradition from a remote antiquity.[25] (See, generally, Common Law; Customs and Usages.)

CONSUETUDINIBUS ET SERVICIIS. In old English law, a writ of right close, which lay against a tenant who deforced his lord of the rent or service due to him.[26]

CONSUETUDO.[27] A custom; an established usage or practice.[28]

CONSUETUDO ANGLICANA. The custom of England; the ancient common law, as distinguished from *lex*, the Roman or civil law.[29] (See, generally, Common Law.)

CONSUETUDO CONTRA RATIONEM INTRODUCTA POTIUS USURPATIO QUAM CONSUETUDO APPELLARI DEBET. A maxim meaning "A custom introduced against reason ought rather to be called a 'usurpation' than a 'custom.'"[30]

CONSUETUDO DEBET ESSE CERTA; NAM INCERTA PRO NULLA HABETUR. A

19. Wharton L. Lex.

20. Webster Dict. [*quoted* in Middleton *v.* Parke, 3 App. Cas. (D. C.) 149, 160].

21. Black L. Dict.

22. Black L. Dict.

23. Fritz *v.* Pusey, 31 Minn. 368, 370, 18 N. W. 94. And see Allis *v.* Nininger, 25 Minn. 525, 528.

24. Churchill *v.* Pacific Imp. Co., 96 Cal. 490, 493, 31 Pac. 560, where it is said: "Appellant's contention, that the word 'construed,' as used in section 5, [of the Civil Code], means simply to 'interpret,' to 'explain,' to 'translate,' or 'to show the meaning of,' cannot be sustained."

25. Black L. Dict.

26. Black L. Dict.

27. Derived from *a Consueto*, properly signifieth a custom; "but in legal understanding it signifieth also tolls, murage, pontage, paviage, and such like newly granted by the king." Coke Litt. 58*b* [*cited* in Egremont *v.* Saul, 6 A. & E. 924, 926, 6 L. J. K. B. 205, 33 E. C. L. 481].

28. Black L. Dict.

29. Black L. Dict.

30. Black L. Dict. [*citing* Coke Litt. 113].

maxim meaning "A custom should be certain; for an uncertain custom is considered null." [31]

CONSUETUDO EST ALTERA LEX. A maxim meaning "Custom is another law." [32]

CONSUETUDO EST OPTIMUS INTERPRES LEGUM. A maxim meaning "Custom is the best expounder of the laws." [33]

CONSUETUDO ET COMMUNIS ASSUETUDO VINCIT LEGEM NON SCRIPTAM, SI SIT SPECIALIS; ET INTERPRETATUR LEGEM SCRIPTAM, SI LEX SIT GENERALIS. A maxim meaning "Custom and common usage overcome the unwritten law, if it be special; and interpret the written law, if the law be general." [34]

CONSUETUDO EX CERTA CAUSA RATIONABILI USITATA PRIVAT COMMUNEM LEGEM. A maxim meaning "A custom, grounded on a certain and reasonable cause, supersedes the common law." [35]

CONSUETUDO, LICET SIT MAGNÆ AUCTORITATIS, NUNQUAM TAMEN PRÆJUDICAT MANIFESTÆ VERITATI. A maxim meaning "A custom, though it be of great authority, should never prejudice manifest truth." [36]

CONSUETUDO LOCI OBSERVANDA EST. A maxim meaning "The custom of a place is to be observed." [37]

CONSUETUDO MANERII ET LOCI OBSERVANDA EST. A maxim meaning "A custom of a manor and place is to be observed." [38]

CONSUETUDO MERCATORUM. The custom of merchants, the same with LEX MERCATORIA,[39] *q. v.*

CONSUETUDO NEQUE INJURIA ORIRI NEQUE TOLLI POTEST. A maxim meaning "Custom can neither arise from nor be taken away by injury." [40]

CONSUETUDO NON TRAHITUR IN CONSEQUENTIAM. A maxim meaning "Custom is not drawn into consequence." [41]

CONSUETUDO PRÆSCRIPTA ET LEGITIMA VINCIT LEGEM. A maxim meaning "A prescriptive and lawful custom overcomes the law." [42]

CONSUETUDO REGNI ANGLIÆ EST LEX ANGLIÆ. A maxim meaning "The custom of the kingdom of England is the law of England." [43]

CONSUETUDO SEMEL REPROBATA NON POTEST AMPLIUS INDUCI. A maxim meaning "A custom once disallowed cannot be again brought forward [or relied on]." [44]

CONSUETUDO TOLLIT COMMUNEM LEGEM. A maxim meaning "Custom takes away the common law." [45]

CONSUETUDO VOLENTES DUCIT, LEX NOLENTES TRAHIT. A maxim meaning "Custom leads the willing, law compels [drags] the unwilling." [46]

CONSUL. See AMBASSADORS AND CONSULS.

CONSULAR COURTS. See AMBASSADORS AND CONSULS.

CONSULTARY RESPONSE. The opinion of a court of law on a special case.[47]

CONSULTATION. A conference between the counsel engaged in a case, to

31. Black L. Dict.
32. Black L. Dict. [*citing* 4 Coke 21].
33. Black L. Dict. [*citing* 2 Inst. 18].
34. Black L. Dict.
35. Black L. Dict. And see Elwood *v.* Bullock, 6 Q. B. 383, 411, 8 Jur. 1044, 13 L. J. Q. B. 330, 51 E. C. L. 383; Tyson *v.* Smith, 9 A. & E. 406, 421, 36 E. C. L. 224; Muggleton *v.* Barnett, 2 H. & N. 653, 661, 4 Jur. N. S. 139, 27 L. J. Exch. 125, 6 Wkly. Rep. 182.
36. Black L. Dict. [*citing* 4 Coke 18].
37. Black L. Dict. And see Finch's Case, 6 Coke 63*a*, 67*a*.
38. Black L. Dict. [*citing* 6 Coke 67].
39. Black L. Dict.
40. Black L. Dict. [*citing* Loftt 34].
41. Black L. Dict.
Applied in Baxter *v.* Doudswell, 3 Keb. 498, 499.
42. Black L. Dict. And see Brown's Case, 4 Coke 21*a*; Coke Litt. 113*b*.
43. Black L. Dict. [*citing* 2 Bl. Comm. 422].
44. Black L. Dict. [*citing* Tanistry's Case, Davis 28, 33].
45. Black L. Dict. And see Coke Litt. 33*b*.
46. Black L. Dict.
47. Black L. Dict.

discuss its questions or arrange the method of conducting it. In French law, the opinion of counsel upon a point of law submitted to them.[48]

CONSULTING. Imparting advice or information.[49]

CONSULTING ENGINEER. A scientific expert.[50]

CONSULTING OCULIST. A special, technical term, which does not include actual treatment and prescriptions given.[51] (See, generally, PHYSICIANS AND SURGEONS.)

CONSULTING PHYSICIAN. One who consults with an attending practitioner required in cases of disease.[52] (See, generally, PHYSICIANS AND SURGEONS.)

CONSUME. To destroy, to bring to utter ruin.[53]

CONSUMMATE. Completed; as distinguished from "initiate," or that which is merely begun.[54] (Consummate: Curtesy, see CURTESY. Dower, see DOWER.)

CONSUMMATING. Completing.[55]

CONSUMMATION. The completion of a thing;[56] the act of carrying to the utmost extent or degree; completion; termination; close; perfection;[57] the completion of a marriage between two affianced persons by cohabitation.[58] (Consummation: Of Marriage, see MARRIAGE.)

CONT. An abbreviation of *contra*.[59]

CONTAGION. The transmitting of a disease from one person to another, by direct or indirect contact.[60]

CONTAGIOUS. Communicable by contact, by a virus or by a bodily exhalation; catching; as, a contagious disease.[61] Often used in a similar sense of pestilential or poisonous and not strictly confined to influences emanating directly from the body.[62]

CONTAGIOUS DISEASE. A disease communicated by contact or touch.[63] (Contagious Disease: In General, see HEALTH. Of Animal, see ANIMALS.)

CONTAINS. The word is a substantial equivalent for the words "states facts."[64]

48. Black L. Dict.

Also defined as a "writ whereby a cause which has been wrongfully removed by prohibition out of an ecclesiastical court to a temporal court is returned to the ecclesiastical court." Black L. Dict.

49. Webster Unabr. Dict. [*quoted* in Union Pac. R. Co. *v.* Graddy, 25 Nebr. 849, 854, 41 N. W. 809].

50. Coppersmith *v.* Mound City R. Co., 51 Mo. App. 357, 366.

51. Union Pac. R. Co. *v.* Graddy, 25 Nebr. 849, 855, 41 N. W. 809, where it is said: "The term . . . would include a diagnosis of the case and advice as to the proper treatment to be pursued, or such other advice as might be required from time to time while under treatment."

52. Webster Unabr. Dict. [*quoted* in Union Pac. R. Co. *v.* Graddy, 25 Nebr. 849, 854, 41 N. W. 809].

53. Webster Dict. [*quoted* in Campbell *v.* Monmouth Mut. F. Ins. Co., 59 Me. 430, 436].

"Consumed" and "destroyed" in an indictment for arson see Com. *v.* Tucker, 110 Mass. 403, 404.

54. Black L. Dict.

55. Hinchman *v.* Ballard, 7 W. Va. 152, 184.

56. Wharton L. Lex.

57. Webster Dict. [*quoted* in Sharon *v.* Sharon, 75 Cal. 1, 76, 16 Pac. 345, in dissenting opinion].

An act is not consummated where anything in relation to it remains to be done. Johnston *v.* U. S., 17 Ct. Cl. 157, 173.

58. Wharton L. Lex. See also Sharon *v.* Sharon, 75 Cal. 1, 76, 16 Pac. 345, dissenting opinion.

59. Burrill L. Dict.

60. Webster Int. Dict.

"'Infection,' and 'contagion' are nearly synonymous, the only difference being, not in the infectious or contagious matter, but in the manner of its communication. Infection is communicated from the sick to the well by a morbid miasm or exhalation diffused in the air. Contagion is communicated by actual contact." Wirth *v.* State, 63 Wis. 51, 55, 22 N. W. 860.

61. Webster Int. Dict.

62. Grayson *v.* Lynch, 163 U. S. 468, 477, 16 S. Ct. 1064, 41 L. ed. 230.

63. Stryker *v.* Crane, 33 Nebr. 690, 691, 50 N. W. 1132.

Compared with "infectious" disease.— "There is doubtless a technical distinction between the two in the fact that a contagious disease is communicable by contact, or by bodily exhalation, while an infectious disease presupposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various dejections from animals." Grayson *v.* Lynch, 163 U. S. 468, 477, 16 S. Ct. 1064, 41 L. ed. 230.

64. Leach *v.* Adams, 21 Ind. App. 547, 52 N. E. 813, construing the word as used in Horner Rev. Stat. Ind. (1897), § 339.

"**The word contain,** though not synonymous, is as broad in its meaning . . . as the

CONTEMNER. See CONTEMPT.

CONTEMPLATE. In its primary significance, to consider attentively or to meditate.[65] Its secondary meaning is to intend, that is, to express a well formed purpose;[66] to expect.[67]

CONTEMPLATED. Intended.[68]

CONTEMPLATION. The act of the mind in considering with attention.[69] (Contemplation: Of Bankruptcy, see BANKRUPTCY. Of Insolvency, see INSOLVENCY; FRAUDULENT CONVEYANCES. Of Marriage Settlement, see HUSBAND AND WIFE.)

CONTEMPORANEA CONSUETUDO OPTIMUS INTERPRES. A maxim meaning "Contemporary custom is the best interpretator."[70]

CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE. A maxim meaning "Contemporaneous exposition is the best and strongest in the law."[71]

CONTEMPORANEOUS. Living or existing at the same time; contemporary.[72] (Contemporaneous: Agreements, see CONTRACTS; EVIDENCE. Construction — Of Constitutional Provision, see CONSTITUTIONAL LAW; Of Statute, see STATUTES.)

word state." State *v.* Younts, 89 Ind. 313, 314.

"Containing," in a deed, does not import or constitute a covenant. Powell *v.* Lyles, 5 N. C. 348.

"Containing by estimation," in a deed see Tarbell *v.* Bowman, 103 Mass. 341, 344.

65. Ætna L. Ins. Co. *v.* Florida, 69 Fed. 932, 935, 16 C. C. A. 618, 30 L. R. A. 87.

66. Ætna L. Ins. Co. *v.* Florida, 69 Fed. 932, 935, 16 C. C. A. 618, 30 L. R. A. 87.

67. Ætna L. Ins. Co. *v.* Florida, 69 Fed. 932, 935, 16 C. C. A. 618, 30 L. R. A. 87 [*citing* Buckingham *v.* McLean, 13 How. (U. S.) 151, 167, 14 L. ed. 91].

68. Ætna L. Ins. Co. *v.* Florida, 69 Fed. 932, 935, 16 C. C. A. 618, 30 L. R. A. 87 [*cited* in Christian *v.* Connecticut Mut. L. Ins. Co., 143 Mo. 460, 467, 45 S. W. 268].

"We mean by 'contemplated,' more than 'foreseen.'" — Oxford *v.* Leathe, 165 Mass. 254, 255, 43 N. E. 92.

69. Black L. Dict.

70. Mickle *v.* Matlack, 17 N. J. L. 86, 98. And see Rex *v.* Bellringer, 4 T. R. 810, 821.

71. Black L. Dict.

Applied or explained in the following cases:

Illinois.— Phœbe *v.* Jay, 1 Ill. 268, 272.

Maryland.— Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 130, 19 Atl. 599.

New Jersey.—State *v.* Kelsey, 44 N. J. L. 1, 22; Clapp *v.* Ely, 27 N. J. L. 555, 561; *In re* Trenton Water Power Co., 20 N. J. L. 659, 663; Mickle *v.* Matlack, 17 N. J. L. 86, 92.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9, 217 [*quoting* Broom Leg. Max. 532]; *In re* Breslin, 45 Hun (N. Y.) 210, 215; Knight *v.* Campbell, 62 Barb. (N. Y.) 16, 28; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 517 [*quoting* Dwarris Stat. 693]; Purdy *v.* People, 4 Hill (N. Y.) 384, 403.

England.—Atty.-Gen. *v.* Parker, 3 Atk. 576, 577, 26 Eng. Reprint 1132, 1 Ves. 43, 27 Eng. Reprint 879; Bank of England *v.* Anderson, 3 Bing. N. Cas. 589, 2 Hodges 294, 1 Jur. 9, 2 Keen 328, 7 L. J. Ch. 265, 6 L. J. C. P. 158, 15 Eng. Ch. 328, 32 E. C. L. 273; Dunbar *v.* Roxburghe, 3 Cl. & F. 335, 354, 6 Eng. Reprint 1462; *In re* Fermoy Peerage Claim, 5 H. L. Cas. 716, 747.

Canada.— Doe *v.* McCulley, 8 N. Brunsw. 508, 540; Hammond *v.* McLay, 28 U. C. Q. B. 463, 470.

72. Century Dict.

What lapse of time is embraced in the word "contemporaneous," is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contemporaneous; they need not be literally so. Alabama Great Southern R. Co. *v.* Hawk, 72 Ala. 112, 117, 47 Am. Rep. 403.